Last Chance Planning - Basic and Advanced Planning to Use the $5.12 Million Unified Credit Before it Disappears

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Charles (Chuck) Rubin, a board certified tax attorney, is managing partner of Gutter Chaves Josepher Rubin Forman Fleisher PA, a tax, trusts and estates boutique law firm situated in Boca Raton, Florida. He is a former adjunct professor at the University of Miami School of Law. Mr. Rubin has published numerous treatises, manuals, and articles, including two BNA Tax Management portfolios, and articles in Journal of Taxation, Estate Planning, Tax Management Estates, Gifts and Trusts Journal, and Tax Notes. He is a regular contributor to Leimberg Information Services. He also authorizes a popular tax blog at www.RubinonTax.blogspot.com, and speaks regularly at professional meetings and conferences.

Mr. Rubin has received favorable peer ratings and recognition by various publications and rating services, including Best Lawyers, Chambers USA, Martindale-Hubble, Who's Who in America Law, Top Lawyers in the South Florida Legal Guide, SuperLawyers and Florida Trend's Florida Legal Elite, and his firm has a Tier 1 ranking in the U.S. News & World Report Best Law Firm rankings.

PRESERVING AND ENAHNCING INDIVIDUAL, FAMILY AND BUSINESS WEALTH THROUGH:

- Planning to Minimize Taxes (U.S. & International)
- Estate Planning, Charitable, Marital and Succession Planning
- Business Structuring and Transactions
- Trusts & Estates Administration
- Creditor Protection
- Trust, Estate & Tax Litigation and Disputes

LAST CHANCE PLANNING - BASIC AND ADVANCED PLANNING TO USE THE $5.12 MILLION UNIFIED CREDIT BEFORE IT DISAPPEARS

I. WHAT IS SPECIAL ABOUT 2012?

A. $5 million unified credit equivalent for 2011-12, and $5 million GST exemption ($5,120,000 in 2012).

B. Once in a lifetime levels?

1. Return to $1 million in 2013.

a) $1.4 million GST exemption.

C. Can make large gifts, and still have room for error without creating a taxable gift.

D. 35% maximum estate, gift, and GST rates.

1. Return to 55% maximum rates in 2013.

II. GENERAL 2012 PLANNING - GIFTS!

A. Direct gifts to individuals.

B. Direct gifts to dynasty trusts, that will be exempt from current gift taxes, and future estate and GST taxes.

1. Variation: use of grantor trusts to further leverage gifting through having the grantor pay taxes on trust income.

C. Less painful, noncash gifts.

1. Forgive existing loans.

2. Gift of unproductive property, such as life insurance, raw land, art, or other collectibles.

III. WHY IS GIFT GIVING A GOOD THING?

A. Shifts future income and growth out of the ownership of donor, and thus will not be subject to estate tax at death of donor.

1. Through use of unified credit amounts that may not be available at death.

2. By also moving future appreciation on transferred assets out of the donor's taxable estate.

B. Shifts income tax incidence perhaps to lower income tax rate recipients.

C. Creditor protection - removes assets beyond reach of donor creditors.

D. Begin training of younger generations in the handling of money and assets.

E. Create a fund that can be used to make investments in new family investments.

F. Allow younger family members to enjoy gifts while older generations are still living - psychic benefits to the donors.
G. Provide a source of funds for a purchase of a first residence.
H. Provide a source of funds for education.

IV. OVERALL COSTS/RISKS/LIMITATIONS

A. Tax Returns

1. Income tax returns.

a) And for 2 trusts, if do spousal trusts.
b) But not necessary if grantor trusts.

2. Gift tax return for the year of the gift.

B. Appraisals Needed

1. For discounted or other noncash property.
2. Marketable securities need only a valuation report.

C. Trustee Fees

1. If third party trustee.

D. Attorneys Fees
E. Clawback

1. Uncertain whether gifts today will result in enhanced estate taxes at death if lower unified credit applies at death.
2. Disagreement among experts, but possibility of clean-up legislation.
3. But at worst, should still get benefit of deferral of gift tax, shifting and thus nontaxability of appreciation and growth, and GST exemption (if no GST clawback).

F. No basis step-up at death on transferred assets
G. Divorce/Remarriage Concerns

1. In a spousal trust situation, loss of access to assets, and if spousal beneficiary had power to appoint assets to the grantor spouse, such an appointment is unlikely to occur.
2. Divorce

a) Eliminate spouse as a beneficiary?
b) Or reduce ability to withdraw?
c) Or eliminate principal distributions?
d) Or require third party consent to distributions or withdrawals?

