YORK HOWELL & GUYMON

ATTORNEYS AT LAW

Asset Protection for High Risk Professionals and High Net Worth Individuals

- Licensed to practice in Alaska, Arizona, California, Idaho, Nevada, Texas, Utah, and Wyoming
- Boutique firm focused on business planning, tax, estate planning, asset protection and charitable organizations
- One attorney is a Certified Public Accountant and another has an LLM in Tax
- Successfully represented clients before the IRS at all levels (Audit, Appeals and US Tax Court)
- Member of the American College of Trust and Estate Counsel and Society of Trust and Estate Professionals
- Attorneys are active in charitable and professional service

What Asset Protection is

- Advanced planning to place assets out of reach of potential future creditors
- Full disclosure
- Strategic ownership of assets
- Compartmentalizing risk

What Asset Protection is Not

- Hiding assets
- Misrepresenting the truth of the matter

Asset Protection in General

Two primary factors to consider when doing asset protection planning:

1. The type and nature of your assets.

2. The type and source of your risks.

Asset Protection in General

1. **The type and nature of your assets.**

   Many assets provide “natural” asset protection.

   Qualified plans and life insurance are two common examples.

   Other assets, however, can be more difficult to protect and State law has a tremendous affect on the level of protection afforded to your assets.

   Part of our planning process entails reviewing and analyzing the type and titling of the assets to develop an asset protection plan specific to the needs.

Asset Protection in General

2. **The type and source of your risks.**

Risks typically come in two forms.

The first is asset based risk – risk that someone have as a result of the assets that you own. Through the use of corporations and limited liability companies, we can try and compartmentalize those potential risks from other assets.

The second is direct risk – risk that comes from personal and professional activities. We can help implement a variety of different strategies to deal with this type of risk, from fairly basic to the most advanced and sophisticated.

Fraudulent Conveyances

- Any transfer which is intended to hinder, defraud, or delay creditors
- The transfer leaves the transferor insolvent
- Creditor – anyone with a claim
- Claim – any right to payment, whether or not reduced to judgment
- Timing – “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”

Utah Code -- Title 25 -- Chapter 06 -- Uniform Fraudulent Transfer Act

Common Law Badges of Fraud

- Transaction with insider
- Debtor retains possession and control
- Transaction concealed and not disclosed
- Debtor sued or threatened with suit
- Transfer substantially all assets
- Debtor absconded
- Debtor removed or concealed assets
- Consideration was less than reasonably-equivalent value
- Debtor insolvent, or soon becomes insolvent
- Transaction shortly before or shortly after substantial debt incurred
- Transfer essential business assets to someone who transfers to an insider

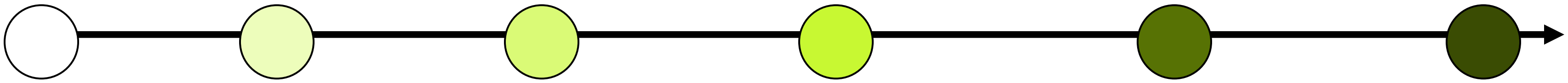
Example – Mr. Business

	Asset	Current Titling
1.	Home	Joint Tenant with spouse
2.	Cabin	Joint Tenant with spouse
3.	Cars	Jointly with spouse
4.	Boat	Own name
5.	IRA	Own name
6.	401(k)	Own name
7.	Life Insurance	Own name/wife & kids
8.	House for Mother	Joint Tenant with Mom
9.	Brokerage Account	Joint Tenant with spouse
10.	Checking/Saving	Joint Tenant with spouse
11.	Rental Properties	Own name

