



Asset Protection Overview

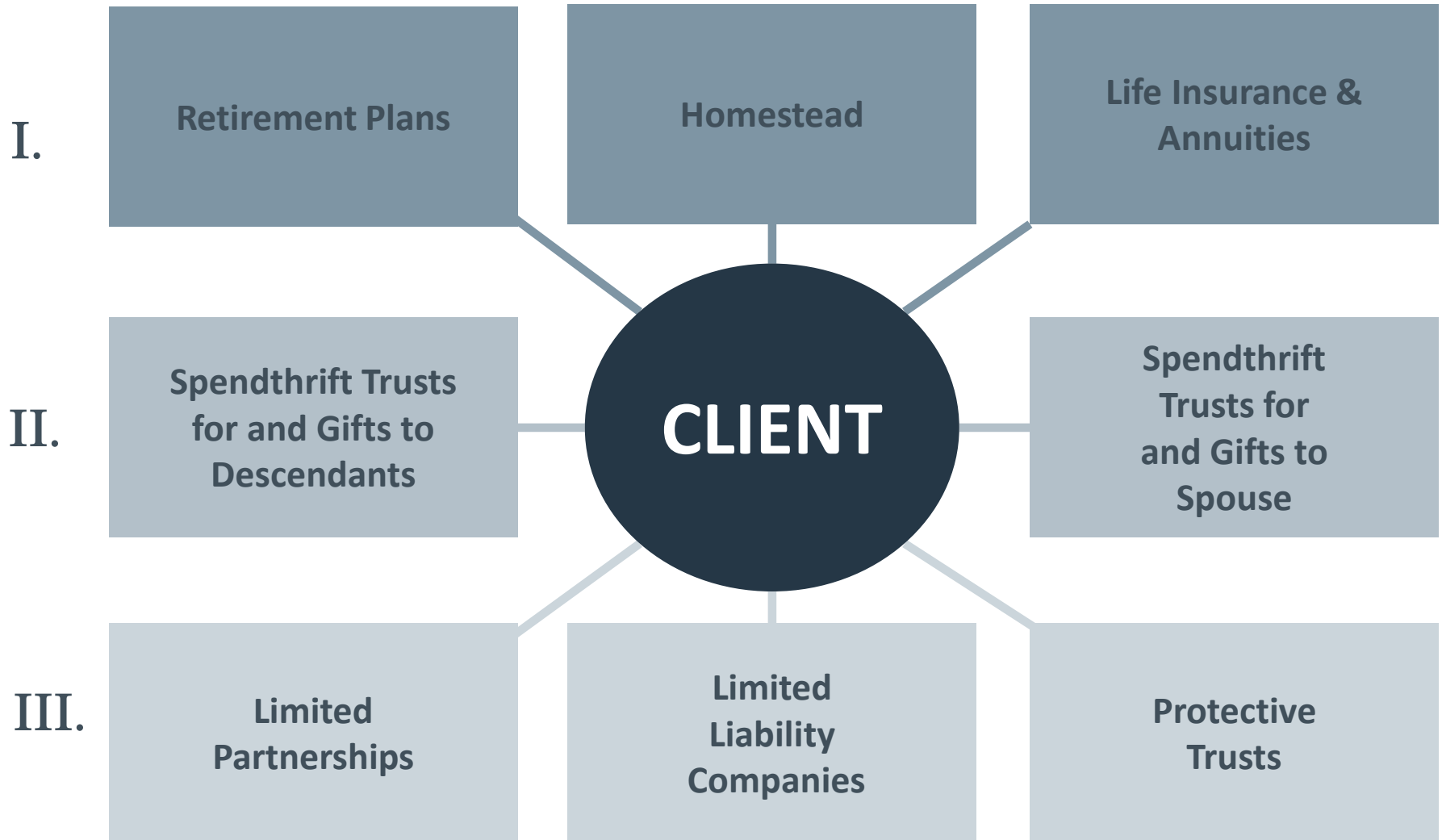
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Methods to Achieve Asset Protection



Creditor Protection: *Fraudulent Transfer Law*

- General rule
 - A gratuitous transfer of property with the actual or constructive INTENT to avoid creditors is fraudulent and may be set aside by creditors
 - Any transfer of assets from nonexempt status to exempt status should be tested to assure that it is not a fraudulent transfer
- Three classes of creditors
 - Present creditor – solvency analysis
 - Potential subsequent creditor – badges of fraud
 - Unknown future creditor

Creditor Protection: *Fraudulent Transfer Law*

(continued)

- Statute of limitations
 - Statute of limitations on fraudulent transfer claims in most states is four years or, if later, within one year of when the transfer could reasonably have been discovered
 - A bankruptcy trustee can have a fraudulent transfer set aside if the transfer is made within two years of bankruptcy – certain transfers to a self-settled trust or similar device subject to a ten-year statute of limitations

Solvency Test

Total value of assets

LESS

Liabilities (including contingent)

LESS

Creditor protected assets (e.g., homestead)

EQUALS

Amount that can be transferred

What is a Spendthrift Trust?

