

HOUSE OF REPRESENTATIVES
COMMITTEE ON WAYS AND MEANS

HEARING ON THE TREATMENT
OF CLOSELY-HELD BUSINESSES
IN THE CONTEXT OF TAX REFORM

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Submission by:
STEFAN F. TUCKER
VENABLE LLP
WASHINGTON, DC

PROPOSALS FOR TAX REFORM FOR ENTREPRENEURIAL CLOSELY HELD (AND OTHER) BUSINESSES

There are four basic concepts that I believe would reform the Internal Revenue Code for entrepreneurial closely held (and in fact all) businesses, thereby enabling business owners to concentrate on (i) access to and accretion of capital, (ii) protecting their personal assets from business risks, (iii) protecting the business and personnel and (iv) providing for business succession, and not to expend significant dollars and human capital in dealing with the Internal Revenue Code:

A. Single Tax Regime for All Pass-Through Entities

1. This would apply to any corporation, limited liability company, general partnership or limited partnership.

(a) This would leave the choice of entity to be determined by the entrepreneur, based on state law issues.

(b) There would be a "check-the-box" election available for all entities.

2. This would eliminate traps within the S corporation for the unwary (and even the wary) person:

- Two classes of stock
- Number of shareholders
- Types of shareholders
- Basis and adjusted basis
- Reconciliation of inside and outside basis

3. Anyone who works for the entity and is an owner, irrespective of the percent of ownership, would be subject to withholding, FICA and FUTA, and receive a W-2, not a 1099.

4. The guidance for such pass-through entities would be subchapter K, eliminating the need for subchapter S.

5. There would need to be a time period to move to the single tax regime without adverse tax consequences. (This would be similar to the end of 1986 when C corporations could elect to become S corporations without adverse tax consequences.)

B. Taxable (C) Corporations

1. These entities would be taxable at standard corporate income tax rates on their income, depending on taxable income.

2. There would be a dividends paid deduction for dividends passed through to their shareholders. This is similar to the current taxation of REITs, but without the requisite distribution requirements.

3. The dividends paid deduction would apply only to dividends paid out of the current year's income. To the extent that any such income is retained, the following would occur:

(a) If the retained income is used to acquire tangible assets used in the trade or business within the United States, the cost basis of such tangible assets would be depreciable over 5 years, thus giving an inducement to grow the business within the United States.

(b) If the retained income is used to acquire tangible assets used in the trade or business outside the United States, the cost basis of such tangible assets would be depreciable over the current established lives under the Code.

(c) If the retained income is later distributed, there would be no dividends paid deduction, and such income would be taxed to the shareholders at their individual rates.

C. Simplify the Compensation Rules

1. There would be no reasonable compensation concerns for any pass-through entity, inasmuch as all taxable income would pass through to the entity owners.

2. There would be no "golden parachute" or similar issues for executives of taxable C corporations, leaving concerns about executive compensation in the hands of the shareholders, where such concerns should be.

D. The maximum individual income tax and the maximum corporate income tax rates should be put on a par, so that there is no inclination to game one form or the other.

**A Continuing Battle:
FLPs and FLLCs vs.
S CORPORATIONS**

**Stefan F. Tucker, Esq.
Venable LLP
Washington, D.C.**

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I. S CORPORATION/LLC COMPARISON

	S Corporation	LLC
A. STRUCTURE		
Organizational structure	<ul style="list-style-type: none"> • A corporation may be treated as an S corporation only if it is a small business corporation • The corporation must be a domestic corporation that: <ol style="list-style-type: none"> 1. is not ineligible 2. does not have more than 100 SHs 3. does not have any SH that is other than an individual, estate, certain trusts or charitable organizations 4. does not have any SH that is a non-resident alien; and 5. does not have more than one class of stock (can have differences in voting rights) 	<ul style="list-style-type: none"> • A limited liability company which has more than one member is a state law entity that is taxed as a partnership unless it makes an election otherwise • Any organizational requirements would be imposed under state law. For purposes of this chart, it is assumed that it is taxed as a partnership
Management structure	<ul style="list-style-type: none"> • Management is periodically elected by the owners • State law usually provides that the board of directors is to govern the affairs of a corporation 	<ul style="list-style-type: none"> • Limited only by the owner's imagination (can be managed by managers or members, or both) • Can have representative management in a manager-managed LLC with elected managers • Managers do not have to stand for election • Managers may not have to be natural persons • Manager does not have to be a member • Can allocate different functions of the LLC to different managers • May cause member to become subject to self-employment tax