The Sliding Scale
Of Asset Protection

Statutory Protections Only

Judgment Proof



Insurance

Revocable Trusts

LLCs

Domestic Asset Protection Trusts

Offshore Irrev. Trusts

100%

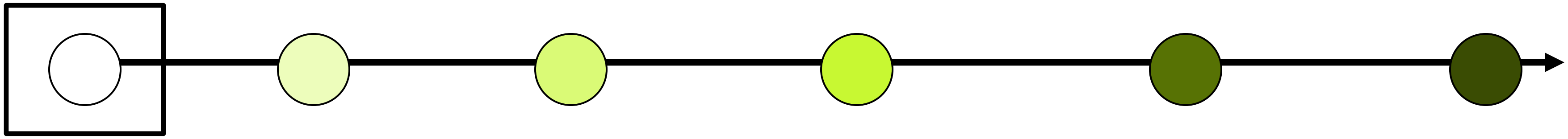
All assets owned in clients own Name

0%

No assets owned in clients own Name

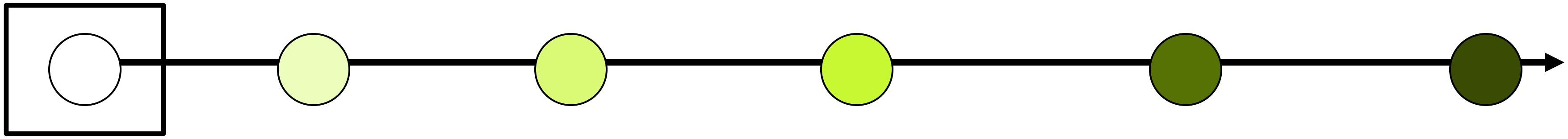
Statutory Protections

- Separate Assets and Debts –neither spouse is liable for the separate debts, obligations, or liabilities of the other (UCA §30-2-5)
  - Note that there is an Exception – 30-2-9
    - The expenses of the family and the education of the children are chargeable upon the property of both husband and wife or of either of them, and in relation thereto they may be sued jointly or separately. (1953)
- Homestead ($40k) - UCA § 78B-5-505
- Personal Property - UCA § 78B-5-505



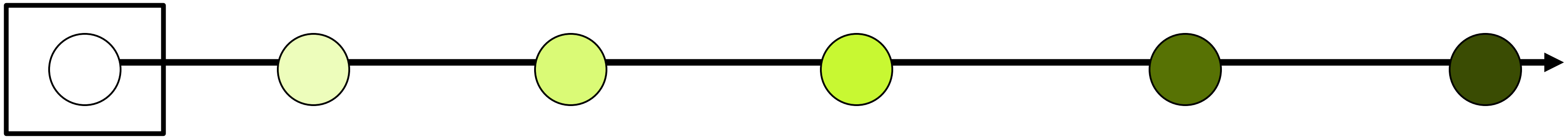
Statutory Protections

- Qualified Retirement Plans assets (401K and IRA) - Federal law
  - Subject to the **$1 million** cap (2005 BACPA)
- Annuities
  - Family annuity
- Life Insurance - UCA § 78B-5-505(1)(a)(xi-xiii)
  - Except contributions made in last 12 months



Non-Dischargeable Debts

- Back child support, alimony obligations and other debts dedicated to family support.
- Debts for personal injury or death caused by driving while intoxicated.
- Student loans, unless it would be an undue hardship to repay.
- Fines and penalties for violating the law, including traffic tickets and criminal restitution.
- Recent income tax debts (within 3 years provided returns were filed) and all other tax debts.
- Debts you forget to list in your bankruptcy papers

