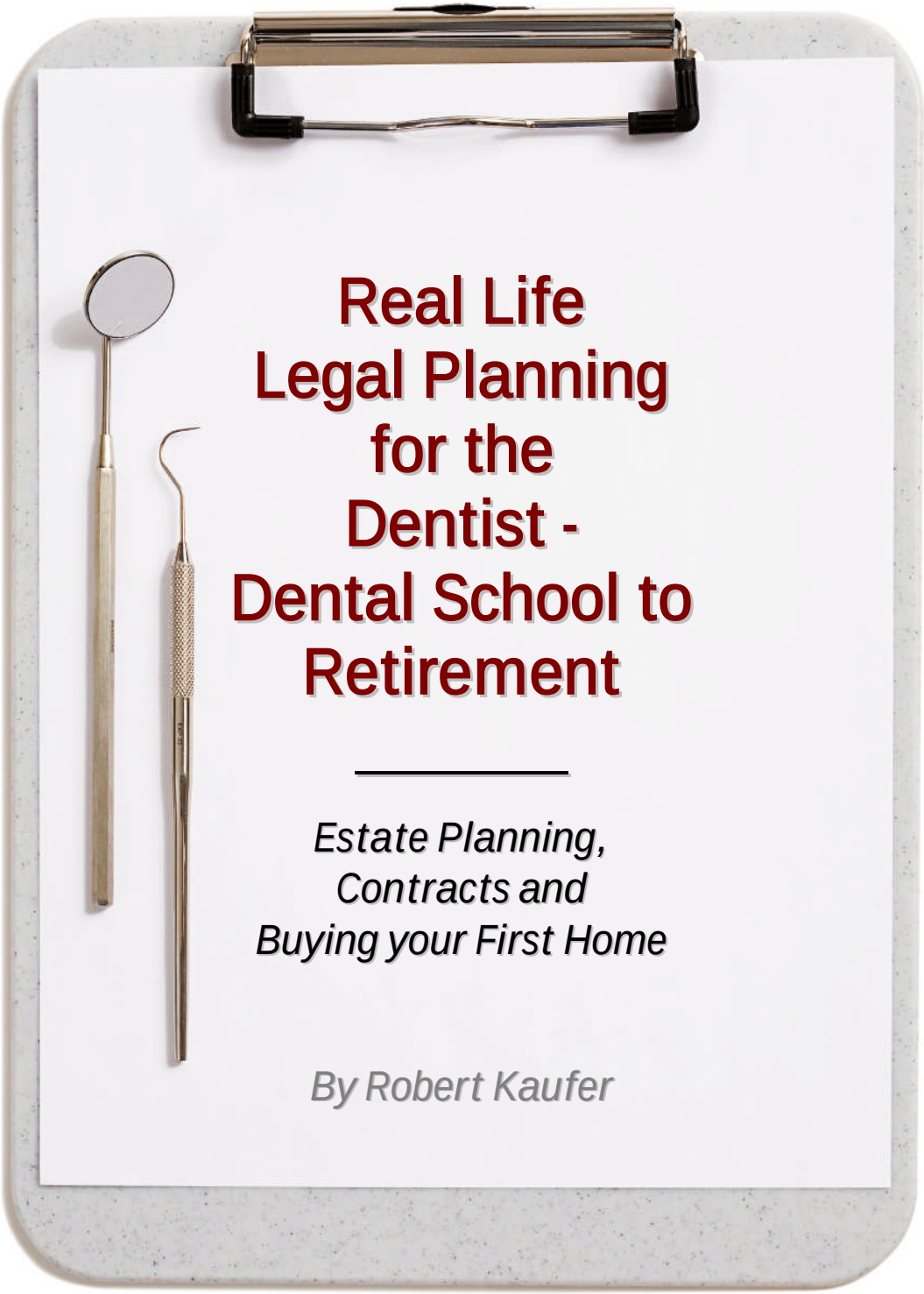

Real Life Legal Planning for the Dentist - Dental School to Retirement

Estate Planning, Contracts and Buying your First Home

By Robert Kaufer

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Acknowledgments

I would most like to thank my wife Stephanie and our two daughters, Mickelle and Mackenna for reminding me why I have been so diligent in my own estate planning and bringing that diligence to help my clients.

Thank You

I would like to extend the following special thank you to…

…Mark Bonnett who I have worked closely with and continue to be impressed with his professionalism, knowledge, character and integrity.

…Phil Richards and the relationship that started as a business alliance and has grown into a personal friendship I treasure Phil is a savvy businessman and a personal mentor.

…Marshall Gifford who shows an incredible amount of knowledge in as a financial advisor specializing in the medical profession and who has helped me grow in my practice as a person and professional.

Forward By Phillip C. Richards

At last, a work that allows dentists without legal training to understand not only the legal issues that will affect their lives, but serves as a GPS system for navigating throughout their entire career, the entire map of giving and sharing.

Robert Kaufer, because of his coaching/teaching experience has created an understandable work that comes close to enabling one to "do it yourself". While that was not the intention, this work allows dentists to get a head start and process ones thoughts and intentions before meeting with counsel.

Bob's work with dentists and or business owners like myself uniquely qualify him for this assignment and his work demonstrates that he was up to the task. Bravo!

Disclaimer

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About the Author

Robert Kaufer has been practicing law for 17 years in the areas of estate planning, asset protection, contract review and various other business law matters. Prior to becoming an attorney he was a high school teacher and college baseball coach.

He received his bachelor's degree in education from the University of Wisconsin at River falls, his Juris Doctorate (JD) from the University of Hamline School of law and a Master of Business Administration (MBA) from the University of St. Thomas.

Robert is licensed to practice law and maintains a presence in Minnesota, Wisconsin and Arizona and currently resides in Saint Paul, Minnesota with his wife Stephanie and daughters Mickelle and Mackenna.

Preface

This book is divided into three sections. Each one addresses a separate planning stage in the “legal life” of the dentist. I call it the “legal life” because by the very nature of the professional choices and activities, the dentist needs more legal planning than the non dentist.

Contract review, asset protection, estate tax minimization, probate avoidance and multiple real estate purchases are just some of the areas of law that affect the dentist and his or her family. After seventeen years of representing dental professionals in my law practice I have found the following stages to coincide pretty closely with the legal needs of most dentists.

The timetables listed here are not hard and fast rules but rather suggestions. The dentist may be in more than one planning stage at a time or skip one all together.

Part One Basic Planning - Dental School - Year 2

Basic planning to protect the family.

Part Two Advanced Estate Planning with Basic Asset Protection - Year 3 - 7

More advanced planning to meet the needs of the dentist's growing net-worth.

Part Three Advanced Asset Protection Planning Year 8 and Beyond

The advanced planning the dentist deserves to protect what they have worked so hard for in their professional and personal life.

Part One

Part One - Basic Planning Dental School - Year 2

In this stage most dentists have a large amount of debt but not a great deal of cash flow. This doesn't mean, however, that they do not face legal issues. With small children, having a basic will that deals with guardianship and money management if both parents die is crucial.

In addition, receiving the first contract can be daunting. In many cases, this contract is anywhere from ten to twenty pages in length and written in a foreign language (Legalese).

Another common occurrence is the purchase of the first home. Again, the dentist and their spouse are presented with a fairly lengthy contract and told to sign at the end.

In part one, I teach the dentist about the above topics and how to protect themselves and their family at this juncture in their professional and personal life. I will also introduce the concept of

having a “Legal Advisor”. This person is as important as the Financial Advisor.

Whether in this stage or beyond, it is a good starting place and foundation to learn about legal planning for the dentist.

1

The Dentist's "Legal Advisor" – A New and Needed Resource

Many dentists will be affected by various areas of the law throughout the course of their life. From estate and tax planning, contracts, and real estate to the possibility of lawsuits, dentists have ongoing needs for legal consultation. Sometimes a legal issue will require an attorney to perform work, while in others a question might be answered in a simple 5 minute phone conversation or email.

Traditionally, dentists will have an attorney on retainer. This means they either pay the attorney ahead of time and the money is held in escrow to be used against future work or they receive a bill for services rendered. Whenever they contact the attorney, they have to pay for the time. The vast majority of law firms bill out at more than $300.00 - $400.00 per hour and in 6 minute increments. That means if the dentist talks to a lawyer on the phone for two minutes, they will receive a bill for $40.00. If

you dare to talk 7 minutes, the bill goes to $80.00. I think you get the picture. It is no wonder that attorneys as a profession can have a bad name and many people that need legal advice, whether simple or complex, are unwilling to call an attorney.

This paradigm is broken and harms both the client and legal profession. The dentist needs access to an attorney without always having to open up their wallet. It may be for a quick question, to get a referral, or to have work performed. This access should not be restricted by the threat of the legal bill.

The concept of a “Legal Advisor” (LA) is relatively new and a much needed addition to the dental community. The LA is an attorney but does not always act in the traditional attorney capacity.

An LA acts in a similar way as a financial advisor. With both an LA and a financial advisor, the dentist develops a relationship that allows them to feel confident any time they pick up the phone and call with a question. They know they will get trusted help and only pay if they sell a product or invest resources.

A competent LA allows dentists and their families to have a contact in the legal world, without the fear of being billed by the minute for any phone

call or email. . An LA will listen to the facts and circumstances of the issue(s) faced by the dentist and family, help sort out the problem if one exists, perform legal work in their areas of focus when appropriate, and/or make a referral to an attorney that can help the dentist at a fair price.

2

Basic Estate Planning Catastrophe Plan – The Will and Healthcare Directive

- What is estate planning?
- Should I plan my estate?
- I am early in my medical career, will my plan change and can I change it?
- What documents do I need?

These are some of the questions I hear most frequently in my law practice when representing dentists.

Estate Planning Defined

Estate Planning is the organized preparation of your financial assets, personal property, and real estate for management during your lifetime, whether in good health or under a disability, along with its disposition upon your death.

You Have a Plan Even If You Haven't Planned

If the dentist has not completed an estate plan before death, the state her or she lives in has a plan for them. The plan is called the "Laws of Intestacy" (Intestacy or intestate means dying without a legal will) and they may not like the outcome.

Their property will generally pass to heirs as defined by state law. These laws are based strictly upon blood relation and marriage and they vary by state. Most divide the estate among the decedent's spouse, children, and parents. If none of these remain living, the property descends to siblings or other relatives.

The following are three different examples of state intestacy laws.

Minnesota's Laws of Intestacy

Any part of a Minnesota decedent's estate not effectively disposed of by a Will is distributed to their spouse, if they have one, as shown in Box 2-1. (*Beware, this can be confusing.)*

Box 2-1

MN Stat. §524.2-102 SHARE OF THE SPOUSE.
The intestate share of a decedent's surviving spouse is:

1. the entire intestate estate if:
   - i no descendant of the decedent survives the decedent; or
   - ii all of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent;
2. the first $150,000, plus one-half of any balance of the intestate estate, if all of the decedent's surviving descendants are also descendants of the surviving spouse and the surviving spouse has one or more surviving descendants who are not descendants of the decedent, or if one or more of the decedent's surviving descendants are not descendants of the surviving spouse.

Generally the spouse gets everything if all the children are also the spouse's and the spouse has no other children. If either the deceased or the spouse has children from a different relationship, then the first $150,000.00 goes to the spouse, along with 50 percent of the rest.

Any part of the intestate estate not passing to the surviving spouse as indicated in Box 2-1, or the entire intestate estate if there is no surviving spouse, shall be distributed as shown in Box 2-2.

Box 2-2

MN Stat. §524.2-103 SHARE OF HEIRS OTHER THAN SURVIVING SPOUSE.
Any part of the intestate estate not passing to the decedent's surviving spouse under §524.2-102, or the entire intestate estate if there is no surviving spouse, passes in the following order to the individuals designated below who survive the decedent:

(1) to the decedent's descendants by representation;
(2) if there is no surviving descendant, to the decedent's parents equally if both survive, or to the surviving parent;
(3) if there is no surviving descendant or parent, to the descendants of the decedent's parents or either of them by representation;
(4) if there is no surviving descendant, parent, or descendant of a parent, but the decedent is survived by one or more grandparents or descendants of grandparents, half of the estate passes to the decedent's paternal grandparents equally if both survive, or to the surviving paternal grandparent, or to the descendants of the decedent's paternal grandparents or either of them if both are deceased, the descendants taking by representation; and the other half passes to the decedent's maternal relatives in the same manner; but if there is no surviving grandparent or descendant of a grandparent on either the paternal or the maternal side, the entire estate passes to the decedent's relatives on the other side in the same manner as the half;
(5) if there is no surviving descendant, parent, descendant of a parent, grandparent, or descendant of a grandparent, to the next of kin in equal degree, except that when there are two or more collateral kindred in equal degree claiming through different ancestors, those who claim through the nearest ancestor shall take to the exclusion of those claiming through an ancestor more remote.

