

PRESENTED TO:  
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NELSON & NELSON, P.A.  
WWW.ESATETAXLAWYERS.COM

**Asset Protection & Estate  
Planning:  
Why Not Have Both?  
Hot Topics in Estate Planning and  
Asset Protection**

*By Barry A. Nelson, Esq.*

SECTION I .....ESTATE TAX UPDATE: RECENT DEVELOPMENTS  
SECTION II .....CURRENT DEVELOPMENTS IN ASSET PROTECTION STRATEGIES  
SECTION III .....PROPOSED STRUCTURE FOR ASSET PROTECTED LIMITED PARTNERSHIP WITH LLC SUBSIDIARIES

SECTION I  
**Estate Tax Update:  
Recent Developments**

## **Legacy for One Billionaire: Death, but No Taxes**

The New York Times, David Kocieniewski (June 9, 2010)

### **Forbes' 74<sup>th</sup> richest man in the world from Houston dies in late March of 2010:**

- Net worth: \$9,000,000,000
- Estate tax liability: \$0.00
- The look on his beneficiaries' faces: PRICELESS!!!!



## **Legacy for One Billionaire: Death, but No Taxes**

The New York Times, David Kocieniewski (June 9, 2010)

- “The Senate Finance Committee is now trying to forge a compromise that would reinstate the tax, but even if that effort succeeds, it is unclear whether any changes might be retroactive and applied to those who have died so far in 2010.”
- One “stock involved includes more than 100 million shares in Enterprise GP Holdings, which closed at \$43.23 the last trading day before Mr. Duncan died. That asset alone could have resulted in a \$2 billion estate tax.”
- “Should the family trust sell these inherited shares, capital gains taxes would presumably be owed on the difference between Mr. Duncan’s original cost, which could be quite low, and their market value when sold. Capital gains taxes are capped at 15 percent.”



## Estate Tax Options

Jane G. Gravelle, Senior Specialist in Economic Policy, 4/23/10

### Percentage of Decedents Subject to Estate Tax Based on Exemption Amount

Exemption Level	2011	2019
\$1 million	1.76%	3.00%
\$3.5 million	0.25%	0.46%
\$3.5 million (indexed for inflation)	0.24%	0.32%
\$5 million	0.14%	0.23%
\$5 million (indexed for inflation)	0.14%	0.18%

**EXHIBIT 1**



## Estate Tax Options

Jane G. Gravelle, Senior Specialist in Economic Policy, 4/23/10

### Estate Tax Liability Under Alternative Proposals

Exemption Level / Tax Rate	2011 (in billions)	2019 (in billions)
\$1 million / 55% rate	\$34.4	\$62.2
\$3.5 million / 45% rate	18.1	31.5
\$3.5 million (indexed for inflation) / 45% rate	17.9	28.9
\$5 million / 35% rate	11.2	20.9
\$5 million (indexed for inflation) / 35% rate	11.2	17.9

**EXHIBIT 1**



## Estate Tax Options

Jane G. Gravelle, Senior Specialist in Economic Policy, 4/23/10

### Estate Tax Liability 2011: Exemption and Rate

Exemption Level	55% Rate (in billions)	45% Rate (in billions)	35% Rate (in billions)
\$1 million	\$34.4	\$28.1	\$21.8
\$3.5 million	22.1	18.1	14.1
\$5 million	17.4	14.2	11.2

**EXHIBIT 1**



## Estate Tax Options

Jane G. Gravelle, Senior Specialist in Economic Policy, 4/23/10

### Percentage Distributions of Taxable Estate Tax Returns by Size of Estate, 2011

Size of Estate (in millions)	\$1 Million Exemption 55% Rate	\$3.5 Million Exemption 45% Rate	\$5 Million Exemption 35% Rate
No. of Returns	44,230 Returns	6,420 Returns	3,560 Returns
1-2	52.2%	0.0	0.0
2-3.5	26.0	0.0	0.0
3.5-5	9.1	23.7%	0.3%
5-10	7.6	44.7	45.2
10-20	2.8	18.7	31.7
Over 20	2.2	12.8	22.5
Total	100.0	100.0	100.0

**EXHIBIT 1**



## Estate Tax Options

Jane G. Gravelle, Senior Specialist in Economic Policy, 4/23/10

### Percentage Distributions of Estate Tax Revenues by Type of Return, 2011

Size of Estate (in millions)	\$1 Million Exemption 55% Rate	\$3.5 Million Exemption 45% Rate	\$5 Million Exemption 35% Rate
Total Revenues	\$34.4 billion total	\$18.1 billion total	\$11.2 billion total
1-2	7.5%	0.0	0.0
2-3.5	15.9	0.0	0.0
3.5-5	10.8	2.4%	0.0
5-10	18.3 <b>\$6.295 B</b>	16.1	9.5%
10-20	13.9 <b>\$16.37 B</b>	18.3 <b>\$14.588 B</b>	18.0 <b>\$11.2 B</b>
Over 20	33.7	62.3	72.5
Total	100.0	100.0	100.0

**EXHIBIT 1**

## Scroggin Sample Client Letter

### Describing Estate Tax Legislation and Repeal

Steve's Leimberg's Estate Planning Email Newsletter – Archive Message #1605  
February 16, 2010

- Sample letter informing the clients of changes to estate tax laws in 2010 and 2011, and encouraging clients to contact their advisors to discuss what steps should be adopted.