	S Corporation	LLC
Scope of managerial authority	<ul style="list-style-type: none"> • Function of state law 	<ul style="list-style-type: none"> • Function of state law, but manager's authority is generally limited to that set forth in the operating agreement
Formalities / operational requirements	<ul style="list-style-type: none"> • New corporation must file S election with IRS within 2½ months after the earliest of the following: (i) the corporation has shareholders, (ii) acquires assets, or (iii) begins doing business. • Same state law requirements as a C corporation • Must have officers and directors • Annual meeting typically required (held at a time designated in the bylaws) – this is where shareholders vote to hire and fire directors and to vote on fundamental changes • Shareholder votes require unanimous written consent or a meeting that satisfies notice, quorum, and voting requirements • Officers are selected and removed by the Directors • Director action requires unanimous written consent or a meeting that satisfies notice, quorum, and voting requirements • Books, records of account, and minutes from shareholder meetings must be kept as part of the normal course of business • Annual reporting required 	<ul style="list-style-type: none"> • Few legal requirements

	S Corporation	LLC
Limitations on types of owners	<ul style="list-style-type: none"> • Nonresident aliens and entities other than certain trusts, estates, and tax-exempt shareholders may <u>not</u> own interests 	<ul style="list-style-type: none"> • There are no limitations on who may be a member or manager
Number of owners	<ul style="list-style-type: none"> • No more than 100 shareholders 	<ul style="list-style-type: none"> • One-member LLC allowed, but disregarded for Federal tax purposes. At least 2 members required to be taxed as partnership
Classes of ownership	<ul style="list-style-type: none"> • Limited to one class of stock 	<ul style="list-style-type: none"> • No limit
Subsidiaries	<ul style="list-style-type: none"> • Wholly-owned corporation may elect QSub status • Wholly-owned LLC will be disregarded 	<ul style="list-style-type: none"> • Wholly-owned LLC will be disregarded
Governing documents	<ul style="list-style-type: none"> • Articles of Incorporation, bylaws, shareholder agreement 	<ul style="list-style-type: none"> • Articles of Organization or Certificate of Formation and Operating Agreement or LLC Agreement
Persons entitled to participate in ordinary decisions	<ul style="list-style-type: none"> • Directors and officers 	<ul style="list-style-type: none"> • Members or managers, depending on state law and the operating agreement
Persons with authority to bind the organization	<ul style="list-style-type: none"> • Officers 	<ul style="list-style-type: none"> • Members (member-managed LLC) or managers (manager-managed LLC), depending on state law and the operating agreement
Permissible participation in management	<ul style="list-style-type: none"> • Shareholders participate in management by electing directors 	<ul style="list-style-type: none"> • Members or managers may participate in management, depending on state law and the operating agreement

B. TAXATION

Taxation of the owner	<ul style="list-style-type: none"> • Each shareholder takes into account a <u>pro rata</u> share of the S corporation's items of income, deduction, loss and credit in the shareholder's taxable year in which the S corporation's taxable year ends • The character of any such item is determined at the entity level • The determination of 	<ul style="list-style-type: none"> • Single member (disregarded entity) – net income from a single member LLC would be subject to self-employment tax unless one of the exceptions to taxation applied • Multiple Member – taxed as a partnership, and each member takes into account the allocated share of the LLC's items of income, deduction, loss and credit in the member's taxable year in which the LLC's taxable year ends
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	S Corporation	LLC
	<p>whether income from the discharge of an S corporation's debt is excluded from a shareholder's gross income because of insolvency or bankruptcy (under Section 108) is also determined at the entity level</p> <ul style="list-style-type: none"> • Generally, the shareholders are directly taxed on the income of a corporation, whether distributed to them or retained by the corporation, and distributions are generally not taxed 	<ul style="list-style-type: none"> • The character of any such item is determined at the entity level • However, the determination of whether income from the discharge of an LLC's debt is excluded from a member's gross income because of bankruptcy or insolvency (under Section 108) is determined at the member level • Generally, the members are directly taxed on the income of an LLC, whether distributed to them or retained by the LLC, and distributions are generally not taxed
Taxation of the organization	<ul style="list-style-type: none"> • Pass through • Generally not subject to tax, but an S corp. that was a C corp. and has C corp. earnings and profits must pay tax on excessive passive investment income and net recognized built-in gains • S corp. must file an information return – taxable income generally computed as though the S corp. is an individual, but any item that may have different tax treatment for different shareholders must be separately stated 	<ul style="list-style-type: none"> • Pass through • Single member – disregarded for tax purposes • Any other LLC – subject to partnership taxation under Subchapter K unless a different classification is elected • LLC must file an information return – taxable income generally computed as though the LLC is an individual, but any item that may have different tax treatment for different members must be separately stated
Ability of owners to use losses of the organization	<ul style="list-style-type: none"> • Loss deductions are limited to the shareholder's stock basis and loans made by the shareholder to the corporation • Losses are deductible by the shareholders in proportion 	<ul style="list-style-type: none"> • Single member – owner may use losses to offset other income, except as limited by at-risk rules and passive activity rules • Any other LLC – member may use losses of the LLC to offset other income as limited by basis, at risk

