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Comprehensive Asset Protection Planning



Partners Wealth Management
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The Real Threat of Litigation

The Top 10 jury verdicts of the last few years are not only staggering in amounts, but also show that private clients are exposed:

- **2020 – Syntel Sterling Best Shores Mauritius Ltd. v. Trizetto Group Inc. – New York \$855M** – A case involving copyright and intellectual property infringement and misappropriation of trade secrets regarding software in the healthcare insurance space (\$570M of punitive damages).
- **2019 – Montagano v. Leading Edge Group Inc., et al. – Illinois \$95M** – A workplace negligence claim brought by an individual hit by a falling object resulting in amputation of both legs.
- **2019 – Monson v. Morsette – North Dakota \$1.1B** – A DUI car accident involving wrongful death of two individuals and a traumatic brain injury of a third.
- **2018 – Lennig v. CRST – California \$53M** – A car accident involving two brothers who were struck and injured by a truck while making a delivery. Employer had vicarious liability for truck driver's negligence.



The Real Threat of Litigation (cont.)

- **2017 – Blaylock v. Schwartz Brothers Restaurants et al. – Washington \$131M** – A woman left a restaurant with her estranged husband, both of whom had been drinking, and is now a quadriplegic after they got in a car accident with him at the wheel. She sued her ex-husband and the restaurant under the Dram Shop Act for negligent service of alcohol.
- **2016 – Epic Systems Corporation v. Tata Consultancy Services, Ltd. – Wisconsin \$940M** – A Wisconsin medical software company was awarded \$940M for misappropriation of trade secrets by an independent contractor who subsequently provided them to a competitor.
- **2015 – FutureSelect vs. Ernst & Young – Washington \$112M over Bernie Madoff scheme** – A Washington state court jury found that Ernst & Young was negligent by signing off on audits of billions in assets that didn't exist.

The Real Threat of Litigation (cont.)

- **2014** – **Samantha and Tiffany Applewhite v. Accuhealth, Inc., Linda Russo, R.N., Emergency Medical Services and the City of New York** – **\$172M** negligence claim – Plaintiff suffered an adverse reaction to steroid shot from EMT Provider. Plaintiff suffered significant brain damage while waiting 20 minutes for another private ambulance with advanced life support equipment.
- **2013** – **Lennar Corp. v. Briarwood Capital, LLC - Florida \$1B** – A California developer and his company were accused of defaming Lennar Corp. (homebuilder) as part of an extortion scheme.
- **2012** – **Chopourian v. Catholic Healthcare West (February 29, 2012)** A cardiac surgery physician assistant was awarded **\$167.7M** for sexual harassment and wrongful termination. This is the largest verdict to an individual employment plaintiff to date.
- **2011** – **Alford v. Aaron's Rents (June 7, 2011)** An Illinois federal jury awarded a **\$95M** verdict – including \$80M in punitive damages – to a store worker who claimed she was sexually harassed and assaulted by a manager while the company turned a blind eye.



Role of Asset Protection in Estate Planning

- Asset Protection Planning is a critical component of estate planning.
- A new standard of care is emerging – may be malpractice not to inform clients of asset protection options.



Asset Protection Planning Process

Aside from acting in a manner that will avoid lawsuits, and carrying sufficient insurance, personal asset protection optimization has two principal components:

- 1) Maximizing Exempt Assets
- 2) Transferring Non-Exempt Assets to Asset Protection Vehicles



Exempt Asset Planning

Step #1:

Identify Exempt Assets in Your State and Maximize Those Assets

- Homestead Exemption
- Tenancy by the Entirety
- Qualified/Retirement Plans
- Insurance
- Annuities
- 529 Plans
- Etc.



Exempt Assets Planning – State Comparison

<u>STATE</u>	<u>TENANCY BY THE ENTIRETY</u>	<u>HOMESTEAD EXEMPTION</u>	<u>IRA</u>	<u>ROTH IRA</u>	<u>STATUTE & SPECIAL PROVISIONS</u>	<u>LIFE INSURANCE CASH VALUE</u>	<u>LIFE INSURANCE PROCEEDS</u>	<u>ANNUITY CASH VALUE and/or PROCEEDS</u>
IL	YES	\$15,000 – cannot exceed \$30,000 735 ILCS 5/12- 901	YES	YES	I.L.C.S. § 5/12-1006; boat longer than 12 feet, bibles, schoolbooks, and family pictures	100% if payable to spouse, child, or dependent. I.L.C.S § 5/12-1001(f)	Same as life insurance cash value	Same as life insurance cash value
FL	YES	Unlimited Fla. Const. Art. X, § 4, Fla. Stat. Ann. §§ 222.01 & 222.02	YES	YES	Fla. Stat. Ann. §222.21, 121.131; prepaid hurricane savings account or prepaid college tuition	100% exempt from debts of owner-insured Fla. Stat. Ann. § 222.14	100% if payable to someone other than insured or his estate. Fla. Stat. Ann. § 222.13	Same as life insurance cash value



Exempt Assets – State Law vs. Federal Law

Federal - Bankruptcy Code, 11 U.S.C. § 522, provides for the following exempt assets:

ERISA Plans – 100% protected (§522(d)(12))

SEP-IRA/Simple IRA – 100% protected (§522(d)(12))

IRAs/Roth IRAs – protected up to \$1,000,000 (§522(d)(12))

Homestead Exemption - \$20,200 (§522(d)(1))

Life Insurance Cash Value - \$10,775 (§522(d)(8))

Annuity Cash Value – exempt to the extent reasonably necessary for support of debtor/dependents (§522(d)(10)(E))

State - State exemptions will apply in a federal bankruptcy case if the state has “opted out” of the federal exemptions.



Exempt Assets - Inconsistencies

Due to inconsistencies between federal law and the various states laws, forum selection must be considered. Examples include:

a) 529 Plans: Federal (§541(b)) - \$5,000 protected if given within 2 years of filing; rest is protected.

Nevada (Nev.Rev.Stat. §21.090(a)) – fully protected.

Illinois – not protected.

b) IRAs: Federal (Bankruptcy Code §522(n)) - \$1,000,000 limit.

Illinois (735 ILCS 5/12-1006) – fully protected.

Maine – not protected.



Planning for Non-Exempt Assets

STEP #2:

When exempt asset planning is either a) not available, or b) not desirable, the remaining assets (the non-exempt assets) must seek protection from asset protection vehicles:

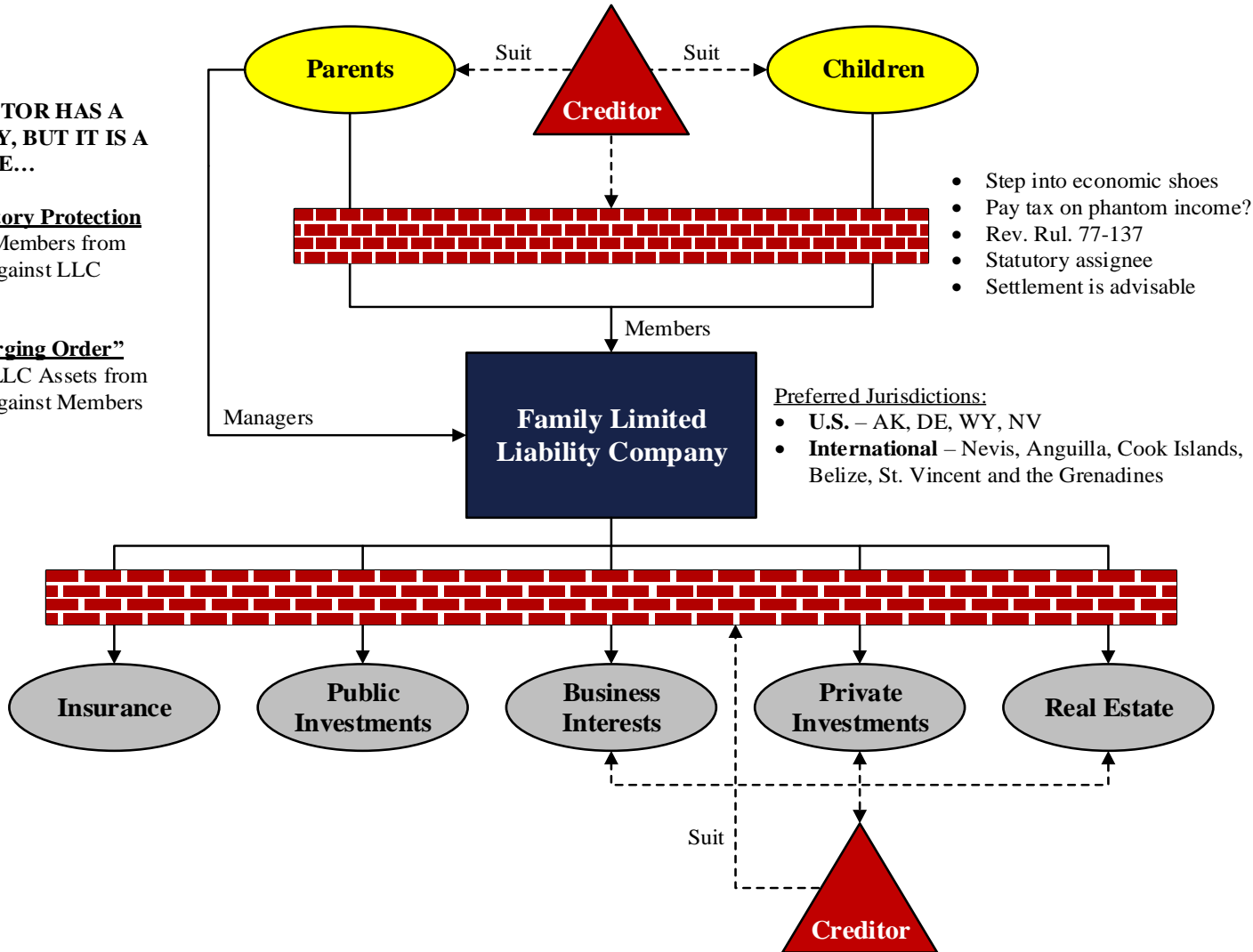
1. Limited Liability Entities – LLCs, LLPs, LPs
2. Asset Protection Trusts – U.S., Offshore, Third-Party, Self-Settled