**EXHIBIT 2**

**Nelson & Nelson: Tax Update – March 9, 2010**

Federal Estate Tax Legislation: Inaction by Congress  
Creates Planning Opportunities and Pitfalls

- Making gifts at the reduced 35% gift tax rate
- Repeal of the GST tax
- Formula provision concerns
- IRA conversions

**EXHIBIT 3**

**Nelson & Nelson: Tax Update – December 21, 2009**

Year-End Estate and Gift Tax Planning for 2009

- Extension of \$3.5 Million Unified Credit
- Use Gift Tax Exemptions to Reduce Estate and Gift Tax
- Review of Estate Planning Documents
- Easy Planning for Intra-Family Loans
- Possible Changes in Estate Tax Laws
- Roth IRA Conversions

**EXHIBIT 4**

### **Should Clients Consider Gifting Before the End of 2010?**

Steve Leimberg's Estate Planning Email Newsletter - Archive Message #1668  
July 1, 2010

- Lifetime gifting of assets in 2010 offers both transfer tax and income tax advantages.
- Since transfer tax rates are increasing in future years, and with an effective transfer tax rate as low as 25.93% (if the donor survives the gift by three years), every affluent client needs to consider the idea of gifting in 2010.

**EXHIBIT 5**

### **Description of Revenue Provisions Contained in the President's Fiscal Year 2011 Budget Proposal**

- President Obama seeks to modify and make permanent the Estate, Gift and Generation Skipping Transfer Taxes after 2009.
- The proposal generally makes permanent the estate, gift, and generation skipping transfer tax laws in effect for 2009, retroactive to the beginning of 2010. Under the proposal, the applicable exclusion amount for estate tax purposes generally is \$3.5 million for decedents dying during 2010 and later years. The applicable exclusion amount for gift tax purposes is \$1 million for 2010 and later years. The highest estate and gift tax rate under the proposal is 45 percent, as under 2009 law.

**EXHIBIT 6**

## **Republican Estate Tax Proposal**

- Would provide permanent estate tax relief by making the estate tax exemption \$5 million and the maximum estate tax rate 35% .
- Introduced on September 13, 2010, by Senate Minority Leader Mitch McConnell of Kentucky.

2010 S. 3773

**EXHIBIT 7**

## **Democrat Estate Tax Proposal**

- The bill would have amended the Internal Revenue Code by reinstating the estate and generation-skipping taxes.
- Would have included an estate tax exemption of \$3.5 million and a maximum estate tax rate of 55% (for those estates over \$50 million).
- Introduced on July 15, 2010, by Representative Linda T. Sanchez (D-CA).

2010 H.R. 5764

**EXHIBIT 8**



**Nelson & Nelson: Tax Planning Letter for 2010 –  
Planning for Terminally Ill Client Based Upon Repeal**

- Annual Exclusion Gifts
- Gifts of Assets from Client’s Spouse to Client with Terminal Illness
- Roth IRA Conversion
- Charitable Giving – Creation of Foundation or Donor Advised Fund
- Gifts Using Actuarial Tables
- Additional Gifts to Grandchildren

**EXHIBIT 9**

**Seven Steps for Coping with Carryover Basis**

Steve Leimberg's Estate Planning Email Newsletter - Archive Message #1701  
September 27, 2010

- “During the one-year ‘gap’--and presumably only for inheritances received this year--there are income tax issues to contend with. What's new: Heirs now must use the original price paid for an asset when computing the income taxes they will owe if they sell inherited assets. Previously, they could use the market value at the time of the owner's death. Each estate is permitted to exempt \$1.3 million of gains from this carryover basis rule. An additional \$3 million exemption applies to assets inherited from a spouse.”

**EXHIBIT 10**

**7520 Interest Rates and AFRs (October 2010)**

**Applicable Federal Mid-Term 120% Annual Rates**

1989	10.10%	2000	7.33%
1990	10.63%	2001	5.52%
1991	9.08%	2002	4.16%
1992	6.96%	2003	4.39%
1993	6.02%	2004	4.36%
1994	8.56%	2005	4.91%
1995	7.59%	2006	5.79%
1996	8.09%	2007	5.23%
1997	7.63%	2008	3.81%
1998	6.16%	2009	3.20%
1999	7.25%	2010	2.07%

**EXHIBIT 11**

**Rev. Rul. 2010-24 Table 1**

**Applicable Federal Rates for October 2010  
Period for Compounding**

<b>AFR</b>	<b>Annual</b>	<b>Semiannual</b>	<b>Quarterly</b>	<b>Monthly</b>
Short -term	.41%	.41%	.41%	.41%
Mid-term	1.73%	1.72%	1.72%	1.71%
Long-term	3.32%	3.29%	3.28%	3.27%

**EXHIBIT 11**

## Intra-Family Loans and AFRs – October 2010 Example

	<b>OCTOBER 2010</b>	• Short Term Rate – 0.41%
	<b>AFRS</b>	• Mid Term Rate – 1.73%
		• Long Term Rate – 3.32%

**For Example:** Consider a loan of \$1 million to your children or a trust for your children. If the money grows by 7% annually, your children or the trust for their benefit will earn \$70,000 per year and yet only owe \$4,100 in interest (assuming a 3 year loan in October of 2010). The additional growth of \$ \$65,900 is a tax-free gift to your children (or to their trust).