- A spendthrift trust is one in which the beneficiary is precluded or restrained from voluntary or involuntary transfers of trust assets
- In some states, this includes a prohibition on the ability to pledge as collateral any interest in a trust
- The consequences of these types of provisions in trust documents is that the beneficiary's creditors are precluded from reaching trust assets
- In most states, settlors cannot utilize a spendthrift trust to protect assets from the settlor's creditors

What is a Protective Trust?

- Definition
 - The Settlor (the person who transferred assets to the trust) is a beneficiary of the trust; and
 - The assets that the Settlor transferred to the trust are protected from the claims of the Settlor's creditors

Asset Protection Trusts –

Two Very Different Options

- Definition
 - The Settlor (the person who transferred assets to the trust) is a beneficiary of the trust; and
 - The assets that the Settlor transferred to the trust are protected from the claims of the Settlor's creditors
- Domestic
 - Available in 15 states: Alaska (1997), Delaware (1997), Nevada (1999), Rhode Island (1999), Utah (2003), Missouri (2005), South Dakota (2005), Tennessee (2007), Wyoming (2007), New Hampshire (2008), Hawaii (2010), Virginia (2012), Ohio (2013), Mississippi (2014), West Virginia (2016)
 - Also, to a lesser extent, Colorado (1994) and Oklahoma (2004)
- Foreign
 - Available in many foreign countries

Vulnerabilities of Domestic *Protective Trusts*

- Access to trust assets through U.S. court system
- U.S. Constitution
- Availability of punitive damages and attorney's fees

Offshore Asset Protection Trusts

Offer Additional Benefits

- Creditors cannot reach assets through U.S. court system
- U.S. judgments are not enforceable
- Cost of pursuing assets offshore is high; loser-pay systems

Offshore Protective Trusts

Offer Additional Benefits (continued)

- Punitive damages and contingent fee contracts not allowed
- Secrecy and privacy laws prevalent and strictly enforced

When To Settle a Protective Trust

- Before Insolvency
 - Cannot make a fraudulent transfer under state law or bankruptcy law – a 10-year clawback period may apply in bankruptcy
 - A gratuitous transfer of property with the actual or constructive INTENT to avoid creditors is fraudulent
- Before a claim arises
 - Greater distance in time between transfer and claim against assets results in superior protection