Asset Protection with LLCs

* CREDITOR HAS A REMEDY, BUT IT IS A BAD ONE...

(1) **Statutory Protection**
Protects Members from Claims Against LLC Assets

(2) **“Charging Order”**
Protects LLC Assets from Claims Against Members



- Step into economic shoes
- Pay tax on phantom income?
- Rev. Rul. 77-137
- Statutory assignee
- Settlement is advisable

Preferred Jurisdictions:

- U.S. – AK, DE, WY, NV
- International – Nevis, Anguilla, Cook Islands, Belize, St. Vincent and the Grenadines

Charging Order Statutes

1. Non-Exclusive Remedy Statutes – e.g., MI, CO
 - a) A court “**may**” charge the membership interest of a member
 - b) Either **allows other remedies or is silent** on the matter – e.g., judicial dissolution, judicial foreclosures, equitable remedies, etc.

2. Exclusive Remedy Statutes – e.g., AK, NV, Nevis, Cook Islands
 - a) A court “**may**” charge the membership interest of a member, plus,
 - b) This is the “**sole remedy**” available to creditors of a member

Single-Member LLCs – Case Law

- In re: Ashley Albright, 291 B.R. 538 (Bankr. D. Colo. 2003) – In the first SMLLC case, the Bankruptcy Court held that “in a single-member LLC, there are no non-debtor members to protect.”
- In re: A-Z Electronics, LLC, 350 B.R. 886 (Bankr. D. Idaho 2006) – “Debtor’s bankruptcy filing effectively assigned her entire membership interest to the bankruptcy estate, and the Trustee obtained all her rights, including the right to control...including decisions regarding liquidation of the entity’s assets.”

Single-Member LLCs – Case Law

- Shaun Olmstead vs. federal Trade Commission, No. SC08-1009, June 24, 2010 –

In deciding not to issue a charging order, the court noted that:

- “[Florida’s] charging order provision established a nonexclusive remedial mechanism,” and,
- “there is no express provision in the statutory text providing that the charging order is the only remedy that can be utilized.

Lessons from SMLLC Cases

With much more case law to come, early lessons of SMLLC cases are:

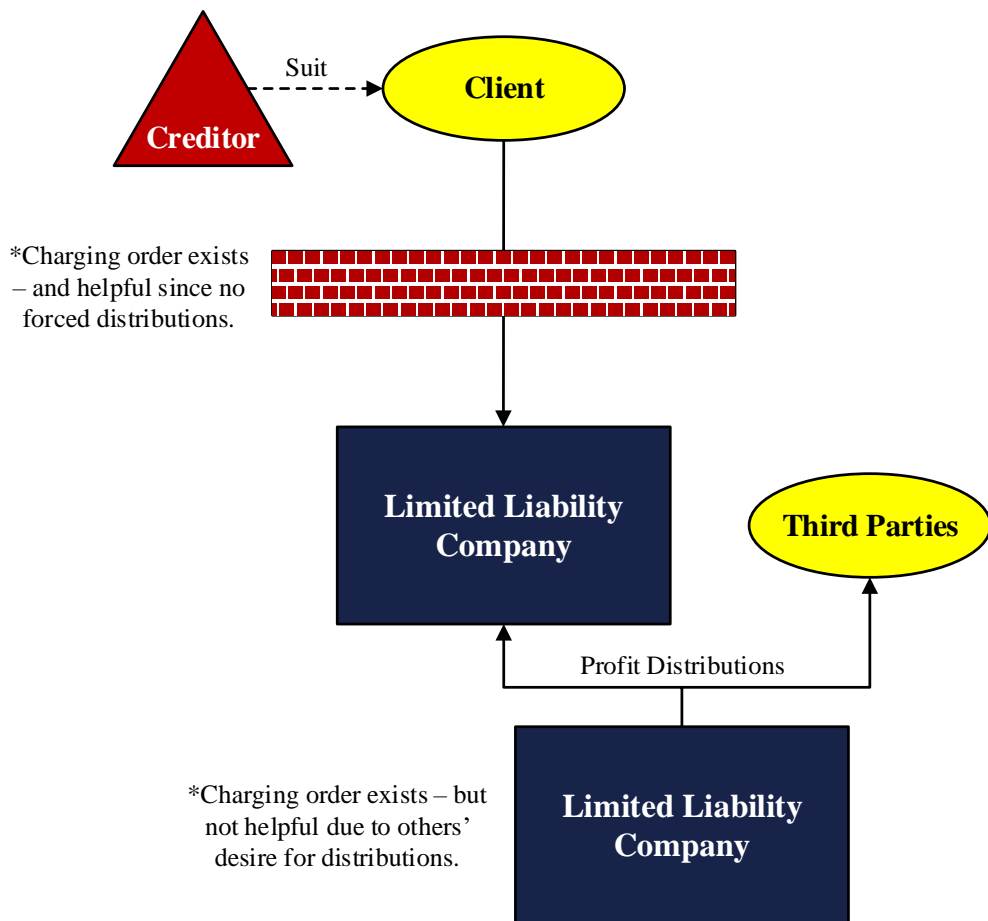
- 1) Bankruptcy Courts will not issue charging orders with SMLLCs – a transfer to a BK trustee is a transfer of all rights;
- 2) Beware of a new and different application of the “alter ego” theory in each state; and,
- 3) Statutory language matters – and not just for SMLLCs (Olmstead is a call for legislatures to respond with express SMLLC exclusivity language).

SMLLCs – Dead or Alive?