**EXHIBIT 12**

## The GRAT Rush of 2010 – Short Term GRAT Planning May be Prohibited

Steve Leimberg's Estate Planning Email Newsletter – Archive Message #1626  
April 8, 2010

- The House of Representatives legislation, if enacted, would eliminate the low-risk short-term grantor retained annuity trust or GRAT. H.R. 4849 passed the House on March 24, 2010.
- Before the law goes into effect by similar action in U.S. Senate, there is a window of opportunity to tap into the huge gift-tax savings now associated with GRATs.

**EXHIBIT 13**

## **New Florida Statute Gives Courts Flexibility to Construe Formula Dispositions**

Steve Leimberg's Estate Planning Email Newsletter – Archive Message #1659  
June 17, 2010

- Many wills contain formula dispositions geared to the estate tax exempt amount, or to the GST exemption amount.
- At least nine states have enacted legislation construing these provisions as if the Federal estate tax and GST tax law in effect in 2009 remained in effect.
- Florida enacted a broader and more flexible statute that allows the court to construe the will based upon the intention of the testator.

Fla. Stat. § 733.1051

**EXHIBIT 14**

## **Pierre – Valuation of Gifts of Single Member LLC Interests (Pierre 2)**

- July 13, 2000 - Taxpayer forms single member New York LLC
- July 24, 2000 - Taxpayer forms two New York irrevocable trusts
- September 15, 2000 - Taxpayer transfers \$4.25 million in cash and marketable securities to the LLC
- September 27, 2000 - Taxpayer makes a donation of 9.5% LLC interests to each trust and sells the remainder of her LLC interest to the trusts in equal portions in exchange for secured promissory notes, and the percentage interests of the donations and the sales of the LLC interests were determined by an appraisal that opined that a 30% discount was appropriate

*Pierre v. Commissioner*, T.C. Memo 2010-106, May 13, 2010

**EXHIBIT 15**

## **Pierre – Valuation of Gifts of Single Member LLC Interests (Pierre 2)**

Taxpayer formed an LLC and part gifted and part sold her entire 100% interest 12 days later.

- The court addressed whether the step transaction required the gift/sale (on the same day) to be treated as a transfer of an aggregate 50% interest or whether the gift could be valued separately than the sale to each trust thereby creating a larger discount.
- The Court held that gifts are valued as gifts of the LLC interests, not as gifts of the underlying assets; and that sale and gift on same day should be valued as one interest. The Court held aggregate but still allowed combined 36.5% discount.

*Pierre v. Commissioner*, T.C. Memo 2010-106, May 13, 2010

**EXHIBIT 15**

## **Ludwick: A Wake-up Call for Lawyers**

Steve Leimberg's Estate Planning Email Newsletter – Archive Message #1642  
August 17, 2010

The Tax Court decided that the proper discount for a gift of a fractional interest in real estate was 17%; the taxpayer had claimed 30%.

- The conclusion was based on the Court's projected costs of partition and discount for time to market.

*Ludwick v. Commissioner*, T.C. Memo 2010-104.  
Filed May 10, 2010.

**EXHIBIT 16**

## **Forum Shopping For Favorable FLP and LLC Law: Part VI**

Steve Leimberg's Asset Protection Planning Email Newsletter – Archive Message #154  
May 25, 2010

The table depicts the following four key areas regarding charging order protection:

1. Whether a creditor may petition the court for a judicial dissolution of an LLC;
2. Whether state law allows for the judicial foreclosure sale of the member's interest;
3. Whether a state law allows or prohibits a broad charging order; and
4. Whether a state law permits or prevents equitable remedies.

**EXHIBIT 17**

## **Forum Shopping For Favorable FLP and LLC Law: Part VII**

Steve Leimberg's Asset Protection Planning Email Newsletter – Archive Message #162  
September 14, 2010

- Unlike the Uniform Limited Liability Company Act of 1996, the uniform limited partnership acts never allowed a creditor to petition for the judicial dissolution of a limited partnership...However, the Uniform Limited Liability Company Act ("ULLC 2006") as well as the Uniform Limited Partnership Act of 2001 ("ULPA 2001") allow for the judicial foreclosure sale of a member's interest.

**EXHIBIT 18**

**Robertson v. Deeb – Inherited IRAs  
Not Asset Protected Under Interpretation of FL Law**

Steve Leimberg's Employee Benefits and Retirement Planning Email Newsletter –  
Archive Message #524 ; April 20, 2010

The Florida Second District Court of Appeals held that inherited IRAs were not exempt from creditors since the IRA did not originate with the debtor and was not something established by the debtor to defer taxation on income or preserve assets for retirement.

*See also In re: Ard*, 2010 Bankr. LEXIS 2659 (Bankr. M.D. Fla. Aug. 18, 2010).

Robertson v. Deeb, 34 Fla. L. Weekly D1661a (Fla. 2nd Dist 2009); Decided August 14, 2009.

**EXHIBIT 19**

**Nessa – Inherited IRAs Protected Under Bankruptcy Law**

Steve Leimberg's Employee Benefits and Retirement Planning Email Newsletter –  
Archive Message #518; March 15, 2010

- The U.S. Bankruptcy Court in the District of Minnesota held that inherited IRAs were protected from creditors up to \$1 million.
  - The Court relied on the new language in the 2005 Federal Bankruptcy law
  - The Court viewed an inherited IRA as still being a retirement account that should be protected from creditors in the hands of the beneficiaries thereof.