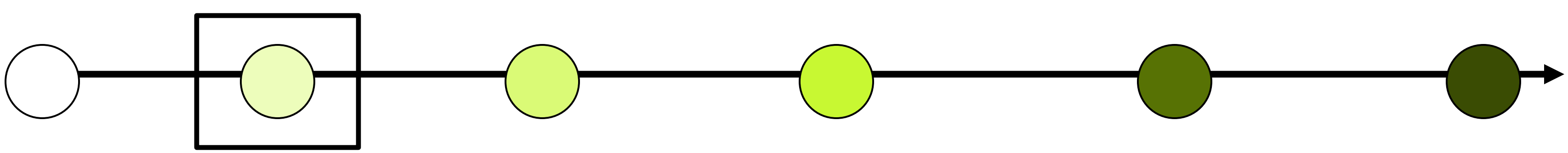


Example – Mr. Business

	Asset	Current Titling	Protection
1.	Home	Joint Tenant with spouse	***$40,000 in equity***
2.	Cabin	Joint Tenant with spouse	
3.	Cars	Jointly with spouse	
4.	Boat	Own name	
5.	IRA	Own name	***Statutory***
6.	401(k)	Own name	***Statutory***
7.	Life Insurance	Own name/wife & kids	***Statutory***
8.	House for Mother	Joint Tenant with Mom	
9.	Brokerage Account	Joint Tenant with spouse	
10.	Checking/Saving	Joint Tenant with spouse	***Limited***
11.	Rental Properties	Own name	

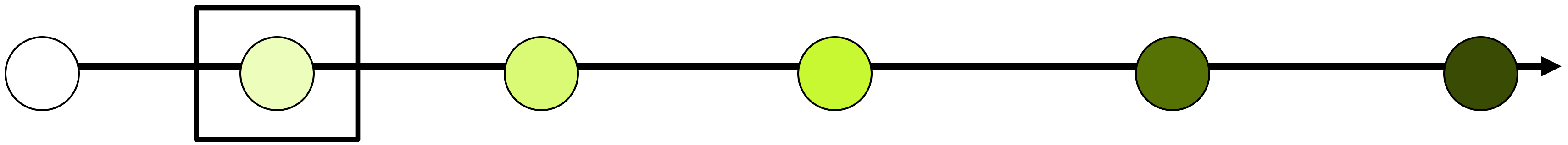
Insurance

- Homeowners / Auto
- Malpractice or Directors and Officers
- Umbrella Policy



Titling of Assets

- Equalize assets between husband and wife (spread risk)
- Spouse with lower risk should own the bigger assets
  - Cars - UCA § 78-11-20
    - Cars for children
  - Boats - UCA § 73-18-18
  - Recreation property
  - Brokerage accounts
- Avoid Joint tenancy with others (mom, brother etc.)

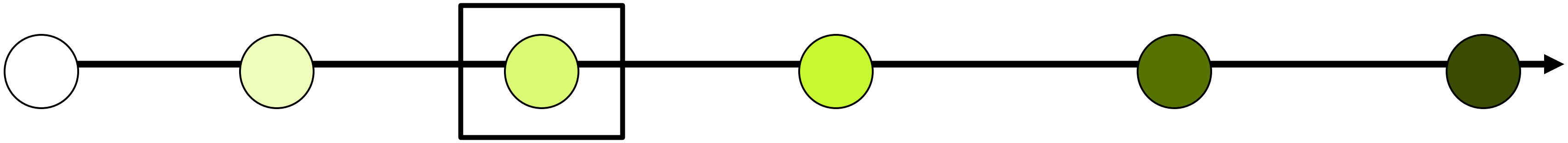


Example – Mr. Business

	Asset	Current Titling	Protection
1.	Home	Joint Tenant with spouse	$40,000
2.	Cabin	Joint Tenant with spouse	
3.	Cars	Jointly with spouse	***Spouse/kids***
4.	Boat	Own name	***Spouse's name***
5.	IRA	Own name	Statutory protection
6.	401(k)	Own name	Statutory protection
7.	Life Insurance	Own name/wife & kids	Statutory protection
8.	House for Mother	Joint Tenant with Mom	***Mom's name***
9.	Brokerage Account	Joint Tenant with spouse	***Spouse's name***
10.	Checking/Saving	Joint Tenant with spouse	***Limit holdings***
11.	Rental Properties	Own name	