Any amount not going to the spouse is distributed as follows:

- all to children, if none then;
- all to grandchildren, if none then;
- all to parents, if none then;
- all to siblings, if none then;
- all to nephews and nieces, if none then;
- all to grandparents and so on.

If there is no taker under any of the above provisions, the intestate estate passes by default ("escheats") to the state of Minnesota.

Wisconsin's Laws of Intestacy

Any part of a Wisconsin decedent's estate not effectively disposed of by a Will is distributed to their spouse, if they have one, as shown in Box 2-3.

Box 2-3

WI Stat. §852.01 Basic rules for intestate succession.

(1) WHO ARE HEIRS. Except as modified by the decedent's will under s. 852.10 (1), any part of the net estate of a decedent that is not disposed of by will passes to the decedent's surviving heirs as follows:

(a) To the spouse:

1. If there are no surviving issue of the decedent, or if the surviving issue are all issue of the surviving spouse and the decedent, the entire estate.
2. If there are surviving issue one or more of whom are not issue of the surviving spouse, one-half of decedent's property other than the following property:
   a. The decedent's interest in marital property.
   b. The decedent's interest in property held equally and exclusively with the surviving spouse as tenants in common.

(b) To the issue, per stirpes, the share of the estate not passing to the spouse under par. (a), or the entire estate if there is no surviving spouse.

(c) If there is no surviving spouse or issue, to the parents.

(d) If there is no surviving spouse, issue or parent, to the brothers and sisters and the issue of any deceased brother or sister per stirpes.

(f) If there is no surviving spouse, issue, parent or issue of a parent, to the grandparents and their issue as follows:

1. One-half to the maternal grandparents equally if both survive, or to the surviving maternal grandparent; if both maternal grandparents are deceased, to the issue of the maternal grandparents or either of them, per stirpes.
2. One-half to the paternal relations in the same manner as to the maternal relations under subd. 1.
3. If either the maternal side or the paternal side has no surviving grandparent or issue of a grandparent, the entire estate to the decedent's relatives on the other side.

Wisconsin is similar to Minnesota except if the deceased has any children, not of the current spouse, then the Spouse gets:

- all Marital Property;
- all property held in Tenants in Common with the deceased; and
- one half of the remainder.

Arizona's Laws of Intestacy

Arizona Laws are shown in Boxes 2-4 and 2-5.

Box 2-4

AZ Stat. §14-2101. Intestate estate; modification by will

A. Any part of a decedent's estate not effectively disposed of by will passes by intestate succession to the decedent's heirs as prescribed in this chapter, except as modified by the decedent's will.
B. A decedent by will may expressly exclude or limit the right of a person or class to succeed to property of the decedent that passes by intestate succession. If that person or a member of that class survives the decedent, the share of the decedent's intestate estate to which that person or class would have succeeded passes as if that person or each member of that class had disclaimed that person's intestate share.

AZ Stat. §14-2102. Intestate share of surviving spouse

The following part of the intestate estate, as to both separate property and the one-half of community property that belongs to the decedent, passes to the surviving spouse:

1. If there is no surviving issue or if there are surviving issue all of whom are issue of the surviving spouse also, the entire intestate estate.
2. If there are surviving issue one or more of whom are not issue of the surviving spouse, one-half of the intestate separate property and no interest in the one-half of the community property that belonged to the decedent.

Box 2-5

AZ Stat. § 14-2103. Heirs other than surviving spouse; share in estate

Any part of the intestate estate not passing to the decedent's surviving spouse under section 14-2102 or the entire intestate estate if there is no surviving spouse passes in the following order to the following persons who survive the decedent:

1. To the decedent's descendants by representation.
2. If there is no surviving descendant, to the decedent's parents equally if both survive or to the surviving parent.
3. If there is no surviving descendant or parent, to the descendants of the decedent's parents or either of them by representation.
4. If there is no surviving descendant, parent, or descendant of a parent, but the decedent is survived by one or more grandparents or descendants of grandparents, half of the estate passes to the decedent's paternal grandparents equally if both survive or to the surviving paternal grandparent or the descendants of the decedent's paternal grandparents or either of them if both are deceased with the descendants taking by representation. The other half passes to the decedent's maternal relatives in the same manner. If there is no surviving grandparent or descendant of a grandparent on either the paternal or the maternal side, the entire estate passes to the decedent's relatives on the other side in the same manner as the half.

The two biggest problems with relying on the laws of intestacy are:

- the dentist will not have a say in who gets physical custody of minor children; and
- children get ALL of their inheritance at either the age of eighteen or twenty-one, depending on state law.

Both of these scenarios could be disastrous to the physical, mental, and financial health of the children. Imagine the children being raised by the least favorite brother in law. Now imagine the same

brother in law also has control of the children's entire estate. Finally, imagine children getting control of all life insurance proceeds when they turn age eighteen. If this scenario does not sound good, then it is advisable for the dentist to complete an estate plan as soon as there are minor children.

An estate plan can be as simple as a will, or it may be more complex and consist of several additional components. These might include a series of trusts, limited liability companies, medical directives, powers of attorney, and gifting strategies designed to avoid probate, manage assets during periods of disability, and minimize or eliminate estate taxes, all while protecting assets from unreasonable creditors.

In chapter five and six, I will discuss and recommend the more advanced estate planning strategies of revocable living trusts and irrevocable life insurance trusts. At this stage of the dentist's life and career, however, I recommend the basic last will and testament.

By completing a will, the dentist takes control and is able to:

- make sure property goes to who its intended;
- make sure minor children are cared for by the right people; and
- make sure children have access to the estate but not control over it until they are old

enough to handle it. Inheritance should be a constructive and not destructive force.

This will give the dentist all of the protection they need against the catastrophe of dentist and spouse both dying at a price that will not cripple current finances.

In addition to the basic will, I also recommend a healthcare directive.

Health Care Directive

This document is known by many names (Health Care Power of Attorney, Living Will, or Advance Medical Directive), but the effect is the same. It is a component of an estate plan that has nothing to do with property. It allows for addressing and managing aspects of health care planning. Usually, depending on state laws, one or more individuals, ("health care agents") can be named to make health care decisions for a person that is incapacitated.

In addition to naming heath care agent(s), a health care directive can allow for specific health care instructions. Within these instructions, wishes on health care and medical treatment can be stated. Some of the most common subjects addressed are the use of life sustaining measures, funeral and burial requests, and organ donation.

The recent legal battle in Florida involving Terri Schiavo is the most glaring example of why you should have a Health Care Directive. Ms. Schiavo did not have a document concerning her health care wishes when she suffered a heart attack in 1990.

As a result of the heart attack she was left in a persistent vegetative state. A long legal battle ensued that pitted her husband against her parents. Her parents effectively, through the legal process, kept her alive for 13 years against her husband's wishes and what her husband said were her wishes. Because she did not have a Health Care Directive, no one knew what she wanted for sure. The courts finally, after a long battle, sided with the husband and she was disconnected from life support. She died a short time later.

If a catastrophic illness or accident occurs, a person could be kept alive for an extended period without a valid health care directive. Even if the situation would rise to the level of the Schiavo case, creating a health care directive will ensure beliefs and wishes will be met and prevent possible disputes and turmoil.

The following link provides for healthcare directive forms for all fifty states that you can download for free.

http://www.caringinfo.org/stateaddownload

3

Dental Contracts

As dental school nears an end, the dentist will be presented with one or more employment contracts. Receiving this contract can be a highly anticipated event that is part of an exciting time. It may also be the most nerve-racking event to date for a new dentist, because, once signed, the dentist is bound by its terms. Understanding the contract's basic elements allows the dentist to better evaluate their job offers.

This chapter is not to replace the contract review by an attorney but to enhance it. Having a better understanding of the dental contract prior to contacting an attorney makes the time with the attorney more understandable and efficient.

When a contract is signed, the terms will control most, if not all, aspects of working life. A bad contract and work environment can have work/life spill over. When work goes bad, it can have a very serious impact on the home life.

While I will cover most, if not all, of the important provisions the new dentist will find in a contract, I can't recommend strongly enough to have an attorney review any agreement BEFORE signing.

A good attorney will be able to tell you:

- what the provisions mean;
- whether they should or should not be included; and
- what provisions are not in the contract that should be.

A review of the contract helps guard against the perfect opportunity turning into a bad situation. Paying a small fee to an attorney now can save you tens of thousands of dollars later if the deal goes bad. Not only might the dentist be liable for any damages to the employer if the employment does not work out as planned, but also they will have to pay their own attorney fees and possibly the employer's.

This chapter is divided into two sections. Section one covers the most common terms and provisions included in the first contract with a plain English explanation. Section two addresses some important items the dentist should consider when negotiating the contract.

Common Terms and Provisions

In the first employment contract, the following common terms and provisions will most likely be included:

- parties to the agreement;
- term of employment and termination;
- employment status and scope of work;
- restrictive covenants;
- compensation, bonuses and fringe benefits;
- malpractice insurance and "tail coverage"; and
- scope of employment and other related issues.

1. Parties - The contract must identify the legal name of all the parties. If either party is a legal entity such as a partnership or a corporation, this should be stated in the contract. This is an important consideration as this will factor into the contract's interpretation and enforcement should it come to that.

2. Term of Employment and Termination - Most dental employment contracts are for one or two-year terms and may state the contract will automatically renew at the end of each term. In most cases, when a term is listed, both parties are bound for that term and may not terminate the contract without potentially being liable for

damages.

With that said, most contracts provide events for the parties to terminate the agreement. Generally, this termination is either with cause or without cause.

"With cause" generally means the contract is terminated due to some act or omission by the dentist,. This area of the contract is often one-sided, providing no events of cause by the employer.

Generally, these events allow for immediate termination by the employer:

- loss of license to practice medicine;
- not passing specialty board tests if applicable;
- failure to meet initial qualifications for employment as agreed upon in the contract;
- loss of hospital privileges;
- loss of malpractice insurance;
- abuse of drugs or alcohol;
- conviction of a felony, theft, or other act of dishonesty;
- dentist’s bankruptcy or permanent disability.

The simple notice provision is the most common “without cause” termination provision. This provision enables the employer to terminate the

contract for no stated reason by providing written notice in advance. The notice period is usually 30 to 60 days. Reciprocal (fair) agreements will allow the dentist to do the same.

The dentist will have to balance this termination length with their individual situation. Usually, the longer the notice period, the better it is for the dentist if it is the employer doing the terminating. On the other hand, if it is the dentist terminating the agreement, they may want to get out as fast as possible.

3. Employment status - This section defines a dentist's status as an employee, independent contractor, or owner. The dentist's tax burden will be directly affected by this classification so it is important to understand what each of these means.

4. Restrictive covenants – A restrictive covenant attempts to limit the dentist and his or her activities during the term of the contract and/or after they have left the employer's employment. The three most common restrictive covenants are:

   - Non-competition provision - A non-competition provision typically prevents a dentist from practicing within a defined geographic area for a certain period of time after the termination of the doctor's

employment, regardless of which party terminated the employment. Generally the more specialized the dentist's practice, the greater the geographic area that will be enforced. This is a very important part of the agreement and the validity of it will depend on the laws of the state the dentist is working in. Non-competition agreements are void per se in some states, while other states analyze the provision under a reasonableness test as to the geographic limitations and time duration.

Under a reasonableness test, a court, depending on the legal precedent of the state, will take one of two actions. In states such as Minnesota, the court applies the "blue pencil" rule to an unreasonable restriction and rewrites the clause to make it acceptable. This represents an attempt to salvage restrictive covenants whenever possible. In other states, such as Wisconsin, a provision that is deemed unreasonable will not be saved by a court. It will be ruled invalid. If the contract contains a non competition provision, the dentist will definitely want an attorney opinion as to the potential ramifications in their particular state.

- Non-solicitation provisions – The agreement may have a non-solicitation provision along with, or instead of, the non-competition clause. In a non-solicitation

provision, the employee may not be limited where he or she can practice, but they may be restricted from trying to bring patients and/or staff with them to their new employment practice. Like the non-competition provision, this may or may not be valid and will depend on state laws. Note that this provision relates to direct solicitation by the dentist and not independent free choice by the patients.

- Confidentiality provisions – This type of provision protects the employer's confidential information and trade secrets. Courts generally agree an employer is entitled to protect its confidential business information and trade secrets. This may even be the case without a specific provision written into the contract, depending on federal and state laws

5. Compensation, bonuses, and other Benefits

- Base compensation – Base compensation will usually be stated in one of three ways:
    - a guaranteed salary;
    - a variable salary based on production; or
    - a combination of the two. The dentist will want to make sure their verbal understanding of compensation matches up with what is in the agreement because, ultimately, the

written agreement will control the relationship.

- Bonus – If any of the compensation is to be in the form of a bonus in addition to the base salary, it will need to be defined in this section. This bonus is usually based on production and collections above a certain threshold. After achieving a certain level of production, the bonus can be from 20 – 40 percent of collections, depending on the area of specialty and geographic location. It is important to have clear language on what is included in calculating revenues and what the accounting period is.