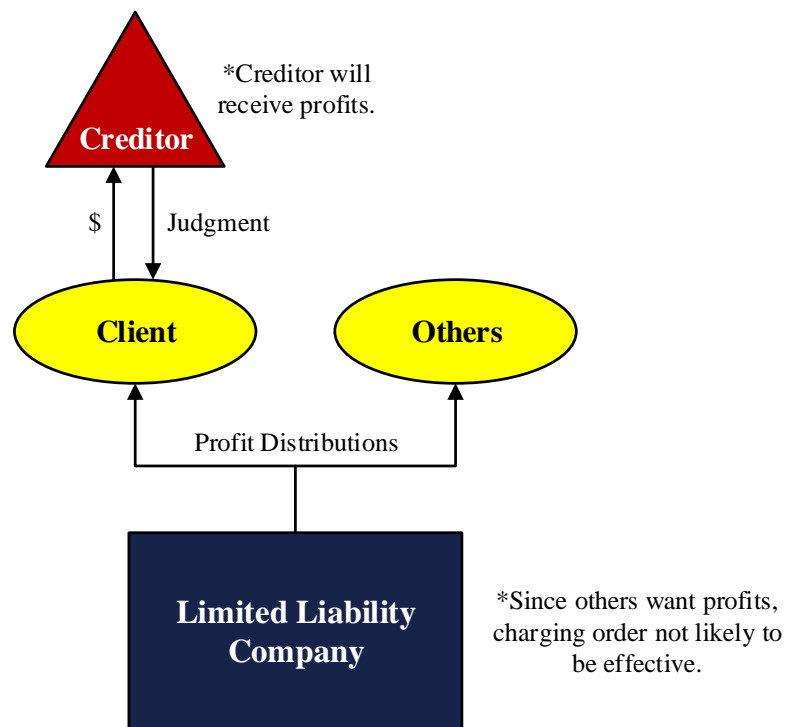
- Not Dead, **developing**;
- Still appropriate as a **substitute for a sole proprietorship** (has nothing to do with charging orders);
- Use SMLLC **exclusive remedy** statutes only;
- Consider legitimate **grantor trust as second legal member**, but only one tax member;
- Consider **MMLLC owning multiple SMLLCs**; and,
- **2010 Proposed Regulations re: Series LLCs** make Holdco with SMLLC subsidiaries more likely.

Sample LLC Planning Structures

“The Investment Holdco”

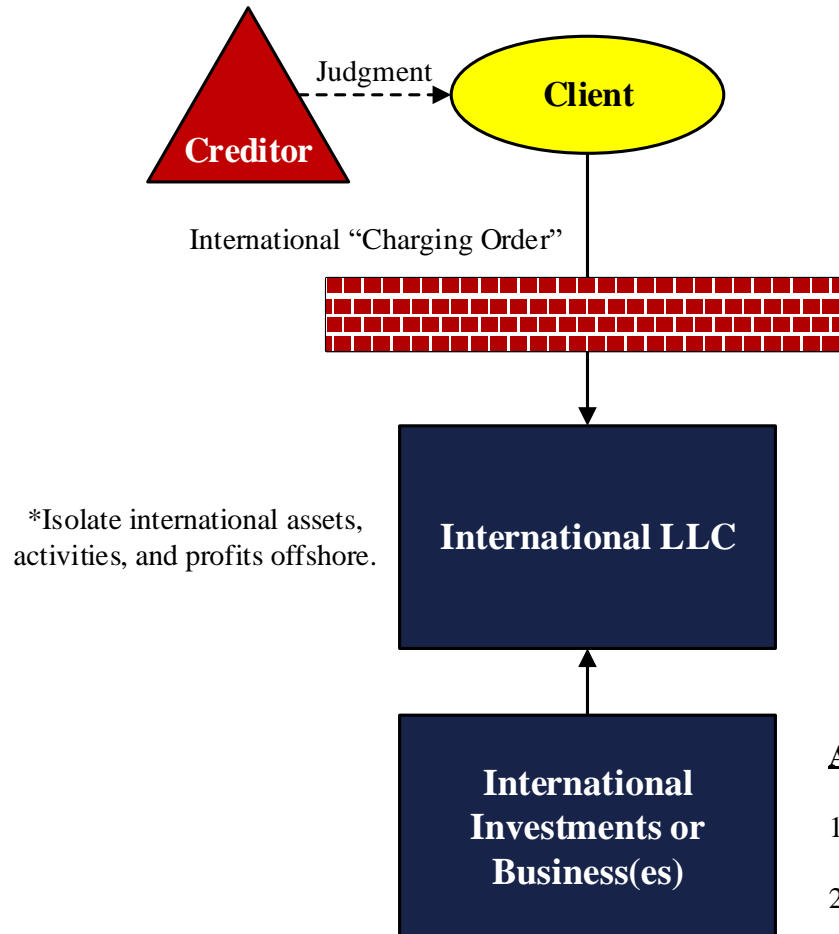


...without Holdco



LLC Planning Structures

“The Wholly International LLC”

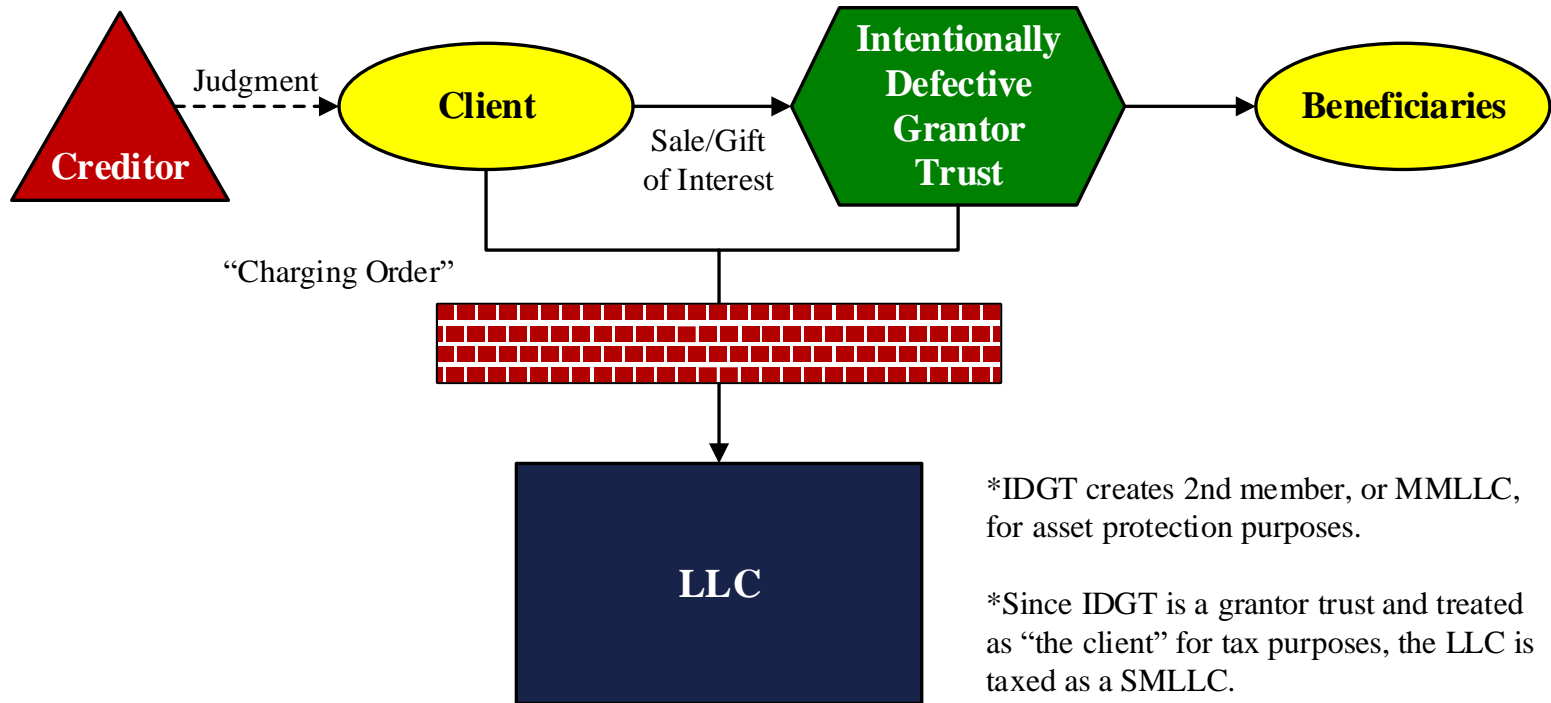


Avoid:

1. International LLC owning U.S.-attached assets.
2. U.S. LLC owning international assets

LLC Planning Structures

“The Multi-Member/Single-Member LLC”



*IDGT creates 2nd member, or MMLLC, for asset protection purposes.

*Since IDGT is a grantor trust and treated as “the client” for tax purposes, the LLC is taxed as a SMLLC.