3. Consider impact of elective share and divorce property settlement considerations, especially in a second marriage situation.

H. Source of Funds

1. Assets passing into trust for benefit of grantor's spouse should not come from the grantor spouse, or there is Section 2036 exposure.

I. Homestead Transfer Limitations.
J. Gift tax risk if IRS disputes value of transferred property, and such higher asserted value would exceed the donor's remaining unified credit amount.

1. This risk can be diminished through the use of formula gift clauses.

a) See Petter v. Comm'r., 653 F.3d 1012 (9th Cir. 2011) and Joanne M. Wandry, et al. v. Commissioner, TC Memo 2012-88 for some favorable cases on the effectiveness of formula clauses to limit gift exposure, and how to properly structure such clauses.

V. PREFERRED MECHANISM - GIFT TRUSTS FOR SPOUSES AND/OR CHILDREN

A. Provides all the usual benefits of a trust.

1. Creditor protection.
2. Divorce protection.
3. Prudent asset management.
4. Professional trust management, if desired.
5. Standards of distributions.
6. Protect minor beneficiaries.

B. Additional benefits.

1. Dynasty trust - multi-generation transfers free of estate and GST taxes.
2. Special benefits from marital trusts (discussed below).

VI. TRUST PLANNING IN DETAIL

A. Current Beneficiaries.

1. Will include the spouse (if there is one).
2. May include other beneficiaries. However, their inclusion may result in less assets available for the marital unit if the grantor is married, including assets that may pass back to the grantor spouse at the death of the beneficiary spouse.

B. Remaindermen.

1. Typically, children and/or grandchildren after the death of the donee spouse.
2. If no spouse, lineal descendants of children - i.e., a typical per stirpes succession.

C. Distribution Terms.

1. Mandatory income to the beneficiary spouse?

a) Allowable, but will reduce growth of the trust. It is desirable that assets remain inside the trust to avoid future estate tax, instead of being passed out to a spouse which will then possibly be subject to estate taxes.
b) Therefore, distributions only as needed by the spouse, after consideration of other available assets, is desirable. If the spouse is not trustee, the distributions can be made wholly discretionary as determined by the trustee.

2. Principal distributions to spouse.

a) If one of the spouses or a subordinate person is trustee, should limit to an ascertainable standard.

(1) And include provisions that require consideration of other assets and resources, to avoid gift tax exposure if the IRS believes the spouse/trustee did not make sufficient distributions to himself or herself.
(2) But must prohibit support distributions to the beneficiary spouse to avoid risk of benefit to grantor spouse (satisfaction of legal obligation to support). Such a retained benefit to the grantor spouse could result in Section 2036 inclusion for that grantor spouse.

b) If third party trustee, can have a broader or discretionary standard.

c) The trust can provide for modifications in the spouse's interest in the event of divorce, separation, or remarriage after death of grantor spouse. This is more an issue in second marriage situations, than in the first marriage, especially if there are mixed children involved.

3. 5x5 Power of Withdrawal.

a) Can be used to provide further access to trust assets, if needed.

(1) Allows withdrawal of greater of $5,000 or 5% of trust assets without trustee cooperation or the ability of remainder beneficiaries to object, and without regard to any ascertainable standard limitations.

b) Again, may want to restrict or eliminate upon divorce, separation, or remarriage after death of grantor spouse.

c) Unlike other powers of appointment issued to a beneficiary that can benefit the beneficiary (i.e., general powers of appointment), this power will not cause the entire trust to be taxable in the estate of the surviving spouse and the failure to exercise the power would not be a taxable release or gift. Code §2041(b)(2).

d) However, if the spouse dies while the power is available, the value of the trust assets that could be withdrawn will be includable in the spouse's gross estate for estate tax purposes.

(1) This risk can be reduced by limiting the power of withdrawal to only a 30 day window each year. Only a death occurring in that window would result in this inclusion. Thus, 11/12 of the risk can be eliminated.

D. Grantor Trust Treatment.

1. This treatment, which results in the grantor spouse being taxable on the income of the trust instead of the trust or its beneficiaries, is generally desirable. It allows the trust, which is exempt from future transfer taxes, to grow in a faster manner, and further depletes the assets of the grantor spouse which may otherwise be subject to estate taxes at death.

a) This treatment also applies to trusts established for family members (other than the grantor spouse) after the death of the first spouse.