In re Nessa, (2010, Bkcty Ct. MN) 105 AFTR 2d 2010-609;  
Decided January 11, 2010.

**EXHIBIT 20**

### **Chilton – Inherited IRAs Not Protected Under Bankruptcy Law**

Steve Leimberg's Employee Benefits and Retirement Planning Email Newsletter – Archive Message #520; March 29, 2010

- Three months after the *Nessa* decision, the U.S. Bankruptcy Court in Texas took the opposite view.
  - Focusing on the same 2005 Federal Bankruptcy law relied on by the *Nessa* Court, the Texas Court held that “the funds contained in an inherited IRA are not funds intended for retirement purposes.”
  - Accordingly, the Texas Court held that such funds are not protected from the claims of creditors

In re Chilton, 105 AFTR 2d 2010-1271 (Bkcty. Ct. TX);  
**Decided March 5, 2010.**

**EXHIBIT 21**

### **Holman v. Commissioner – Dell Stock Owned by Partnership Limited to Discounts of Less Than 25%**

Steve Leimberg's Estate Planning Email Newsletter – Archive Message #1628  
April 13, 2010

- IRC Section 2703-style restrictions may properly collar valuation.
- “[M]aintenance of family ownership and control of [a] business” may be a bona fide business purpose – but *not* in a case in which there is no business

Holman v. Commissioner, 105 AFTR 2d 2010-1802 (8<sup>th</sup> Cir. Ct. of App.); Decided April 7, 2010.

**EXHIBIT 22**



**PLR 201025021: IRS Grants Extension of Time to Make QTIP Election for Inter Vivos Transfer**

Steve Leimberg's Estate Planning Email Newsletter – Archive Message #1699  
September 16, 2010

- Requests for relief under §§ 301.9100-2 and 301.9100-3 will be granted when the taxpayer provides the evidence to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and that granting relief will not prejudice the interests of the government.
- Section 301.9100-3(b)(1)(v) provides that a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer reasonably relied on a qualified tax professional, including a tax professional employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make, the election.
- Based on the facts submitted and the representations made, we conclude that the requirements of § 301.9100-3 have been satisfied because Grantor acted reasonably and in good faith, and the grant of relief will not prejudice the interests of the Government.

Private Letter Ruling 201025021, 2/19/2010

**EXHIBIT 23**

**Price v. Commissioner – Annual Exclusion Gift of FLP Interests**

Steve Leimberg's Estate Planning Email Newsletter – Archive Message #1572  
January 5, 2010

- The Court addressed the issue of the taxpayer's utilization of the annual exclusion to make gifts of discounted FLP interests to his three children.
- The Court found that the outright transfer of an equity interest in a business or property is not enough to overcome the "present interest" requirement for the annual exclusion, since restrictions attached to the interests.

Price v. Commissioner, T.C. Memo 2010-2 (January 4, 2010).

**EXHIBIT 24**

**Black v. Commissioner –  
Graegin Loan not Respected in Combination with FLP**

Steve Leimberg's Estate Planning Email Newsletter – Archive Message #1566  
December 22, 2009

- Decent transferred corporate stock to an FLP, and made gifts of FLP interests to various trusts.
- Lack of liquidity at the time of the decedent's death forced the decedent's son to take out a *Graegin* loan.
- The Tax Court determined that the partnership could have redeemed the estate's partnership interest shortly after the partner's death in order to satisfy the estate tax burden, thereby rendering the loan unnecessary. However, had the estate and partnership done that, the IRS would have certainly argued that the partnership itself was simply a ruse to reduce the estate tax.

Black v. Commissioner, 133 T.C. No. 15 (December 15, 2009).

**EXHIBIT 25**

**Petter v. Commissioner –  
Defined Value Clause Respected in Combination with LLC**

Steve Leimberg's Estate Planning Email Newsletter – Archive Message #1562  
December 16, 2009

- The Court upheld the validity for federal gift tax purposes of a defined value formula gift which specifically transferred units in an LLC to trusts for the benefit of two of the donor's children with the value that exceed a specific amount being gifted to a publicly supported charitable organization.
  - The Court concluded that Petter did not create a condition subsequent and was not contrary to public policy.

Petter v. Commissioner, T.C. Memo 2009-280; Decided  
December 7, 2009.

**EXHIBIT 26**

**Estate of Christiansen:  
Formula Gift in Favor of Noncharitable Beneficiaries Respected**

Steve Leimberg's Estate Planning Email Newsletter – Archive Message #1560  
December 14, 2009

- Eighth Circuit Upholds Formula Disclaimer Over Public Policy Objections
- The Court approved the ability of a taxpayer to establish a charitable lead annuity trust estate plan activated by a formula clause disclaimer.

Estate of Christiansen v. Commissioner, 104 AFTR 2d 2009-7352 (8th Cir. Nov. 13, 2009, corrected Nov. 18, 2009).