- Other benefits – Other benefits can include:
    - health insurance (family coverage);
    - dental insurance;
    - short term disability insurance – (It is important to speak with a Financial Advisor about coverage in this area.);
    - long term disability insurance;
    - continuing education costs;
    - license fees;
    - journals;
    - paid vacation; and
    - PTO (paid time off, such as sick days).

6. Malpractice insurance and “tail coverage”

- Malpractice insurance - The consideration here is:

    - who pays for the malpractice insurance;
    - the type – “occurance” or “claims made” policy; and
    - policy limits (Coverage of $1,000,000 per incident/$3,000,000 in the aggregate is common. However, $2,000,000 per incident/$4,000,000 in the aggregate is becoming more prevalent in the market. Similar to a bonus, this number may depend on area of specialty and geographic location.).

- Tail coverage - There are two main types of professional malpractice insurance. One covers you when the act occurs, an “occurrence policy,” and the other must be in force when the act occurs AND the claim is made, a “claims made policy”. Tail insurance is a companion for a claims made policy and is for the period of years that the statute of limitations would apply for a particular act of malpractice. Tail insurance needs to be in force if the dentist ever discontinues malpractice insurance, usually when he or she

leaves an employer, and the insurance through a new employer does not cover prior acts. When considering a contract, dentists should know who will pay for tail coverage and make sure the agreement indicates this. Employers often pay for tail coverage, sometimes splitting the cost with the dentist. If the employer does not pay for tail coverage, the dentist may want to determine what the cost would be and get this cost addressed in the compensation portion of the contract.

7. Scope of employment and other related issues – Some other provisions that the dentist may find in the contract may be:

   - employer responsibilities - These might include items such as providing office space, support staff, supplies, billing services, etc. Any expectations by the dentist should be included in the agreement.
   - Employee Responsibilities - Expected workload and patient volume is sometimes included in this section, but this is not frequent. A good contract will provide at least some detail about the dentist's typical schedule and duties and expectations about call duties.

     If the dentist is expecting special considerations such as part time work, a

specific schedule or clinic, or certain parameters about call, it is important to spell this out in the agreement.

A contract that simply says the dentist will "perform the usual duties of a dentist" doesn't give either party much information about the expectations of the other party.

- Is other outside employment permitted by the dentist? If the dentist anticipates "moonlighting," it should be negotiated and included in the agreement. In one contract I reviewed, there was a "Loyalty" provision. It said the dentist was to work for the Corporation and may not engage in the practice of medicine except pursuant to this agreement. It went on to say that if the dentist received any fees or income from professional services, such as speaking or publishing, they belonged to the Corporation. In addition, they needed to get prior approval for such activity from the Corporation, even though the Corporation would receive all fees.
- Who owns the dentist's Research and Writing, the employee or the employer?
- Are there any processes for dispute resolution such as arbitration? Who pays attorney fees, etc. Many non-compete clauses require the dentist to pay the employer's attorney fees. There usually is not a reciprocal provision if

the dentist has to enforce a contract provision.

Negotiating the Contract

A fair and balanced agreement will support both the interests of the dentist and employer. If the dentist is presented with a one-sided agreement, that may signal the mindset of the employer in other matters. The following items should be considered when discussing the contract with the employer.

- Notice Provisions. –
  - without cause - decide based on the facts and circumstances of the agreement and position whether a short or long notice provision for termination is better.
  - with cause - consider adding a cure provision if one does not exist. A cure provision would allow the dentist a period of time to fix the event that has occurred so the employer cannot terminate him or her.
- Letter of Intent – If the initial offer is verbal, request it in a letter of intent. This helps to bridge from verbal offer to written contract if there is a time gap before receiving the contract. This can also help to ensure that the dentist and employer are on the same page with respect to the offer before the contract is

drafted. Also, I recommend against any physical moves or declining other offers based on a verbal offer or letter of intent, because it will, in most cases, not be binding on the employer.

- Decide ahead of time what is really important in the negotiations and what might be considered throw away items. If the dentist can come up with several potential negotiating points, it will be easier to dismiss the ones that the dentist considers throw away and push for the items that are important.

4

Buying The First Home

As a dentist, real estate will likely play an important role throughout their career. Whether a main residence, vacation property (see Chapter Eight on Legacy Property Planning), or an investment property, there could be multiple purchases and sales during their lifetime. The first encounter with real estate transactions may begin with the purchase of the first home.

Most real estate transactions occur without the aid of an attorney on both the buyer and seller side, and most close without an issue. I will leave it up the dentist to make the decision of retaining an attorney to assist after learning the pros and cons. Keep in mind though with potentially hundreds of thousands of dollars at stake in each transaction spending a few hundred dollars to have someone truly look out for your interests is not a bad idea.

Conflict of Interest

Perhaps the most important reason to consider representation by an attorney is conflicting

interests of the parties. In a typical real estate transaction, there is a listing real estate agent/broker, usually, but not always, a “buyers” real estate agent/broker, and a mortgage lender. None of these parties can provide legal counsel advice. The purchase of real estate is ripe with conflict. In this process, the buyer's and seller's interests often are at odds with each other. Worse, yet, these real estate professionals only get paid if the deal closes, which can also cause conflict. A buyer does not have anyone truly representing them unless they retain a professional for a fee that is not contingent on the deal closing. A lawyer retained by the buyer will serve only the buyer’s best interests.

If the dentist decides to retain an attorney to assist, here are some of the benefits they may be afforded.

- Review of the Purchase Agreement Before Signing It - The purchase agreement is the most important document in the transaction. It is the offer to the seller and becomes a binding legal contract if accepted. Once signed by the seller, the buyer cannot unilaterally change their mind and get out of the transaction. If the buyer does want out, they will most likely be in for a legal fight.

  Standard printed forms are usually used for this purchase agreement and an attorney can

be helpful in explaining the forms and making changes and additions to reflect the buyer's desires.

If the dentist does want to sign the purchase agreement without having an attorney, it may be advisable to have the following language inserted as a contingency:

"SUBJECT TO THE APPROVAL OF THE BUYER'S ATTORNEY FOR THE PARTIES WITHIN _____ DAYS" (usually 7 or 10 days). This will give some time to have it reviewed with an out. Without such contingency language in the purchase agreement, the buyer will be bound by the terms of the contract.

- Other Contingencies - There are other contingencies the buyer may want in the purchase agreement as well. Contingencies are a potential out for the buyer, provisions that are added to the purchase agreement under which the buyer will or won't buy the house. Some common contingencies are:

    - Financing Contingency - The buyer is not accepted for a mortgage.
    - Inspection Contingency - The house has major structural defects that are discovered through the inspection.

- Clear Title Contingency - There are liens or other charges or claims on the property.
- Appraisal Contingency - The house appraisal comes in lower than the price you offered to pay.
- Sale of Current Home Contingency – A current house can't be sold.

Depending on the type and nature of the contingency, the seller may want to continue to offer and show the property to other buyers. In these cases, if another offer comes in, the seller can ask the buyer to lift one, or all, of the contingencies. If they are unable or unwilling to lift the contingencies, the seller can accept the other offer, and the purchase agreement would be void.

- Arbitration – In the purchase agreement or as an addendum, the buyer may have the choice to sign an arbitration agreement.

  Arbitration is a process for settling disputes out of court. An arbitrator, not a judge, will hear all sides of a dispute and make a decision. Like litigation, it has its pros and cons. It is usually less expensive and quicker than a court case, which is good, but it is usually final, with the buyer waiving a great deal of rights. Generally, the loser will have no right of

appeal if the arbitrator made a mistake. On the other hand, arbitration is more expensive than a small claims court, which the buyer could handle themselves if the dispute is small. A small claims court judgment can also be appealed if there was a mistake.

Signing or not signing won't affect the purchase agreement, and if not signed, the buyer and seller can always agree to arbitrate later. This is another area for an attorney to advise as to what is best.

- Seller's Title - When the purchase agreement is signed and all contingencies are lifted, the seller's title (ownership) will need to be reviewed. This review will come to the buyer most likely in the form of a "title opinion" or "title commitment". At this point, it can be a very good idea to have an attorney review the title information and to give an opinion as to whether title insurance is available for this transaction and, if so, what type of policy should be purchased. When title insurance is available, the buyer will most likely be required to purchase this insurance on behalf of the lender. This does not protect the buyer. The buyer should also buy a buyer's policy. Ask if a combo policy is available. It will protect both the buyer and lender and is less

expensive than two individual policies.

There is no clear cut answer as to whether an attorney should be retained for this process. It will be a business decision with a risk/cost assessment. Is the risk of something going wrong greater or less than the $500.00 - $1,000.00 that will be paid in attorney fees?

Part Two

Advanced Estate Planning with Basic Asset Protection and Estate Tax Minimization / Elimination - Year 3 - 7

By this time in the legal life of the dentist, they are beginning to pay down debt and increase net-worth. It is time to move from the basic plan completed a few years earlier to more advanced estate planning in order to protect what they have worked so hard to achieve.

This usually means upgrading from a basic will to a revocable living trust. This strategy allows the avoidance of probate upon death, minimization of estate taxes, and access to some basic asset protection strategies.

For dentists, I usually suggest, in addition to the revocable living rrust, an irrevocable life insurance trust (ILIT) to hold large life insurance policies. This strategy allows all of the protection benefits for the family but none of the estate taxes that could occur.

5

Advanced Estate Planning – Revocable Living Trusts

Revocable Living Trust (RLT) - The Form

The revocable living trust is the tool I recommend to dentists for their estate planning once they have reached this stage of their legal life. The last will and testament is perfect, with respect to cost and content, when a dentist is younger, but, by this stage of the dentist's life, they are beginning to move into a more complicated set of circumstances with respect to assets and life events.

The following are legal areas of concern for many dentists:

- Asset Protection – The RLT is the basic foundation for more advanced asset protection planning. (Discussed in depth in Chapter Seven) dentists can be a greater target for lawsuits compared to non dentists.

The extent of the asset protection planning a dentist does is up to their individual risk tolerance, but they should have at the least the bare minimum.

- Probate Avoidance – Probate is an unnecessary time loss and expense for a family upon death and can easily be avoided by choosing the RLT over the Will.

- Financial Planning for Incapacity – A will does nothing for incapacity planning. If a person becomes disabled in their lifetime and owns assets in their name alone, they will most likely need to have a financial guardian appointed by a court to manage their affairs. This emotional and costly court proceeding can easily be avoided by choosing the RLT.

- Financial Privacy – The dentist will continue to work hard for their estate. It is no one's business but theirs and the RLT will assist in keeping it that way during life and after death. The trust document, in most cases, is not filed anywhere and never becomes public record.

The revocable living trust is a separate entity(ies) from the dentist and spouse.

The dentist, who is the creator of the trust (Grantor), is typically also the trustee (person in

control) and the primary beneficiary (in most cases with the spouse and minor children). The dentist, as trustee, owns and manages property for the beneficiaries of the trust (the family).

Basic Differences between the "Will" and the "Revocable Living Trust" (RLT) - One of the primary features of the RLT is as a probate avoidance tool. It avoids probate, because the deceased does not own any assets in his or her name when they die, assuming the trust was properly funded. All property and assets are owned in the trust for the family's benefit.

Probate Defined - Probate is a court procedure to oversee the transfer of assets owned solely by one person at their death with no beneficiary designation. Most people believe if they have a will, they avoid probate, and this is not true.

HAVING A WILL DOES NOT AVOID PROBATE. A WILL PROVIDES THE DIRECTIONS AS TO WHO GETS THE PROPERTY AND WHO WILL HANDLE THE ESTATE.

A probate needs to occur because the only legal signatory, the person legally able to transact business on the assets, is deceased. The only way a new legal signatory can be named is by the court.

In Minnesota, the average attorney fees associated with a probate are between –four and six thousand dollars.. In other parts of the country, they can be much higher. This cost is per probate per state. If both spouses each individually own property there would be a probate upon both deaths. Also, if property is owned out of state, such as a Minnesota resident owning a vacation property elsewhere, then there would also be a probate in the state where that property is located.

Along with the cost, there is also a time factor associated with a probate. Most probates average from 8 – 14 months following the death of the decedent. In some cases, however, they can drag on for years.

Pre-death administration differences - The "Will" - There are very few administrative issues with a will pre-death. In general, the dentist and spouse work with an attorney, make the substantive/content decisions, and sign the documents.

The wills are then put in a safe place (safe deposit box, fireproof box, or home safe) and hopefully not used for a long time. They may make beneficiary designation changes based on the attorney's advice and have them periodically reviewed.

For the most part, creating a will is a simple procedure, as the work comes later, in the form of a probate upon one or both spouse's deaths.

The "Revocable Living Trust" - The RLT has more pre-death administration. Generally, the dentist and spouse work with the attorney, make the substantive/content decisions, and sign the documents.