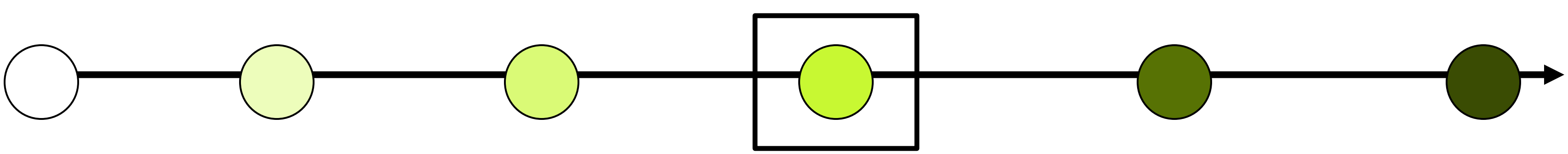
Revocable Trusts

- Separate Revocable Living Trusts (RLT)
  - Assets in one spouse’s RLT can be protected from potential claims against the other spouse
    - Example: personal residence
  - On death, a revocable trust becomes irrevocable and the assets inside a properly drafted trust can become absolutely protected from claims of creditors (spendthrift clause)



Family LLCs

- Members own only a bundle of rights outlined in Operating Agreement (not the assets of the Company)
- Shield owners from liabilities of entity up to their capital investment
  - Creditors relief limited to the assets of entity
    - Inside vs. outside creditors
- Corporation vs. LLC
  - Corporations creditors may attach the shares of stock, including right to vote, sell, bring derivative actions
  - LLC creditors limited to **charging order** (restrict creditors from directly effecting the partnership)



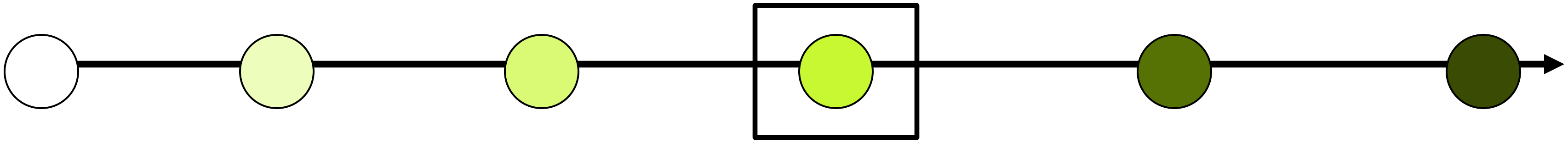
Family LLCs

- **Charging Orders (UCA § 48-1-25; § 48-1-29; § 48-2a-703; § 48-2c-1103)**
  - Like a lien or garnishment – Assignment of partners economic right to distributions from the partnership (assignment of income)
  - Purpose is to protect the non-debtor members from becoming partners with a creditor
    - What about single member LLCs?
      - No charging order protection, creditor is granted full economic rights (In re Albright, No. 01-11367 (Colo. Bkrpt. April 4, 2003)
      - Still provides Members protection from “inside creditors”
      - Add a member (1%) for protection from “outside creditors”
        - For value and with a business purpose

Compartmentalizing Risk

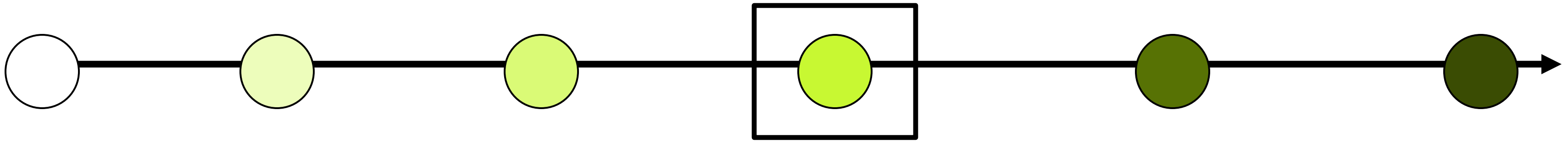
- **Separate LLC for equipment owed by an corporation**
  - Equipment is protected from the potential creditors or lawsuits of the operating business
  - Payment of lease payments from the "S" corporation to the LLC, if leased in conjunction with real property, can generate passive income, which can be used against passive losses

