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Essential Gift & Estate Tax Planning Before 2026

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About the Presenters...

Shanna N. Fink (née Yonke) is an attorney and shareholder at Ruder Ware, L.L.S.C., headquartered in Wausau, Wisconsin. She earned her undergraduate degree from the University of Minnesota – Twin Cities, and her law degree from the University of Minnesota Law School. Shanna focuses her practice on trust and estate planning and administration for high net worth individuals and families. She works with her clients to identify their estate planning objectives and to develop estate plans designed to achieve their objectives. She ensures all clients have core estate planning documents, including revocable trusts, wills, powers of attorney, and other basic estate planning documents. She develops estate plans that incorporate planning for clients' unique circumstances and assets, especially including legacy planning for special family properties and succession planning for closely held businesses. Shanna also assists her clients with the implementation of complex and sophisticated estate planning techniques designed to transition wealth in the most cost- and tax-efficient manner while accomplishing the clients' objectives. She advises clients regarding the practical and tax implications of these plans, including but not limited to ensuring the clients' understanding of cash flow, decision-making authority, and other logistical matters, as well as gift and estate tax, generation-skipping transfer tax, and income tax implications. Shanna also works with her clients to administer irrevocable grantor and non-grantor trusts during their lifetimes, and to administer estates and trusts after death. She is capable of handling complex administrative and tax matters, including but not limited to advising personal representatives and trustees regarding the valuation and distribution of assets; addressing ambiguities in documents; making tax elections; filing gift tax returns, estate tax returns, and fiduciary income tax returns; and other administrative matters. Finally, Shanna also serves as a trustee of revocable and irrevocable trusts through her firm's Fiduciary Services Department, which currently manages assets worth over $1 billion.

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Kelly O'Connor Dancy is a partner at Walny Legal Group LLC and focuses her practice on estate planning and probate and trust administration. She is a member of the Real Property, Probate, and Trust Law section of the State Bar of Wisconsin, as well as an associate board member of the Zoological Society of Milwaukee. She is a past president of the Milwaukee Estate Planning Forum and past Director of the Society of Financial Service Professionals National Board. In addition, her articles have appeared in numerous publications, including the Journal of Financial Service Professionals, Trusts and Estates, Fox Business News, and the Wisconsin Lawyer.

ESSENTIAL GIFT AND ESTATE TAX PLANNING BEFORE 2026

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I. OVERVIEW OF THE FEDERAL GIFT AND ESTATE TAXES

A. Status of Wisconsin gift and estate taxes.

1. Wisconsin gift and inheritance taxes were eliminated on January 1, 1992.

2. The Wisconsin estate tax is a so-called "pick-up" tax defined by reference to I.R.C. § 2011, which was permanently repealed. There has been no proposed legislation to modify or replace the Wisconsin estate tax.

B. Unification of the federal gift and estate tax systems. The federal gift and estate tax systems are "unified," meaning the same rates and credits apply to both the gift tax and the estate tax. As a result, gifts during life may affect the estate tax on death.

C. Annual exclusion gift defined. The "annual exclusion gift" is the amount that may be transferred by gift without utilizing the applicable exclusion amount (defined below). The annual exclusion gift amount is $10,000 per donor per donee per year, indexed for inflation. As of January 1, 2025, the inflation-adjusted annual exclusion gift amount is $19,000.

D. Applicable exclusion amount defined. The "applicable exclusion amount" is the total combined value of gifts during lifetime (less annual exclusion gifts) and transfers upon death that are exempt from the federal gift and estate taxes. If transfers during lifetime or upon death exceeds the applicable exclusion amount, the transfers are subject to gift or estate tax. The gift and estate tax rates are 40% on the amount in excess of the applicable exclusion amount.

E. Tax Cuts and Jobs Act. The Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017) ("TCJA"), was enacted on December 22, 2017.

1. TCJA increased the applicable exclusion amount from $5,000,000 to $10,000,000, indexed for inflation. As of January 1, 2025, the inflation-adjusted applicable exclusion amount is $13,990,000.

2. The exclusion from the federal generation-skipping transfer tax is tied to the applicable exclusion amount, so it also increased to $10,000,000, indexed for inflation ($13,990,000 in 2025 with indexing).

3. TCJA is effective for tax years beginning after December 31, 2017, and before January 1, 2026. In other words, TCJA sunsets on December 31, 2025.

4. The applicable exclusion amount is anticipated to be approximately $7,000,000 after TCJA sunsets. Your client has a limited time, use-it-or-lose-it opportunity before January 1, 2026, to gift any portion of his or her unused applicable exclusion amount in excess of $7,000,000 (referred to by some commentators as the "bonus exclusion amount"). For a client who has not utilized any of his or her $13,990,000 applicable exclusion amount, the bonus exclusion amount is $6,990,000, and full utilization will prevent the client from paying gift tax in the amount of $2,796,000.

F. Legislative action.

1. Death tax repeal bills were introduced in both the Senate (Death Tax Repeal Act of 2025, S. 587, 119th Cong. (2025)) and the House of Representatives (Death Tax Repeal Act, H.R. 1301, 119th Cong. (2025)) on February 13, 2025. The bills aim to repeal the federal estate and generation-skipping transfer taxes; to make permanent the $10,000,000 gift tax exemption (indexed for inflation); and to reduce the gift tax rate to 35%. There has been no significant movement on either bill, likely due to the 60-vote requirement in the Senate.

2. Relevant legislation will proceed as a reconciliation act, which requires only a simple majority vote in the Senate (rather than the traditional 60-vote requirement). Due to the so-called "Byrd Rule" in the Senate, and the current law approach applied by the Congressional Budget Office in accordance with the Congressional Budget Act, the budget window will prohibit repeal but permit extension of the TCJA sunset, likely for ten years or less (the so-called "budget window").

a. The Senate adopted its initial budget resolutions for this legislative session on February 21, 2025, and adopted amended resolutions on April 5, 2025 (S. Con. Res. 7, 119th Cong. (2025)).

b. The House adopted its initial budget resolutions for this legislative session on February 25, 2025, and adopted amended resolutions in the same form as the Senate's amended resolutions on April 10, 2025 (H.R. Con. Res. 14, 119th Cong. (2025)), thus opening the door for the budget reconciliation process.

c. As of April 10, 2025, the current versions of the budget resolutions extend the TCJA sunset through December 31, 2034.

II. CLIENT CHARACTERISTICS

A. <u>The Majority – Married $10-$12 million/Single $10 million or less</u>.

1. The vast majority of Americans will not have any estate tax liability after the sunset.

a. Portability

(1) Allows the surviving spouse to "port" or transfer the deceased spousal unused exclusion amount (DSUEA) from the deceased spouse for use by the surviving spouse.

(2) The surviving spouse then has use of his or her own applicable exclusion amount as well as the DSUEA.

(3) To make the portability election, the estate must file a federal estate tax return.

b. Annual exclusion gifts

(1) $19,000 for 2025.

(2) Indexed to inflation and adjusted annually.

(3) Calculated per donee.

(4) Gift splitting available for married couples.

(5) Will not reduce individual's applicable exclusion amount.

c. Draft for flexibility

(1) Given the changing estate tax landscape, drafting trusts to provide for flexibility is key.

(a) Use of A/B Trust structure with disclaimer funding

(b) Trust Protector

(c) Survivor's Trust amendable after the death of the first spouse

(d) Utilization of statutory modification techniques as applicable and appropriate

d. Benefits of comprehensive estate planning

(1) Revocable trust-based plan with powers of attorney

(2) Coordinate with asset titling and beneficiary designations

(3) Plan for the strategic rollover of retirement assets from the deceased spouse to the surviving spouse

B. The Difficult Middle – Married $12-$25 million/Single over $10 million.

1. These clients should engage in more advanced estate planning techniques to ensure the use of their applicable exclusion amounts and mitigation of any estate tax liability.

a. Gifting

(1) Amplify use of annual exclusion gifts

(2) Additional gifting for educational and medical purposes

(a) Gifts for educational and medical purposes will not count against annual exclusion gifts or the applicable exclusion amount.

(3) 529 plans

(4) Charitable giving

(a) Qualified charitable distributions (QCDs)

(b) Donor advised funds

(c) Charitable trusts

b. Ensure use of DSUEA at death

(1) Portability

(2) Use of A/B Trust structure

(a) Survivor's Trust and Bypass Trust

(b) Disclaimer v. Formula funding mechanism

c. Irrevocable trusts that allow for the removal of assets from one's taxable estate

(1) Irrevocable trusts for descendants

(2) Irrevocable life insurance trusts (ILITs)

(3) Spousal lifetime access trusts (SLATs)

(4) Special power of appointment trusts (SPATs)

(5) Domestic asset protection trusts (DAPTs)

(6) Sales to intentionally defective grantor trusts (IDGTs)

C. The "Lucky" Few – Married over $40 million/Single over $20 million.

1. These clients will want to take full advantage of the current applicable exclusion amount (i.e., max out).

2. They will be more concerned about the federal estate tax rate as well as possible state estate taxes.

3. Their goals will include reducing the size of their taxable estate, limiting the growth of their taxable estate, and transferring assets outside of their taxable estate in the most tax-efficient way possible.

a. Gifting

(1) Valuation discounts

(a) The transfer of an asset with less than full ownership or control rights, thereby reducing its value for transfer purposes.