At this time, the pre-death administration begins. The attorney and dentist/spouse create a project plan to transfer (re-title) probate eligible property to the trusts and change beneficiary designations. In effect, the clients are doing a quasi probate during their lifetimes to make it easier on the surviving family members. The clients must also remember to title future additions of assets/property correctly into the trust. Any property that is missed may have to go through probate.

If the dentist or spouse does become incapacitated during their lifetime, the successor trustee (usually the well spouse) continues managing property for the benefit of the entire family. No financial guardianship court proceeding is needed.

Post-death administration differences - The "Will" - Here is where the main administration comes in for a will. The decedent's family will meet with the attorney, who initiates a probate (Court Proceeding that averages eight to fourteen months,

and often goes longer. Every document and record is of public record. The personal representative nominated in the Will is appointed by the court and he/she:

- collects all assets;
- pays all valid debts;
- files all appropriate tax returns and pays any state and or federal estate taxes;
- closes the Probate proceeding;
- pays final costs. (Attorney Fees four to six thousand, or more, depending on the state); and
- distributes remaining assets of Estate.

The most common complaints I hear regarding probate are the time and cost, along with the public nature of the proceeding. Meanwhile, the family is trying to move on with life and take care of any minor children.

The "Revocable Living Trust" - With the revocable living trust, most of the administration work was done up front by the dentist and spouse. The successor trustee may or may not need to meet with an attorney, and all activity and assets are private. There are no public proceedings or public records.

The Successor Trustee pays all valid debts, files appropriate tax returns, and follows the terms

of the trust agreement by either continuing to manage the assets in trust or distributing them outright.

Revocable Living Trust (RLT) - The Content

The content (substance) of the RLT is the instructions and roadmap left behind directing how assets/property should be distributed. This includes who it goes to and who will administer it.

The following should be considered:

- guardians for minor children;
- fiduciaries (Personal Representative[s] and Trustee[s])
- special Gifts if any;
- primary and contingent beneficiaries; and
- trust provisions for children.

Selecting Guardians

Choosing guardians for minor children is the hardest decision in estate planning. This is where I ask all clients to start. Guardians are the people that have physical custody of minor children and are responsible for making parenting decisions.

In choosing a guardian, I recommend looking for people who have a similar parenting philosophy.

People who will make the same or similar decisions as the parents would for the children. No one will do as good of a job as the parents in raising the children, but the objective is to get close.

Selecting Fiduciaries {Personal Representative[s] and Trustee[s]}

The fiduciaries will be handling financial affairs during any incapacity and after death.

After selecting guardians, I ask clients to look at these people through a financial magnifying glass to determine if they should also be trustees of the funds for the children. They should decide if the guardian nominees meet the following three part test.

- Do they understand money? (In other words, is money on their radar and do they pay attention to financial matters? They do not need to be financial experts, but they need to have an awareness of money.)
- Do they spend their own money wisely or frivolously? and
- Are they trustworthy with the money?

If the answer to these three questions is yes, then I recommend naming the same people as both guardians and trustees. This will make the administration easier. If the answer is no or maybe, I suggest different people be nominated as fiduciaries.

Another option to naming separate guardians and trustees is to name a corporate trust company as co-trustee along with the guardians. The corporate trustee would give the professional oversight to the money while still allowing the guardians a voice in the matter.

Specific Gifts if any;

Most clients distribute their estate in a general manner. (i.e. “divided equally between…). There are times, however, when an exact gift of cash or a particular item of tangible personal property should go to an individual. This can be handled as follows:

- Gifts of Cash - Exact gifts of cash can be detailed in the RLT. This, however, is often an item that will need to be changed in the future for a variety of reasons. I recommend clients list these first before dividing the remainder of the assets among the primary beneficiaries.

- Tangible Personal Property – If state statutes permit, the best way to distribute tangible personal property is by a separate written list. If the RLT makes reference to the separate list, it will be incorporated into the documents as a valid component.

The great feature of this list is that the dentist does not need to have an attorney draft it for them. This means they can make changes themselves. In Minnesota, it must be in the person's handwriting, listing the item, the recipient, signed, and dated. It does not need to be witnessed or notarized.

- Primary Beneficiaries - For most families, the primary beneficiaries will be their spouse first, then children. This can, however, be split up according to their individual facts and circumstances. For most people, though, dividing the estate into equal shares works the best.

- Contingent Beneficiaries If there are younger children who still reside with the parents, I always suggest naming contingent beneficiaries, those that would take the estate if the entire immediate family should perish.

Trust provisions for children - When deciding on leaving the estate to children, the money should be constructive and available for their benefit and not to act as a destructive force in their lives. To do this, I recommend creating contingent trusts. These trusts will spring to life if certain events occur.

The event most commonly triggering this contingent trust is the children being under certain

ages. I recommend distributing trust funds in three segments, one third at twenty-five, thirty, and thirty-five years of age. These ages are completely discretionary and the clients can pick any ages or fractions they like. If the children had already attained these ages, then the trust would not spring to life, and the funds would be distributed outright to them at the parent's death.

6

Advanced Estate Planning - Irrevocable Trusts for Estate Tax Minimization / Elimination

An irrevocable trust is exactly what its name says, irrevocable. Once sign, the terms cannot be changed and generally the creator cannot get the money or property back once the transfer is made.

This is in contrast to the revocable living trust, a basic estate planning technique discussed in the previous chapter. The revocable living trust is a basic estate planning tool that is fully amendable and revocable.

The irrevocable trust is an advanced estate planning technique used for specific and narrow purposes. A few of those purposes are:

- Minor's trust - A trust set up to provide gifts for the benefit of a minor with someone other than the minor managing the assets and

having discretion on spending;

- Supplemental Needs Trust –If an intended beneficiary is a recipient of Medicaid, SSI, or other governmental assistance programs, an outright gift or a gift in trust may disqualify the beneficiary from continuing to receive such assistance. Federal, as well as most state, laws, however, allow for a “Supplemental Needs Trust” set up for the benefit of a disabled individual if it is designed so distributions are made only to "supplement" the government benefits already being received by the disabled individual.

- Education Trust – Similar to a minor’s trust but used for the beneficiary’s educational needs.

- Charitable Remainder Trusts (CRTs) and Charitable Lead Trusts (CLTs) – These types of charitable trusts are used to make a charitable contribution. Property or money is gifted to an irrevocable trust that has a charity as the ultimate beneficiary. The donor (called the Grantor) receives income from the trust while living, and the charity receives the principal after a specified period of time. The grantor avoids any capital gains tax on the donated assets and also gets an income tax deduction for the fair market value. In

addition, the property/money is removed from the Grantor's estate, reducing subsequent estate taxes.

Life Insurance Trust - The primary reason, however, for the dentist to create an irrevocable trust at this juncture in their professional/personal lives is to hold large life insurance policies. Because having large life insurance policies is such an important part of the dentist's financial plan, it is important to structure such ownership in a way to keep the death benefits safe from the IRS.

When used for this purpose, it is commonly referred to as an Irrevocable Life Insurance Trust (ILIT). The ILIT is probably the most frequently used irrevocable trust.

If life insurance is owned by the dentist, the death benefits will be included in calculating their taxable estate. Life insurance owned by and with death benefits paid to the ILIT will avoid Estate Tax upon the death of the insured and the insured's spouse. Estate tax is a tax levied on a person for dying with a net-worth greater than a certain amount. The tax essentially is double taxation. The dentist is taxed when the money is earned and then again the same money is taxed upon death.

The only guarantee regarding the estate tax is that it will be there in some form over the course of the dentist's life. Congress will continue to change

the threshold. How high or low it is will depend on the political party in control.

The requirements of the ILIT are:

- it must be irrevocable; and
- no distributions of the trust's principal or income can be made to the insured; and
- certain administrative formalities must be followed.

Typically, the premiums for life insurance held by an ILIT are paid from gifts made to the trust by the person who establishes it. The beneficiary must have the right to take the gift. This right is called "Crummey[1] demand powers" and is used to preserve the tax-free gift exclusion for gifts of a present interest. This yearly exclusion is up to $13,000 per beneficiary ($26,000 if the gifting is joined in by the Grantor's spouse).

Under Crummey demand powers, the ILIT beneficiaries have the right to demand the trustee pay them their share of the monies contributed to the trust within a specified period. If they waive this demand either affirmatively or by inaction over the passage of time, this withdrawal power lapses. The

trustee can then use these gifts to pay the premiums on life insurance owned by the trust.

Because of the estate tax savings, ILIT planning is crucial. For the cost to set up the ILIT, often less than $3,500.00, the dentist can potentially save hundreds of thousands, if not more. Not only will there most likely be a large tax savings upon death, there are great asset protection benefits as well, since all life insurance proceeds will be protected from creditors.

Part Three

Advanced Asset Protection Planning - Year 8 and Beyond

The last stage of the dentist's legal life can be filled with threats aimed at the financial security is has taken a lifetime to build. Threats may come in the form of a lawsuit, estate taxes, or both.

In the next two chapters, I will teach about advanced asset protection planning, advanced estate tax minimization, and protecting and passing vacation property.

With respect to this type of planning, the dentist must make a business decision/risk assessment. Is the threat and risk great enough to warrant the financial and administrative costs? This is another great reason to have a relationship with a legal advisor. A legal advisor who understands the legal issues faced by the dentist can make these types of decisions much easier.

7

Estate Planning With Advanced Asset Protection Strategies

"Asset Protection" (AP) planning should not be viewed as a strategy to avoid paying legitimate and reasonable creditors, but as a process to protect personal assets from unreasonable creditors. Unreasonable creditors are those who bring frivolous lawsuits or get unreasonable jury awards related to medical malpractice or personal liability claims such as automobile or slip and fall accidents. These unreasonable creditors do exist. They are the predators looking to sue anyone who is successful. This type of lawsuit could be any legal action where a valid claim simply doesn't exist.

In general, "asset protection" is about putting up barriers in front of the unreasonable creditors to make it difficult or impossible for them to get at personal and business assets. The key questions are, what are the options and when should they be implemented?

The first step in navigating through the asset protection choices is to get educated. This chapter is not intended to be an exhaustive treatise on asset protection, but a primer to get the dentist going in the right direction. It is also not intended to be legal advice and should not be taken as such; it is for information purposes only. Before implementing any asset protection strategy, the dentist should consult with their legal advisor and an attorney licensed to practice law in their state.

There are the five asset protection classifications:

- state provided AP strategies – (All dentists Should Take Advantage of These);
- basic foundational AP strategies– (All dentists Should Take Advantage of These);
- intermediate AP strategies – (Each dentist should make a business/risk assessment and make a decision based on risk tolerance);
- advanced AP strategies – (These should only be implemented in limited circumstances.);
- extreme AP strategies – (Rarely should these strategies be implemented.)

State Provided AP Strategies - Exempt Assets

The first line of defense against unreasonable creditors is the protection provided by the state. Each state, through its statutes, exempts certain assets from creditors. These assets can include all or a portion of the following:

- Home: In many states, there is an exemption from creditors for the homestead. This, however, is usually not an unlimited exemption, and in some states (New Jersey, for example) there is no exemption at all. Other states (such as Florida) give an unlimited exemption, meaning a creditor cannot force the sale of the homestead to pay off a judgment no matter what the value is. While these two states present both ends of the spectrum, the bulk of the states fall somewhere in between. An example is Minnesota, where the statute allows an owner to protect $300,000 of equity in their home. If the difference between the home's market value and all mortgages is greater than $300,000, a creditor can force the sale of the home, paying to the creditor any amount over the exemption.

- Life insurance: Some states will protect life insurance partially or entirely. This can be both the cash value and/or death benefit.
    - States such as Texas protect all of the cash value paid into a life insurance contract. This means a creditor cannot force the withdrawal of funds to pay off a debt.
    - To contrast the laws of Texas, Minnesota only protects cash value of $7,600. Any amount above this can be reached by a creditor. Checking with a legal advisor or attorney is appropriate in the event these laws change.

- Annuities: Annuities are similar to life insurance. Each state decides how much, if any, can be protected from creditors.

- Individual retirement accounts: IRAs are also given a certain amount of protection by state laws, and the protection varies from state to state. Again, it can be all, nothing, or somewhere in between. The trend, however, is for greater protection to be given to these types of accounts. Stay tuned as these laws are changing.

- ERISA-governed retirement plans: These plans are most commonly employer-sponsored profit sharing/401k plans. They are different from IRAs in that they are governed by federal law instead of state law. In most cases, federal law will trump state laws, including judgments that require an ERISA-governed plan to liquidate assets in order to pay a creditor.

An attorney licensed state should be contacted in order to determine what protections the state will give against the unreasonable creditor.

Basic Foundational AP Strategies– Basic Estate Planning with the Revocable Living Trust

As discussed in Chapter Five, the foundation for any asset protection strategy is the basic estate plan using the revocable living trust. This should be implemented as soon as possible in stage two of the dentist's legal life.