**EXHIBIT 27**

**Berall: Problems Caused by Absence of Estate & GST Taxes and Reinstitution of Carryover Basis**

Steve Leimberg's Estate Planning Email Newsletter – Archive Message #1705  
October 5, 2010

- The U.S. government may be missing out on its opportunity to collect estate and generation skipping taxes for 2010 deaths, including those of at least four multi-billionaires.
  - There may be a possibility of a remedy in a post-election lame duck session.
  - Despite demanding higher income taxes on the rich, President Obama has not addressed these problems
- No serious attempts have been made by Congress to deal with the carryover basis rules.

**EXHIBIT 28**

SECTION II

**Current Developments in  
Asset Protection Strategies**

**OLMSTEAD**

**FTC v. Peoples Credit First, LLC  
(Following Florida Supreme Court's Decision in Olmstead v. FTC)**

**Facts**

- Defendants mailed consumers over ten million solicitations that created the impression that the consumer could receive a “platinum” credit card like a VISA or MasterCard in exchange for a payment of \$45 or \$49.
- However, consumers received a platinum-colored card...usable ONLY for purchasing products from Defendants' merchandise catalog or website.

FTC v. Peoples Credit First, LLC, 2010 U.S. App. LEXIS 20082 (11th Cir. Sept. 29, 2010).

## **OLMSTEAD**

### **FTC v. Peoples Credit First, LLC (Following Florida Supreme Court's Decision in Olmstead v. FTC)**

- Appealed from the United States District Court for the Middle District of Florida
- The district court entered a judgment for injunctive relief and for more than \$10 million in restitution.
- FTC moved to compel Defendants to surrender their membership interests in their non-party single-member LLCs to the receiver.

FTC v. Peoples Credit First, LLC, 2010 U.S. App. LEXIS 20082 (11th Cir. Sept. 29, 2010).

## **OLMSTEAD**

### **FTC v. Peoples Credit First, LLC (Following Florida Supreme Court's Decision in Olmstead v. FTC)**

- Defendants objected, arguing that the FTC only has the rights of an assignee under Florida law.
- The Florida Supreme Court concluded “that Florida law permits a court to order a judgment-debtor to surrender all right, title, and interest in the debtor’s single member LLC to satisfy an outstanding judgment.”  
Olmstead v. FTC, 35 Fla. L. Weekly S 357 (Fla. June 24, 2010).

FTC v. Peoples Credit First, LLC, 2010 U.S. App. LEXIS 20082 (11th Cir. Sept. 29, 2010).

## **OLMSTEAD**

### **FTC v. Peoples Credit First, LLC (Following Florida Supreme Court's Decision in Olmstead v. FTC)**

- Because the plain language of this provision draws no distinction between single-member and multiple-member LLCs, Defendants argue that charging order is the only remedy that a judgment-creditor may obtain against the membership interest of an LLC member, even if that member is the sole member of the LLC.

FTC v. Peoples Credit First, LLC, 2010 U.S. App. LEXIS 20082 (11th Cir. Sept. 29, 2010).

## **OLMSTEAD**

### **FTC v. Peoples Credit First, LLC (Following Florida Supreme Court's Decision in Olmstead v. FTC)**

- For these reasons, we affirm the district court's order compelling the Defendants to surrender all "right, title, and interest, in their single-member LLCs. AFFIRMED.

FTC v. Peoples Credit First, LLC, 2010 U.S. App. LEXIS 20082 (11th Cir. Sept. 29, 2010).

FTC v. Peoples Credit First, LLC, 2010 U.S. App. LEXIS 20082 (11th Cir. Sept. 29, 2010).

**OLMSTEAD**  
**Olmstead v. FTC**  
**(From Florida Supreme Court Opinion)**

- A charging order is a statutory procedure whereby a creditor of an individual member can satisfy its claim from the member's interest in the limited liability company as a protection of the other partners of the partnership or other member of the LLC.

Olmstead v. FTC, 35 Fla. L. Weekly S 357 (Fla. June 24, 2010).

**OLMSTEAD**  
**Olmstead v. FTC**  
**(From Florida Supreme Court Opinion)**

Prior attempt to create continuity between Charging Order  
Protection for LLC Partnerships was Unsuccessful

(See Section II, Part 1, Pages 194-195)

- The proposal was withdrawn when opposition to the policy being extended was expressed by those representing creditors, and this issue was never considered by the Florida Legislature.

Olmstead v. FTC, 35 Fla. L. Weekly S 357 (Fla. June 24, 2010).

**OLMSTEAD**  
**Olmstead v. FTC**  
**(From Florida Supreme Court Opinion)**

- Inconsistent Treatment for Limited Partnerships, General Partnerships, and LLCs may have Caused Confusion in the Majority Opinion

(See Section II, Part 1, Pages 195-196)

- Fla. Stat. § 608.433 (4) for LLCs: On application to a court of competent jurisdiction by any judgment creditor of a member, the court may charge the limited liability company membership interest of the member with payment of the unsatisfied amount of the judgment with interest. To the extent so charged, the judgment creditor has only the right of an assignee of such interest.

Olmstead v. FTC, 35 Fla. L. Weekly S 357 (Fla. June 24, 2010).

**OLMSTEAD**  
**Olmstead v. FTC**  
**(From Florida Supreme Court Opinion)**

- Fla. Stat. § 620.1703 (1) for LPs: On application to a court of competent jurisdiction by any judgment creditor of a partner or transferee, the court may charge the partnership interest of the partner or transferable interest of a transferee with payment of the unsatisfied amount of the judgment with interest. To the extent so charged, the judgment creditor has only the rights of a transferee of the partnership interest... (3) for LPs: This section **provides the exclusive remedy...**

Olmstead v. FTC, 35 Fla. L. Weekly S 357 (Fla. June 24, 2010).