LLC Planning Structures

Corporate Conversions – Convert Corporation into LLC

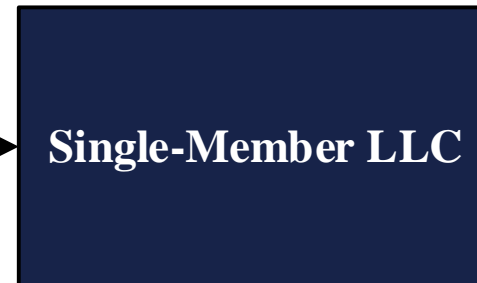
*No charging order protection



Conversion

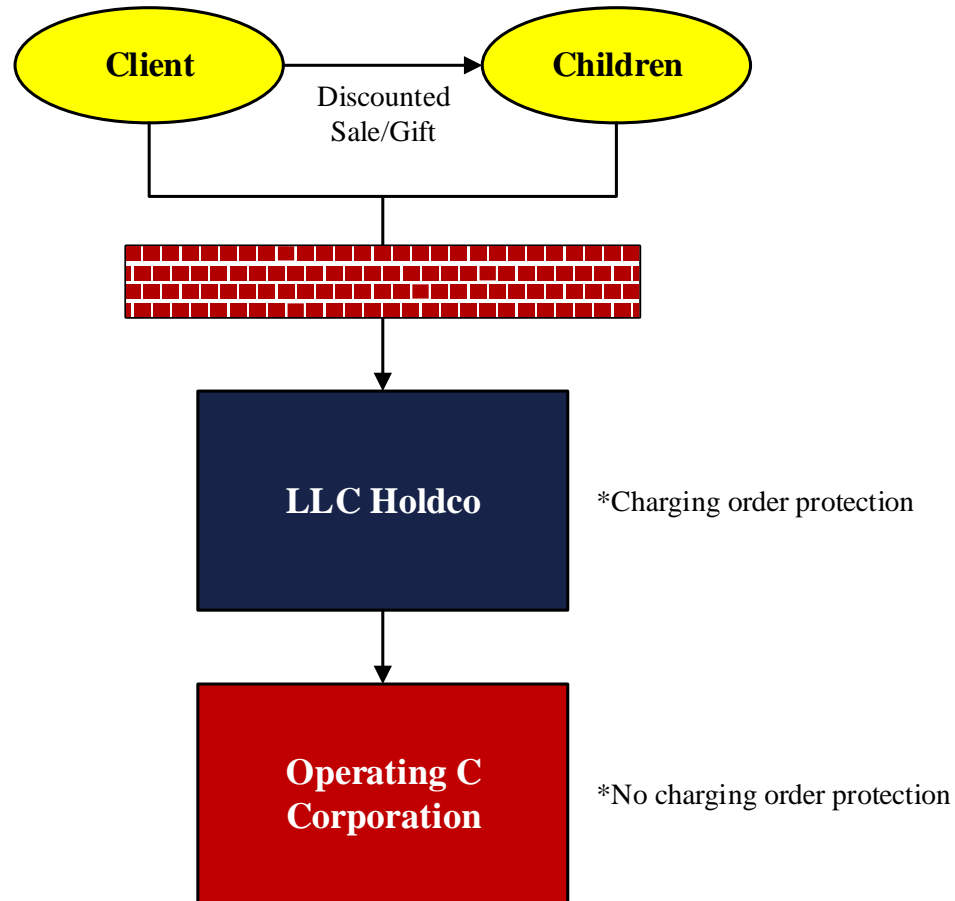
Tax-free
reorganization if
maintain same tax
status (“S” or “C”)

*Charging order protections



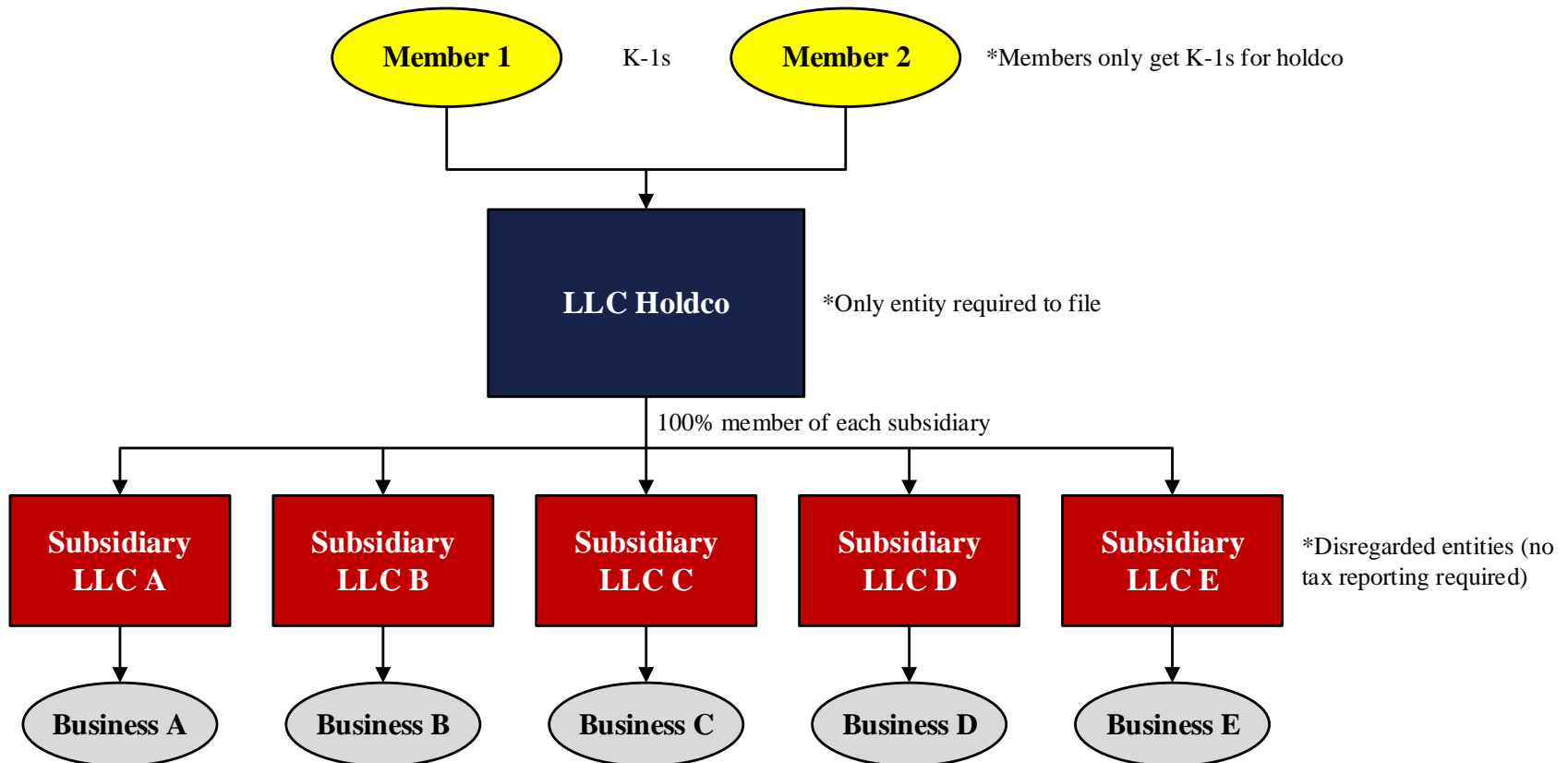
LLC Planning Structures

Corporate Conversions – Layer in LLC over Corporation



Series LLCs/SMLLC Alternative – New Reporting Requirements

IRS Proposed Regulations for Series LLC's (September 2010) make conventional LLC Holdco structure appealing once again.



Asset Protection Trusts

Asset Protection Trusts come in many varieties:

- a) Domestic
- b) Offshore
- c) Self-Settled
- d) Settled for Others

* At their core, they all rely on the fundamental Spendthrift Clause, which provides no remedy to creditors.



Spendthrift Clause

Sample Clause - No interest under this instrument shall be assignable by any beneficiary or be subject to the claims of his or her creditors, including claims for alimony or separate maintenance. The preceding sentence shall not be construed as restricting in any way the exercise of any right of withdrawal or power of appointment or the ability of any beneficiary to release his or her interest.