(b) Example: Minority, non-voting units in a family business LLC

b. Dynastic trust planning

(1) Clients will want to utilize dynastic planning structures, setting up irrevocable trusts for not only their children but grandchildren and future generations.

c. Generation-skipping transfer (GST) tax planning

(1) Allocating GST tax exemption to a dynastic trust, ensuring assets can pass outside this transfer tax system for future generations.

d. Use of intentionally defective grantor trusts (IDGTs) to further reduce taxable estate

(1) An IDGT is a type of irrevocable trust where assets in the trust are excluded from the grantor's estate for estate tax purposes but income from the trust is treated as the grantor's income for income tax purposes.

(2) "Freeze and burn" strategy

(a) Freeze the value of the asset for estate tax purposes at the time of transfer to the grantor trust.

(b) Burn the value of the taxable estate by having the grantor pay the income tax on the trust assets, thereby further reducing the value of their taxable estate.

III. PREPARATION FOR SIGNIFICANT GIFTING

A. Solidifying holdings as part of gifting transactions.

1. Assess and clean up the ground floor before adding additional layers of ownership.

2. Avoid triggering tax issues or transfer restrictions.

3. Ensure corporate formalities are observed both to support gifting transaction itself but also to ensure shareholder expectations are met (e.g., preservation of corporate veil).

B. Equity ownership ledger.

1. Review the ownership ledger – Is the record from incorporation to present ownership supportable by the equity ownership records?

2. If not, discuss with the client the implications of poor record keeping and the possible solutions to address these issues.

a. Effect on corporate liability protection (piercing the veil)

b. Protection against claims by former or current owners

c. Disputes – shareholder oppression, validity of corporate action, etc.

C. Equity certificates.

1. If equity certificates are in place, ensure that they are accurate.

a. Alignment with stock or ownership ledger

b. Former owners have surrendered certificates and they have been marked surrendered

c. Certificates accurately reflect shareholder name, number of shares, and class of certificates

2. If equity certificates are not used by the business entity, then evaluate whether they make sense and should be instituted.

a. Stock certificates can help facilitate lending by allowing the lender to more easily perfect its security interest in the certificated security by taking physical possession of the stock certificate (e.g., collateral stock pledge to secure a promissory note).

b. A security interest in uncertificated securities can be perfected by filing a UCC-1 financing statement and by "control" (which usually requires the execution of a control agreement).

D. Recapitalizations.

1. Recapitalization is restructuring the capital structure of a business entity.

a. For example, a corporation may have a single class of stock. Gifting objectives may require voting and non-voting stock. A recapitalization could create separate voting and non-voting classes of ownership.

b. Recapitalizations do not change relative equity ownership percentages. However, as part of a contemporaneous process, redemptions or issuance of new equity may change ownership.

2. Evaluate applicable S corporation restrictions.

a. These IRS restrictions do not prohibit separate classes for voting and non-voting shares, but other class differences may affect the entity's S corporation election.

b. Qualified tax and accounting advice is important.

3. Note that the Articles of Incorporation will need to be modified to create separate classes and, in an entity with certificated securities, new stock certificates are required as well.

E. Restrictions on transfer.

1. Buy-sell agreements, operating agreements, and even articles of incorporation or articles of organization should be reviewed.

a. For example, does the recapitalization trigger a buy-out under a buy-sell agreement or operating agreement?

b. Do the agreements have "Permitted Transferee" language that will permit this type of gifting without triggering options or rights in another party? If not, evaluate the use of waivers of all owners and the business entity in order to eliminate obstacles.

(1) For example, prepare a gift agreement and include the other owners and the company as signatories to the gift agreement solely to permit that ownership transfer.

IV. GIFT PLANNING OPPORTUNITIES

A. Outright gifts.

1. A donor may make gifts outright and free of trust to a donee. The mechanics of the transfer are dependent on the nature of the gifted asset. For example:

a. Cash – The donor delivers cash or a check to the donee.

b. Securities – The donor transfers securities in kind to the donee.

c. Real estate – The donor signs a deed transferring the real estate to the donee.

d. Closely held business interests – The donor may sign a stock or unit power, or an assignment of membership interest, transferring the business interests to the donee, and there may be other requirements pursuant to any governing shareholder or member agreement.

2. Pros:

a. Simple

b. Cost effective

3. Cons:

a. Lack of creditor protection

b. Lack of multi-generational wealth transfer tax protection

B. Irrevocable trusts for descendants.

1. A donor may make gifts to an irrevocable trust for the benefit of one or more of the donor's descendants. The mechanics of the transfer are similar to outright gifts, except the transfers are to an irrevocable trust.

2. If a donor makes gifts of closely held business interests, be mindful of gifting business interests to an irrevocable trust when the business is taxed as an S corporation. The irrevocable trust must include provisions that will allow the trust to qualify as a qualified S corporation shareholder, and the trustee or the primary beneficiary will need to make a qualified subchapter S trust (QSST) election or an electing small business trust (ESBT) election if the irrevocable trust is not a grantor trust for income tax purposes.

3. Pros:

a. Creditor protection

b. Multi-generational wealth transfer tax protection

c. Income tax planning opportunities

4. Cons:

a. Complexity

b. Loss of Access

C. Irrevocable life insurance trusts (ILITs).

1. Overview

a. An irrevocable trust designed to hold life insurance. The policy is titled in the name of the trust. When the insured dies, the policy proceeds are paid to the trust, and ultimately, distributed in accordance with the trust's terms.

b. The trust is irrevocable, and the beneficiaries are typically the grantor's spouse and/or the grantor's issue.

c. Ideally, the trustee is an independent third party, such as a corporate fiduciary (i.e., bank or trust company).

2. Benefits

    a. An ILIT will remove the life insurance proceeds from the taxable estates of both the insured and the beneficiary of the trust.

    b. Little to no gift tax is incurred upon creation of the ILIT and the payment of subsequent premiums.

    c. The life insurance proceeds will be available to the insured's beneficiaries for the payment of taxes, debts, and expenses associated with the administration of the grantor's estate (i.e., liquidity).

    d. ILITs can provide asset protection to current and future generations.

    e. Multi-Generational

        (1) A dynastic ILIT, which can be drafted to last for multiple generations, allows trust funds to grow for future generations without being exposed to the transfer tax system between generations.

3. Funding the trust

    a. Types of insurance

        (1) Term policies are not ideal candidates to fund an ILIT, unless done in conjunction with other whole life policies.

            (a) Term policies will terminate at some point and are less likely to pay out into the ILIT.

        (2) Whole life policies should be the main funding source of ILITs.

            (a) They are permanent policies that will pay out upon the grantor's death and will be available for future generations.

            (b) These policies are also likely to have accumulated cash value during the course of the policy.

    b. A current policy can be gifted to the trust.

        (1) Gift tax consequences. This funding may result in the reduction of the grantor's applicable exclusion amount.

(2) Estate tax consequences. If existing policies are gifted to the trust, the grantor must survive the transfer by 3 years to avoid inclusion in the grantor's taxable estate under I.R.C. § 2035(a)(2).

(3) Value of gifted policy.

(a) The policy is valued as its replacement value on the date of the gift, which is the cost of a comparable policy for someone of the insured's age and health.

(b) The value is also dependent on the type of policy (i.e., new cash value policy versus single premium or paid-up policy).

c. A new policy can be purchased by the trust.

(1) Having the ILIT purchase the policy is the preferred way to fund the ILIT.

(a) In doing so, the rules of I.R.C. § 2035 won't apply, even if the grantor dies within 3 years of the policy's issuance because it was purchased by the trust.

(2) The grantor may also seed the ILIT with liquid funds, so the trustee can purchase the policy. This may result in gift tax consequences, but on a smaller scale than gifting the whole policy.

d. Payment of premiums

(1) Once the policy is in the ILIT, the grantor(s) will gift an amount to the trust, usually annually, so the trustee can pay premiums.

(2) Some grantor(s) may also seek to fund the trust initially with some cash to also provide for the payment of premiums.

e. Gifting

(1) A gift of a life insurance policy to an ILIT will reduce one's applicable exclusion amount. This would include the initial gift of the policy, along with any gift made to pay future premiums after the ILIT is funded.

(2) The exemption will not be reduced if the ILIT is drafted so that the funding or (more likely) the payment of premiums qualifies for the annual exclusion ($19,000 in 2025).

(3) To qualify for the annual exclusion, the gift must be a gift of a "present interest." However, since the policy will not pay out until the insured dies, the interest is unlikely to be deemed present.

(a) However, there is an exception, known as "Crummey powers," based on the case Crummey v. Commissioner (1968). If the trust is drafted to provide beneficiaries with a limited right of withdrawal upon a gift to the trust, the gift is deemed a gift of a present interest.

(b) The trustee should give the beneficiaries notice in writing, and the window for withdrawal is typically 30-60 days.

(4) If the gift does not qualify for the annual exclusion as a present interest gift, it would still be deemed a gift and would just reduce the grantor's applicable exclusion amount.

4. Community property

a. Wisconsin is one of 9 states that have community property laws. The other states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington.

b. In these states, title is not determinative. Upon marriage, each spouse is deemed to have an undivided one-half interest in all marital assets. Spouses are also deemed to have equal responsibility for debts incurred during marriage.

(1) There are a few exceptions, such as property owned before marriage, gifts, and inheritances, which are deemed separate property.

(2) The parties can also execute agreements to opt out of this community property regime and determine what is marital versus separate upon marriage, as well as how earned income, etc., will be treated during marriage.

c. Upon divorce, all community property is subject to equal division, regardless of who earned it, acquired it, or is the titleholder.

d. Community property must be addressed when transacting with an ILIT.

(1) If neither spouse is a beneficiary of the ILIT, contributions can be made using community property.