**OLMSTEAD**  
**Olmstead v. FTC**  
**(From Florida Supreme Court Opinion)**

What Should States do Now?

(See Section II, Part 1, Page 197)

- Carter Bishop:
  - However, when applied to a SMLLC [“single-member LLC”], the same rules create a perverse and unexpected result...There are no other remaining partners to protect as in the case of a multi-member limited liability company. ...Ultimately, these perverse results are best cured by statutory amendment. Preferably, every state would amend its SMLLC legislation to provide that upon the voluntary or involuntary transfer of the only economic interest in the SMLLC, the transferee will be admitted as a substituted member, with or without the consent of the only member.

Olmstead v. FTC, 35 Fla. L. Weekly S 357 (Fla. June 24, 2010).

**OLMSTEAD**  
**Olmstead v. FTC**  
**(From Florida Supreme Court Opinion)**

(See Section II, Part 1, Page 197)

- Currently, only Wyoming specifically provides exclusive remedy protection to a judgment debtor who is **the sole LLC member by stating that its protection includes “any judgment debtor who may be the sole member” of an LLC.**

Olmstead v. FTC, 35 Fla. L. Weekly S 357 (Fla. June 24, 2010).

## **OLMSTEAD**

### **Olmstead Patch**

- Approved September 25, 2010, by the Executive Council of the Real Property, Probate and Trust Law Section of the Florida Bar.
- “[T]he sole remedy of a creditor seeking to enforce a judgment against the interest owned by a member of a **multiple-member LLC** is a charging order against the member’s transferable interest in the LLC. **Foreclosure on the judgment debtor’s interest and all other remedies a creditor could have are not available and may not be ordered by a court.**”

## **Revisions to Florida Statutes Section 736.0505**

## **Revisions to Florida Statutes § 736.0505 Creditors Claims Against Settlor**

**IT IS HEREBY PROPOSED THAT SECTION 736.0505,  
FLORIDA STATUTES, BE AMENDED TO READ AS FOLLOWS:  
736.0505 Creditors' claims against settlor...**

(3) Subject to the provisions of s. 726.105, for purposes of this section, the assets in

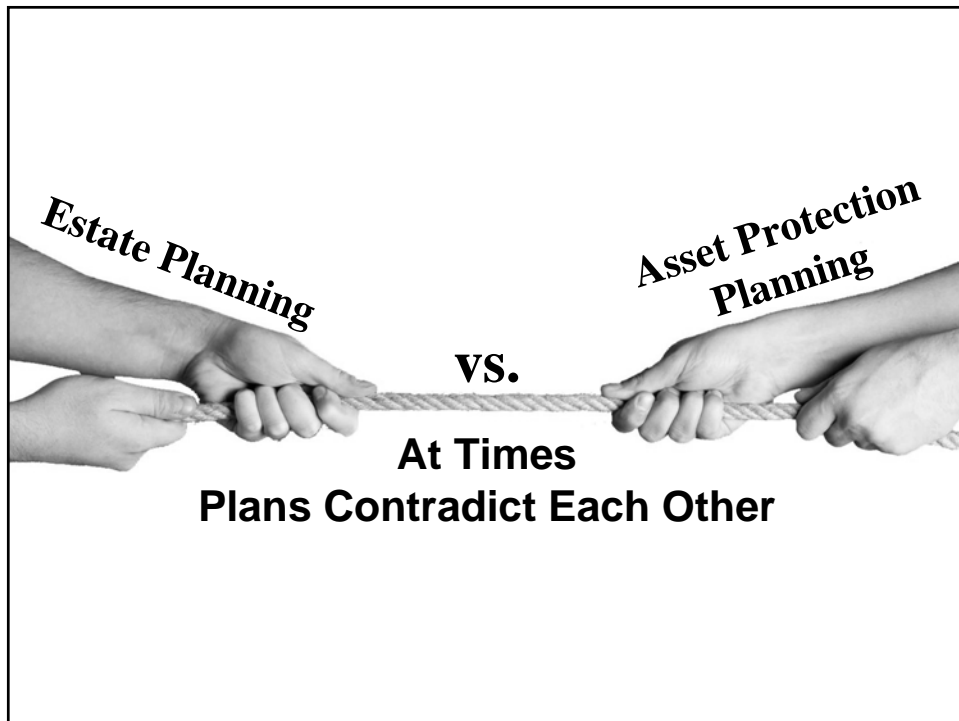
(a) a trust described in section 2523(e) of the Internal Revenue Code of 1986, or a trust for which the election described in section 2523(f) of the Internal Revenue Code of 1986 has been made; and

(b) another trust, to the extent that the assets in the other trust are attributable to a trust described in (a),

**shall, after the death of the settlor's spouse, be deemed to have been contributed by the settlor's spouse and not by the settlor.**

## **Inter Vivos QTIP Legislation Approved in Florida**

- If and when federal estate taxes are reinstated, it will remain an important planning consideration that both husband and wife have sufficient assets to utilize their respective exemptions from the estate tax.