Intermediate AP Strategies – Family Limited Liability Companies and Family Limited Partnerships and/or Irrevocable Trusts

One of the more common strategies used in asset protection to build upon the basic estate

planning is the family limited liability company (FLLC) or family limited partnership (FLP).

FLLC

A limited liability company is a new form of business entity that has become increasingly popular. It combines the liability protection of a corporation with the tax and asset protection advantages of a general partnership. All fifty states have enacted LLC laws, with most of them looking and feeling like a general partnership. Some states (Minnesota, in particular) have taken on the feel of the corporation with the two levels of management (governor and manager). This feature makes it ideal for the family LLC, because it allows husband and wife to maintain various levels of control over the company depending on their life circumstances.

An LLC can elect to be taxed like a corporation <u>or</u> a partnership. However, the majority of LLCs today elect to be taxed like a partnership, which means these LLCs do not pay income tax. The income flows through directly to the members and is reported on their personal tax returns.

To begin the LLC, articles of organization are filed with the state. Some states (such as Minnesota) allow the names of the members, governors, and managers be kept private with only the name of the

organizer being filed (in most cases, the attorney that sets up the company). Having this anonymity can provide for benefits and is an important component of an asset protection strategy.

FLP - General Partnerships

A general partnership is formed when two or more persons agree to carry on a business together to make a profit. It is as simple as that, and no writing has to be made and no documents need to be filed with the state, except for registering the name to be used. It is good practice, however, for any partnership to have a written partnership agreement so all partners understand their rights and responsibilities. The problem with a general partnership is all partners are jointly and separately liable for all debts of the partnership. The general partnership should be avoided at all costs because of this liability trap. If a partnership is to be used in an asset protection setting, it should be formed as a limited partnership.

FLP - Limited Partnerships

A limited partnership consists of one or more general partners and one or more limited partners. A general partner handles the control and management of the partnership. The tradeoff for this is he or she

has unlimited personal liability for all debts and obligations of the partnership. The limited partners cannot be involved in the control or management of the partnership, but they do enjoy protection from the debts of the partnership, because their liability is limited to their investments in the entity. If a limited partner does participate in the control or management of the partnership, that individual may lose their limited liability.

Choosing Between the Two

For many years, the FLP was the entity of choice for asset protection and the minimization of estate taxes, but, since its advent, the LLC is fast becoming the entity of choice. This may be because the LLC is more flexible than the FLP and because there is no unlimited liability for the general partners as there is with a FLP. In a family LLC, the husband and wife can be involved in the management of the company without losing their liability shield while there are no creditors. If a lawsuit arises, the spouse/defendant resigns from their management role but retains their personal liability protection.

Assets of a FLP or FLLC Usually not Reachable by Creditors

In most states, the only remedy for a judgment creditor of an LLC or limited partnership is a “charging order”. A charging order is a legal remedy that gives the creditor the right to receive any distributions from an FLP or FLLC. It does not give the creditor the right to become an owner or the right to have a say in the management of the company. The creditor only receives the distributions intended to go to the owner/debtor. If this happens, the FLP/FLLC will simply choose not to make any distributions. The poison pill, however, is that even if the FLP/FLLC does not make a distribution, the creditor is responsible for the tax consequences as if a distribution had been made.

The idea behind charging order protection is simple enough: Owners should not be involuntarily forced into a partnership with somebody they do not choose. To get complete protection from this strategy, however, great care must be put into the “operating agreement” to give the maximum protection possible from creditors. Using this entity to hold the assets the dentist most wants to protect allows the protection of them from creditors.

Trusts - Irrevocable Trusts

In planning, it is important to keep the revocable living trust concept discussed earlier

separate from the irrevocable trust. The revocable living trust can be amended or revoked allowing complete control, but it gives only limited asset protection. On the other hand, the irrevocable trust will protect assets (assuming the transfer of property was not a fraudulent conveyance[2]); however, the dentist will lose all control and benefit. In a properly executed asset protection strategy, irrevocable trusts do play an important role.

As discussed in chapter six, one of the more common uses of the irrevocable trust is to own life insurance. If the trust is created properly and all of the administrative formalities are followed, it will keep the proceeds out of a deceased person's estate for tax purposes and keep them away from creditors.

Advanced AP Strategies – (Should be implemented only in limited circumstances)

A strategy that is gaining popularity is the asset protection trust (APT). An APT is a self-settled trust, meaning it is funded by the creator of the trust, who is also the beneficiary. This is different from the irrevocable trust discussed above, because in a traditional irrevocable trust, the intended beneficiary is usually the spouse or children and not the person who creates the trust.

There are two main types of APT's: the Domestic APT and the Offshore (foreign) APT.

Domestic Asset Protection Trusts

In many states, the self-settled APT is not allowed. But in a minority of states, recent legislation is beginning to allow such asset protection vehicles. Eight states, (Alaska, Delaware, Rhode Island, Missouri, Utah, Oklahoma, South Dakota and Nevada) now allow some form of a self-settled trust to be set up that is outside the reach of creditors. These are very new and have yet to be challenged in court. Many legal scholars believe they are unconstitutional because of the "Full Faith and Credit" clause of the constitution, which says, "a state is to recognize the judgment from another state". This sets up a conflict of state laws issue (the self-settled APT is exempt from judgment creditors in the state it was created) and the United States Constitution. This means the creditor must simply register the judgment and does not have to initiate the lawsuit all over again in that state.

Until the above mentioned conflict of laws issue is settled in court, the domestic APT should probably be avoided unless the dentist happens to live in one of the states where they are recognized. These trusts are usually expensive to set up and

administer, and they are probably not a good choice for asset protection unless the dentist is a citizen of a state that has enacted the legislation.

Very Advanced AP Strategies – (Rarely should these strategies be implemented.)

Offshore APT

An offshore or foreign APT is similar to the domestic APT except the trust situs (location) is in a foreign jurisdiction. The Cook Islands or Nevis are two popular destinations. These trusts are self-settled, but the trustee is located in one of these foreign jurisdictions, thereby putting them out of reach of the United States courts. A creditor would not simply be able to register a United States judgment in one of these jurisdictions; they would have to initiate a new lawsuit.

While the trustee and trust may be outside the reach of the United States courts, the creator of the trust is not unless he or she leaves the country. Many state and federal judges despise this setup and will do whatever is in their power to unwind this type of trust, including putting the creator of the trust in jail for contempt of court. There is a long line of cases that deal with this issue, many not favorable to the debtor. These trusts are also very expensive to set up

and administer and should probably only be used in extreme cases and not with all assets. Consult with an expert asset protection attorney before considering these types of trusts.

Final Asset Protection Considerations

Time is the ally. Having a plan in place and implemented for a period of time before an event (judgment or death) occurs will give the plan a better chance of withstanding an attack by a creditor or the Internal Revenue Service. If the dentist waits until a lawsuit is initiated or even after an event occurs that may cause a lawsuit to be initiated, it may be too late because any transfer may be deemed a "fraudulent conveyance" and will likely quash any asset protection strategies then implemented, on the theory that their only purpose was to deny creditors their claims.

How far should the dentist go? As far as necessary to get "peace of mind". Assess the risk and consider the cost of implementing an asset protection plan. Take the actions that give the protection level desired. With that in mind, the dentist should discuss their situation with a legal advisor and/or an attorney who works in the area of estate planning and asset protection.

If the intended goal of asset protection is to be completely judgment-proof, successful asset protection becomes extremely difficult. However, if the goal is to protect a portion of the estate against the unreasonable creditor, that goal can be obtained with the help of an experienced attorney. Without successful asset protection planning, the dentist will lose all assets that are not exempt if there is a judgment awarded against them. With the right planning, the dentist will be able to build walls between themselves and their creditors that will improve their bargaining position and help them protect what they have worked so hard to earn.

Remember, action needs to be taken before there are any potential lawsuits. Otherwise, any actions taken may be unraveled by the courts.

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Advanced Estate Planning - Legacy Property (Lake Cabin, Cottage, or Vacation Condominium)

The final chapter in the legal life of the dentist is advanced planning centered on the vacation properties owned or intended to own. This type of planning is one part estate planning, one part asset protection planning, and about ten parts family relationship preservation.

When all is said and done, money is great, but peace and happiness in the family (parents to children and siblings with siblings) is the legacy that is most important. Nothing can drive a wedge between these parties faster than the vacation property. This can potentially occur during the life of the parents but is more likely to occur after their deaths.

Legacy Property may be a pristine cabin or cottage on a beautiful lake in northern Minnesota or Wisconsin. Or, it could be a condominium in Colorado, Florida or Arizona where Mom and Dad live in the winter and the family loves to visit.

I refer to it as "Legacy Property" because most clients have put their heart and soul into the property and want it to continue in the family for future generations to bring the same joy and happiness forward. They want their memories to live on in the property.

The dentist's Legacy Property has the potential to create the family's greatest times and memories. Without the proper planning however, it may be the very thing that divides children forever.

These are just a few of the comments and/or questions I hear as an estate planning attorney focusing on vacation property planning:

- Child number one is always working and helping but we do not see child number two and child number three when work needs to get done.

- The older children are doing well financially, but the youngest is struggling.

- We love our daughter-in-law, but we don't want her to inherit the cabin if our son dies.

- Our son-in-law is always poking his nose into our affairs. How do we make sure he doesn't become an owner if our daughter divorces him?

- How will the children afford the taxes, insurance, and upkeep?

- How can we prevent the kids from fighting over the property?

Marion came to see me about her condominium in Paradise Valley, Arizona. She and husband Jaymes had owned it while Jaymes was alive. Marion decided to keep it after Jaymes passed away mainly to provide a vacation spot for the children and grandchildren in the winter.

Marion also wanted this property to be hers and Jaymes' legacy to their kids and grandkids. It was very important that she plan this transfer in a careful and thought out manner so it would be done right and would not cause dissention amongst her four children.

Marion's four children couldn't have been more different and her biggest concern was managing this property after her death. She could easily see her two older sons dominating the situation and forever dividing the siblings.

Marion elected to use a Legacy Property LLC (which you will learn about in Chapter 6) as her plan to resolve her concerns and give her the peace of mind she deserves. The entire family continues to enjoy their trips to the "Grand Canyon State" and visiting grandma.

Two main factors are driving this specialized area of estate planning:

1. The number of vacation homes, such as the lake cabin or warm weather, or ski, condominium are increasing dramatically; and

2. Vacation property values are on the rise. This increase in value causes many estates to be pushed into the category of being affected by estate taxes.

The process is best initiated and driven by the parents so they can set the parameters and expectations of the property's future for their children.

Good planning can prevent family disputes and divisions especially when:

- one or more of the children has a strong personality;

- there is a disparity in the children's financial means;

- the children use the property in different proportions;

- the children contribute labor and upkeep at different levels.

Real Estate Law - The Default Planning for Legacy Property

Unless the dentist chooses one of the advanced strategies such as a Legacy Property Trust or Legacy Property Limited Liability Company LLC, real estate law will be the framework for passing Legacy Property to heirs.

Real estate law as it applies to Legacy Property is divided into two sections: how Legacy Property transfers under real estate law and the consequences of using real estate law instead of trust or business law.

When examining how Legacy Property transfers under real estate law, options include:

- doing nothing and allowing the Legacy Property to pass to heirs as state statutes dictate;
- creating basic estate planning documents such as the revocable living trust to dictate who receives Legacy Property;

- transferring the Legacy Property using a transfer on death deed;
- life Transfer (Gift or Sale) with or without retaining a life estate; or

Without Affirmative Planning

If there is no estate plan using a basic will or revocable living trust, Legacy Property, along with everything else owned, will pass per the intestacy laws of the state where it is located.

As I stated in chapter two on the laws of intestacy, they are based strictly upon blood relation and marriage and vary by state. Most divide the estate among the decedent's spouse, children, and parents. If none of these remain living, the property descends to siblings or other relatives.

When nothing is done and the intestacy laws dictate the disposition of Legacy Property, one of two events can occur:

- Liquidation - The legal representative liquidates the Legacy Property and distributes the net proceeds equally. This may or may not be with the input of children. If this occurs, the property and perhaps the legacy the dentist put many years into is gone.

- Distribution In Kind - If the Legacy Property is not liquidated, then real estate law generally dictates it be distributed out in kind as "tenants in common" equally to heirs. Again, these people are determined by state law. One caveat to this distribution is if the Legacy Property owner is in a second marriage situation. The surviving spouse may have rights to the property. Parents may think this will work out fine, but I can say from experience in my law practice that this usually leads to trouble and can be most difficult for the children.

While the tenancy in common lasts, none of the owners own any particular part of the land. Everyone is allowed to use the whole of the property with all other owners.

With Affirmative Planning - Passing the Legacy Property inside of a Revocable Living Trust

I have had many clients choose not to make a specific reference to their Legacy Property in their basic estate planning documents. The Legacy Property then passes through the residue of the estate. This has almost the same effect as if a person has no plan at all.

The personal representative will either have the ability to liquidate and distribute the net

proceeds or distribute in-kind. The only benefit this has over no plan at all is getting to select who the residuary beneficiaries are as opposed to the property going to heirs per state law.