2. If properly structured, the payment of taxes by the grantor spouse is not treated as an additional gift by the grantor for gift tax purposes.

a) Rev. Rul. 2004-64, 2004-2 C.B. 7.

b) If the governing trust instrument or applicable local law requires that the trustee reimburse the grantor for the income tax payable by the grantor the full value of the trust assets is includable in the grantor's gross estate under Code §2036(a)(1). If, however, the trust's governing instrument or applicable local law gives the trustee the discretion to reimburse the grantor for the income tax liability, the existence of that discretion, by itself, (whether or not exercised), does not cause estate tax inclusion of the trust assets in the grantor's gross estate.

3. Grantor trust status also allows the grantor to purchase assets from the trust without recognizing capital gains. Thus, the grantor may wish to purchase low basis assets from the trust using either cash or higher basis assets owned by the grantor, so that they can obtain a step-up in basis at the death of the grantor. Rev. Rul. 85-13, 1984-1 C.B. 184.

a) The purchase should not generate any taxable gain per the grantor trust treatment.

b) Also facilitates loans to the grantor.

4. Methods to Achieve

a) Nonfiduciary power to substitute assets.
b) Spouse as beneficiary.

5. Rental Property.

a) If the trust is funded with residential property, the grantor spouse can rent the property for his or her personal use. If the trust is a grantor trust, the rental payments should not constitute taxable gifts to the trust, and should not generate taxable income.

6. Allows an alternate funding mechanism of funding with cash today, and doing a substitution for hard-to-value assets later.

a) Pros

(1) Avoids checkoff on gift tax return of a discounted gift.
(2) Can combine with an adjustment clause in the trust instrument itself under the power of substitution clause.
(3) Lower audit profile.
(4) Appraisal not needed before the gift tax return is filed.
(5) No need to leave a cushion under the credit amount when funding to avoid a taxable gift if IRS imposes a higher gift value, since value is certain.

b) Cons

(1) Step transaction?

E. Who can be Trustee?

1. Spouse beneficiary can be the trustee, if income distribution is either mandatory or limited to an ascertainable standard, and principal distributions are limited to an ascertainable standard.

a) But must prohibit support distributions to the spouse who is serving as trustee.

2. Grantor spouse can retain right to remove and replace trustee as a control mechanism.
3. Watch application of §2036(b) if transfer in voting stock and grantor also serves as trustee.

F. Long Term Generation Skipping Trusts.

1. To the extent that the grantor has available GST exemption to allocate to the trust, the trust provisions should provide for continuing trusts for the lineals of the grantor and the grantor's spouse - i.e., long-term dynasty trusts should be established. This will allow the assets to continue to pass to lower generations (until consumed) without incurring future estate or generation-skipping taxes.
2. Similar to concerns regarding a possible clawback of gift and estate tax benefits if future exemption amounts are reduced below the current $5,120,000 amount, there is also a concern that such a future reduction in GST exemption may reduce the anticipated GST protection. The sunset provisions of the 2012 law state that the law should be interpreted as if EGTRRA “had never been enacted.” This may mean that the trust has to be treated as if the larger GST exemption had never been available. This is unlikely, but it cannot be entirely discounted. Even if such an interpretation turns out to be correct, the grantor will not be in a worse position (as compared to not making the gift and trust), but would only result in the possible application of

generation skipping taxes in the future to a greater extent than anticipated. This impact can be reduced by making sure that the trustee has the ability, under the trust instrument or applicable local law, to be able to divide the trust into GST exempt and non-exempt shares.

G. Special Power of Appointment.

1. A beneficiary spouse can be granted the right to appoint trust assets to children of the grantor and the grantor's spouse, during lifetime and/or at the death of the beneficiary spouse. This allows for tax free gifting to be made to them at such times.
2. Consideration should be given to adding the grantor spouse as a potential appointee from the trust at the death of the beneficiary spouse. This is addressed in more detail below.

H. Formula clauses.

1. Consideration should be given to the use of formula clauses for uncertain or difficult to value property that is transferred to the trust, so that if the final value is determined to exceed the available unified credit amount of the grantor spouse, the excess can pass in a manner that is deductible for gift tax purposes (e.g., charitable or marital deduction gifts), or the amount of assets transferred is reduced to the remaining available unified credit amount.

a) See Petter v. Comm'r., 653 F.3d 1012 (9th Cir. 2011) and Joanne M. Wandry, et al. v. Commissioner, TC Memo 2012-88 for some favorable cases on the effectiveness of formula clauses to limit gift exposure, and how to properly structure such clauses.