Control and Contacts

Less

Asset Protection

More

Asset Protection



Greater Settlor control

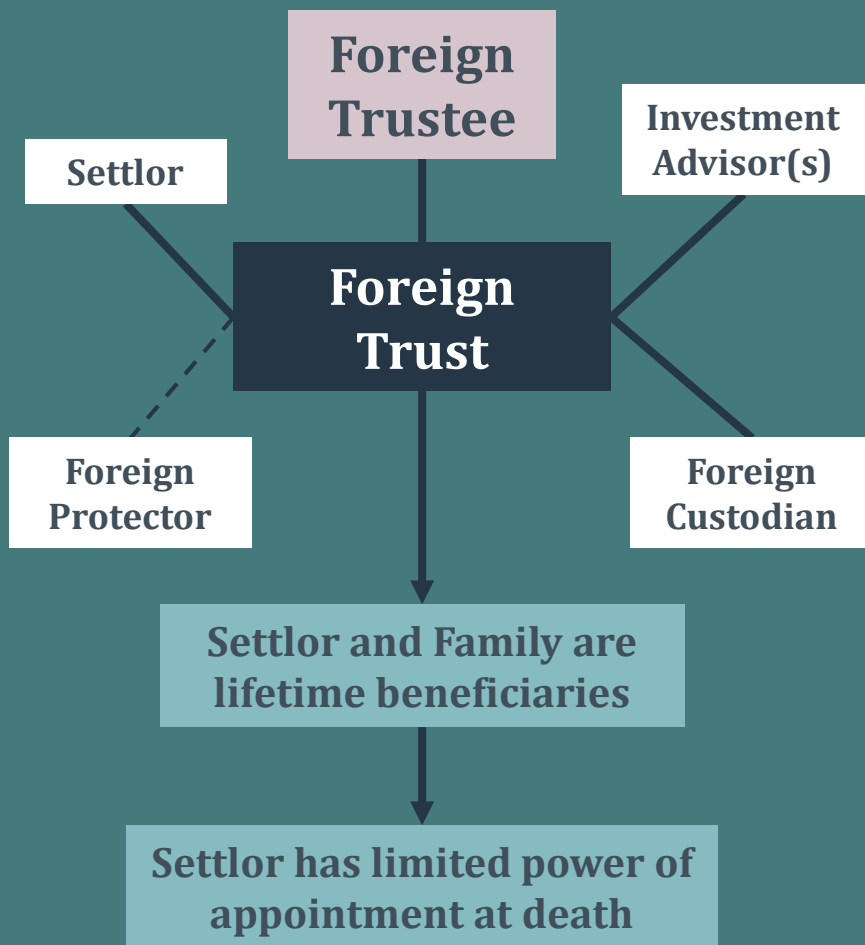
Less Settlor control

More U.S. contacts

Few or no U.S. contacts

Typical Asset Protection Trust Structure

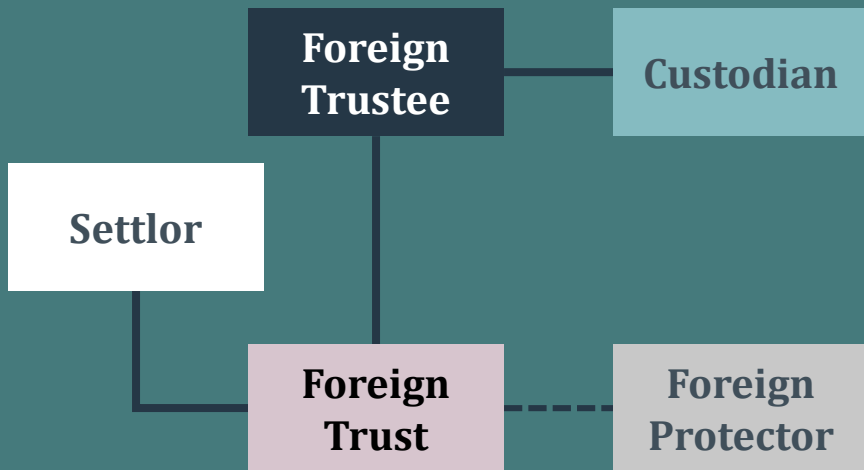
(Foreign)



- Wholly discretionary (rather than ascertainable) distribution standard
- Trustee can add and remove beneficiaries
- Redomiciliation permitted
- Independent investment advice the norm

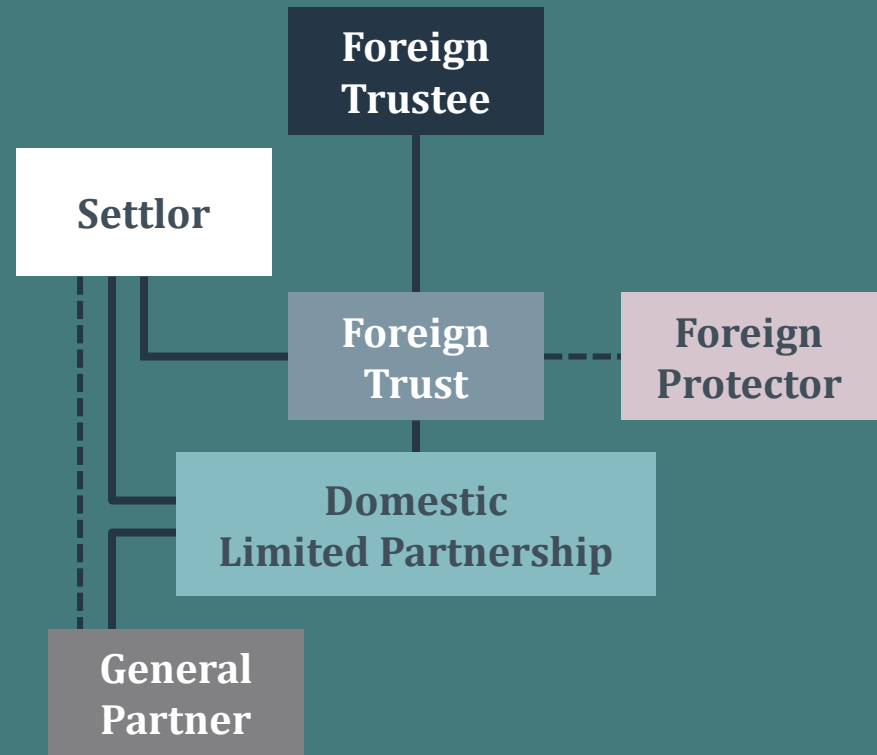
Two Fundamentally Different Offshore Strategies