- **Separate LLC for Real Estate owned by a corporation**
  - Creates the ability to treat such property as a capital asset and obtain capital gain treatment on the future sale of property
  - Can lower the potential tax on such gains from a combined federal and state tax rate.
  - Real Estate is protected from the potential creditors or lawsuits of the operating business



Compartmentalizing Risk

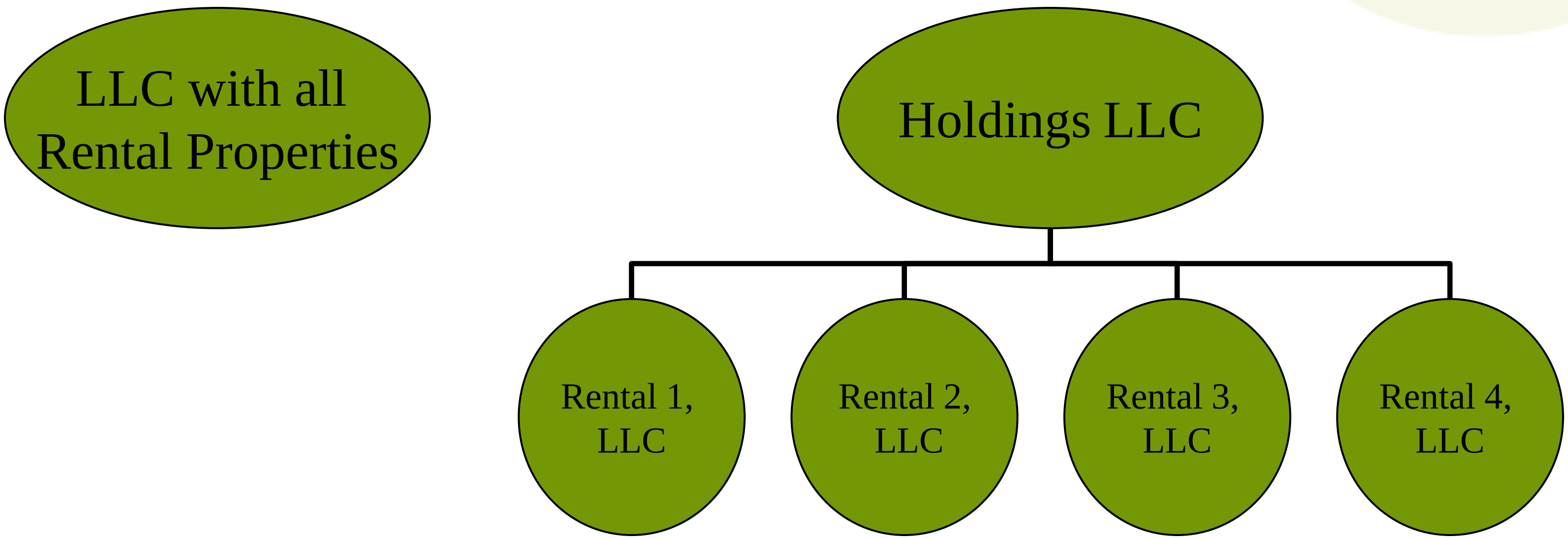
- **Subsidiary LLCs Wholly-Owned by the Parent (Example - Rental Property)**
  - Segregate the risk associated with any one rental property
  - Parent company could establish any number of wholly-owned subsidiary LLCs which could be disregarded for income tax purposes (one tax return) but which could create a wall of separation between each rental property



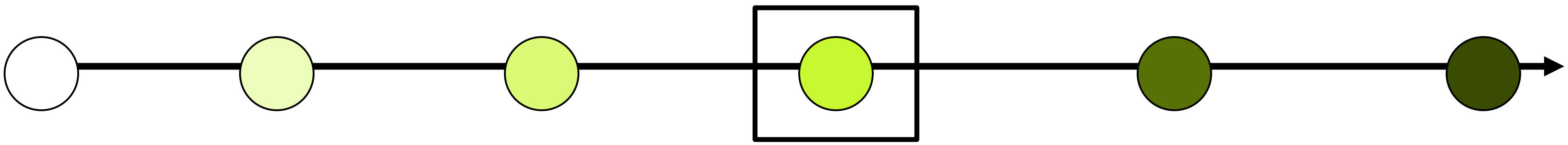
Compartmentalizing Risk

Option 1

Option 2



Requires: Separate bank accounts & lease agreements (but only one tax return if rental LLCs are wholly owned by holding company)