(2) However, if one spouse is a beneficiary of the ILIT, care must be taken to ensure that no community property is contributed to the ILIT, as it may result in estate tax inclusion for the beneficiary spouse.

(3) If community property is contributed to an ILIT, and the non-contributing spouse is a beneficiary, that spouse/beneficiary's interest in the ILIT could be included in that spouse's estate.

(4) To avoid this issue, the parties will need to re-categorize their community property into separate property. Each spouse should receive the same amount of separate property.

D. Spousal lifetime access trusts (SLATs).

1. Overview

a. An irrevocable trust for married couples. Each spouse creates and funds a trust primarily for the benefit of the other spouse.

b. The non-gifting spouse is a trust beneficiary and can receive distributions from the trust.

c. Upon the death of the beneficiary spouse, the SLAT will make distributions to the contingent trust beneficiaries (usually children or the next generation).

d. SLATS are typically structured as intentionally defective grantor trusts (IDGTs). The assets will be excluded from the grantor's taxable estate but income will be includable for income tax purposes.

2. Benefits

a. SLATs provide flexibility by allowing the gifting spouse to have indirect access to the trust assets through the beneficiary spouse.

b. Estate tax exclusion

3. Structure

   a. The beneficiary is always the non-gifting spouse but may also include other beneficiaries, such as the grantor's children or more remote descendants.

   b. Who should be the trustee?

      (1) The donor spouse should never be the trustee.

      (2) The beneficiary spouse may serve as trustee in limited situations, such as (a) when the distribution standard is limited to a discretionary ascertainable standard, or (b) as co-trustee so long as the beneficiary spouse but is restricted from participating in distribution decisions.

      (3) The most prudent option is to appoint an independent trustee.

4. Reciprocal trust doctrine

   a. If two SLATs are created (one for each spouse), they cannot be reciprocal. If they are reciprocal, the IRS will view them as cancelling each other out under the so-called "reciprocal trust doctrine," and the assets will be includable in the grantors' taxable estates under I.R.C. § 2036 and/or I.R.C. § 2038.

   b. If the trusts are interrelated and leave both grantors in about the same "economic position" they would have been if they simply created the trust for themselves, the reciprocal trust doctrine will apply.

   c. Two SLATs can still be created, but they must be sufficiently different. Below are differences that may be incorporated into the SLATs:

      (1) Beneficiaries. One SLAT may be for the benefit of the spouse only, while the other SLAT may also include descendants as beneficiaries.

      (2) Distribution standards. The SLATs can incorporate different distribution standards in each trust. For example, one trust may include an ascertainable standard (health, education, maintenance, and support), while the other SLAT is fully discretionary.

(3) Powers of appointment. The SLATs can provide one spouse with a limited power of appointment and the other spouse with no power of appointment.

(4) Trustees. The two trusts could have different trustees or co-trustees.

(5) Timing. The SLATs could be executed at different times, or even in different calendar years.

(6) Funding. The trusts can be funded with different types of assets, such as marketable securities, privately held business interests, insurance policies, etc.

(a) The value of the assets funding the trusts should also vary, such that one trust is funded with more assets than the other.

5. Community property

a. The donor spouse must gift assets that are their separate property. Wisconsin is a community property state, so any community property should first be converted into separate property before gifting any assets to a SLAT.

b. If the funds contributed to the SLAT are deemed to be community property, it causes estate tax inclusion.

c. Some assets may need to be re-allocated or re-categorized by agreement, so it is important to identify the assets that will fund the SLATs well in advance.

E. Special power of appointment trusts (SPATs).

1. A donor may make gifts to an irrevocable trust for the benefit of the donor's spouse and/or descendants, and the donor may be a potential appointee pursuant to a special power of appointment granted to a powerholder. The mechanics of the transfer are similar to outright gifts, except the transfers are to an irrevocable trust.

2. To ensure the special power of appointment does not cause estate inclusion, the powerholder must not be related to the donor or subordinate to the donor in an employment relationship (within the meaning of I.R.C. § 672(c)), and there must be no express or implied understanding between the donor and the powerholder that the powerholder will exercise the power in favor of the donor. Generally, the donor signs an affidavit attesting to these facts simultaneously with the execution and funding of the irrevocable trust.

3. Pros:

   a. Creditor protection

   b. Multi-generational wealth transfer tax protection

   c. Income tax planning opportunities

   d. Access

4. Cons:

   a. Complexity

   b. Cost

F. Domestic asset protection trusts (DAPTs).

1. A donor may make gifts to an irrevocable trust for the benefit of the donor, the donor's spouse, and/or the donor's descendants. The mechanics of the transfer are similar to outright gifts, except the transfers are to an irrevocable trust.

2. The terms of the irrevocable trust must provide that all distributions are discretionary.

3. The fiduciary with the power to make distributions to the beneficiaries must not be related to the donor or subordinate to the donor in an employment relationship (within the meaning of I.R.C. § 672(c)), and there must be no express or implied understanding between the donor and the fiduciary that the fiduciary will make distributions to the beneficiaries.

4. Wisconsin law does not yet allow the creation of self-settled discretionary trusts that offer protection from the donor's creditors. However, numerous states have adopted laws that permit the creation of these trusts (South Dakota, Nevada, Alaska, etc.). Therefore, the irrevocable trust needs to be created under the laws of one of these states in order to be utilized for wealth transfer tax planning. Most states that have adopted these laws also require that at least one trustee of the trust is resident in the state, and that trustee must possess and exercise substantive trustee powers.

5. Federal law has consistently provided that if the donor's creditors cannot attach the assets in a self-settled discretionary trust, the transfer to the trust is a completed gift and the trust is not included in the donor's estate for estate tax purposes. However, not a single domestic asset protection trust has been tested all the way through the court system; either the cases have settled or the I.R.S. and attorneys who represent creditors have not taken legal action because they believe that, if tested, a domestic asset protection

trust created under the laws of one of the favorable states will work to protect assets.

a. Donors generally rely on Rev. Rul. 77-378, 1977-2 C.B. 347, and I.R.S. Priv. Ltr. Rul. 200944002 to support the position that the trust assets will not be included in the donor's estate for estate tax purposes.

(1) In Rev. Rul. 77-378, the I.R.S. found that the donor of a self-settled discretionary trust had made a completed gift where under state law (i) the trustee had discretion (and was not required) to make distributions to beneficiaries, including the donor, (ii) the donor could not require that the trust assets be distributed to the donor, and (iii) the creditors of the donor could not reach the trust assets. The I.R.S. stated that whether the donor would enjoy any of the trust assets was "dependent entirely on the uncontrolled discretion of the [t]rustee" and "such a hope or passive expectancy" does not make the gift incomplete.

(2) In I.R.S. Priv. Ltr. Rul. 200944002, the I.R.S. ruled that a self-settled discretionary trust created under the laws of Alaska would not be included in the donor's gross estate under I.R.C. § 2036 unless there is an implied understanding or other factor that would cause estate tax inclusion. The key part of the private letter ruling states, "[T]he [t]rustee's discretionary authority to distribute income and/or principal to [the donor], does not, by itself, cause the [t]rust corpus to be includible in [donor's] gross estate under § 2036. . . . We are specifically not ruling on whether [t]rustee's discretion to distribute income and principal of [t]rust to [donor] combined with other facts (such as, but not limited to, an understanding or pre-existing arrangement between [donor] and [t]rustee regarding the exercise of this discretion) may cause inclusion of [t]rust's assets in [donor's] gross estate for federal estate tax purposes under § 2036." However, a private letter ruling may be cited as authority only by the taxpayer to whom it was issued.

b. The most conservative approach is for the donor to request his or her own private letter ruling. As of January 1, 2025, the user fee for a private letter ruling is $43,700 (Rev. Proc. 2025-1, 2025-1 I.R.B. 1).

6. Pros:

a. Creditor protection

b. Multi-generational wealth transfer tax protection

c. Income tax planning opportunities

d. Access

7. Cons:

a. Complexity

b. Cost

c. Coordination with out-of-state legal counsel and trustee

G. Sales to intentionally defective grantor trusts (IDGTs).

1. Intentionally defective grantor trusts (IDGTs)

a. A grantor trust is a type of irrevocable trust in which assets in the trust are excluded from the grantor's taxable estate for estate tax purposes but income from the trust is treated as the grantor's income for income tax purposes.

b. The grantor trust powers are found in I.R.C. §§ 673 through 678.

(1) Reversionary interests

(2) Power to control beneficial enjoyment

(a) Power to add charitable beneficiaries

(3) Administrative powers

(a) Power to make loans to the grantor without adequate security

(b) Power of substitution

(4) Power to revoke

(5) Income for the benefit of the grantor

(a) Power to use income to pay premiums on insurance on the life of the grantor or grantor's spouse

(6) Persons other than the grantor treated as substantial owners

(7) Foreign trusts having one or more United States beneficiaries

2. Installment sales

a. The grantor sells an asset to the IDGT in exchange for an installment promissory note equal to the fair market value of the asset. The IDGT pays interest on the note to the grantor.

b. This technique removes the asset from the grantor's taxable estate and replaces that transferred asset with an interest bearing note.

(1) For example, the grantor sells an asset valued at $10 million to the IDGT in exchange for a note for $10 million. If the asset appreciates in value after the sale, it will do so outside of the grantor's taxable estate and only the $10 million note will be included in the grantor's taxable estate.

c. Closely held business interests are common assets to consider transferring by installment sale.

d. The note must include a legitimate interest rate.