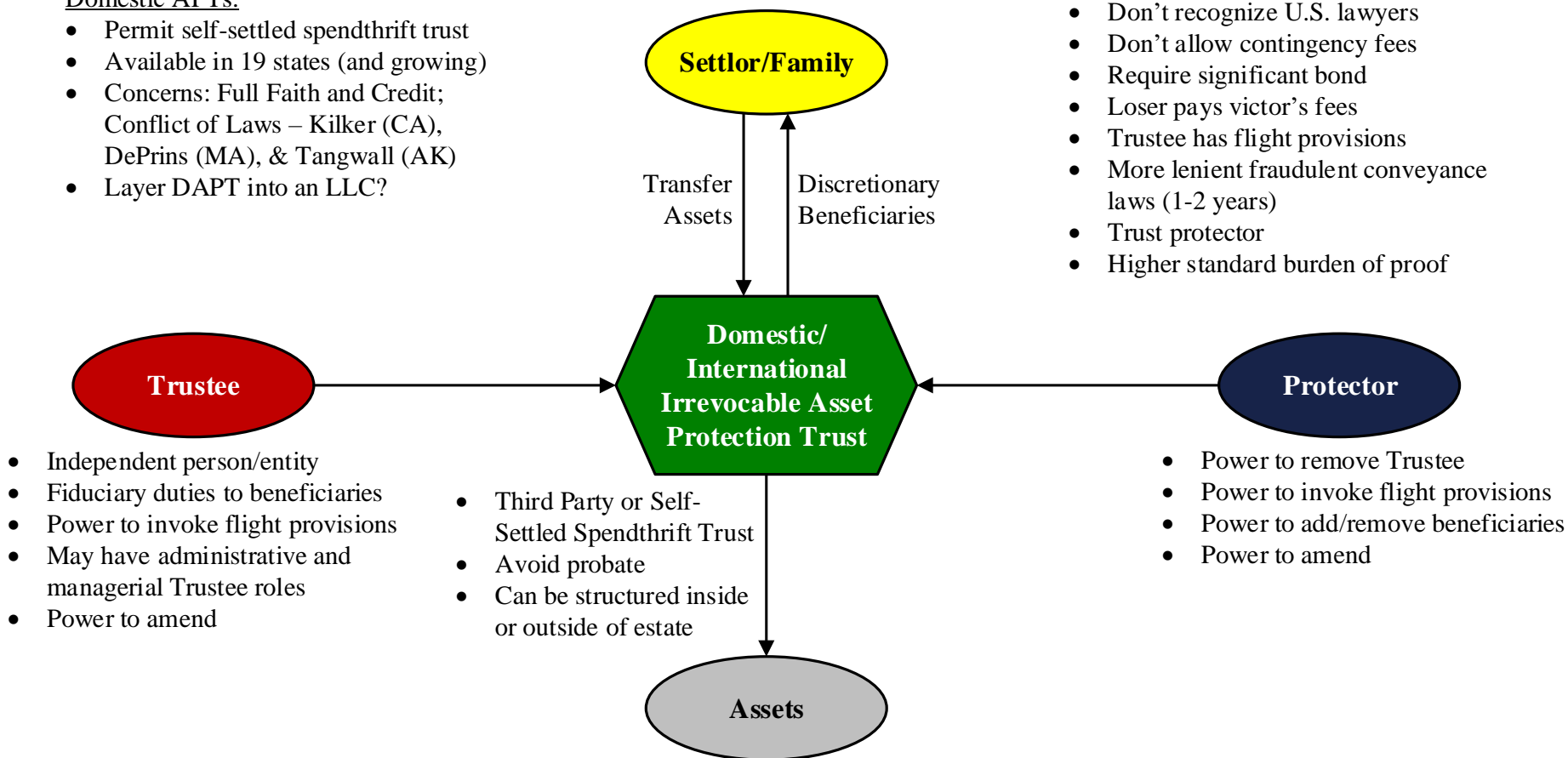
Asset Protection Trust Structure

Domestic APTs:

- Permit self-settled spendthrift trust
- Available in 19 states (and growing)
- Concerns: Full Faith and Credit; Conflict of Laws – Kilker (CA), DePrins (MA), & Tangwall (AK)
- Layer DAPT into an LLC?

International APTs:

- Permit self-settlement
- Don't recognize U.S. judgments
- Don't recognize U.S. lawyers
- Don't allow contingency fees
- Require significant bond
- Loser pays victor's fees
- Trustee has flight provisions
- More lenient fraudulent conveyance laws (1-2 years)
- Trust protector
- Higher standard burden of proof



Domestic APTs – Jurisdiction Comparison

	Irrev.	Spendthrift Provision	Assets in DAPT State	DAPT Law Govern	SOL (Future Creditor)	SOL (Preexisting Creditor)	Spouse/Child Support Exception Creditors	Preexisting Torts/Other Exemption Creditors	Type of Trustee	Rule Against Perp.	Protect Attys. & Trustee	Inc. Tax	Value Limit
AK	Yes	Yes	Some	Yes	4 yrs.	4 yrs. or 1 yr. discovery	Divorcing spouse	No	AK resident, AK trust co., or AK bank	1,000 years	Yes	No	None
CO	Silent	Silent	Silent	Silent	Silent	Silent	Silent	Silent	Silent	1,000 years	No	Yes	None
DE	Yes	Yes	Some	Yes	4 yrs.	4 yrs. or 1 yr. discovery	Divorcing spouse; alimony; child support	Preexisting torts	DE resident or if authorized by State law.	Abolished, except 110 years for real prop.	Yes	No	None
HI	Yes	Yes	Some	Yes	2 yrs.	2 yrs. for personal injury or 6 yrs. for contracts	Divorcing spouse; alimony; child support	Preexisting torts; lender of loan with trust assets used as security/collateral; state tax liabilities	HI resident or Trust Co.	Abolished for DAPTs	Yes	Yes	25% of Net Worth
MO	Yes	Yes	Silent	Silent	4 yrs.	4 yrs. or 1 yr. discovery	Alimony; child support	State/U.S. to extent state/federal law provides	Silent	Common Law rule codified	No	Yes	None
NV	Yes	Silent	Some	Silent	2 yrs.	2 yrs. or 1/2 yr. discovery	No	No	NV resident, NV trust co., or NV bank	365 years	No	No	None
NH	Yes	Yes	Some	Yes	4 yrs.	4 yrs. or 1 yr. discovery	Divorcing spouse; alimony; child support	Preexisting torts	NH resident, bank or trust co. w/ place of business in state	Common Law rule codified	Yes	Yes on dividends and interests	None



Domestic APTs – Jurisdiction Comparison

(cont.)

	Irrev.	Spendthrift Provision	Assets in DAPT State	DAPT Law Govern	SOL (Future Creditor)	SOL (Preexisting Creditor)	Spouse/Child Support Exception Creditors	Preexisting Torts/Other Exemption Creditors	Type of Trustee	Rule Against Perp.	Protect Attys. & Trustee	Inc. Tax	Value Limit
OH	Yes	Yes	Silent	Yes	4 yrs.	1.5 yrs. or 1/2 yr discovery	Divorcing spouse; alimony; child support	No	Resides in OH or is an authorized entity in OH	1,000 yrs	Yes	Generally No	None
OK	No	Silent	All	Silent	4 yrs.	4 yrs. or 1 yr. discovery	Child support	Protection limited to \$1,000,000	OK based trust co.	Common Law rule codified	No	Yes	\$1 mil
RI	Yes	Yes	Some	Yes	4 yrs.	4 yrs. or 1 yr. discovery	Divorcing spouse; alimony; child support	Preexisting torts	RI resident or corporation subject to RI supervision	Abolished	No	No	None
SD	Yes	Yes	Silent	Yes	2 yrs.	2 yrs. or 1/2 yr discovery	Divorcing spouse; alimony; child support	No	SD resident or corporation, trust co., or bank authorized by SD to act as trustee	Abolished	Yes	No	None
TN	Yes	Yes	Some	Yes	2 yrs.	2 yrs. or 1/2 yr. discovery	Divorcing spouse; alimony; child support	No	TN resident, or corporation subject to TN supervision	360 yrs	Yes	Yes on dividends and interests	None
UT	Yes	Yes	Some	Yes	2 yrs.	2 yrs. or 1 yr discovery	Child support	No	UT trust co. or resident	1,000 yrs	Yes	Yes	None
VA	Yes	Yes	Some	Yes	None	5 yrs	Child support	Silent	VA resident or legal entity	Uniform statutory rule	Yes	Yes	None
WY	Yes	Yes	Silent	Yes	4 yrs.	4 yrs. or 1 yr. discovery	Child support	Property listed on app. To obtain credit; property received by fraudulent transfer	WY resident or corporation subject to WY supervision	1,000 yrs	Yes	No	None