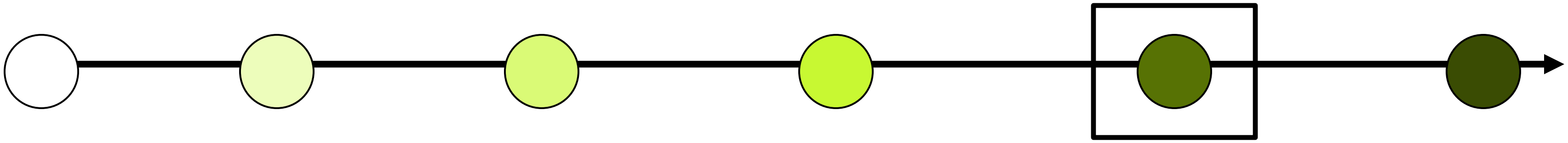


Example – Mr. Business

	Asset	Current Titling	Protection
1.	Home	Joint Tenant with spouse	***Wife's Trust***
2.	Cabin	Joint Tenant with spouse	***Recreation LLC***
3.	Cars	Jointly with spouse	Spouse/kids name
4.	Boat	Own name	Kid's name
5.	IRA	Own name	Statutory protection
6.	401(k)	Own name	Statutory protection
7.	Life Insurance	Own name/wife & kids	Statutory protection
8.	House for Mother	Joint Tenant with Mom	***Mom or LLC***
9.	Brokerage Account	Joint Tenant with spouse	***Investment LLC***
10.	Checking/Saving	Joint Tenant with spouse	Limit holdings
11.	Rental Properties	Own name	***One or more LLCs***

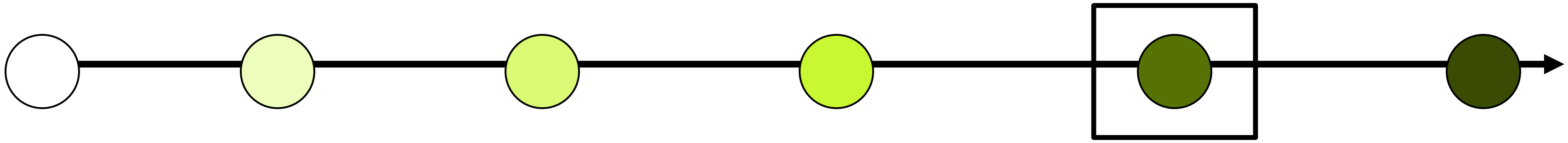
Self-Settled Trusts

- A Self-Settled Trust is a Trust established by a person (a “Settlor”) who is also a beneficiary of the Trust
- Two Traditional Problems with Self-Settled Trust
  - Assets of the Trust are subject to the Settlor’s creditors (English Statute – 1487)
  - Terms are limited in how long they can last (Rule Against Perpetuities – 1682)