(1) I.R.C. § 7872 notes a below-market rate as one that is lower than the applicable federal rates (AFRs) established by the Treasury pursuant to I.R.C. § 1274.

(2) To work well, the asset transferred should be appreciating at a rate faster than the AFR.

e. The IDGT should already have liquid assets in it.

(1) For any sale to be respected, the buyer should have some income and assets (and the same is true for trusts).

(2) It is common practice to "seed" up to 10% of the expected purchase price into the IDGT as a separate gift before the sale transaction occurs. This helps secure the ability of the IDGT to make the initial installment note payments, until the asset transferred into the IDGT can generate enough cash flow to pay the note payments going forward.

f. A valuation should be undertaken if closely held business interests are being sold to the IDGT.

g. The note should be in writing; secured (typically by the assets sold to the IDGT); and the note term should not exceed the grantor's life expectancy. Regular note payments should be made to the grantor.

h. Benefits

(1) Removes appreciating assets from the grantor's taxable estate

(2) Preservation of applicable exclusion amount (excluding the seed money)

(3) No income tax consequences upon the sale of the assets to the IDGT because the IDGT is a grantor trust

3. Self-canceling installment notes (SCINs)

a. An installment note that contains provisions under which the IDGT's obligation to pay automatically ceases in the event the grantor dies before the end of the term of the note.

b. The value of the asset sold to the IDGT is excluded from the grantor's taxable estate.

c. The grantor should be in reasonably good health when the transaction is undertaken. If not, the IRS will likely scrutinize the transaction.

d. The grantor "wins" if he or she dies before the note is fully repaid.

V. QUESTIONS/COMMENTS

RESOURCES FOR HANDLING COMPLEX CIVIL AND COMMERIAL LITIGATION

ABA Business Court Benchbook
ABA The Business Lawyer publication
Economic Analysis for Lawyers, 4th Ed. Henry Butler, Joanna Shepherd and James C. Cooper
State Bar of Wisconsin Brown books
Waukesha County Local Rules
Wisconsin Civil Jury Instructions and case notes
Wisconsin Fair Dealership Law
Wisconsin Judicial Benchbook

STATE OF WISCONSIN, CIRCUIT COURT, _____ COUNTY

Plaintiff: _____
Address: _____
-VS-
Defendant: _____
Address: _____

Management Report by Parties and Proposed Scheduling for Case

Case No. _____
Case Code _____

1. **Meeting of parties.**
Pursuant to the Court's Standing Order for cases in the Commercial Docket (and Scheduling Order), a meeting was held on [Date] _____, 20_____ at [Time] _____ and was attended by:

For plaintiff [Name] _____.
For defendant [Name] _____.

2. **Nature of case; summary of dispute.**
[No more than 250 words for each litigant, or 500 words if a joint description.]

_____

3. **Status of pleadings.**
[Describe status of pleadings, proposed amendments, service of process, addition of new parties, any initial pleading motions.]

_____

4. **Discovery Plan.**
The parties jointly propose to the Court the following discovery plan:
[Use separate paragraphs or subparagraphs as necessary if parties disagree.]

_____

Discovery will be needed on the following subjects:
[*Brief description of subjects on which discovery will be needed.]*

All discovery commenced in time to be completed by [Date] _____.
Discovery on issue for early discovery to be completed by [Date] _____.

Dates for preliminary disclosure of fact witness:
From plaintiff: _____
From defendant: _____

Maximum of _____ interrogatories by each party to any other party. *[Responses due _____ days after service].*

Maximum of _____requests for admission by each party to any other party. *[Responses due _____ days after service.]*

Maximum of _____ depositions by plaintiff and _____ by defendant.

Each deposition *[other than of _____]* limited to maximum of _____ hours unless extended by agreement of parties.

Disclosure and reports from retained experts due:
From plaintiff: _____
From defendant: _____

Supplementations under §804.01(5), Wis. Stats.
[List of dates or intervals]: _____

5. **Preservation of Discoverable Information:**
The parties agree to handle the preservation of discoverable information in the following way:

_____

6. **Electronically Stored Information:**
The parties agree to handle electronically stored information in the following way:

_____

7. **Other Items:**
[Use separate paragraphs or subparagraphs as necessary if parties disagree.]

Plaintiff/Defendant requests a protective order on materials and information provided in discovery.

The parties ☐ request ☐ do not request a conference with the Court before entry of the scheduling order.

The parties request a pretrial conference in [Month and Year] _____.

Plaintiff should be allowed until [Date] _____ to join additional parties and until [Date] _____ to amend the pleadings.

Defendant _____ should be allowed until [Date] _____ to join additional parties and until [Date] _____ to amend the pleadings.

All potentially dispositive motions should be filed by [Date] _____.

Settlement is
☐ cannot be evaluated prior to [Date] _____.
☐ the parties agree to use _____ as a mediator in this matter. If there is no agreed mediator, then the parties agree to this process to select a mediator: _____.

Final lists of witnesses and exhibits should be due from plaintiff by [Date] _____ from defendant by [Date] _____.

Parties should have _____ days after service of final lists of witnesses and exhibits to list objections.

The case should be ready for trial by [Date] _____ and at this time is expected to take approximately [Length of time] _____.

BY THE PARTIES:

_____
Plaintiff/Defendant

_____
Name Printed or Typed

_____
Address

_____
Email Address Telephone Number

_____
Date State Bar No. (if any)

_____
Plaintiff/Defendant

_____
Name Printed or Typed

_____
Address

_____
Email Address Telephone Number

_____
Date State Bar No. (if any)

DISTRIBUTION:
1. Court
2. Plaintiff
3. Defendant
4. Other: _____

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

_____,

Plaintiff,

v. Case No. _____

_____,

Defendant,

ORDER OF REFERENCE PURSUANT TO WIS. STAT. §§ 804.01(2)(e)1r.f. and 805.06

¶1. In the light of the complex and contentious nature of the dispute and the need potentially to protect confidential information of third parties, the Court concludes, in its discretion, that the appointment of a discovery referee will expedite the case, protect confidential information, facilitate the discovery of information, and preserve judicial resources.

¶2. Accordingly, pursuant to WIS. STAT. §§ 804.01(2)(e)1r.f. and 805.06, the Court appoints the [referee] as Referee, effective as of the date of this order, to assist the Court in coordinating discovery, including the scope of discovery and objections to discovery. This includes addressing any motions to compel discovery and for protective order, as well as ruling on any objections to the scope and nature of discovery. The Court reserves the right, at the request of a party, the Referee, or on its own initiative, to modify or supplement the tasks comprising the reference.

¶3. The parties must cooperate with [referee] as Referee in developing future scheduling recommendations and orders for this case.

¶4. The Referee has the full authority of the Court in coordinating and establishing all procedures relating to discovery. All discovery motions filed in this case will initially be heard by the Referee, who will make a recommended ruling to the Court on all motions. The recommendations of the Referee are subject to *de novo* review by this Court as described below.

¶5. Except as ordered by the Referee, the filing, service, and notice of motions are governed by the Wisconsin Rules of Civil Procedure and the Local Rules of this Court.

¶6. The original of every document submitted to the Referee must be filed with the Court. The Referee must file with the Court the original of any recommendation.

¶7. If the Referee determines that a specific issue presented by the parties for the Court's decision is of such fundamental importance to the progress or outcome of the case that effective case management would not be furthered by having the Referee issue a recommendation, the Referee may certify that issue to the Court. As the final arbiter of case management, the Court may accept the certification or refer the matter back to the Referee for a recommendation. If the Court does not accept the certification, the Referee will proceed to make a recommendation in accordance with the terms of this order.

¶8. Within seven (7) calendar days of the issuance of a recommendation, either party may file with the Court an objection to the recommendation. Objections not filed within this time period are forfeited.

¶9. The Court's review of the Referee's recommendations will be based on, and limited by, the materials and information comprising the record before the Referee. No additional submissions will be permitted unless good cause and exceptional circumstances are

demonstrated. The Court will review *de novo* the recommendations of the Referee. Absent objection, any recommendation of the Referee may be approved immediately and without a hearing.

¶10. All recommendations approved by the Court are appealable after the final disposition of this case as if they were made by this Court. A party need not object to a recommendation of the Referee in order to preserve the issue for appeal, either on an interlocutory basis or as an appeal of a final order.

¶11. The Referee must be reasonably available to hear matters promptly and at such times as may be convenient, at the discretion of the Referee.

¶12. The Referee has the discretion to hear argument on a motion or dispute in person, by video conference, or by telephone.

¶13. Hearings will be held at places directed by the Referee. The Referee may arrange for a court reporter to be present at hearings and will provide to the parties or their counsel a copy of the transcript of the hearing if requested. The cost of the court reporter will be borne jointly by the parties, subject to the Referee's discretion to allocate the costs between the parties.

¶14. All decisions of the Referee must be accompanied by supporting reasons and must be served upon the parties at the same time as it is filed with the Court.

¶15. Except for good cause shown or by stipulation of the parties to a dispute, the Referee will issue a decision on all disputed matters within ten (10) calendar days of the hearing of any motion, or within ten (10) calendar days of the conclusion of briefing if no oral argument is scheduled.

¶16. The Referee will be compensated at the rate of $___.00 per hour, and will be reimbursed for all reasonable and necessary expenses. The fees and expenses of the Referee will

be allocated equally between the parties, subject to a motion to reallocate the fees and costs, which the Referee will address in the first instance.

¶17. The Referee must submit itemized statements to the parties on a monthly basis.

¶18. All counsel of record promptly must send their telephone, address, and email address to [referee] at [email].

SO ORDERED.