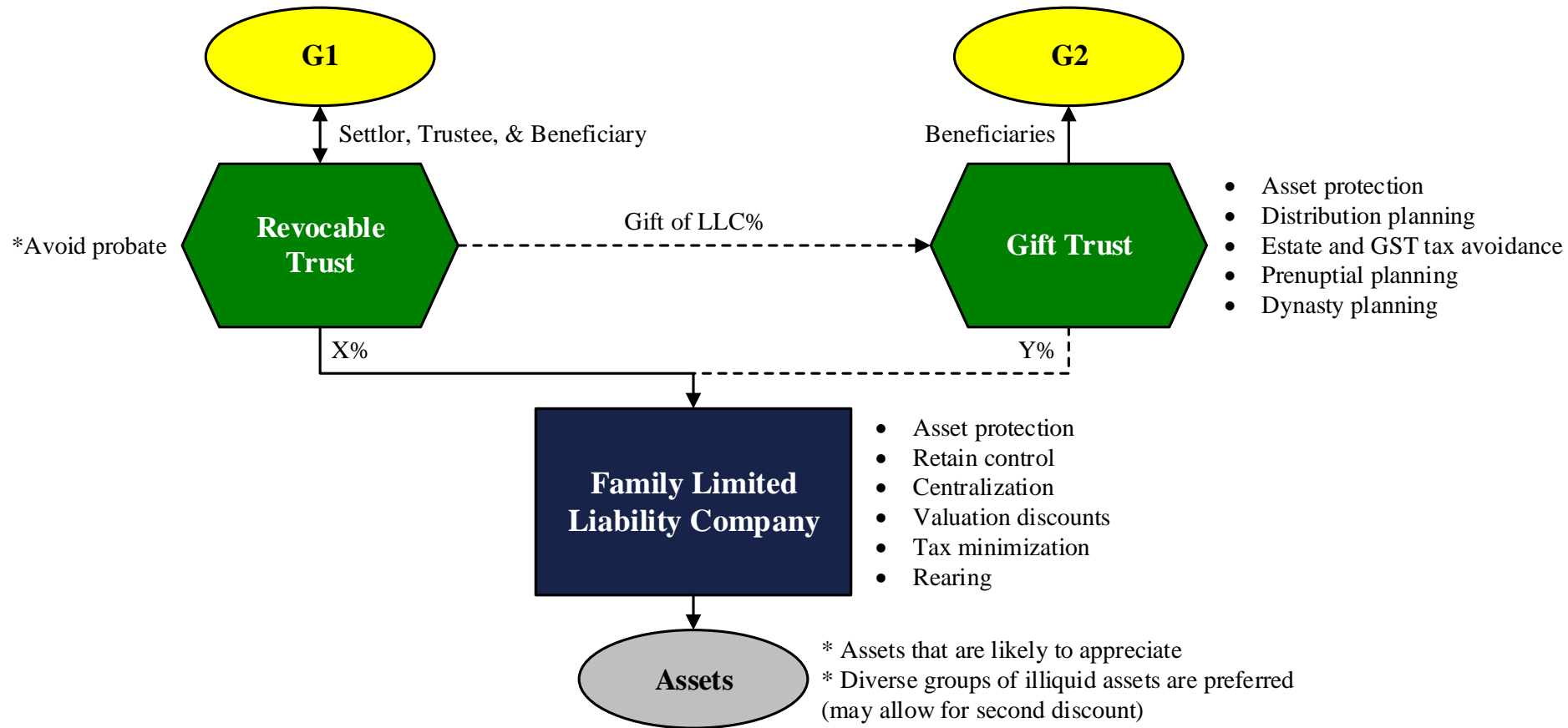


International APTs – Jurisdiction

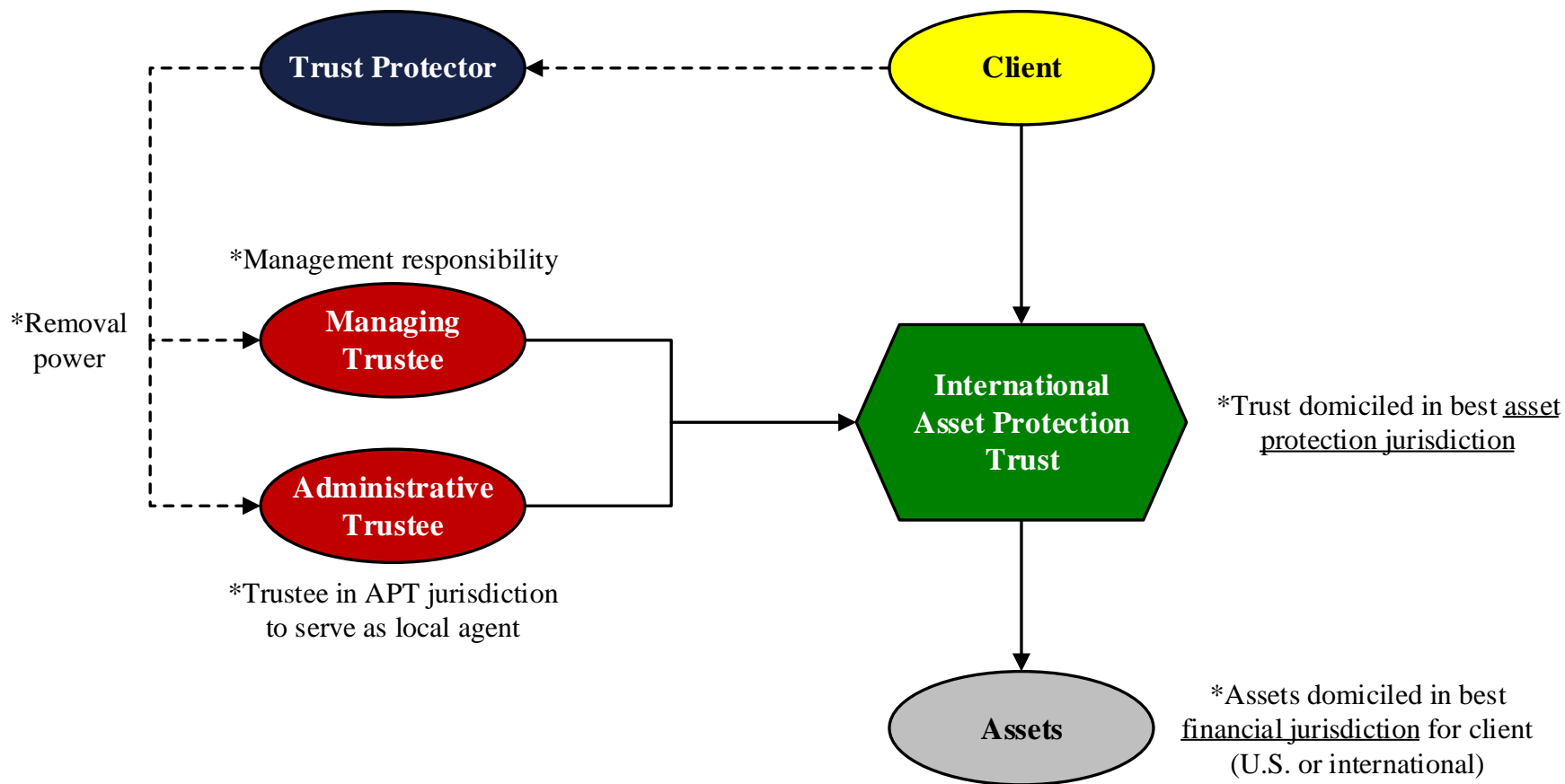
Comparison

Jurisdiction	Statutory Certainty regarding non-recognition of foreign judgments	“Beyond reasonable doubt” standard of proof required in establishing fraudulent intent	Statute of limitations on challenging an APT	Statutory Certainty that settler can be a beneficiary	Statutory Certainty that settler can retain some degree of control	Burden of proving fraudulent intent is always on creditor	Posting of bond required before litigation can commence	Statutory certainty that trust remains valid if fraudulent transfers determined to have taken place	Presumption against fraudulent Intent if transferor remains solvent following transfers
Anguilla	X		X	X		X			X
Antigua/Barbuda	X	X	X	X	X	X	X	X	
Bahamas			X	X	X	X		X	
Belize	X			X	X				
Bermuda			X			X		X	
Cayman			X		X	X		X	
Cook Islands	X	X	X	X	X	X		X	X
Cyprus			X	X		X			
Gibraltar								X	X
Jersey	X				X				
Labuan	X	X	X	X	X	X		X	X
Lichtenstein			X		X			X	
Mauritus	X		X	X		X			
Nevis	X	X	X	X	X	X	X	X	X
Saint Vincent & the Grenadines	X		X	X	X	X		X	X
Seychelles		X	X	X		X			
Turks & Caicos			X			X			X