	S Corporation	LLC
	<p>to their shares of ownership</p> <ul style="list-style-type: none"> • Shareholder must satisfy at risk rules and passive activity loss rules • Shareholder may carry forward disallowed losses, which are treated as incurred by the S corporation in the next taxable year • Disallowed losses and deductions are personal to the shareholder and cannot be transferred 	<p>rules, and passive activity loss rules</p> <ul style="list-style-type: none"> • A member interest is not treated as a “limited partner” interest for purposes of applying the passive activity loss rules
Assets that may be owned	<ul style="list-style-type: none"> • If an S corp. has earnings and profits from a prior year in which it was a C corp., and passive income in excess of 25% gross receipts, then its excessive passive income is subject to a 35% penalty tax. If the condition exists for 3 years, S corp. election terminates at the beginning of the 4th year 	<ul style="list-style-type: none"> • An LLC is expressly authorized to hold real or personal property
Computation of basis	<ul style="list-style-type: none"> • Basis is initially the amount of cash contributed and the basis of property contributed • Increased by contributions to the corporation and loans to the corporation, BUT no increase in basis for debts of the corporation to any creditor, even if the shareholder is liable on the debt (however, the shareholder can take out a loan and then loan to the S corporation to get a basis increase) 	<ul style="list-style-type: none"> • Basis is initially the amount of cash contributed and the basis of property contributed • Increased by contributions • Increased by member’s share of the LLC’s debts • No basis for contribution of promissory note until payments made on note (question as to whether this is applicable for the contribution of a personal promissory note)
Dealer property	<ul style="list-style-type: none"> • An S corp. is better suited to insulate owners from the 	<ul style="list-style-type: none"> • By contrast, an LLC (like a partnership) is sometimes treated as an

	S Corporation	LLC
	taint caused by dealer property since the treatment of a corporation as an entity distinct from its shareholders is firmly entrenched in the law	aggregate of its partners rather than a separate entity
Sale of an interest in the organization	<ul style="list-style-type: none"> • Generally stock sales are treated as giving rise to capital gains and losses • Beginning in 2013, generally, a 3.8% Medicare investment tax will be imposed on the income earned on the disposition of an interest in an S corporation to the extent of the net gain that would be taken into account by the transferor if all property of the entity were sold for its FMV immediately before the disposition of such interest 	<ul style="list-style-type: none"> • The sale of an interest in an LLC is generally treated as the sale of a capital asset • The sale of withdrawing member's interest will create a technical termination for the LLC, if 50% or more of the interest in the LLC is sold within a 12-month period. • Beginning in 2013, generally, a 3.8% Medicare investment tax will be imposed on the income earned on the disposition of an interest in an LLC to the extent of the net gain that would be taken into account by the transferor if all property of the entity were sold for its FMV immediately before the disposition of such interest
Sale of substantially all assets	<ul style="list-style-type: none"> • Gain or loss realized by the S corporation will pass through to its shareholders. Gain will increase a shareholder's basis so that no gain should be realized with respect to the receipt of sale proceeds by the shareholder. • Potential for two levels of tax, if any of the sold property is subject to built-in gains. • Generally, gain is eligible for the installment method 	<ul style="list-style-type: none"> • Gain or loss realized by the LLC will pass through and be taxed to its members. A member's basis in its interest is increased by this gain, so that the distribution of sales proceeds is not subject to a second level of tax. • Generally, gain from the sale is eligible for the installment method
Disposition of ownership interest at a loss	<ul style="list-style-type: none"> • May yield ordinary loss under Section 1244 	<ul style="list-style-type: none"> • Generally yields a capital loss