Dated this __ day of _____, 20__.

BY THE COURT:

___/s/ Michael J. Aprahamian_____
Circuit Court Judge

Wis. Stat. 804.05(2)(e). A party may in the notice name as the deponent a public or private corporation or a limited liability company or a partnership or an association or a governmental agency or a state officer in an action arising out of the officer's performance of employment and designate with reasonable particularity the matters on which examination is requested. The organization or state officer so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. The persons so designated shall testify as to matters known or reasonably available to the organization. This paragraph does not preclude taking a deposition by any other procedure authorized by statute or rule.

Fed. R. Civ. P. 30(b)(6) *Notice or Subpoena Directed to an Organization.* In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. Before or promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the matters for examination. A subpoena must advise a nonparty organization of its duty to confer with the serving party and to designate each person who will testify. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

Waukesha County Civil Local Rule 2: Discovery

2.1 Discovery Conference with Mediator

Except in actions exempted by the Court, the parties must meet with the mediator selected by the parties or identified in the scheduling order at least 90 days after the scheduling order to discuss the case and the possibilities for prompt resolution. The parties and the mediator must (a) discuss discovery to be completed prior to mediation, (b) identify any contemplated motions, particularly those that may impact the scheduling of mediation, and (c) secure a date for mediation on the mediator's calendar.

2.2 Form of Response

An objection or answer to an interrogatory, request to produce a document, or request for admission must reproduce the request to which it refers. Absent good cause or written agreement by the parties, objections not timely made to any discovery request are waived.

2.3 Standard Definitions Applicable to All Discovery

(1) The full text of the definitions set forth in subparagraph (2) is deemed incorporated by reference in all discovery, and may not be varied by litigants, but does not preclude the definition of other terms specific to the particular litigation, the use of abbreviations, or a more narrow definition of a term defined in paragraph (2).

(2) Definitions. The following definitions apply to all discovery:

(a) Communication. The term "communication" means the transmittal of information (in the form of facts, ideas, inquiries, or otherwise).

(b) Document. The term "document" is defined to be synonymous in meaning and equal in scope of the usage of this term in Wis. Stat. §804.09(1). A draft or non-identical copy is a separate document within the meaning of this term.

(c) To Identify.

(i) With Respect to Persons. When referring to a person, "to identify" means to give, to the extent known, the person's full name, present or last known address, and when referring to a natural person, additionally, the present or last known place of employment. Once a person has been identified in accordance with this subparagraph, only the name of that person need be listed in response to subsequent discovery requesting the identification of that person.

(ii) With Respect to Documents. When referring to documents, "to identify" means to give, to the extent known, the (i) type of document; (ii) general subject matter; (iii) date of the document; and (iv) author(s), addressee(s), and recipient(s).

(d) Person. The term "person" is defined as any natural person or any business, legal, or governmental entity, or association.

2.4 Confidentiality of Discovery Materials

(1) All motions and stipulations requesting a protective order must contain sufficient facts demonstrating good cause. Upon a showing of good cause, the Court may enter a protective order regarding confidentiality of all documents produced in the course of discovery, all answers to interrogatories, all answers to requests for admission, and all deposition testimony. A protective order template is included in the Appendix to these Local Rules.

(2) A party may challenge the designation of confidentiality by motion. The movant must accompany such a motion with the certification required by Civ. L. R. 2.7(1). Absent good cause, the party prevailing on any such motion may recover as motion costs its actual attorney fees and costs attributable to the motion.

(3) At the conclusion of the litigation, all material not received in evidence and treated as confidential under this Rule must be returned to the originating party or, if the parties stipulate, the material may be destroyed.

2.5 Limitation on Discovery Requests

(1) Interrogatories. Except as provided in sub (3), no party may serve more than a total of 25 interrogatories to another party in any case.

(a) The 25 permissible interrogatories may not be expanded by the creative use of sub-parts. Each sub-part of an interrogatory is counted as one interrogatory.

(b) Interrogatories inquiring about the name and location of parties, expert witnesses, and other persons having knowledge of discoverable information, or about the existence, location, or custodian of documents or physical evidence are excluded and not counted toward the limit.

(2) Parties represented by the same attorney or law firm are regarded as one party for purposes of determining compliance with limitations on discovery.

(3) Parties may agree to permit additional discovery beyond that authorized under this rule or the Wisconsin Rules of Civil Procedure. Such agreement must be in writing or on the record and need not be filed with the Court except in support of a motion seeking compliance with the stipulation. After complying with Civ. L. R. 2.7(1), a party may move the Court for permission to serve or pursue additional discovery beyond the limitations of these rules or the Wisconsin Rules of Civil Procedure.

2.6 Depositions

(1) Objections to a deposition notice, including a notice to an organization under Wis. Stat. §804.05(2)(e), must be raised and resolved either by stipulation or protective order prior to the deponent sitting for the deposition. Absent good cause, objections to the notice not resolved prior to the deponent sitting for the deposition are waived.

(2) Objections to questions asked at a deposition must be stated concisely in a non-argumentative and nonsuggestive manner. An objection "to the form of the question," preserves all objections to the question unless the questioning party asks the objecting party the basis for the objection. An attorney may instruct a deponent not to answer a question only when necessary to preserve a privilege, to enforce a limitation ordered by a court, or to suspend the deposition to present a motion for a protective order under Wis. Stat. §804.01(3).

2.7 Discovery Motions

(1) All motions to compel discovery or for a protective order precluding or limiting discovery must be accompanied by an affidavit by the movant certifying that, after the movant in good faith has conferred or attempted to confer with the opposing party to resolve the discovery dispute without court action, the parties are unable to reach an accord. The affidavit must recite the date and time of the conference or conferences and the names of all parties participating in the conference or conferences.

(2) Absent good cause, a motion to compel discovery must be filed no later than 90 days after the date upon which the discovery response was due (if no discovery response was served) or the date the discovery response was served.

(3) Failure to comply with this rule may result in immediate denial of the motion.

2.8 Completion of Discovery

Unless the Court orders otherwise, all discovery (excluding depositions to preserve testimony for trial) must be completed 20 days before the final pretrial hearing. Completion of discovery means that discovery must be scheduled to allow depositions to be completed, interrogatories and requests for admissions to be answered, and documents to be produced before the deadline and in accordance with the Wisconsin Rules of Civil Procedure. On motion and for good cause, the Court may extend the time during which discovery may occur or may reopen discovery.

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

PLAINTIFF,

Plaintiff/Counterclaim Defendant,

vs

SCHEDULING ORDER
Case No. _____

DEFENDANT.

Defendants/Counterclaim Plaintiffs.

The parties held a scheduling conference pursuant to the Court's meet and confer order. ____ appeared on behalf of the Plaintiff and _____ appeared on behalf of Defendant. The parties stipulate to the following deadlines and conditions for the litigation of the case, with each party reserving the right to move to amend this order for good cause or in the interest of justice.

IT IS ORDERED:

1. Plaintiff must pay the jury fee or give written notification of non-payment no later than _____. Defendant(s) must pay the jury fee or give written notification of non-payment no later than _____. The right to a jury trial is waived or otherwise forfeited if the fees are not timely paid. The trial date will be scheduled at the final pretrial conference.

2. Amended pleadings, including the addition of parties, must be accomplished by Plaintiff no later than _____ and by Defendant by _____. In the event that a party is added and the appropriate fee paid, a copy of this scheduling order along with any additional pleading must be served on the added party(ies).

3. The party bearing the burden of proof on a claim or counterclaim must provide in writing to the court and the opposing parties: (1) the names and addresses of all lay witnesses along with a brief statement of his/her anticipated testimony; and (2) an itemized statement of damages claimed, including, if applicable, any special damage claims and permanency, no later than _____. Responsive disclosures must be made no later than _____. The party bearing the burden of proof on a claim or counterclaim must serve the names, addresses, and resumes for each expert named, along with a written report specifying all opinions to be offered, by _____. All expert disclosures and reports in response to those named above must be named by _____. Any rebuttal expert or rebuttal expert opinion must be disclosed no later than _____. Witnesses not timely named and described will be precluded from testifying as witnesses at trial, except for good cause shown.

4. Summary judgment and other dispositive pretrial motions must be filed no later than _____. Unless otherwise ordered by the Court, responding party has 30 days from service of the movant's motion and supporting documents to serve and file a response brief and supporting documents, or waiver in writing; movant has 14 days from service of a response brief and supporting documents to serve and file a reply brief limited to matters in reply to the response brief. All submissions must comply with Civ. L. Rule 3.3. Parties are encouraged to file a joint scheduling order for the briefing of summary judgment and other significant motions.

5. Any motion pursuant to Wis. Stats. § 901.04 to allow (out of the ordinary experts) or to challenge the admission of expert testimony must be filed by _____, unless a stipulation is filed by the parties which resolves such issues. The motion must be accompanied by an offer of proof and a written basis for the requested relief.

6. Discovery must be completed by all parties twenty (20) days prior to the scheduled final pretrial in accordance with Civ. L. Rule 2.8. In the event the trial date is rescheduled or a second final pretrial conference is scheduled, **discovery is not reopened without permission of the Court**. At this time, the parties agree to the provisions in Civ. L. Rule 2.5, but the parties reserve their right to pursue additional discovery pursuant to Civ. L. Rule 2.5(3). Any motion to compel discovery must comply with Civ. L. Rule 2.7. Pursuant to Wis. Stat. § 804.12(1)(c), the Court will award the successful party its expenses, including attorneys fees, incurred relating to the motion,

unless the losing party convinces the Court that an award of expenses would be unjust or inappropriate under Wis. Stat. § 804.12(1)(c).