**Inter Vivos QTIP Legislation  
Approved in Florida**

- One common example of planning that may be favorable for estate tax savings and probate avoidance but that may needlessly subject family wealth to creditor's claims, is the division of assets so each spouse owns, and has testamentary control over, approximately one-half of their combined wealth.

**Inter Vivos QTIP Legislation  
Approved in Florida**

- If a spouse owns his or her share of the family's wealth in his or her own name, the assets comprising the share are not creditor-protected.

**Inter Vivos QTIP Legislation  
Approved in Florida**

- Under the Uniform Trust Code, holding significant assets in a revocable trust does not enhance the situation because assets in a revocable trust are not protected from claims of the settlor's creditors.

**Inter Vivos QTIP Legislation  
Approved in Florida**

- An alternative that is effective both for estate tax and asset protection planning is an Inter Vivos QTIP Trust.

**White Paper on  
Proposed Revision to  
Florida Statutes  
Section 736.0505**

**Bob and Judy – Tenancy by the Entireties Plan  
Part 1**

	<b>Bob</b>	<b>Judy</b>	<b>T by E</b>
House – Protected Homestead			\$3.5 M
Brokerage			\$10 M
<b>TOTAL</b>			<b>\$13.5 M</b>
Bob's Gross Estate Assuming He Dies First			\$6.75 M
<b>MARITAL DEDUCTION</b>			<b>\$6.75 M</b>
Bob's Taxable Estate			\$0
Bob's Tax			\$0

**See Section II Part 2 page Nelson 212**

**Bob and Judy – Tenancy by the Entireties Plan  
Part 2**

<b>UPON JUDY'S DEATH</b>			
Judy's Gross Estate			\$13.5 M
Less Unified Credit Equivalent Amount			(\$3.5 M)
Judy's Taxable Estate			\$10 M
Judy's Tax			\$4.5 M
Assets subject to creditors while both married and living			\$0
Assets subject to creditors upon death of 1 <sup>st</sup> spouse or divorce			\$10 M

**See Section II Part 2 page Nelson 212**

### Bob and Judy – Tax Savings Plan Part 1

	Bob's Revocable Trust	Judy's Revocable Trust	T by E
House – Protected Homestead			\$3.5 M
Brokerage	\$5 M	\$5 M	
<b>TOTAL</b>	<b>\$5 M</b>	<b>\$5 M</b>	<b>\$3.5 M</b>
Bob's Gross Estate Assuming He Dies First	\$6.75 M		
Bob's Share of Homestead to Judy Outright	(\$1.75 M)		
Marital Trust	(\$1.5 M)		
<b>MARITAL DEDUCTION</b>	<b>\$3.25 M</b>		
Bob's Taxable Estate	\$3.5 M		
Less Unified Credit Equivalent Amount	(\$3.5 M)		
Bob's Tax	\$0		

**See Section II Part 2 page Nelson 213**

### Bob and Judy – Tax Savings Plan Part 2

<b>UPON JUDY'S DEATH</b>									
Judy's Gross Estate	\$10 M	<div style="border: 1px solid black; padding: 2px; display: inline-block;"> <table style="font-size: small;"> <tr> <td>Homestead</td> <td style="text-align: right;">\$3.5 M</td> </tr> <tr> <td>Judy's Rev Trust</td> <td style="text-align: right;">\$ 5 M</td> </tr> <tr> <td>Marital Trust</td> <td style="text-align: right;">\$1.5 M</td> </tr> </table> </div>	Homestead	\$3.5 M	Judy's Rev Trust	\$ 5 M	Marital Trust	\$1.5 M	
Homestead	\$3.5 M								
Judy's Rev Trust	\$ 5 M								
Marital Trust	\$1.5 M								
Less Unified Credit Equivalent Amount	(\$3.5 M)								
Judy's Taxable Estate	\$6.5 M								
Judy's Tax	\$2.925 M								
Savings Compared to Tenancy by the Entireties	\$1.575 M								
Assets subject to creditors while both married and living			\$10 M						
Assets subject to creditors upon death of 1 <sup>st</sup> spouse or divorce Assuming assets pass into spendthrift trust for surviving spouse upon death of 1 <sup>st</sup> spouse			\$5 M						

**See Section II Part 2 page Nelson 213**



### Bob and Judy – Inter Vivos QTIP Trust Part 1

	Bob's QTIP	Judy's QTIP	T by E
House – Protected Homestead			\$3.5 M
Brokerage	\$5 M	\$5 M	
<b>TOTAL</b>	<b>\$5 M</b>	<b>\$5 M</b>	<b>\$3.5 M</b>
Bob's Gross Estate Assuming He Dies First	\$6.75 M		
Bob's Share of Homestead to Judy's Marital Deduction	(\$1.75 M)		
QTIP Marital Gift to Judy	(\$1.5 M)		
<b>MARITAL DEDUCTION</b>	<b>\$3.25 M</b>		
Bob's Taxable Estate	\$3.5 M		
Less Unified Credit Equivalent Amount	(\$3.5 M)		
Bob's Tax	\$0		