VII. LEVERAGE

A. Valuation discounts

1. Joint tenancy
2. Family partnerships
3. Nonvoting stock

VIII. OTHER GIFTING IDEAS

A. Seed defective grantor trusts with gift.

1. Then can do an installment sale to shift a large amount of appreciating assets to the trust.
2. 10% funding rule of thumb.
3. Repurchase of assets prior to death allows for at-death step-up in basis.

B. Qualified personal residence trusts, with larger properties.

1. Since remainder interest is a gift, can shift more valuable properties into a QPRT than under lower unified credit amounts.
2. But per ETIP rules, cannot allocate GST exemption until after initial term.

C. Grantor retained annuity trusts.

1. Without being zeroed out.

IX. WHAT IS THE BIGGEST NONTAX PROBLEM WITH GIFT GIVING?

A. The desire of the donor to retain the economic benefits of the transferred assets, or at least have access to them if needed in the future.

1. May not be that big an issue to the very wealthy, but to most everyone else this is always a concern.

X. USING RECIPROCAL TRUSTS TO MAKE IT PAINLESS

A. Overall

1. One spouse makes the gift to a trust for the other spouse, so that the grantor spouse can still indirectly benefit from the gifted assets if needed. That is, distributions from the trust to the beneficiary spouse can indirectly benefit both spouses, including the grantor spouse.

B. More Particularly

1. The grantor spouse is essentially prefunding a credit shelter trust using all or a portion of the grantor's unified credit.

a) No marital deduction is taken for the transfer in trust.

2. Grantor does not retain any powers over the trust and is not a permissible distributee of the trust.

3. Grantor's spouse and children may receive benefits for health, education, maintenance and support, and beyond.

a) With or without mandatory income distributions.

(1) Depending on who is trustee, this choice may impact grantor trust status under Code §674.

b) Ascertainable powers of distribution should apply to beneficiaries who are also serving as trustee to avoid inadvertent creation of a general power of appointment.

c) But must prohibit support distributions to the beneficiary spouse to avoid risk of benefit to grantor spouse (satisfaction of legal obligation to support). Such a retained benefit to the grantor spouse could result in Section 2036 inclusion for that grantor spouse.

4. 5x5 power can be granted to beneficiary spouse, to enhance access to the trust.

5. Special power of appointment to family members can be granted to spouse beneficiary (inter vivos or testamentary).

a) But see later discussion about whether grantor spouse should be a possible appointee.

6. Grantor trust status allows for greater growth, enhancing transfer tax benefits.

7. Third party trustee can be used on a more liberal and/or discretionary standard.

a) Since this trust is free of future estate and GST taxes, it is advantageous if distributions to the spouse beneficiary are minimized if other assets are available to support the spouse.

C. What do we accomplish?

1. Use of unified credit transfers, with attendant benefits.

2. Safety net for the grantor and spouse remains intact.

a) Grantor spouse benefits indirectly via distributions to the beneficiary spouse.

3. Special power of appointment provides flexibility.

4. Trusts can grow for benefit of children and more remote beneficiaries, if are not consumed for support of spouses

5. GST benefits.

D. Misc Issues

1. If the trust would otherwise qualify for the gift tax marital deduction, make sure it is not taken.
2. Note also that this type of trust is automatically a grantor trust (because the grantor's spouse is a beneficiary), and the grantor cannot turn off the grantor trust powers. This is usually a nonissue during the marriage since the assets will be reported on a joint return anyway. However, planning for divorce or separation is desirable to be able to terminate such status in appropriate circumstances. See Code §682 regarding some grantor trust mitigation for the grantor spouse upon divorce if the beneficiary spouse continues to have an interest in the trust.

E. Reciprocal Trust Doctrine Issues

1. General Definition:

a) Reciprocal trusts are trusts that have inter-related, reciprocal, and substantially identical economic property interests, created by two people for the benefit of one another under a common plan. Lehman v. Comm'r., 109 F.2d 99 (2d Cir. 1939).

2. What is the impact?

a) The reciprocal trust doctrine causes the inclusion of the trust assets in the grantor's gross estate under IRC §§ 2036 or 2038. Each grantor is treated as having established a trust for himself or herself, instead of for the other person.
(1) Thus, it would effectively defeat the planning undertaken to avoid estate tax in the grantor spouse's estate of the transferred property.