	S Corporation	LLC
Allocations	<ul style="list-style-type: none"> • Allocations of income, loss, deduction, or credit must be <u>pro rata</u> among shareholders • The profits and losses are allocated on a strict per share, per day basis 	<ul style="list-style-type: none"> • Allocations may be made in any manner agreed upon by the members, so long as the allocations have substantial economic effect or are otherwise in accordance with the members' interests in the LLC
Contributions of property	<ul style="list-style-type: none"> • A contribution of property is taxable to the shareholder unless control tests are met and liabilities do not exceed the adjusted basis of the transferred property • Receipt of stock for services is taxable as compensation 	<ul style="list-style-type: none"> • Generally tax free, unless "disguised sale" or member relieved of debt in excess of basis • Receipt of membership interest for services may be taxable as compensation for services rendered or may be treated as a "profits interest" or "promote interest" ultimately taxable as capital gain
Contributed property with a built-in gain or loss	<ul style="list-style-type: none"> • Unrecognized gain or loss from contributed property is shared by the shareholders on a per day, per share basis 	<ul style="list-style-type: none"> • Built-in gain or loss must be allocated to the contributing member (who has the book/tax disparity)
Distributions of property	<ul style="list-style-type: none"> • Must be proportionate to stock ownership • A distribution of appreciated property will generally cause gain to be recognized at the corporate level (gain is recognized as if the property were sold for its fair market value on the date of distribution); such gain is shared <u>pro rata</u> among shareholders • The corporation does not recognize any realized loss for distributions of loss property • If an S corporation has no earnings and profits (from existence as a C Corp), amounts received by shareholders in distributions are tax free to the extent of the shareholder's basis; 	<ul style="list-style-type: none"> • Need not be proportionate to LLC ownership. • Generally tax free, unless member is relieved of debt in excess of basis in partnership interest or money received by member is in excess of adjusted basis of membership interest or is a "disguised sale"

	S Corporation	LLC
	amounts received in excess of basis are treated as gain from the sale or exchange of an asset	
Tax-free reorganization	<ul style="list-style-type: none"> Tax-free corporate reorganization provisions apply 	<ul style="list-style-type: none"> Tax-free corporate reorganization provisions do not apply
C. ESTATE PLANNING		
Owner's default right to payment on death	<ul style="list-style-type: none"> The death of a shareholder does not require the corporation to repurchase the deceased shareholder's shares 	<ul style="list-style-type: none"> On the death of a member, if the business of the LLC is continued, the legal representative of the deceased member may have the value of the member's interest at the time of dissociation, or, if later, at the expiration of the term
Basis adjustment under Section 754	<ul style="list-style-type: none"> Not applicable 	<ul style="list-style-type: none"> If a 754 election is not made, the sale of an appreciated LLC asset by the LLC causes the LLC, and therefore successor member (or estate of the deceased member), to recognize gain on the sale, even though the successor member or estate has a stepped up outside basis in his/her/its LLC interests If a 754 election is made, the basis of the LLC's assets will be adjusted with respect to the successor member (or estate of the deceased member) thereby avoiding gain (on the difference between the old/deceased member's basis and the new member's stepped up basis) on the sale of the LLC asset The outside basis for the new member/estate may be stepped down if the value of the asset has fallen below its basis; the 754 election would thus prevent the new member/estate from taking a loss on the sale of the asset
Non-tax reasons for entity ownership of real	<ul style="list-style-type: none"> Non-voting stock can be used to shift ownership among family members without shifting control 	<ul style="list-style-type: none"> LLCs (like FLPs) allow the owner to control the management of real estate and establish a plan for succession, no matter who the members are

	S Corporation	LLC
estate		<ul style="list-style-type: none"> Entities, like LLCs, protect the real estate from creditor claims that are made against any of the members or against any other real estate owned by a member in a different entity
Continuity of life / period of duration	<ul style="list-style-type: none"> A corporation has perpetual duration unless limited in the Articles of Incorporation 	<ul style="list-style-type: none"> LLCs typically will have continuity of life in that the personal representative of the last remaining members may elect to continue the LLC

II. BUSINESS USE OF FLPs AND FLLCs

Real estate owners use entities such as Family Limited Partnerships (“FLPs”) and Family Limited Liability Companies (“FLLCs”) for several reasons, the most important of which are not tax related. These entities allow the owner to continue to control the management of the real estate and establish a plan for the succession of that management, no matter who the limited partners or members may be, which is imperative, given the specialized nature of real estate management and development. Furthermore, the entities protect the real estate from creditor claims that are made against any of the entity’s owners or against any other real estate the individual owns, which presumably are held in separate entities. Finally, these entities provide many non-tax estate planning benefits, such as probate avoidance.