The option of a specific gift making allows parents to take the control from the personal representative and affirmatively require the Legacy Property to be sold or distributed in kind.

A directive can be put in the revocable living trust for the trustee to sell the Legacy Property and distribute the net proceeds. This is referred to as a sale provision without options. In this type of situation, many of my clients want the first option to purchase the property to go to their children but others, like Ray and Melissa, may feel otherwise.

Two of my clients, Ray and Melissa, loved their cabin on a lake in northern Minnesota. They had great times there entertaining their children and families but were very adamant about doing everything possible to make sure none of their children could become owners upon their deaths.

Perhaps it was because they bought it later in life when their children were grown or knew that it would cause dissension between siblings. In their Revocable Living Trusts, they made specific reference to sell it and distribute the net proceeds. They even went so far as to name a special trustee, a non child, to handle the sale and distribution so the children could attempt to subvert the terms of the trust.

The more common course of action is to allow some, or all, of the children to purchase the Legacy Property from the revocable living trust, which is called a sale provision with options. If this is desired, then a specific clause to put the Legacy Property up for sale but allow the children to opt in or give each child the right of first refusal would be included.

With this type of specific purchase option, the parents will need to consider how the Legacy Property should be valued, under what terms the children should be allowed to purchase (do they need to get their own financing or can they pay over a period of years), and notice and acceptance provisions.

It should also be considered how to handle issues of whether children should purchase as joint tenants or tenants in common and/or what to do if they cannot reach an agreement.

With a distribution in kind, clients simply distribute the Legacy Property out to children in-kind with no direction. “Here kids, this is yours, you figure it out.”

Passing the Legacy Property outside of the Revocable Living Trust

The options above were for passing Legacy Property through a revocable living trust. The following options are for passing Legacy Property outside of the revocable living trust but these strategies will not take the property out of real estate law.

I cannot recommend strongly enough the need to get competent legal advice before selecting one of these strategies, as the choices can have serious tax consequences for the dentist and/or their children.

Transfer on Death Deed (TODD)

The transfer on death deed (TODD) is fairly new in the United States, but it is catching on quickly. Minnesota, Arizona and Wisconsin all have this option. The TODD basically allows putting beneficiaries on property similar to a beneficiary on a life insurance policy or retirement account.

The benefits include:

- avoiding probate for the Legacy Property if it is owned in a parent's name at death;
- retaining the ability to revoke this beneficiary;
- receive a step up in basis for the property for the beneficiaries; and
- a gift tax return is not needed.

The consequences are the property is still governed by real estate law with all of the pitfalls described later in this chapter.

Life Transfer (Gift or Sale)

Parents can gift or sell the property to children and retain the right to possess it while alive. (This is a transfer with a retained life estate) This will allow continued use and enjoyment of the property during their lifetime. The parents will still be required to pay the expenses of insurance, taxes, maintenance, and a portion of any capital expenses.

This is also similar to the beneficiary concept of the insurance policy. The ownership interest goes away at death, but, unlike the transfer on death deed, the future interest is transferred during lifetime and cannot be undone.

The benefits of retaining a life estate are the continued use of the property with the avoidance of the post death administration to transfer the property.

Consequences include giving up a portion of the interest in the property. This can't be undone without the cooperation of children and perhaps their spouses.

In a transfer without a retained life estate, the entire interest in the property can be given away.

This is however an irrevocable transaction. All rights to the property are also transferred including use and enjoyment.

The children will be able to exclude the parents from the Legacy Property and sell or dispose of it without any input from the parents. Please know there may be adverse tax consequences if this is done as a gift.

Consequences of Passing the Legacy Property using Real Estate Law

Going hand in hand with how Legacy Property can transfer under real estate law, the dentist must also look at the consequences of using real estate law instead of trust or business law. They may think using one of the above strategies will work out fine, but there are many hidden pitfalls to using real estate law. These include the use of the property between children, divorce or death of a child, payment of expenses, insurance and taxes, creditor issues of one or more children, and, of course, family members fighting over the property.

1. Use of the property:

There are no restrictions on how or who may use the property. All children will have an undivided interest. If one of the children wants to dominate the use of the property, the other children cannot

prevent it. One child may choose to invite any friends at any time. This also means that one child cannot exclude another on any given day, week or weekend. This could make for awkward entertainment scenarios, depending on the siblings. Usage of the property includes the usage of any personal property, such as a boat or dock that went along with the Legacy Property.

A child could move in full-time as long as they didn't attempt to exclude anyone else. Under this scenario, this child would not be required to pay rent to the other siblings.

Each owner can also make any changes, additions, and alterations as long as they would not be viewed by a court as damaging or destructive.

In addition, there are certain financial scenarios that may arise. While it is not frequent, a tenant in common can grant a mortgage on his or her interest without permission of the others. If this is the case and the child does not repay the mortgage, their interest can be foreclosed upon and sold. Again, this is not common, but, if it occurs, a non-family member can become a part owner through this process.

Finally, a tenant in common may also sell their interest to an outside buyer if they wish. This is more likely than a foreclosure, and the consequences would again be a non-family member owner.

If considering passing property under real estate law, it is important to think about the personalities of the children and how they would react to these scenarios.

Would they be able to agree on how to use the property, or would it cause a divide in the family? Think not just about the children but also grandchildren, as they will come into the picture at some point if the children follow the same path and do not put a plan in place.

2. Divorce of a Child:

If a child owns an interest in the Legacy Property as a tenant in common, depending on state law and events after the parents' death, their spouse may have a right to a portion of the property if they get divorced. In a country were statistics say 50 percent or more marriages end in divorce, this can be a very real possibility.

The parents will need to consider whether a son or daughter-in-law should have an interest in the Legacy Property after a divorce or use this potential as leverage against a child in a settlement?

3. Death of a Child:

As with the divorce of a child, a death can have similar impact. Only 30-40 percent of the

people in this country have put an estate plan in place. If a child dies as a tenant in common without a plan, then their interest goes to their spouse.

A couple of years ago, I dealt with a situation in my law practice where three siblings owned a beautiful cabin in northern Minnesota. Matt, Lisa, and Kristy received this property from their parents who had no estate plan. Once it came out of probate, which lasted several years, they approached me about putting a plan in place.

Despite gentle, and sometimes not so gentle, persuasion by me, they still refused to finish the plan. The threat of completing the plan was greater than their fear of dying before the completion of the plan.

Unfortunately, one of the siblings, who was unmarried, did die in an accident with one of her children. In an instant, one third of the property was now split into fourths. Three of those fourths went to children and one fourth went to the surviving spouse of the deceased child. This property went from having three tenants in common, all siblings, to six, with one of them being a non blood relative. The remote possibility had occurred. The surviving spouse was not particularly close to the family and last I heard was trying to force a buy out of their one twelfth. It is going down the road of a partition, which is described below.

4. Payment of insurance, upkeep, and taxes:

Without a plan, such as an owner's agreement (see below), and/or using life insurance or a specific gift of cash in place to handle how expenses are contributed to and paid, there is no mechanism short of a lawsuit to force an owner to pay their fair share.

In many instances, children vary in their financial health. Not all children can afford to pay expenses on two properties. Not all children will want to pay either. If a child lives out of state and rarely, if ever, uses the property, the child may not feel happy about paying a percentage of these costs.

5. Bankruptcy or other Creditor Issues of a Child:

Most states have very strong laws supporting creditors. If a child encounters financial difficulties, their creditors can put a lien on the property and eventually foreclose to collect a debt.

Even if children are solid from a financial standpoint, accidents can happen.

Cheryl came to me about three years ago completely devastated. She and her husband owned a wonderful cottage on a lake in western Wisconsin. She was an only child, and this property had passed down to her from her parents, who had received it from her grandparents.

She was in my office not because of proactive estate planning but looking for reactive asset protection planning. The previous week, she was involved in an auto accident where two people had died. The accident was her fault because of inattentive driving (she was only distracted for a moment).

Cheryl and her husband had not done any estate or asset protection planning with respect to this property and were now looking at a potential judgment from the accident that would exceed her auto liability insurance. Any such judgment would put this property at a large risk of being sold at a sheriff's sale with the proceeds going to the families of the accident victims.

There was not much I could do for Cheryl and the last I heard, she was forced to sell this property and file for bankruptcy.

6. Discord Between Siblings and Partition

If the children are like mine, their personalities are different, and they don't always get along. The levels of their disputes vary with the subject. The more money that is at stake, the greater

the potential for a dispute. My experience at my law practice has shown me siblings will fight fiercely when it comes to money and what they think is rightfully theirs.

Probably the worst scenario that can come out of a family fight is a partition action. Under real estate law, generally all owners have the RIGHT to force a sale through a judicial proceeding called partition. Without an agreement, the remedy is automatic and there is no defense. Because of this, any child can make a demand to cash out and use this court proceeding remedy as a threat.

The Johnson family had three children. The two oldest lived in Wisconsin and Chad, the youngest, lived in Georgia. Chad rarely came north and had not been to the family cabin for two years. Most of his inheritance from his parents came in the value of the family cabin that was distributed in-kind in equal shares to all three children as tenants in common. Both of his siblings were well-off financially, but Chad had been hit rather hard by the recent recession and was desperate for cash.

Chad recently talked to me about his options. He had tried to talk with his siblings to buy out his share, but neither was interested. They started to bring up the fact Chad had not paid anything toward taxes, insurance, and maintenance. Chad's response was that he didn't use it so why should he pay.

Ten minutes into my meeting with Chad, I could see where this was going, and it was not going to be a pretty end.

There are two kinds of partition. The first, a partition in-kind, is where the land is physically divided into individual portions and each owner gets an individual portion in their name alone.

The second is a “partition by sale.” A partition by sale, which I have seen more frequently in my practice, is accomplished by selling the entire property and dividing the proceeds among the owners.

When owners of an undivided interest in a property can't agree on disposal, the court can do it for them. Needless to say, the costs in a partition are great. Not only will there be attorney fees, appraisal costs, and time, the damage to the relationships of siblings is often irreparable.

It comes down to one child forcing the liquidation of the property their parents most likely intended to be a legacy to the children and grandchildren. In this situation, it does become a legacy, a legacy of dividing the family for good.

One option to try to avoid some of the issues listed above is to put in place an “Owner’s Agreement.” Many things can be addressed in this type of contract but it is a short term solution and has downsides.

- To agree to the terms, all parties must be owners. If the children are not current owners, then they, in most cases (depending on state laws), cannot join in the agreement until they are on title. If they are not going to take title until after the parents' death, then the parents are depending on the children to agree at that time. In many cases, this is too late.

- The second downside is the cost. Usually, the attorney costs to draft this type of an agreement are as much or more than a Legacy Property Trust or Legacy Property LLC as discussed in the upcoming sections. If trust or business law is chosen to pass the Legacy Property, the parents can make all of the necessary decisions and bind their children.

In an Owner's Agreement, parents can cover topics such as:

- the use of the property – sharing or allocating;
- will it be strictly family residential or allow for rental to generate income;
- restrictions on transfer, options to purchase, and valuation formulas;
- fees for usage, cleaning, management, etc.;
- will there be property rules covering issues such as smoking, cleaning, work days and/or pets;

- payment of expenses and, more importantly, consequences for non-payment;
- dispute resolution.

I am sure it is becoming apparent that using basic estate planning and real estate law to pass Legacy Property can cause problems. The solution lies with using one of two advanced legacy property planning options.

The following pages detail advanced planning that, in most cases, creates not only peace of mind for parents but peace amongst siblings.

The Reasons to Act

In order to help make the advanced planning decision, it is important to consider why. In the last chapter, I explained the basic aspects of real estate law and how it will affect Legacy Property after the death of the parents.

Avoiding real estate law should be the number one reason to at least explore advanced planning. Relying on the default can bring many unintended and unexpected consequences.

Other than removing the property from real estate law, here are some other primary reasons for advanced planning.

Take Control and Set Limitations

Since the day children are born, the task as a parent is been to take control and set limitations. As important as it was when the parents were raising them, it remains so with the most treasured property. By putting together a plan that fits the family, the parents are communicating how they want the children to proceed into the future with respect to that property.

If the parents don't do it while alive, the children can only be left to guess what their parents would have wanted. There have been many client meetings where I have heard one child say Mom wanted this or that only to glance at siblings and see them shake their head no. Sometimes this ends in chuckles, but often it leads to arguments and people leaving my law office hurt, mad, or both.

Keep the Family Together

Will the Legacy Property possibly divide the children? By taking a look at the history of the children, it should be pretty easy to project the possibilities.

- Where do they live geographically? Will the property cause a divide if one or more of the children are unable to use it often?
- Personalities – Do any of the children have a strong personality that would dominate? On the other side, are any of them meek but potentially harbor a silent grudge?
- How much do they fight about little things? This will give a glimpse into the possibility of whether they would fight over big things.
- Look at their friends. If one sibling has friends that may not be desirable to the others, this could cause many issues.
- Did they clean their room when they were growing up or were they sloppy? How clean do they keep their current home? (This includes not only the child but their spouse and kids as well.) Unneeded friction will arise if a sibling arrives time after time to a mess created by their brother or sister's family.