7. Mediation is ordered by the Court. The Court appoints _____ as mediator, but the parties may agree upon a different mediator. Within 90 days from the date of this scheduling order, the parties must participate in a discovery conference with the mediator pursuant to Civ. L. Rule 2.1. The Court expects the parties and the mediator to address the discovery to be completed prior to mediation, to identify any contemplated motions that may impact the scheduling of mediation, and to secure a date for mediation on the mediator's calendar. Fees and expenses of mediation will be divided equally between the parties unless otherwise ordered by the Court. The parties and their attorneys must be personally present for mediation, unless approved by the Court. Each corporate party must be represented by an individual with decision-making authority to negotiate a resolution in this matter, or such person with decision-making authority must be immediately available to the mediator during the mediation. In the event a party appears without full authority to negotiate a resolution, the party may be ordered to pay all costs of the mediation. The ordered mediation must be completed no later than 20 days prior to the final pretrial conference unless approved by the Court.

8. Copies of all documents and evidence to be used at trial must be identified and made available to the opposing party(ies) no later than 48 hours prior to the final pretrial conference. All exhibits must be premarked. Plaintiff is to use exhibit numbers 1-99 and Defendant is to use exhibit numbers 100 – 199, or an agreed upon and consistent protocol to prevent duplicate numbers. Exhibits are to be filed with the Court pursuant to Civ. L. Rule 4.4.

9. A final pretrial conference is set on _____ **at ____ a.m. in Room ____**. The attorney(s) who will actually try the case must be present. The party must also personally appear unless the attorney has full authority to act for the party. If the party cannot be personally present, the party must be reasonably available by phone. The parties must be prepared to discuss the scheduling of any evidentiary depositions for use at trial, as well as the order of witnesses and the exchange of any final trial exhibits. If any party fails to appear at the final pretrial conference, the Court may enter an order dismissing the case or defaulting the party without further notice.

10. Pretrial Report: Each party must file with the Court a pretrial report no later than seven days prior to the final pretrial conference. The report must be signed by the attorney who will try the case or a party personally if not represented by an attorney. The pretrial report must include the following:

A. A detailed summary of the facts of the case, issues, theories of liability or defense, and evidentiary issues. The summary should not exceed two pages.
B. Identification of each trial witness, lay and expert, and a summary of anticipated testimony not exceeding one page per witness.
C. Exhibit List identifying each exhibit (except those to be used for impeachment only). In addition, each party must identify any objections (and the grounds therefor) to the admissibility of opposition exhibits.
D. An estimate of the probable length of the trial in half-day increments.
E. Designation of all depositions or portions thereof to be read into the record at trial as substantive evidence, unless used only for impeachment purposes.
F. **If a jury trial**, provide: (a) all proposed jury instructions, numbers only unless requesting modified or special instructions; (b) proposed special verdict form and (c) motion(s) in limine. A date to hear the motion(s) in limine will be set at the time of the final pretrial conference. The Court will order the parties to meet and confer to agree upon a special verdict and jury instructions.
G. **If a court/bench trial**, provide: proposed findings of fact and conclusions of law.
H. Certification that alternative dispute resolution occurred, including the mediator and the date(s) it occurred.
I. In addition to completing a report, parties are expected to confer and make a good faith effort to settle the case. Parties are also expected to arrive at stipulations that will save time during the trial. The pretrial report must itemize any stipulations.

11. The parties may stipulate to an extension of time limits in this order that will not affect dispositive motions or the final pretrial conference date. Other stipulations must be approved by the Court.

12. _____

_____

FAILURE TO COMPLY WITH THE TERMS OF THIS ORDER IS CAUSE FOR IMPOSING SANCTIONS, INCLUDING THE DISMISSAL OF CLAIMS AND DEFENSES, THE EXCLUSION OF WITNESSES, AND MONETARY SANCTIONS.

Circuit Court | Civil Division | Racine County

Scheduling Order

JUDGE: EUGENE GASIORKIEWICZ CASE **NO.**

Attorneys

Plaintiff

vs.

Defendants

IT IS ORDERED:

1. The case is set for trial to (the court) a Jury of _____Persons on _____, 20_____at 8:30 am. The trial time is expected to be _____days.

(Check one) ☐ Jury fee has been paid

☒ Jury Fee has not been paid and must be paid within 7 days or the case shall be tried to the court on the same date pursuant to Wis. Stats. § 814.61(4).

2. All discovery shall be completed by _____.
3. All actions, including motions and amendment of pleadings, relating to adding additional parties, third party practice, interpleader, misjoinder shall be served, filed and completed by _____. Plaintiff shall join as parties all persons with subrogated, derivative or assigned rights by _____ pursuant to Wis. Stat. § 803.03(2).
4. Except as provided in paragraph 3, all amendments to pleadings and supplemental pleadings shall be served and filed by _____.
5. All dispositive motions under Wis. Stat. § 802.06 and § 802.08, shall be filed, served and heard by _____. The motion(s) shall be filed and served at least _____(30) days before the hearing date. Respondent shall have _____(20) days from the filing of the movant's brief to file a response brief. The movant shall have _____(5) days from the filing of respondent's brief to file a reply brief. See Racine County Local Rules.

6. Circuit Court Rule III Civil "C" (6/20) Plaintiff shall provide the defendant(s) with the name(s) of all the expert witness(es) by ____/___/____.

    □ With a summary of expected testimony and a current curriculum vitae.

    □ Full compliance with the Special Order Regarding Expert Reports - attached.

7. Defendant(s) shall provide the plaintiff with the name(s) of all their expert witness(es) by ____/___/____ in compliance with the requirements of plaintiffs in paragraph 6.
8. Plaintiff shall furnish to defendant(s) an itemized list of all special damages, copies of all medical and hospital records in the possession of the plaintiff and a permanency claim report and loss of earnings capacity by _____.
9. Any physical and/or mental examination of the plaintiff(s) shall be scheduled and completed by the defendant(s) by _____. Defendant(s) shall deliver to the plaintiff(s) a copy of all IME and medical reports prepared pursuant to such examination within 10 days after receipt, but no later than 3 weeks after appointment date.
10. Trial briefs, requested jury instructions and requested jury verdict forms shall be served and filed 1 week before the final pretrial date. Motions in limine, *including Daubert motions*, must be served and filed 1 week before the final pretrial and will be heard at final pretrial. Attorneys must be present in person at final pretrial and have clients immediately available by telephone. Final Pre-trial is _____ At _____PM.
11. No adjournment will be granted due to non-availability of expert witnesses. Counsel and parties are bound to the time limits and dates set by the Scheduling Order unless altered by the court.
12. All attempts to resolve through **mandatory** alternative dispute, including mediation or arbitration are to be completed by _____. Pursuant to Wis. Stat. 802.12, the parties **shall inform** the court by letter of the outcome of ADR within 1 week of the above date.
13. Compliance with attached *Daubert* challenges is **mandatory**.
14. Other:_____

    _____.

Dated this _____ day of _____, ____.

FAILURE TO COMPLY WITH THE PROVISIONS OF THIS ORDER MAY RESULT IN SANCTIONS TO THE NON-COMPLIANT PARTY INCLUDING ENTERING OF JUDGMENT OR DISMISSING CLAIMS OR DEFENSES. SEE WIS. STAT § 804.12, § 805.03.

_____

Circuit Court Commissioner

SPECIAL ORDER REGARDING EXPERT REPORTS AND *DAUBERT* CHALLENGES

DUE TO THE NATURE OF THIS CASE, THE COURT ORDERS THAT THE PLAINTIFF'S AND THE DEFENDANT'S DESIGNATION OF EXPERTS AND THE PROVIDING OF REPORTS BE COMPLIANT WITH FEDERAL RULE OF CIVIL PROCEDURE 26.

IT IS FURTHER ORDERED THAT ANY *DAUBERT* CHALLENGE BE COMPLIANT WITH THE ATTACHED FORMAT AND SPECIFICALLY DESGINATE THE AREAS CHALLENGED AS IDENTIFIED IN *STATE V. JONES*, 2018 WI 44, ¶ 29; 381 Wis.2d 284, 911 N.W.2d 97.

1. **Plaintiff's and Defendant's designation of expert in accordance with the Scheduling Order shall contain the following items identified in Fed. Rule Civil Procedure 26:**
    a. **The expert witness must provide a written report prepared and signed by the expert witness. The report must contain:**
        i. **A complete statement of ALL opinions the witness will express and the basis and reasons for them;**
        ii. **The facts or data considered by the witness in forming them;**
        iii. **Any exhibits that will be used to summarize or support them;**
        iv. **The witness' qualifications, including a list of all publications authored in the previous 10 years;**
        v. **A list of all other cases in which, during the previous 4 years, the witness testified at trial or by deposition; and**
        vi. **A statement of the compensation to be paid for the study and testimony in the case.**
2. **Order regarding *Daubert* challenges. Generally speaking, unless otherwise ordered by the Court, such challenges will be by paper (affidavit) review.**
3. **Mandatory compliance with Court's order for specificity on any *Daubert* challenge.**

STANDING ORDER ON CHALLENGES TO THE ADMISSIBILITY OF EXPERT TESTIMONY UNDER WIS. STAT § 907.02 AND *DAUBERT*

This Standing Order governs challenges to the admissibility of expert testimony pursuant to Wis. Stat § 907.02 et seq. and the U.S. Supreme Court's decisions in ***Daubert v. Merrell Dow Pharmaceuticals Inc***., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); ***Kumho Tire Co., v. Carmichael***, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999); and Wisconsin court decisions in ***State v. Giese***, 2014 WI App 92; ***Seifert v. Balink***, 2017 WI 2; ***State v. Jones***, 2018 WI App 44; ***State v. Hogan***, 2021 WI App 24; ***Vanderventer v. Hyundai Motor Co***., 2022 WI App 56.