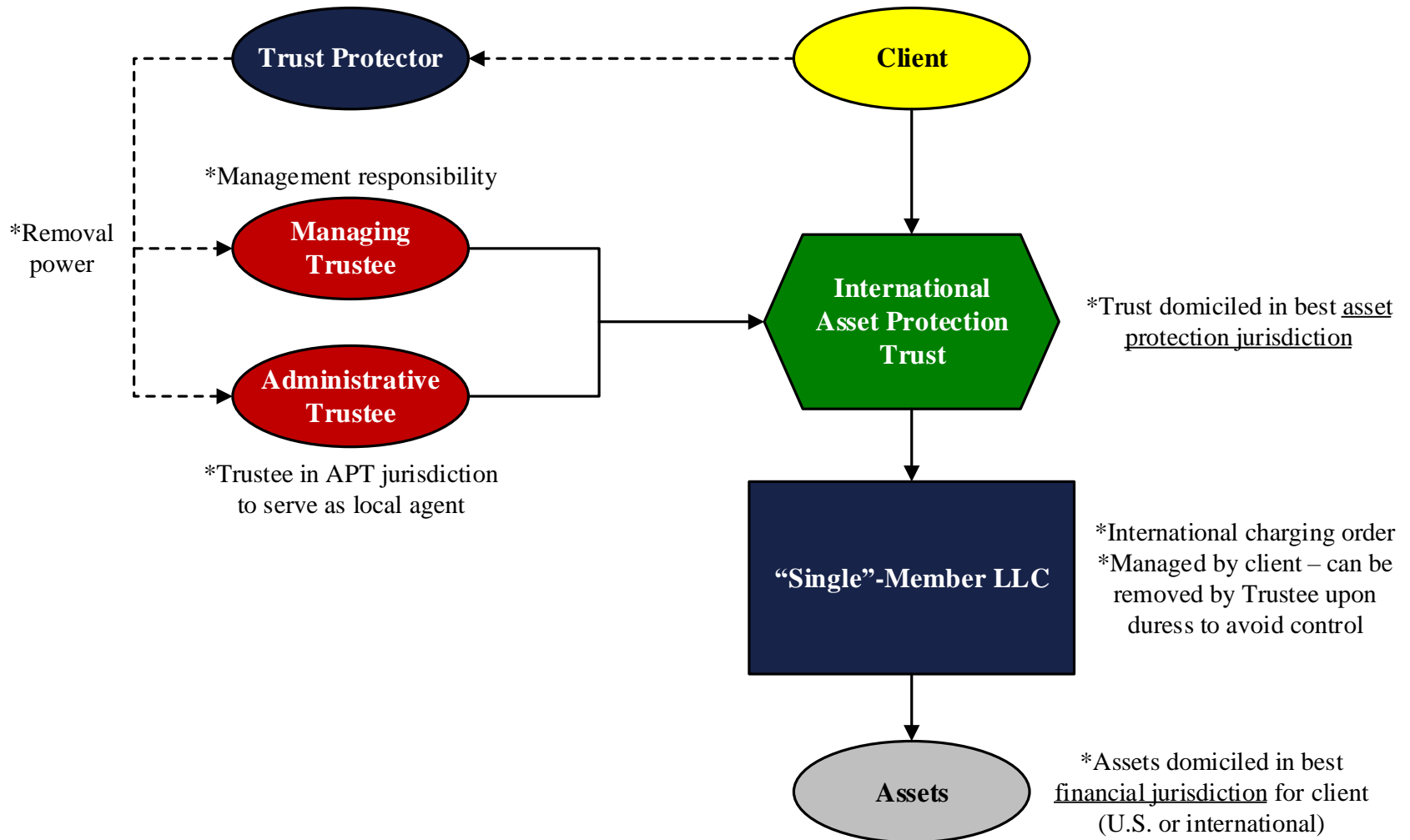
Gift Trust with LLC



International APT Planning Structure

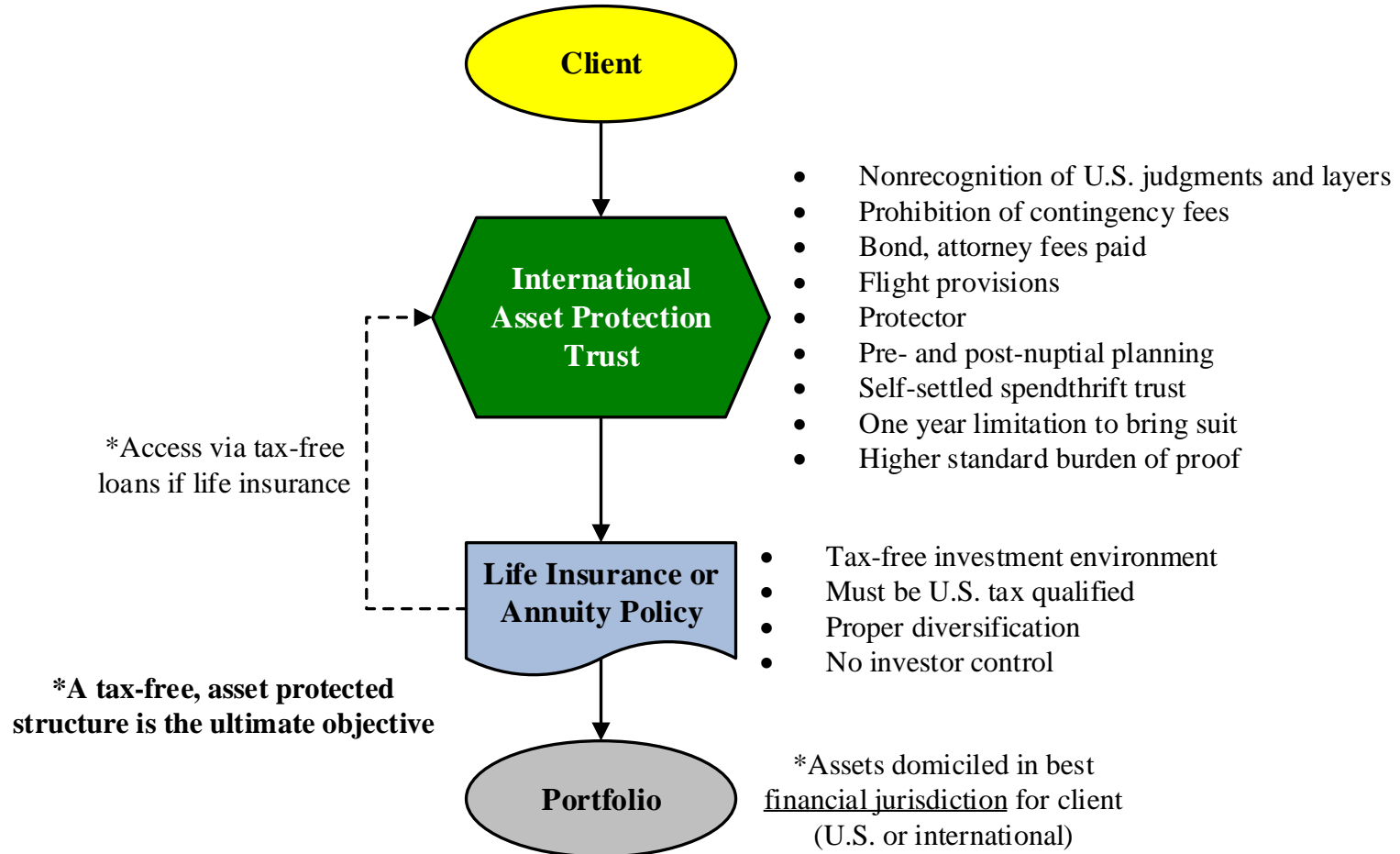


International APT/LLC Structure



Insurance/Annuity Portfolio Wrappers

Owned by International APT



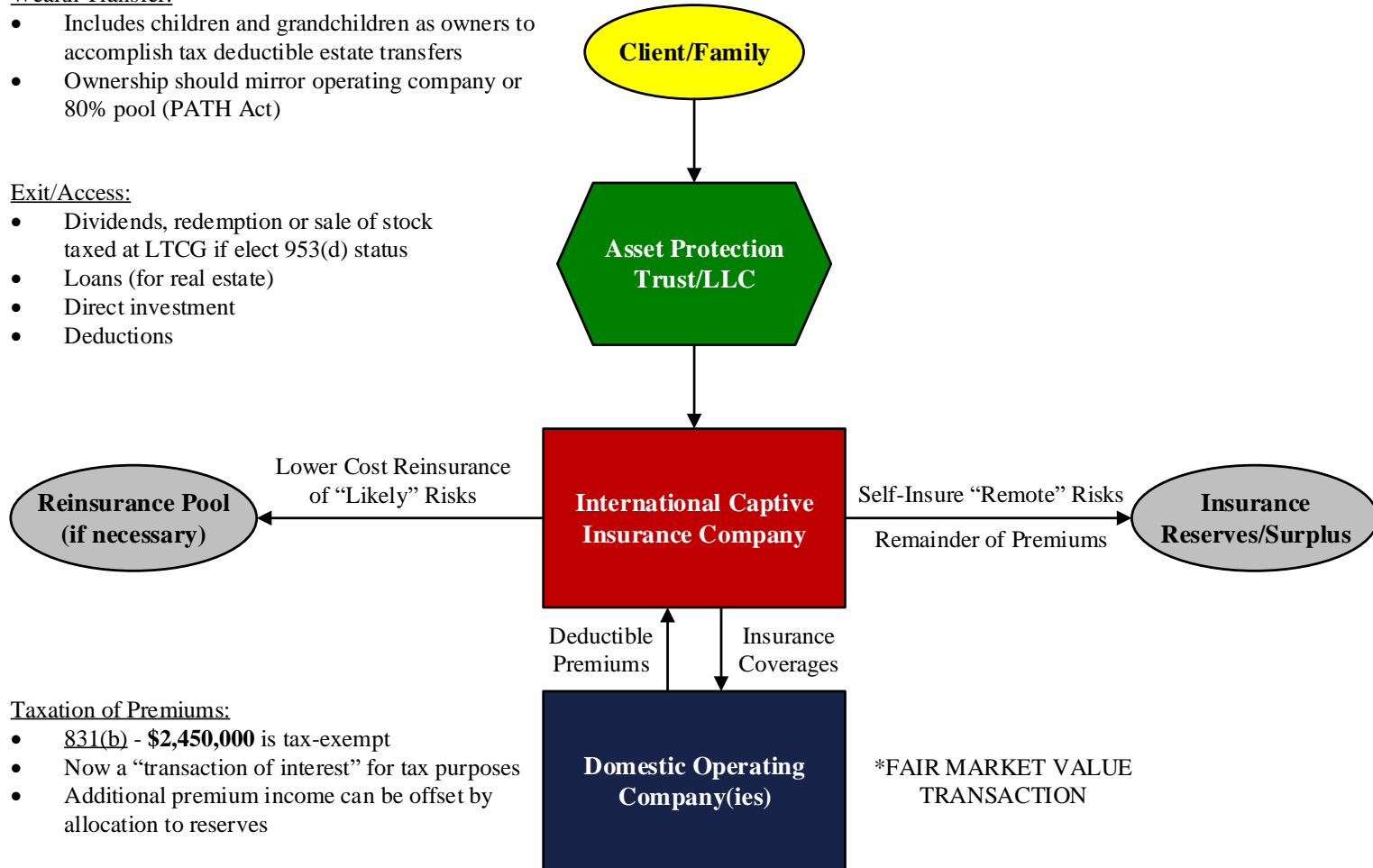
Sample Captive Insurance Planning Structure

Wealth Transfer:

- Includes children and grandchildren as owners to accomplish tax deductible estate transfers
- Ownership should mirror operating company or 80% pool (PATH Act)

Exit/Access:

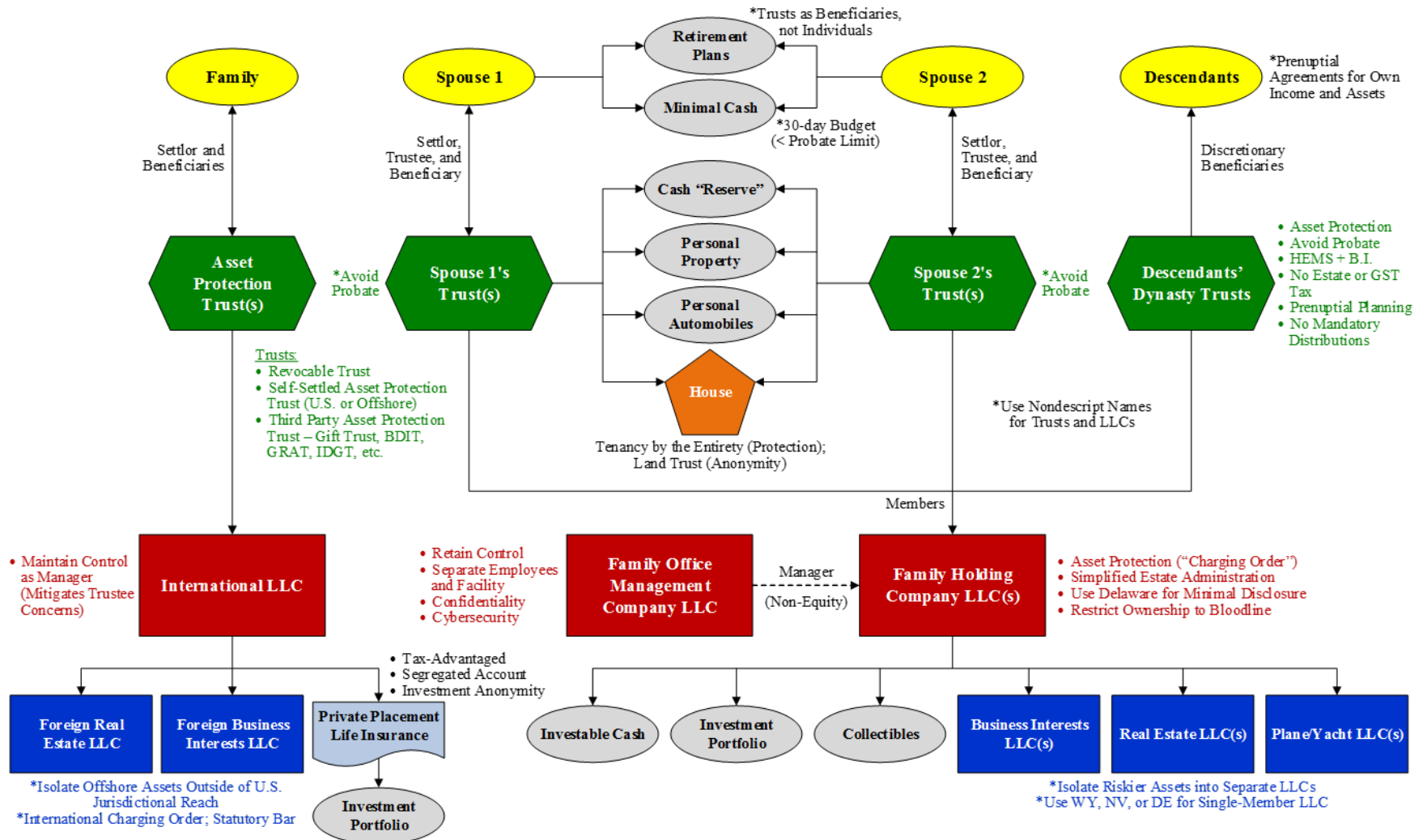
- Dividends, redemption or sale of stock taxed at LTCG if elect 953(d) status
- Loans (for real estate)
- Direct investment
- Deductions



Taxation of Premiums:

- 831(b) - \$2,450,000 is tax-exempt
- Now a "transaction of interest" for tax purposes
- Additional premium income can be offset by allocation to reserves

Sample Integrated Planning Structure



A Word on Fraudulent Conveyance

A transfer is fraudulent, whether it is made before or after a creditor's claim arises, if it is:

1. Subjective Test – made with actual intent to hinder, delay, or defraud.
2. Objective Test – made for less than equivalent value and debtor is, or reasonably expects to be, insolvent.
3. Lookback/Clawback – 4 years, state; 10 years, Federal.



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