A. Retain Control over the Business.

1. The use of an FLP or FLLC allows older family members to transfer their property interests to younger family members while still retaining control over the transferred assets by acting as (i) the general partner (“GP”) of an FLP (preferably through ownership of a separate limited liability entity), or (ii) the Manager of an FLLC.

a. Some older family members may not be ready to hand over control of the transferred property to younger family members.

b. Some younger family members may not be ready to assume control of the transferred property, either (i) because they are not old enough or (ii) because they lack the business knowledge and skills necessary for managing the transferred property.

2. The older family members will still be able to control the assets of the FLP or FLLC as the GP or Manager, even as they continue to transfer their interests in the FLP or FLLC through annual gift giving.

B. Provide Continuous Ownership of Property within the Family Unit.

1. The use of an FLP or FLLC allows the older family members to restrict the younger family members’ ability to sell or transfer his or her interests.

2. Examples of these restrictions are:
 - a. Rights of first refusal;
 - b. Buy-sell provisions; and
 - c. Prohibitions on selling or transferring FLP or FLLC interests in a manner that is disruptive to (i) the entity or (ii) the family.

3. In all events, the entity agreement should provide that the other owners and the entity should have the first right to purchase the interest, if it is to be sold.

4. Older family members can continue to manage the assets while they adopt a plan for the succession of (i) ownership, (ii) management and (iii) control of the assets, regardless of who the limited partners or members may be. This is especially important when dealing with the specialized nature of real estate management and development.

C. Protect the Owners from Liability and Creditors of the Entity.

1. Owners of FLP and FLLC interests will be protected from the liability or creditors of the entity unless:

- a. The owners are personally responsible for the act or omission that resulted in the liability;
 - b. The owners personally guaranteed the debts of the FLP or FLLC;
- or
- c. The owners are liable as owners or operators under environmental law.

2. The use of more than one entity to hold ownership interests in real estate should be considered for the following reasons:

a. Claims against an entity's property (such as environmental claims) will only extend to the assets held in that entity, to the general partner's assets (if it's a partnership), or, if the general partner is a corporation or other entity, to such entity's assets.

b. Accordingly, if assets are held in different entities, the claims against one entity will not "taint" the assets in a separate entity.

c. As a result of the general partner's liability, consideration should be given to using a separate entity general partner for each partnership, since the entity general partner's interest in the other partnerships could be reached because of the claims against one partnership's assets.

D. Protect the Assets of the Entity from the Owners' Liability and Creditors.

1. FLPs and FLLCs protect the transferred property from creditor claims that are made against any of the entity's owners or against any other property the individual owns, which presumably is held in separate entities.

2. FLP and FLLC assets generally cannot be directly attached to satisfy the personal debts of the partners or members. The owners' creditors are typically left to the following three options:

a. **Charging Order:** A charging order is the court-ordered remedy of a creditor if the creditor is unable to force a partner or member to assign his or her interest. A charging order is neither an assignment nor an attachment. It is a court order that directs the entity to make any distributions to the owner's creditors that it otherwise would have made to the owner. Under many limited liability company statutes, a charging order is the only remedy a creditor possesses.

b. **Assignment of partnership or LLC interest to a creditor:** This occurs when a creditor is able to force an owner to assign his or her interest in the entity to the creditor. The creditor could become a partner or member (and, if a general partner interest or Manager interest is so assigned, control the entity) unless the entity's agreement provides otherwise.

c. **Power to sell interest:** If a creditor can establish that the claim may never be paid, a court may consider an order forcing the sale of the debtor's entity interest, although such an order is rare since a sale could cause a material adverse disruption to the entity. Even if such an order is obtained, the interest will have little value to an outside party, especially since the purchaser will merely become an assignee.

3. The use of more than one entity to hold ownership interests in real estate should be considered.

a. Creating more than one entity and choosing different jurisdictions for each entity will make it much more difficult on the part of a creditor to reach all of the assets, so that the creditor may decide to attempt to reach the interests in the entities closest to the creditor or to seek to reach only certain entities, leaving the rest undisturbed.

b. A creditor may be more likely to settle with a debtor who owns most of his or her assets in one or multiple FLPs or FLLCs in one or multiple jurisdictions.

c. However, there may be an adverse income tax consequence of creating more than one entity and holding different assets in different entities.