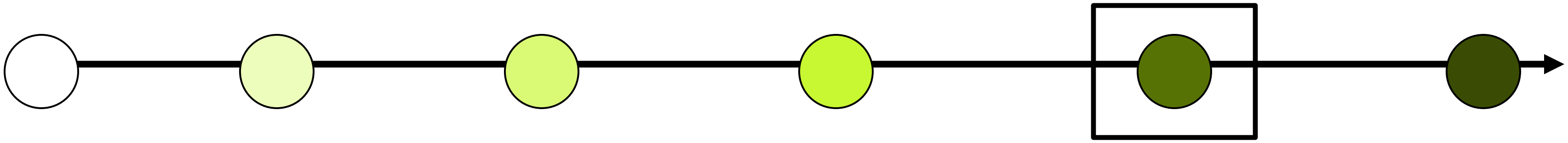
Self-Settled Trusts

- Domestic Asset Protection Trusts
  - Certain States have adopted laws which allow a person to establish a trust for the benefit of themself, their spouse, and children, without those assets being subject to the claims of future potential creditors
  - Trust assets can either continue to be included in the estate for estate tax purposes (“incomplete gift trusts”) or outside of the estate for estate tax purposes (“complete gift trusts”)
  - Currently the best States for Domestic Asset Protection Trusts are: Alaska, Delaware, Nevada and Utah (for Utah residents)



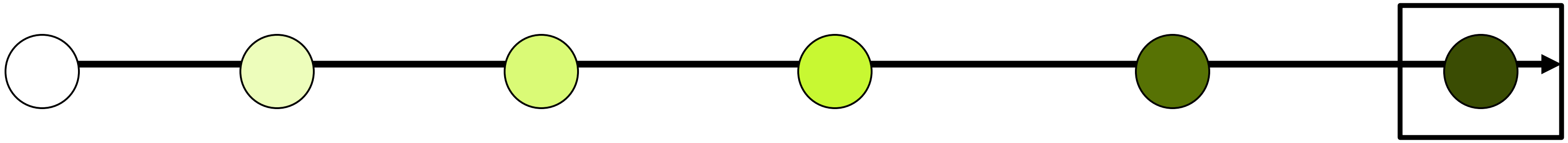
Self-Settled Trusts

- **PLR 9332006**
  - Assets in a foreign trust can be outside of a Settlor's estate for estate tax purposes, even if the Settlor is a beneficiary
- **Revenue Ruling 2004-64**
  - Trust can pay taxes on a self-settled trust for the Settlor and the assets of the Trust can still be out of the estate for estate tax purposes
- **PLR 200944002**
  - Domestic asset protection trusts can hold assets for a Settlor and still have those assets outside of a Settlor's estate



Self-Settled Trusts

- Foreign Asset Protection Trusts
  - Designed like Domestic Asset Protection Trusts
  - Foreign jurisdictions can refuse to honor (give full faith and credit) US judgments or creditors
  - Trustee can pay expenses for beneficiaries – any distributions are totally discretionary
  - Subject to additional Federal reporting requirements
    - FBAR
    - Foreign Trust Tax Returns
  - Assets can also be held offshore, either now or in the future



Example – Mr. Business

	Asset	Current Titling	Protection
1.	Home	Joint Tenant with spouse	***DAPT***
2.	Cabin	Joint Tenant with spouse	***LLC owned by DAPT***
3.	Cars	Jointly with spouse	Spouse/kids name
4.	Boat	Own name	Kid's name
5.	IRA	Own name	Statutory protection
6.	401(k)	Own name	Statutory protection
7.	Life Insurance	Own name/wife & kids	Statutory protection
8.	House for Mother	Joint Tenant with Mom	Mom or LLC
9.	Brokerage Account	Joint Tenant with spouse	***LLC owned by DAPT***
10.	Checking/Saving	Joint Tenant with spouse	Limit holdings
11.	Rental Properties	Own name	One or more LLCs

Summary Recommendations

- PLAN BEFORE THERE'S A PROBLEM
  - Transfers made after issue/malpractice has been committed or debt has been assumed can be set aside as a fraudulent conveyance
- Insurance
  - Keep enough insurance
  - Malpractice Insurance
  - Umbrella Liability Policy
- Maintain proper titling
- Maximize ownership of exempt assets
- Fund retirement assets to protect non-exempt cash and defer income tax

Summary Recommendations

- Avoid Fraudulent Transfers
  - Make it part of estate and business planning
  - Do not make significant changes in financial statement
  - Remember – the only planning worth doing is planning that can be fully disclosed
- Let trusts and LLCs make future business and investment opportunities
- Avoid personal guarantees