General Procedures. Any party may challenge the admissibility of expert testimony offered by another party. The party seeking to challenge the admissibility of expert testimony shall do so by motion, in accordance with any schedule set by the Court. In the motion, the moving party **shall** identify the specific opinion(s) that the movant seeks to exclude and the legal basis for exclusion, together with sufficient background information to provide context. The movant **shall** electronically file the relevant expert report(s) and, if the expert was deposed, the full transcript of the expert's deposition, and any affidavits and supporting materials for the Court to consider.

Legal Framework. The parties should be familiar with the legal standard governing the admissibility of expert testimony in a Wisconsin court. The following discussion is not intended to be an exhaustive discussion of the Seventh Circuit law, but instead seeks to remind the parties of certain guiding principles:

"Federal Rule of Evidence 702 governs the admissibility of expert testimony, as does the Supreme Court's seminal case of *Daubert*…"; [same as Wis. Stat. § 907.02] ***United States v. Lupton***, 620 F.3d 790, 798 (7th Cir. 2010); ***Lewis v. CITGO Petroleum Corp***., 561 F.3d 698, 705 (7th Cir. 2009).

"The proponent of the expert bears the burden of demonstrating that the expert's testimony would satisfy the *Daubert* standard." ***Lewis***, 561 F.3d at 705 (citing Fed. R. Evid. 702 - Adv. Comm. Notes ("[T]he admissibility of all expert testimony is governed by the principles of Rule 104(a). Under that Rule, the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence")).

"The district court is responsible for acting as a gatekeeper to ensure that all admitted expert testimony satisfied [Rule 702's] reliability and relevance requirements." ***Stollings v. Ryobi Techs. Inc***., 725 F.3d 753, 765 (7th Cir. 2013)(citing *Daubert*, 509 U.S. at 592-93). "[T]he key to the gate is not the ultimate correctness of the expert's conclusions. Instead, it is the soundness and care with which the expert arrived at the opinion: the inquiry must 'focus…solely on principles and methodology, not on the conclusions they generate.'" ***Schultz v. Akzo Nobel Paints, LLC***, 721 F.3d 426, 431 (7th Cir. 2013)(citing *Daubert*, 509 U.S. at 595). *See also Wisconsin cases previously cited in accord*.

Daubert* Hearing**. The Court, upon request of a party, may use its discretion to conduct a *Daubert* hearing or conduct a paper review. See ***United States v. Ozuna, 561 F.3d 728, 737 (7th Cir. 2009) (district court has discretion over whether to conduct a *Daubert* hearing.) A *Daubert* hearing permits the parties to examine the challenged expert in open court or by paper review to develop his or her testimony for purposes of evaluating its admissibility.

General Principles: The hearing shall be limited to the specific issues raised in the *Daubert* motion. If an in-person hearing is granted, the expert at issue will testify. The hearing is not a forum to develop the expert's testimony for any purpose other than evaluating its admissibility. The parties shall avoid inquiry into undisputed issues of admissibility. The Court encourages the parties, where possible, to stipulate to any uncontested issues of admissibility, such as the expert's qualifications, prior to the hearing. *See requirements* ***State v. Jones***. The proponent of the expert is responsible for procuring and paying for the expert's attendance at the hearing.

Before the Hearing: **One week** prior to the hearing, the parties **shall** file a Joint Report stating whether any party intends to present testimony from any witness other than the expert at issue. The Court does not anticipate that the parties will present any witness other than the expert at issue. The Joint Report shall also include an exhibit list and copies of any exhibits that the parties intend to use at the hearing.

If **Paper Review**:

1. The party opposed to the expert's opinion will file affidavit in opposition with authorities, along with the *Daubert* challenge motion.
2. The proponent of an expert shall file any affidavits or supporting materials in support of the proffered opinion within ten (10) days of the challenge motion filed.
3. The Court will then rule on the admissibility of the expert's findings.
4. The above time constraints must be complied with and served and filed 1 week before the scheduled final pretrial.

STATE OF WISCONSIN CIRCUIT COURT COUNTY

Plaintiff,

vs.

Defendant.

Court's Order for Specificity on Any *Daubert* Challenge

Now comes Circuit Court Br __ of _____ County, Wisconsin, and pursuant to its inherent authority to control[1] its calendar and in the interests of judicial economy, hereby orders that any party seeking a pre-trial *Daubert*[2] challenge to any expert testimony provide at the time of scheduling the motion or review specificity[3] to the Court and opposing parties in conformity with the relevant Court inquiries articulated in ***State v. Jones,*** 2018 WI 44, ¶ 29; 381 Wis.2d 284; 911 N.W.2d 97.

The party seeking a *Daubert* challenge shall provide at the time of filing for said hearing or review the specific areas challenged as outlined below:

- Whether the scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact of issue; (referencing Wis. Stat. § 904.02.)
- Whether the expert is qualified as an expert by knowledge, skill, experience, training, or education;
- Whether the testimony is based upon sufficient facts or data;
- Whether the testimony is the product of reliable principles and methods; and
- Whether the witness has applied the principles and methods reliably to the facts of the case.

By the Court,

[1] ***State vs. Schwind***, 2019 WI 48, ¶¶ 12-16, 386 Wis.2d 526, 926 N.W.2d 742; ***State v. Henley***, 2010 WI 97, ¶ 73, 328 Wis.2d 544, 787 N.W.2d 350.
[2] ***Daubert v. Merrell Dow Pharmaceuticals, Inc***., 509 U.S. 579 (1993).
[3] ***Irby v. State,*** 60 Wis.2d 311, 210 N.W.2d 755 (1973).

Attorneys Shanna Fink and Steve Lipowski of Ruder Ware, and Attorney Kelly O'Connor Dancy of Walny Legal Group, present:

Essential Gift and Estate Tax Planning Before 2026

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Presentation Overview

- Overview of Federal Gift and Estate Taxes
- Client Characteristics
- Preparation for Significant Gifting
- Gift Planning Opportunities

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2

Overview of Federal Gift and Estate Taxes

- Status of Wisconsin gift and estate taxes
- Unification of the federal gift and estate tax systems
- Annual exclusion gifts
- Applicable exclusion amount
- Tax Cuts and Jobs Act
- Legislative Action

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3

Client Characteristics

- The Majority
  - Married $10-$12 million
  - Single $10 million or less
- The Difficult Middle
  - Married $12-$25 million
  - Single over $10 million
- The “Lucky” Few
  - Married over $40 million
  - Single over $20 million

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Preparation for Significant Gifting

- Assessment of organizational documents
  - Stock / ownership records
  - Classes of stock
  - Stock certificates
  - Recapitalizations
- Transfer restrictions
  - Permitted Transferees
  - Gift agreements / waiver of transfer restrictions

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Gift Planning Opportunities

- Outright gifts
- Irrevocable trusts for descendants
- Irrevocable life insurance trusts
- Spousal lifetime access trusts
- Special power of appointment trusts
- Domestic asset protection trusts
- Sales to intentionally defective grantor trusts

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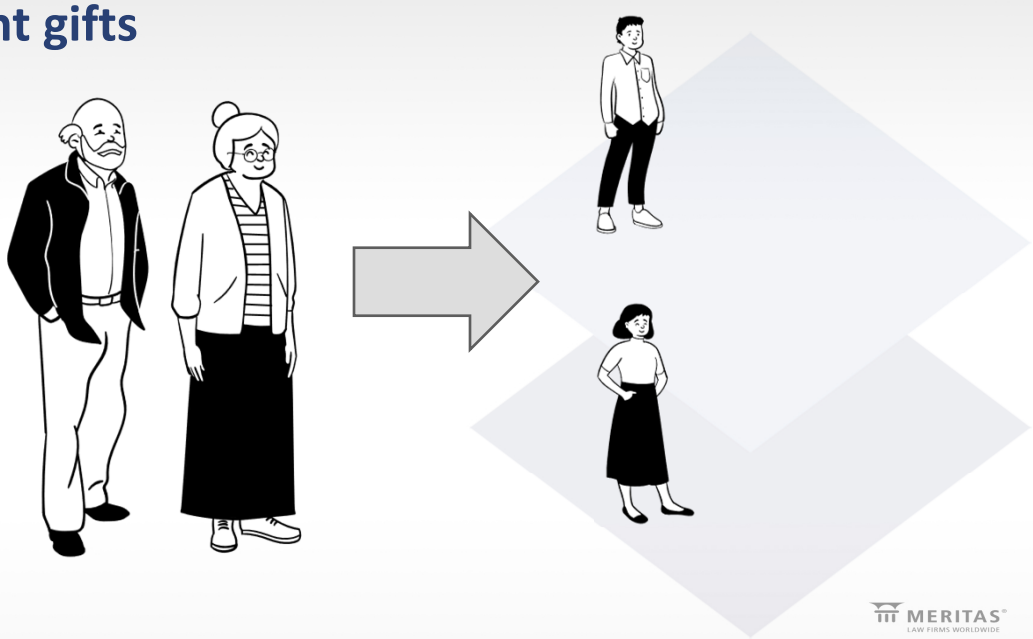
Outright gifts