Provide For Adequate Expenses, Taxes, Fees, and Upkeep

Are there disparities in the income and finances of the children? If all the children owned the property as tenants in common and a large expense came along, would they all be able to fund it?

There are many ways to provide for adequate funds to take care of known and unknown expenses. Life insurance is the most often used method with my clients. A Legacy Property Trust is a great vehicle to own life insurance and not have it add to any estate tax liability.

With each new generation, the number of people involved continues to grow. The property in its form and size may not be large enough in another generation or two. Life insurance not only provides for a way to pay for expenses, taxes, insurance, and upkeep, it can provide a wonderful endowment to enlarge the property if appropriate.

Keep Property in the Family

Children's spouses and present/future creditors are all potential owners of the property if a plan is not put in place to handle these contingencies. The question needs to be asked if any of the children could get divorced and what that process might be like. If there is a chance that a divorce would get messy, and there always is, would

a spouse use the Legacy Property as a weapon against a child?

Advanced Planning – Legacy Property Trust or Legacy Property LLC

Don't be scared by the title "Advanced Planning." Advanced planning does not have to mean difficult planning but it does mean specific planning. The dentist may have a very simple situation and still be a great candidate for advanced Legacy Property planning. On the other hand, the dentist may have a complicated estate but make the affirmative decision that they don't want to manage aspects of family dynamics beyond their death.

When doing advanced Legacy Property planning, the dentist will need to consider contingencies that could happen and then plan for how the next generation(s) should handle them. It is another way to impart wisdom to the family.

Who does the Planning

For proper planning to done, all owners must be in agreement. The easiest scenario is for the parents to create the plan. Once the parents have died and it is in the kids' hands, this does not mean that advanced planning cannot still be done. The children can always, IF they are in agreement, create

a Legacy Property Trust or Legacy Property Limited Liability Company to own and manage the property.

The next question, if the planning is to be done by the parents, is if the children should be included. This is another important consideration and must consider the personalities of the children.

I have had parents choose to do all of the planning and implementation on their own without including the children. Others decide to bring their children in on the process, either formally at the meetings or informally by consulting with them, each step of the way.

In my practice, I suggest parents do it on their own or with informal input from the children. If they choose to get such input, I also suggest they not do it as a group but consult each child individually to prevent strong personalities of some children from affecting others.

I. Advanced Legacy Property Options

Outside of real estate law, there are two main options for Legacy Property. The first is the Legacy Property Trust. The second is the Legacy Property Limited Liability Company.

One option is not better than the other. A Legacy Property Trust is not better than a Legacy Property Limited Liability Company and vice versa.

The one to choose depends on many factors including:

- the amount of control to retain;
- the type of management structure;
- whether the result should be democratic in nature;
- the level of asset/creditor protection;
- cost;
- complexity.

Legacy Property Trust

A trust is a trust is a trust. A trust is defined as "a fiduciary relationship in which one person (the trustee) holds the title to property (the trust estate or trust property) for the benefit of another (the beneficiary)." In Chapter five, I discussed the revocable living trust as a basic estate planning tool. The Legacy Property Trust follows the same concept, except the primary purpose is to hold and manage the Legacy Property.

In a Legacy Property Trust it is common that all beneficiaries are equal in rights. They may or may not have any say in the management of the property or any voice as to their rights and usage.

Legacy Property LLC

A Limited Liability Company (LLC) is a legal entity formed for business purposes under state law. When used for Legacy Property, it may be the state the Legacy Property is located or another state where one or more of the owners reside. I always recommend to clients to have some nexus to the state in which the entity is formed. The “Legacy Property” in the title is a term I use for referring to the purpose of holding assets for the family and not a legal term.

To begin the LLC, articles of organization are filed with the state in which you intend to set up the company. Some states (such as Minnesota) allow you to keep the names of the members, governors, and managers private with only the name of the organizer being filed (in most cases, the organizer is the attorney who sets up the company).

Where the Legacy Property Trust has a trustee and beneficiaries, the Legacy Property LLC has owners referred to as members. The members own membership units (similar to stock in a corporation) or membership interests (expressed as percentages) which are used to represent the members' ownership interests.

The governance structure is hierarchical with members electing governors (directors). The board of governors sets policy, establishes the vision of the

company, and provides the framework of the management. The board also elects managers (president, vice president, secretary and treasurer). These officers will run the day to day operations and implement the policies and directions established by the governors.

II. Which one is right for the Dentist

This decision will be personal to each legacy property owner and family. It will depend on all of the facts and circumstances along with family history, personalities, and long-term objectives.

While I cannot definitively say what is best, I can, based on my law practice, give indications of who should not use a Legacy Property Trust.

One factor that points toward a Legacy Property LLC is creditor protection. If the parents are worried creditors of any child will try to seize the child's interest of the property, then the Legacy Property LLC is a better choice. The reverse is true also. If an accident happens on the property that causes damages over and above any insurance coverage, the Legacy Property LLC will give better protection to the outside assets of each child.

Another factor is the management. If the parents prefer to vest management primarily in one person a Legacy Property Trust will be a good

choice. If it is paramount the set up is as democratic as possible, the Legacy Property LLC is possibly a better choice. In the next few sections, I will discuss the pros and cons of both entities in detail which will enable dentists to apply their facts and circumstances to help them make the correct decision.

III. Advantages and Disadvantages of Using a Legacy Property Trust

Someone says it would be wise to own Legacy Property in a trust. Why a trust? Here are what I consider the five main reasons that support the use of a trust and the six main disadvantages.

Advantages of a Legacy Property Trust

1. Less Expensive than the Legacy Property LLC

If the dentist is going to do more than the basic estate planning and move into advanced strategies such as the Legacy Property Trust or Legacy Property LLC, there will be additional costs. A trust is generally less expensive to draft than the Legacy Property LLC. Generally, there is only a main trust document and a few short supporting documents. Many clients don't see their Legacy Property as something that justifies higher costs.

2. Better structure if there is a mortgage on the property.

If the property is mortgaged and the desire is to transfer the property to the entity upon formation (as opposed to a springing transfer at some future event such as death), then the Legacy Property Trust should be the choice. Each mortgage contains a due on sale clause. Therefore any transfer will trigger this clause and give the mortgage company the ability to call the entire amount of the mortgage due.

There is an exemption, though, for certain qualified trusts. A transfer of the property to a revocable living trust may be exempt under the Garn-St. Germain Depository Institutions Act of 1982. The exemption applies in the case of a real property loan that is secured by a mortgage on residential real property containing less than five dwelling units. The exemption applies to a transfer of residential real property to a living trust if the grantor is a beneficiary of the trust. Some of the Legacy Property Trusts I draft in my law firm do qualify for this exemption. There is no such exemption for a Legacy Property LLC.

3. No Government Filings

Compared to the Legacy Property LLC, the Legacy Property Trust does not need to have any governing documents filed with a city, county or state government. (This should not be confused with the filing of the deed transferring title to the entity

created). The existence of the trust may stay hidden depending on the circumstances.

With the Legacy Property LLC, the initial governing document will need to be filed with one or more government agencies and, additionally may need annual filings.

4. Simpler to Set Up

When comparing the Legacy Property Trust to the Legacy Property LLC, much less work needs to be done. There are less decisions to make and less documentation to be prepared.

5. Life Insurance Ownership.

This is an advantage for both the Legacy Property Trust and the Legacy Property LLC and a wise decision any way its looked at it. One of the biggest causes of disputes within a Legacy Property is money. How will expenses, taxes, and insurance be paid by all of those involved?

Most of the issues lie with either the unequal use of the property by siblings or their unequal net worth. Life insurance can be used for both the payment of expenses for years to come or also with the specific goal of buying a deceased owner's share if it will not be transferred to the next generation.

Life insurance ownership is almost a must have for any Legacy Property plan.

Disadvantages of a Legacy Property Trust

There are six main disadvantages of selecting the trust. Along with each disadvantage, I have, when appropriate, included any potential solutions. Some disadvantages may be able to be mediated by adopting business law principles within the trust document, and others cannot.

1. Lack of Flexibility Upon Death of the Grantor

A trust is created by the "Grantor." For the most part, this is the only person who can make changes and, of course, they can only do so when alive. Even if the trust is created to be revocable and amendable, it will nonetheless become irrevocable upon the death of the Grantor.

Within the trust itself, parents can get as detailed or as general as desired. They can dictate how every little item will be handled or provide the basic framework for children but allow them the ability to create a separate Operating Agreement. In an operating agreement, children can create provisions for day to day operations, rather than parents taking the time to dictate such parameters. These can include scheduling, budgeting, payment of expenses, and other issues. Regardless of which way is chosen, the main document will be frozen upon death.

Not only is there a lack of flexibility with trust provisions, it is also less flexible for future generations. Because descendants are beneficiaries and not owners, their rights are different. For the most part they will have equal rights to all other beneficiaries. While a trust can be drafted to give beneficiaries unequal rights, this is an awkward task with respect to an illiquid asset such as a Legacy Property.

2. Requirement of a Trustee

To have a trust, there must be a trustee. Generally, this must be an individual. A corporate trustee (banks and trust companies) does not like to administer this type of a trust because they generally do not like to hold real estate and prefer assets that are easy to value and administer. They also do not want to be in the middle of family personal issues. In my practice, I recommend picking the same people that will watch over the children's funds until they reach the ages selected for control. After that period, the children can rotate in the function as trustee if the trust agreement is drafted with this in mind.

Most Legacy Property trust agreements I draft allow for a child to be a trustee, and the job function of trustee can rotate. This can be seen as both a disadvantage and an advantage. If the only impediment to using a trust instead of a Legacy Property LLC is this issue, the trust I draft allows for the trustee to have certain powers, but each family

unit can have a say. This way several thousand dollars can be saved in initial costs and the result is the same as if a Legacy Property LLC was chosen

3. Eventual End

In many states, a trust cannot last forever due to the rule against perpetuities. From a practical standpoint, this means if a state has the traditional rule, the trust must come to an end in about 2–3 generations depending on the ages of the beneficiaries when parents die. This is the case for Minnesota. Wisconsin does not have such a rule, and Arizona allows for trusts to last up to 500 years. If, however, the parents do live in a state with the traditional approach, and this eventual ending is an objective of Mom and Dad, then this should not dissuade the use of a trust.

4. Liability Protection.

When comparing the Legacy Property Trust to the Legacy Property LLC, the trust is generally not as good for liability protection for the family members. I classify liability in two ways.

Outside liability refers to a debt of one of the trust beneficiaries caused by something other than the property. The creditor of this beneficiary may try to attach a judgment to the Legacy Property. If a trust has a provision called a spendthrift clause it may be insulated against such an attack. Usually,

though, state statutes for LLC's offer much better protection because they are designed and written to protect the ongoing nature of a business.

Inside liability refers to an accident that occurs on the property. In this case, the beneficiaries and trustee could be personally liable for any money judgments. With a Legacy Property LLC, assuming all of the formalities are followed, any creditors are blocked from going after the personal assets of descendants.

5. Rental Property Management.

The trust is not a good choice if the property will be used for rental purposes. If there is a possibility that the property could be rented to offset costs or create a stream of income for descendants, then the Legacy Property LLC structure is much better from an administrative and tax perspective.

6. Dispute Resolution.

If there ever are disputes among descendants/trust beneficiaries that rise to the level where a court is involved, then they will be resolved according to trust statues and case law. This generally is not as appropriate as business law statues and cases for resolving disputes.

IV. Advantages and Disadvantages of Using a Legacy Property Limited Liability Company

On the other hand, parents may have received some advice from a friend to set up an LLC for Legacy Property. Here are, what I consider, the eight main reasons that support the use of a Legacy Property LLC along with the four main disadvantages.

Advantages of a Legacy Property Limited Liability Company

1. Perpetual Existence: A Legacy Property LLC will have perpetual existence. In other words, it will continue until a point of time in the future when the owners decide to terminate it. It does not have to go on forever, but in most cases that is how they are set up. This gives descendants the ability to decide in the future if it is appropriate to continue the entity or end its existence.

2. Unequal Ownership: There may be factors in the family that would cause parents to want to treat the children differently with respect to the estate as a whole or just the Legacy Property. The Legacy Property LLC allows for this type of treatment. Depending on the state lived in, parents may also be able to split

the management (governance rights) and usage/equity (financial rights).

3. Estate Tax Minimization: If an estate is subject to estate taxes, the Legacy Property LLC is a good entity to use to slowly transfer value from one generation to the next during life. In a limited liability company, there can be both voting and nonvoting membership units. The parents then have the ability to slowly transfer nonvoting units to children over the rest of their life. This strategy effectively transfers value out of the estate but allows parents to retain complete control of the LLC and Legacy Property. Before undertaking a strategy like this, though, parents need to consult with a competent tax advisor, because the IRS may inspect these transactions closely.