**See Section II Part 2 page Nelson 214**

### Bob and Judy – Inter Vivos QTIP Trust Part 2

<b>UPON JUDY'S DEATH</b>			
Homestead	\$3.5 M		
Marital Trust	\$1.5 M		
QTIP Trust from Bob	\$5 M		
Judy's Gross Estate	\$10 M		
Less Unified Credit Equivalent Amount	(\$3.5 M)		
Judy's Taxable Estate	\$6.5 M		
Judy's Tax	\$2.925 M		
Savings Compared to Tenancy by the Entireties	\$1.575 M		
Assets subject to creditors while both married and living			\$0
Assets subject to creditors upon death of first spouse or divorce			\$0 M

**See Section II Part 2 page Nelson 214**

### Comparison of Benefits of Inter Vivos QTIP Trust

	Tenancy by the Entirety Plan	Tax Plan	Winner & New Champion (QTIP Plan)
Technique	T by E	Tax Savings Plan	Funded Inter Vivos QTIP
Securities Protected While Both Living	\$10 M	\$0	\$10 M
Securities Protected Upon Death of 1st Spouse	\$0	\$5 M	\$10 M
Tax Paid Upon Death of Spouse	\$4.5 M	\$2.925 M	\$2.925 M

See Section II Part 2 page Nelson 215

## SEC v. Solow

- **Mrs. Solow retained asset protection lawyer four days after a \$6 million verdict was entered against Mr. Solow.**

*Securities and Exchange Commission v. Jamie L. Solow*, 682 F. Supp. 2d 1312 (S.D. Fla., 2010) (Decided January 14, 2010).

## **SEC v. Solow**

- **Days later, Mr. and Mrs. Solow commenced a series of money-shuffling transactions**
  - Execution of a mortgage on Ft. Laud. residence for a CD to be assigned to Mrs. Solow's Cook Island Trust.
  - Execution of a mortgage on Hillsboro Beach residence in the amount of \$5,261,289.
  - The lender for both mortgages was a Nevis LLC identified in the Cook Island Trust scheme.

## **SEC v. Solow**

- **Mr. Solow claimed he had a "negative net worth."**
- **The District Court found that Mr. Solow's "depleted net worth was the result of a purposeful campaign of asset dissipation" and that "[t]he Solows (and their attorneys) have worked very hard to give their assets an opaque appearance."**

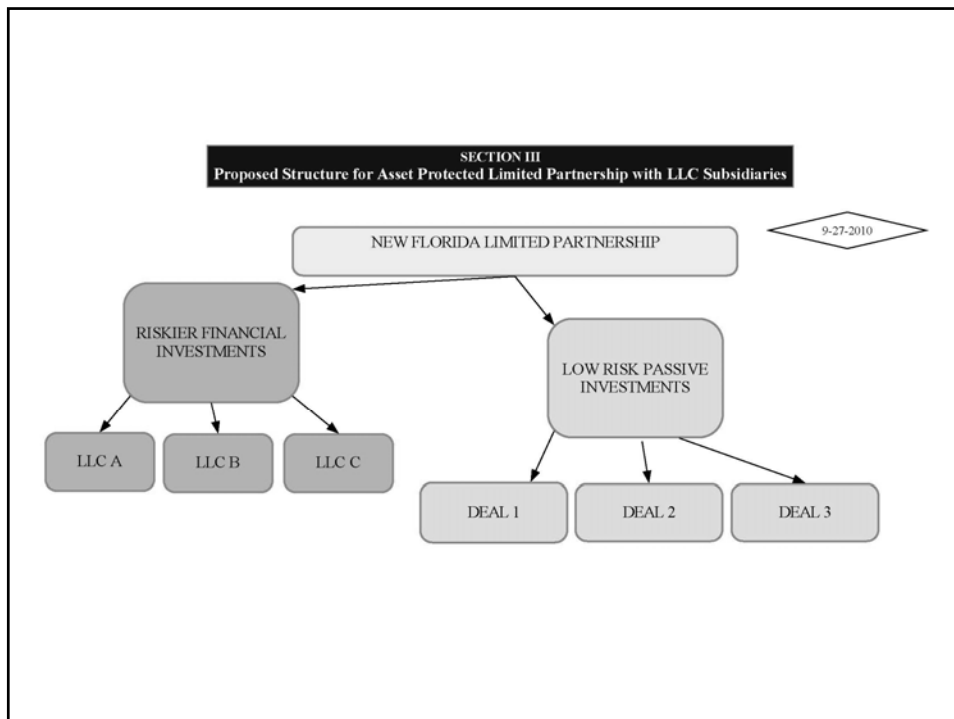
## **SEC v. Solow**

- **The Court held Mr. Solow in contempt.**
- **Mr. Solow was incarcerated on January 25, 2010.**
- **On the Solows' counsel's website, their attorney begs the question: "Have Debtor's prisons returned to the United States?"**

## **SEC v. Solow**

- **Update:** *Case No. 06-81041-CIV-MIDDLEBROOKS/JOHNSON*
- **On June 4, 2010, Mr. Solow was released from incarceration.**
  - **The release was based on Mr. Solow's expression of remorse and pledge to make his best efforts to meet his obligations.**
  - **Mr. Solow promised to make partial payment upon the sale of his Highland Beach Property.**

SECTION III  
**Proposed Structure for Asset  
Protected Limited Partnership  
with LLC Subsidiaries**



PRESENTED TO:  
FICPA: FLORIDA INSTITUTE ON FEDERAL TAXATION CONFERENCE (FIFT)

ORLANDO, FL  
NOVEMBER 5, 2010

NELSON & NELSON, P.A.  
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Thank you!