3. Lead Case: U.S. v. Estate of grace, 395 U.S. 316 (1969).

a) U.S. Supreme Court case.
b) Facts.
(1) Mr. Grace executed a trust agreement on December 15, 1931, in which he named his wife as the income beneficiary for her lifetime. Mrs. Grace signed an identical trust agreement 15 days later naming her husband as the income beneficiary for his life.

c) Not determinative:
(1) Not dependent upon a finding that each trust was created as a quid pro quo for the other.
(2) Not dependent on a tax avoidance motive.

d) Test:
(1) The trusts were interrelated and that the arrangement leaves the settlors in approximately the same economic position as if they had created the trusts naming themselves as lifetime beneficiaries.

4. Helpful Precedent.

a) Estate of Levy v. Comm'r., TC Memo 1983-453.
(1) A husband and wife created mutual trusts naming the other as trustee. One spouse's trust had a limited power of appointment while the other did not.
(2) No reciprocal trusts found.
(3) The limited power of appointment was sufficiently significant as to create two separate and distinct trusts that were not reciprocal.

b) PLR 0426008 (June 25, 2004).

(1) The husband's trust gave the wife the right to withdraw specified amounts of trust principal in the event that the couple's son died before her. She also held an inter vivos special power upon the son's death to appoint trust principal among the husband's issue and their spouses.
(2) Wife did not exercise the power of appointment, and died before the son died.
(3) No reciprocal trusts found.
(4) This result occurred, even though the differences in the trusts would arise only if an unlikely event occurred - the son predeceasing the wife.
(5) Limited precedential value as a private letter ruling.

5. How avoid it?

a) Grant special power of appointment in beneficiary spouse.
(1) Cannot use a general power of appoint (one that can benefit the beneficiary, the creditors of the beneficiary, or the estate of the beneficiary or its creditors).
(2) Based on Levy.
(3) Perhaps can make it contingent on certain events, but conservatively should be exercisable without regard to any contingency.

b) Don't sign at the same time. The more time that can pass between them, the better.
(1) Note that 15 days wait was not enough in Grace.

c) Attempt to provide for other differences in terms.
(1) Including different residuary beneficiaries.
(a) Such as one or more different charities.
(2) Have different children as beneficiaries in each trust, or have children as beneficiaries in one trust and grandchildren beneficiaries in the other.

d) Have different trustees.
e) Have different assets.

F. Reversionary Interest or Power of Appointment Back to Other Spouse

1. A direct reversionary or beneficial interest in the grantor spouse after the death of the beneficiary spouse will usually be a problem in most jurisdictions. It may result in the trust assets being included in the taxable estate of the donor spouse at his or her death, since such a retained interest may allow access to the trust to the donor spouse's creditors.

a) Although, see Reg. §25.2523(f)-1(f), examples 10 and 11, which find no estate tax inclusion in the grantor spouse when the trust that is established is a marital deduction QTIP trust.
(1) Presumably, these provisions should not be extended beyond QTIP trusts since the result in the Regulations may be a function of mandated gross estate inclusion in the beneficiary spouse's estate (and subject to the gift tax backup of §2519). Thus, in circumstances when there is no such inclusion, the IRS may not be as agreeable to no gross estate inclusion for the donor spouse.

b) An interest in the donor spouse that is merely a discretionary interest in the discretion of a third party trustee may be workable in jurisdictions with trust creditor protection statutes. This is discussed separately below.

2. An alternative is to give a beneficiary spouse a power of appointment to redirect trust assets to the grantor spouse at the death of the beneficiary spouse.

a) This is a special power of appointment. A special power of appointment does not cause inclusion in the taxable estate of the beneficiary spouse. Code §2041(b)(1).
b) But depending on applicable state law, the new trust could be deemed to be a self-settled trust that may be available to the creditors of the grantor, and thus result in 2036 or 2041 inclusion in the estate of the grantor spouse at his or her death.
(1) Tax law is based on a creditor's rights to reach the assets of a trust; if the creditor may attach the trust assets, the transfer to the trust generally is considered to be an incomplete gift and is not subject to gift tax and the trust is included in the settlor's gross estate. IRC § 2041; Also see Rev. Rul. 76-103, 1976-1 C.B. 293.
(2) Further, the "relation back" doctrine could treat the donor spouse as being the transferor of the trust established for him by the power holder spouse. This would then result in the donor spouse establishing a trust for himself or herself, and thus subjecting the trust assets to §2036 inclusion.