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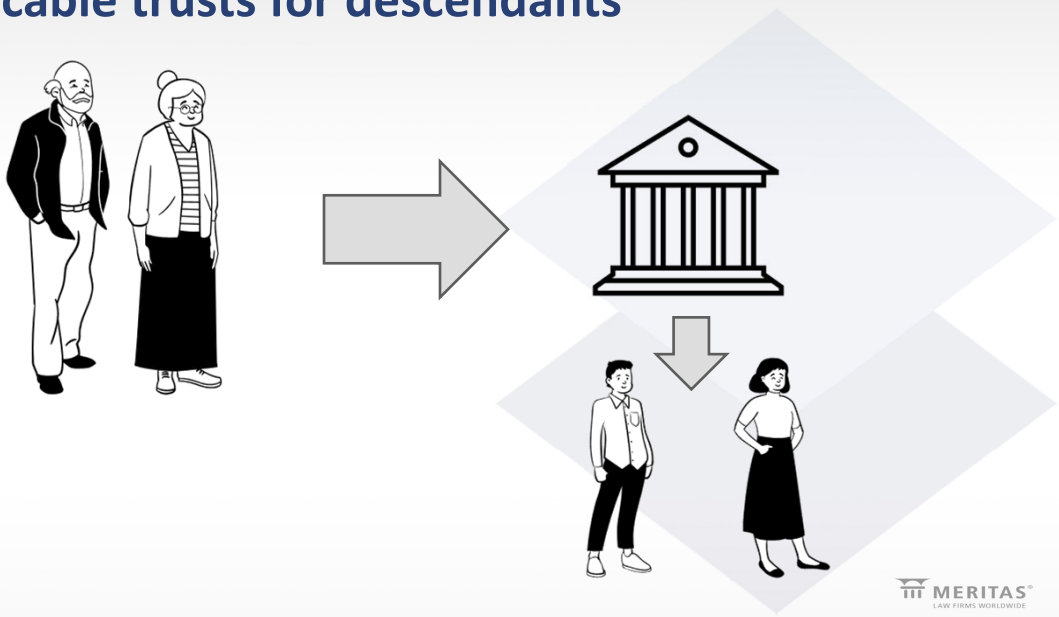
Irrevocable trusts for descendants



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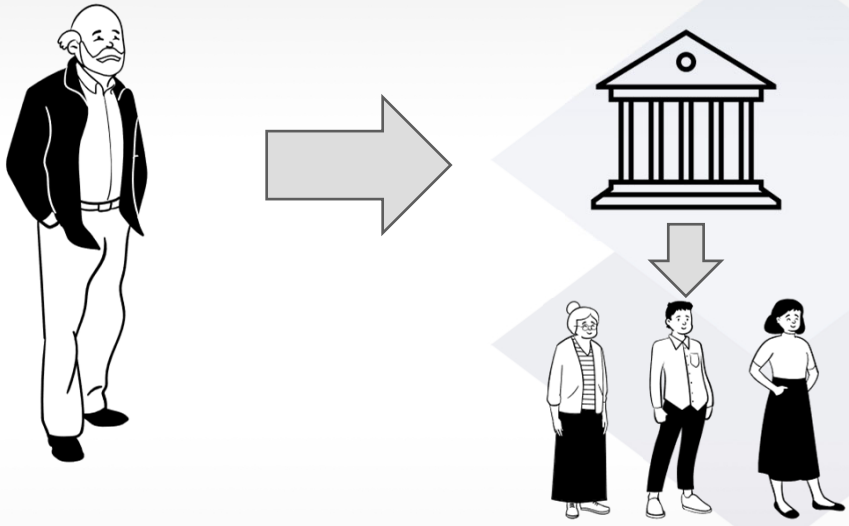
Irrevocable life insurance trusts



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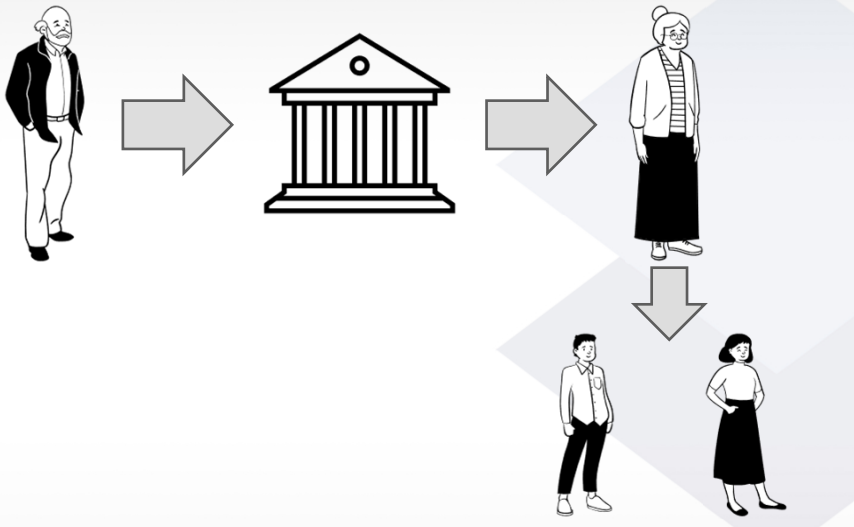
Spousal lifetime access trusts



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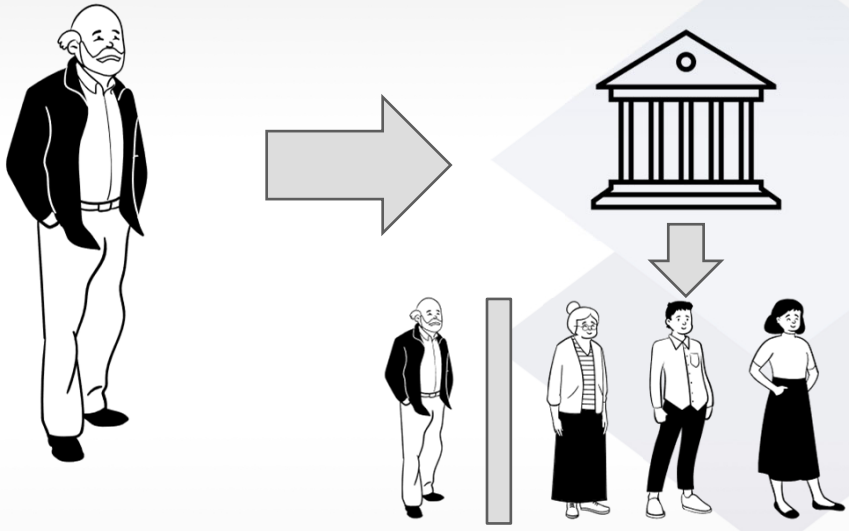
Special power of appointment trusts



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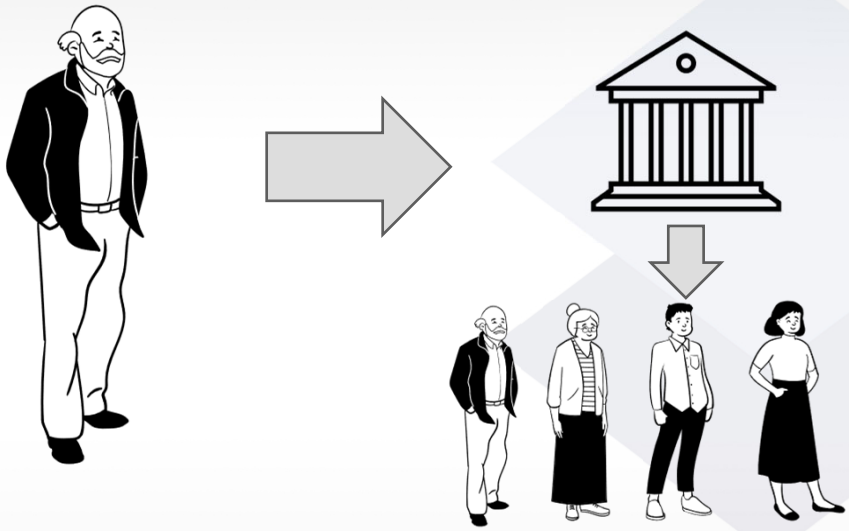
Domestic asset protection trusts



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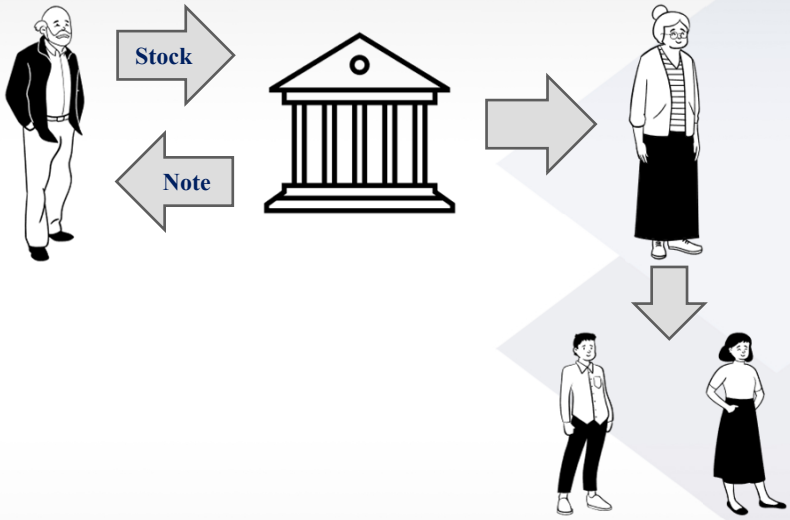
Sales to intentionally defective grantor trusts



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