EXPORT THE ASSETS



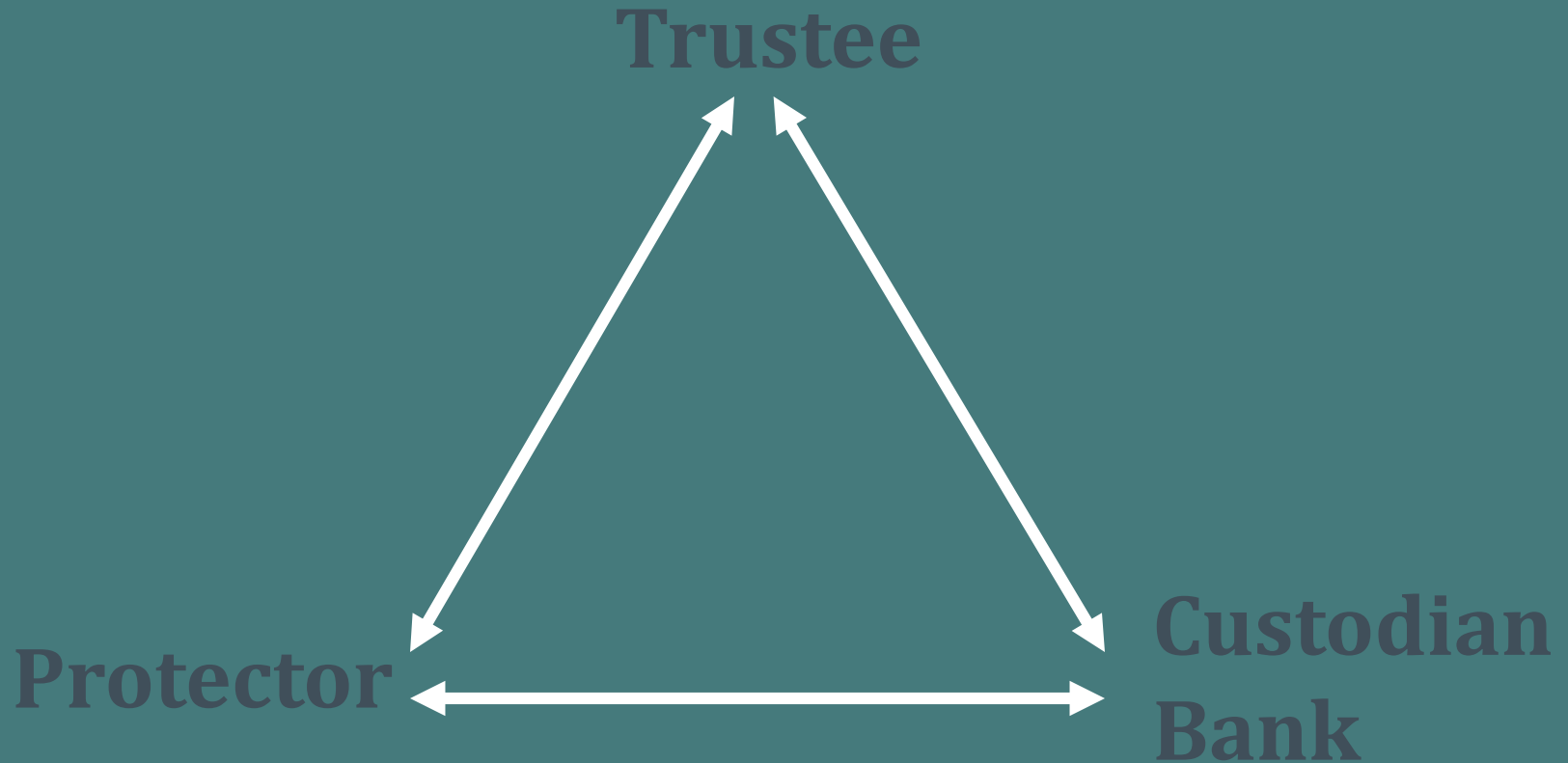
Jurisdictionally Severed

IMPORT THE LAW

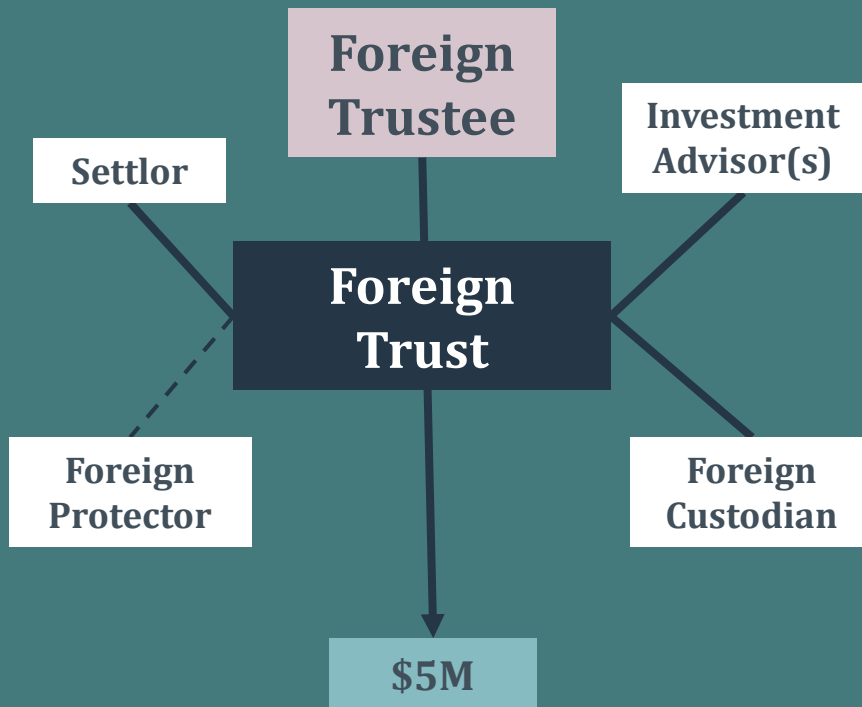


Jurisdictionally Connected

Check and Balance System



Nest Egg Trust



EXAMPLE

- Settlor has \$20M total assets
- Settlor has \$10M investment assets
- Settlor retains \$5M of investment assets personally and funds trust with \$5M
- Investment advice to Settlor and to Trustee may be provided by pre-selected investment advisor
- Contributions to trust are not subject to gift tax
- Settlor is subject to income tax on all earnings of the trust
- Trust assets are includible in settlor's estate for estate tax purposes

Trust Implementation

Selection of Jurisdiction

- Traditional Jurisdictions
 - Jersey
 - Guernsey
 - Liechtenstein
 - Isle of Man
 - Bermuda

Selection of Jurisdiction *(continued)*

- Established “Asset Protection” Jurisdictions
 - Cayman Islands
 - Bahamas
 - Gibraltar
 - Belize

Selection of Jurisdiction *(continued)*

- New “Asset Protection” Jurisdictions
 - Cook Islands
 - Nevis
 - Turks & Caicos
 - Mauritius
 - Niue
 - St. Lucia
 - Antigua

Negotiation of Fees

- Start-up
 - Legal fees
 - Trustee fees
 - Foreign taxes/duties
- On-going
 - Legal fees
 - Accounting fees
 - Trustee fees
 - Protector fees
 - Custodial fees
 - Money management fees
 - Foreign taxes

Taxation – Typically Tax Neutral

- **Capital Gain Tax:** no tax on transfer of appreciated assets when trust is a Grantor Trust (IRC §684)
- **Gift Tax:** gifts can be either complete (gift tax due on transfers) or incomplete (no gift tax due on transfers); incomplete gift requires retention by grantor of special power of appointment
- **Estate Tax:** assets not includible in estate for federal estate tax purposes if there was a completed gift made at time of transfer, but are included if there was an incomplete gift made at time of transfer
- **Income Tax:** taxed as Grantor Trust if Settlor and at least one beneficiary are, or could be, U.S. persons (IRC §679)
 - All items of income, deduction, and credit flow through to Grantor

Primary Foreign Trust

Filing Requirements

- Form 3520: Annual Return to Report Transactions with Foreign Trusts
- Form 3520-A: Annual Information Return of Foreign Trust with U.S. Owner
- Form 1041: U.S. Income Tax Return for Estates and Trusts (prepare as Grantor Trust Information Letter)

Primary Foreign Trust

Filing Requirements (continued)

- FinCEN Form 114: Report of Foreign Bank and Financial Accounts
- Form 709: United States Gift (and Generation-Skipping Transfer) Tax Return *“Disclosure only”*



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