4. Superior Liability Protection: If Liability Protection is of high importance, then a Legacy Property LLC is much better than the Legacy Property Trust. Based in business law, the Legacy Property LLC statutes are designed to protect the owners from both inside and outside liability.

5. Document Amendments: While the Legacy Property Trust is irrevocable after the death of the Grantors, the controlling documents for the Legacy Property LLC can be changed.

This feature allows for future generations to adapt the company and property uses to changing economy, family dynamics, legal and tax considerations, etc. Based on the above, the following may need changes over time:

- how the legal entity will operate;
- if and how ownership interests can change;
- who will lead and how will they interact;
- what operating rules are appropriate;
- ending the entity altogether.

6. Future Ownership Changes: When beginning to consider this entity and that the Legacy Property will go on for multiple generations, it is easy to see that some members will want to or be able to have an interest in using the property and others will not. The Legacy Property LLC is much better suited to allow for rules to govern how ownership can be transferred among owners and whether ownership can be transferred to non-owner third parties.

7. Restricting Ownership Changes: Along with giving future generations the ability to buy and sell between each other or to an outsider, parents may also want to put restrictions on these transactions to protect the other owners. Again the Legacy Property LLC is superior to the Legacy Property Trust for this

objective. Among the more common transfer situations that can be controlled by ownership control agreements are:

- preventing non family members from becoming owners by giving the other owners or the entity itself the right to purchase ownership interests of someone wanting to sell;
- not allowing any owner to use their interest in the entity as collateral for a personal loan. This prevents a lender from becoming an owner upon default;
- deciding what should happen to a deceased owner's interest upon their death. Should it pass to non family spouse, should it go their children or should there be an option to purchase by other owners and or the entity itself;
- deciding what should happen to an interest that becomes or may become subject to an involuntary transfer, such as in a divorce, bankruptcy or other type of judgment.

8. Life Insurance Ownership: This is an advantage for both the Legacy Property Trust and the Legacy Property LLC and a wise decision any way its looked at it. One of the biggest causes of disputes within a Legacy Property is money. How will expenses, taxes, and insurance be paid by all involved? Most of

the issues lie with unequal use of the property by siblings that live in a different state or siblings with unequal net worths. Life insurance can be used for both the payment of expenses for years to come or also with the specific goal of buying a deceased owner's share if it will not be transferred to the next generation. Life insurance ownership is almost a must have for any Legacy Property plan.

Disadvantages of a Legacy Property Limited Liability Company

There are four main disadvantages to owning a Legacy Property in an LLC and they are substantial.

1. Formalities for Continued Existence and Liability Protection.

With a business entity there are various formalities that need to be followed such as:

- annual filings with the state;
- member and governor meetings and minutes.

These formalities need to be followed in order to make sure the initial expectations for holding the entity in a Legacy Property LLC is maintained. If not followed, the entity may be dissolved by the state, causing the property to be owned by all of the

members individually. This mistake would subject it to all of the liability and disputes that were intended to be avoided.

2. Increased Expenses.

With creating and maintaining an LLC there will be more initial and ongoing costs than if a trust were selected. These costs can add up and include:

- Initial filing costs for filing the articles of organization. In Minnesota, the cost is $170 compared to Arizona where it is only $50.
- If the entity owns property in another state, registration of the LLC in that state may also be required, which can cause an additional fee. In addition, an attorney may also be required in that state.
- Attorney Fees: Anyone can set up an LLC without an attorney. All that is required is to file a one page form with the state and pay the fee. Most states even provide a form to fill in. The problem with this is it gives the basic shell to own the property but it does not provide any of the formalities to give the protections of the LLC. Nothing has been gained except for a false sense of security. Attorney fees for a properly set up LLC can add up fast, and

protecting a Legacy Property is a highly specialized area.

- Accountant Fees: While the attorney fees are substantial, they are for the most part up front. As long as an LLC is in existence, there are annual tax filings (partnership tax form and K-1) that may need to be completed and filed. Accountant's fees will occur annually. Depending on how many owners there are, annual financial reports may also need to be produced.

3. Mortgages

- First, if parents own it as in their names and it has a mortgage, they most likely will not be able to transfer it to the LLC until that mortgage is paid off. As discussed above in the advantages of using a Legacy Property Trust, each mortgage contains a due on sale clause which in effect prevents the property from being transferred.

- Second, the favorable terms individuals can get for mortgages will no longer be available because it is owned by a business entity. Business mortgages usually have a higher interest rate, and the process of borrowing money is more complicated. If money is needed for improvements or other expenses,

the LLC will most likely need to work with a commercial lender. Additionally, this lender will require personal guarantees by the members.

4. Business Purpose

Many states and the IRS require business entities to have a business purpose. This is not insurmountable when holding real estate but it is a consideration. One such purpose is holding the property for appreciation and asset protection is another. If the plan is renting the property, operating a rental business is a possibility even if these renters are limited to family members who want to pay for additional usage.

V. Considerations and Decisions

Once the decision is made to go forward and create an entity to own, manage, and control the Legacy Property for children and future generations the following considerations and decisions must be made.

The first is whether to use a Legacy Property Trust or a Legacy Property Limited Liability Company. Once this decision is made (and should only be made with the counsel of an attorney experienced in preparing these types of plans), parents need to make both entity level and property specific decisions. An entity level decision is one that

affects how the entity itself deals with the facts and circumstances that will arise with future generations. A property level decision affects the use and enjoyment of the property itself.

Entity Level Decisions

Below are twelve considerations to think about at the entity level decisions.

1. Transferring the property to the entity now or at death.

When a client of mine selects a Legacy Property Trust, I will generally recommend the trust be irrevocable. In the trust, they can own life insurance on their lives to provide for liquidity at death to prevent family financial fights. Under this strategy, the death benefits will not compound any potential estate tax liability they may have because the trust is irrevocable. I don't necessarily recommend that the property be immediately transferred to the irrevocable trust though because it is very hard, if not impossible, to undo and will limit their flexibility. Usually, I advise the client to own the property currently in their revocable living trust and transfer to the irrevocable trust on death. They will then have maximum flexibility to make any course changes in the future but still have a great plan for their death.

To contrast this with the Legacy Property LLC, if this structure is chosen as the planning entity, the property will most likely transfer with the the creation of the entity. This will give the asset protection that may be desired while still retaining control.

2. Providing for expenses with cash gift or life insurance.

Should parents provide for future expenses in the entity by either a cash gift or life insurance death benefits, or should the children be allowed to fend for themselves and pay all expenses of the property?

This will depend entirely on individual facts and circumstances and most of all the size of the estate and the personalities of children and their life circumstances.

3. Do the parents want to allow any of the children to opt out of the structure established at death? (This is usually only advisable for larger estates).

This can be a very difficult question to answer. If parents are going to allow children to opt out of the structure they set up by choosing other assets, then they will need to make sure that there are in fact sufficient resources for this to occur. A problem with this is that there may be sufficient resources now, but, due to life changes, this may have to be revisited this in the future.

I will generally recommend clients not allow this option but let the mechanisms in the governing documents allow for buyouts and options to control.

4. Do parents want to create more of the infrastructure for the entity or a more basic plan leaving future generations to make decisions?

If parents want to set up as much of the terms and conditions of how future generations handle property issues, they will most likely want to choose a Legacy Property LLC. This structure, and using business law, will give better tools to achieve this objective. If parents are more concerned with setting up the basic structure with some constraints so children can enjoy this property without fights and divisions, then the Legacy Property Trust is probably a better choice. (Subject to the asset protection issue)

5. Include strong asset protection considerations.

If asset protection is a big concern, then parents will probably lean toward the Legacy Property LLC. Of course this is but one factor among many that will need to be given weight during the decision making process.

6. Should spouses of children be allowed to be owners, or should all ownership stay with blood relatives?

Most of my clients keep spouses of children from becoming owners at the death of a child. It will depend on how the children's marriage is perceived but most likely an interest of a deceased child will either pass to the grandchildren or be allowed to be purchased by other children.

7. Equal or unequal ownership usage and or management rights.

Parents may not allow a child to opt out of the entity entirely. Instead, they may decide a child who lives a greater distance from the property and will not use it as often should get a smaller ownership interest. They can then compensate that child with other assets of the estate. This will most likely only happen with larger estates and is better accomplished through the Legacy Property LLC.

8. Will children or future generations be allowed to offer their interest for sale to other relatives or outside parties?

Parents will probably not allow the potential sale to non family members but allowing future generations an out is a good idea, especially when getting to grandchildren or beyond.

9. Dispute resolution

Should a dispute resolution provision be included? Remember the more decisions left to

future generations, the greater the chance of disputes. Parents will need to balance this with how much they want to reach back from the grave and dictate to children. Regardless of which way is chosen, parents will most likely want to include some form of dispute resolution.

10. Deciding when the entity ends. Parents can either allow this to be an operation of law, leave it to future generations, or make the decision themselves. If they decide when the entity should end, they will need to consider the following:

    - What should happen to the property? Should it be:
        - sold and the net proceeds divided amongst the then current owners;
        - sold to some or all of the descendants;
        - distributed in kind to some or all of the current descendants?

11. What events may cause a descendant to divest their interest, and how should it be handled? (I.e. divorce, bankruptcy, judicial judgment, etc.)

12. Expenses, taxes, and insurance.

If parents do not fund the entity with cash or life insurance, I suggest they include provisions for payment of proportionate share of expenses, taxes insurance and other costs when necessary. They will

also need to think about the ramifications if one or more of the descendants decide not to pay. Will their use and interest be suspended and eventually forfeited for nonpayment of required expenses?

Property Level Decisions

Below are six decisions parents may want to think about at the entity level decision.

1. Personal Property: Parents will need to decide if they want to include any of the personal property associated with the Legacy Property in the entity (most likely yes). If they do, then they will need to provide for this in the entity documents.

2. Fiduciary decisions: In this section consider how little or much discretion to give to the people left in charge. Some of these considerations may be:
   - what can the fiduciary (trustee or managers) do without input from descendants? Additionally, when and under what circumstances do the descendants have the ability to decide how entity funds are spent? Is there a threshold?
   - what types of assets can be purchased? Boats, docks, jet skis, furniture, artwork, etc.
   - is there a threshold for the fiduciary for repairs and improvements before going to descendants or will the fiduciary have full authority?

- Should professional cleaning services be used to clean after usage and how should payment be handled? Alternatively, should each party be responsible for their own cleaning? If each party has responsibility, are there penalties if they do not comply?

3. Property rules: Who should create and implement property rules. Should it be the parents or descendants?

4. Dispute resolution. Parents know their kids, did they ever fight when they were growing up. Do their personalities ever clash? How will any disputes be handled? These considerations should be given some thought.

5. Management of the property:
   - selecting or assigning weeks of usage;
   - can descendants trade assigned usage or perhaps sell between family members?
   - is consecutive week scheduling allowed?
   - will exclusive use be allowed between family units or will it be shared use?

6. Are guests allowed to come to the property with owners? Should restrictions be imposed on inviting guests or should it be wide open? Here are some suggestions:
   - prohibiting guests all together

- allowing guests but putting limitations on the number and when they can come.
- implementing extra charges to bring a guest.
- should guests be at the property without the host?
- can guests bring property such as boats which may lead to extended liability?

There are many possible decisions that can be made when setting up a Legacy Property entity. This should not be an impediment to beginning the process, because even if the parents do not have all the answers now, they should get a plan in place. An attorney with a focus in Legacy Property planning can assist through this process and make it easy.

9

Epilogue

I hope you found this book helpful and informative. The information is based on many years of working with dentists across the spectrum of their respective practices, from residents to those ready to retire.

Each situation is different, and I have found that no one plan fits all. However, there are two common things I try to bring to working with dentists as an attorney and/or their legal advisor. To every encounter, I try to bring this mindset: Listen first, teach second.

It is important for me to develop a good relationship with the dentist and determine what they want to achieve for themselves and their families. Only then can I educate them on how to get there. My hope in distributing this book is to bring these goals to a wider audience. I hope to help dentists become aware of the legal issues they face, help them narrow and define their objectives, and teach them how to get where they're going.

I hope you enjoyed reading this book and have a better understanding of the legal issues you face as a dentist. If you have any questions, please feel free to call me at:

Toll Free: 888-711-4524
Minneapolis., MN Office: 651-967-7932
Phoenix, AZ Office: 480-779-0498
Madison, WI Office: 608-492-0206; or

email me at robert@robertkaufer.com.

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Endnotes:

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[1] The name comes from D. Clifford Crummey, whose court case resulted in the approval of the demand right technique.

[2] Uniform Fraudulent Transfer Act (UFTA), Section 4(1) states:

A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

1. with actual intent to hinder, delay, or defraud any creditor of the debtor; or
2. without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

> (a) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
> (b) intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.