c) Some state laws attempt to help.
(1) E.g., Arizona Revised Statutes § 14-10505(E)(4) ("An irrevocable trust for the benefit of a person, the settlor of which is the person's spouse, regardless of whether or when the person was the settlor of an irrevocable trust for the benefit of that spouse.")
(2) Corresponding provision in Florida does not apply to non-marital deduction trusts (unfortunately) - only to marital deduction trusts. Fla.Stats. §736.0505.

d) Perhaps require that the special power of appointment in favor of a grantor spouse only be exercised through the creation of a trust in a state that specifically avoids creditor exposure for these types of trusts, and perhaps further require that any such "return" trust provide for a discretionary interest only to the donor spouse to further gain the benefit of the trust asset protection laws of that jurisdiction.
(1) So as to obtain the benefit of the favorable state laws and arguably avoid gross estate inclusion.
(2) Even better would be to establish the trusts initially in such favorable states.
(3) See Bove, Jr., Alexander A., "Using the Power of Appointment to Protect assets--More Power than You Ever Imagined," 36 ACTEC L.J. 333 (Fall 2010).

e) Watch 674 grantor trust via power of appointments granted to spouse or third parties.
f) Further refinement is to have grantor spouse added as a remainder beneficiary based on an independent third party.

3. Other Planning.

a) Grantor spouse not included as a potential beneficiary except after death of beneficiary spouse or divorce.
b) Grant a third party the power to remove the settlor as a beneficiary - this could be exercised when settlor is near death.
(1) Should avoid 2036 if no prearrangement found.

XI. OTHER WAYS FOR A DONOR TO RETAIN AN ECONOMIC INTEREST IN THE GIFTED PROPERTY

A. Grantor as discretionary beneficiary in a jurisdiction that provides for asset protection for self-settled trusts.

1. General mechanism is to establish a trust in a qualified asset protection trust jurisdiction that provides that the grantor, the grantor's spouse, and their lineal descendants (but perhaps not until after the death of the grantor and the grantor's spouse) are discretionary beneficiaries.
2. If the trust is formed in a creditor protection trust jurisdiction such as Alaska, Nevada, or Nevis, a retained discretionary interest should not give rise to gross estate inclusion as to the grantor spouse.

a) More certain results in this regard likely for non-U.S. trusts than U.S. trusts.
(1) Per potential U.S. Constitutional challenges to the effectiveness of U.S. asset protection trusts across state lines.

b) These trusts will usually require a professional trustee located in the trust jurisdiction.
(1) And thus trustee fees.

c) In PLR 0944002, the Service addressed the question of the estate tax status of a self-settled trust. In that ruling, the trustee had the power, in its sole and absolute discretion, to distribute income and principal “for the benefit of one or more members of the class consisting of Grantor, Grantor’s spouse and Grantor’s descendants..” The state statute provided that a creditor was prevented from reaching assets of a self-settled trust unless: (1) the trust was revocable; (2) the grantor intended to defraud a creditor; (3) the grantor was in default of a child support obligation; or (4) the trust requires that all or part of the trust’s income or principal must be distributed to the grantor. The Service determined that the transfer to the trust was a completed gift and that the trust was not included in the grantor’s estate for estate tax purposes because none of the four conditions existed. The Service specifically did not rule on whether the trustee’s discretion to distribute income and principal to the grantor “combined with other facts (such as, but not limited to, an understanding or pre-existing arrangement between Grantor and trustee regarding the exercise of this discretion) may cause inclusion of Trust’s assets in Grantor’s gross estate for federal estate tax purposes under section 2036..” Absent these other circumstances, however, a self-settled spend thrift trust should be deemed to be a completed gift for gift tax purposes and the assets of the trust excludable from the estate for estate tax purposes. The self-settled trust gives the grantor all the benefits of the gift tax exclusion amount and the security of access to the trust if needed (in the discretion of the trustee).
d) Watch limits on effectiveness if federal bankruptcy within 10 years.

B. Life Insurance.

1. To allow for wealth replacement at the death of the donee spouse while the grantor spouse is living, the trust established for the grantor spouse can buy life insurance on the donee spouse. Those policy proceeds will thus enhance the trust held for the surviving grantor spouse and will substitute for lack of indirect benefits that the grantor spouse was benefitting from during the life of the donee spouse.

XII. PARTING THOUGHTS.

A. Does not have to be "all or nothing." Partial use of the unified credit exemption is better than no use.
B. Why not (if otherwise affordable)?