4. **Owner's Right to Receive "Fair Value" upon Withdrawal or Dissolution.**

a. Notwithstanding the right of an owner to receive fair value upon liquidation, the ambiguity of the term "fair value" may well provide protection against creditors. For creditor purposes, the agreement determines what rights the owners have to withdraw and liquidate his or her interest, and, further, the value such owner will get for his or her interest upon withdrawal.

b. The valuation of the interest to which an owner is entitled is binding on creditors as well. As a result, the agreement should address two goals: (i) making the entity interest as unattractive as possible to a creditor by imposing a method of valuing the interest that will result in the lowest value possible, and (ii) establishing a value that the family can afford to pay when buying the owner out of the entity. Generally, the basis on which value can be determined is either "going concern" value, under which the entity is valued as a ongoing business with no disruptions, including the element of goodwill, or "liquidation" value, which is the value the assets would bring if the owners were to sell all of the assets at one time for whatever they could obtain, without any element of goodwill. Obviously, valuing the interests by using the liquidation value method will result in a lower value. Furthermore, the agreement will either give the owner a pro rata percent of the entity assets, as valued either on a going concern or liquidation basis, or an amount after discounting the pro rata percent of the assets for the owner's minority interest in the entity. Again, the second alternative will result in a lower value for both creditor attachment purposes (thereby forcing the creditor to look elsewhere for repayment) and family repurchase purposes.

c. The disadvantage of these valuation alternatives is that they cannot be used only for creditor protection purposes if they are to withstand court scrutiny. As a result, there may be reasons that a owner wants to withdraw that have nothing to do with financial issues, but the entity must (in the absence of new negotiations) pay the owner this lower value, thereby forcing the owner to remain in the entity so that he or she may recoup his or her investment.

5. Convert Real Property to Personalty.

a. Being able to change the situs of personal property can also have creditor and tax advantages, although it is recommended that there be some ties to the jurisdiction selected so that the choice of jurisdiction is not perceived as shopping for the most favorable situs for creditor, probate or tax purposes.

b. As a result, it is possible to change the situs of real property by placing it into a partnership and moving the situs to a more favorable jurisdiction for probate (at least to the extent of moving the situs from the location of real estate to the decedent's domicile), state transfer tax and creditor purposes.

E. Litigation Avoidance.

1. The use of FLPs and FLLCs allow families to negotiate with each other to determine a means of managing the property without intra-family litigation. If the family members are beyond negotiation, then the entity agreement allows the parents/older generation a means of imposing a system of management on future owners.

2. The Partnership Agreement of an FLP or the Operating Agreement of an FLLC will typically include a provision requiring that arbitration will be used to settle family disputes over the entity's assets.

3. The operative Agreements can also include a provision that requires the losing party to pay legal fees and costs incurred by the winning party during litigation or arbitration.

F. Probate Avoidance.

1. The use of FLPs and FLLCs may allow for probate avoidance.

a. A partnership or LLC interest is personalty; as a result, the situs of the entity may be established in any jurisdiction, including a foreign jurisdiction.

b. Real property not held in an entity is probated in the place where it is located.

c. Personal property, however, is subject to probate in the decedent's domicile and may even avoid probate all together, if the personal property is converted into a non-probate asset, such as transferring it to a revocable trust or into joint ownership.

d. As personalty, the real estate may, depending on state law, be subject to state estate tax in the descendant's state of residence and not in the state where the real estate is located.

G. More Advantageous Annual Gifting by Parents.

1. Giving undivided interests in real property directly to younger family members, compared to giving interests in an FLP or FLLC, is a simpler method of transfer. However, there are far greater disadvantages to direct giving.

a. As a tenant in common, the donee's interest will be subject to his creditors, who will at the least have the right to compel the sale of that tenant in common interest, and may have the right to compel the sale of the entire property, in order to satisfy their claims.

b. The property interest can be gifted or devised to any person, thereby leaving the remaining co-tenants with no control over their future co-owners.

c. Such interests will pass through probate upon each co-tenant's death with the resulting delay or other impediments in conveyancing.

H. More Flexible than Trusts.

1. The older family member will have greater management flexibility as a GP of an FLP or a Manager of an FLLC than they would if they were the trustee of a trust holding assets for the benefit of younger family members.

2. An FLP or FLLC is much easier to modify than a trust.

3. Transferring property to a trust would not provide for lack of control and lack of marketability discounts.

4. Trustees are held to a much higher standard (prudent person) than a GP in an FLP or a Manager in an FLLC.

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