

The Use of LLCs in Estate Planning

BY VAR LORDAHL, ESQ. AND HILARY WILLIAMS, ESQ.

Most lawyers are aware of the prevalence of the limited liability company (LLC) as the preferred entity structure for many modern enterprises. Less obvious, however, are the many benefits that properly structured LLCs can provide to estate plans. The combination of an LLC's asset protection features, organizational flexibility, potential for separation of ownership and management, and tax flexibility make it the go-to legal entity in many estate planning scenarios. This article will provide a brief overview of the various creative uses of LLCs in an estate plan.

The Basics

In 1991, Nevada passed legislation that created NRS Chapter 86, titled "Limited-Liability Companies." With help of approval by the IRS, LLCs (in and outside of Nevada) subsequently became a popular business organization structure, due to the flexibility with which they are taxed, their limited liability features and their ability to be either member-managed or manager-managed.

The Internal Revenue Code allows an LLC broad flexibility in choosing its

own tax treatment. Currently, multi-member LLCs may elect to be taxed as partnerships, S Corporations (assuming other requirements are met) or C Corporations. Single-member LLCs may elect to be completely disregarded for tax purposes or to be taxed as either type of corporation.

Furthermore, LLCs generally possess the same limited liability features as a corporation. Unlike traditional limited partnerships, there is no need to appoint a general partner with unlimited liability. More significantly, in Nevada, when a judgment creditor receives an order, the greatest recourse they can obtain from the judgment debtor's interest in an LLC is a charging order.¹ Under a charging order, the judgment creditor must essentially sit and wait for distributions from the LLC and cannot liquidate, force

distributions from or participate in the management of the LLC.

With respect to management, LLCs can elect to be either member-managed (similar to a general partnership) or manager-managed.² In the vast majority of scenarios, and particularly with respect to estate planning, LLCs should elect to be manager-managed, in order to separate the ownership from the management of the entity.

Family Businesses

The most obvious use of an LLC in an estate plan is in the context of a family business. For example, assume that Mom and Dad run a series of local car washes and wish to gradually transfer ownership to their children, while retaining control of the

continued on page 19





Please join/renew as a CCBA member now!

All members of the State Bar of Nevada; members of the local, state, and federal bench; and their legal support staff are invited to join /renew as members of the Clark County Bar Association (CCBA).

- Become an active member.
- Attend bar luncheons.
- Develop bar services.
- Teach CLE seminars.
- Volunteer for community service activities.
- Produce content for *Communiqué*.
- Promote professionalism.
- Support your local legal community.

To join or renew as a CCBA member, complete the application or renewal form (available online, PDF, or as paper) and submit payment to the Clark County Bar Association. For more information, visit clarkcountybar.org, call the CCBA office at (702) 387-6011, or send a request to Donna Wiessner at donnaw@clarkcountybar.org.

Thank you!



The Use of LLCs in Estate Planning

company during their lives. In this scenario, Mom and Dad may initially create an LLC in which they own 100 percent of the membership (ownership) interest and act as the sole managers.

Each year, Mom and Dad may elect to transfer a small percentage of their membership interests to each of their three children. Each child would then hold a membership interest in the business, but Mom and Dad, by virtue of being the managers, would retain control over the business.

Now assume that the oldest daughter possessed the skill and knowledge to take over the family business. Mom and Dad could appoint their oldest daughter as manager, thereby ensuring that each of their children would have an *ownership* interest in the business, but that only their eldest daughter would have the right to *manage* the business (and perhaps draw a salary for doing so).

Over time, ownership could be further ceded in varying percentages to the children, but the oldest daughter could remain in control of it. This arrangement serves the needs of the business and may also help to alleviate tensions among the non-managing children, who nevertheless receive minority ownership interests in the family business.

Taxes

In most (but not all) situations, the aforementioned family LLC would be taxed as partnership or S Corporation. Therefore, no entity-level federal income tax would be due. Furthermore, a portion of the taxable income would pass through to the children's tax returns, likely resulting in a lower overall income tax burden to the family. Moreover, it would likely qualify for the 20 percent pass through income tax deduction under the Tax Cuts and Jobs Act of 2017, further ameliorating the family's aggregate tax burden.³

With respect to federal estate and gift taxes, the current unified credit for a legally married couple is a combined \$22.36 million. However, to the extent that Mom and Dad's estate is in excess of their unified credit (perhaps due to large prior gifts or because of the value of their total assets), Mom and Dad must contemplate the impact of the 40 percent federal estate and gift tax on their assets.

Again, LLCs can become a critical tool for estate tax efficiency. Assume the family LLC was extremely successful with an aggregate value of \$40 million: well in excess of the unified credit. Mom and Dad may consider one of many strategies, such as making discounted gifts of membership interests to their children. More specifically, if Mom and Dad decided to give each child a one-time gift of a 20 percent interest in the LLC—with a gross value of \$8 million each—Mom and Dad may consider discounting these values on their gift tax return. Because each 20 percent membership interest has no management rights (it's a manager-managed LLC, remember?), and because there is no readily available liquid market for minority non-management interests in family LLCs, Mom and Dad (after obtaining a qualified appraisal of the LLC), might take a 35 percent valuation discount on

the gift to account for the lack of control and lack of liquidity associated with the interests. The bottom line is that each 20 percent interest gifted to the children would be worth only \$5.2 million for gift tax purposes, as opposed to the gross \$8 million asset value of each interest.⁴

At a 40 percent estate and gift tax rate, this strategy could result in a total tax savings of up to \$3.36 million, due entirely to the structuring of the LLC and subsequent gifts. An aggressive estate planner may also utilize this strategy by placing other family assets into an LLC (such as investments or artwork) and making discounted gifts of those LLC membership interests.

Obtaining competent tax counsel in these scenarios is absolutely critical. A properly structured valuation discount is an incredibly effective strategy. However, the IRS may assess penalties and interest, and prosecute for potential tax fraud for improperly structured or malfeasant valuation discounts.

Asset Protection for Mom and Dad's Other Assets

Most estate plans should include some form of asset protection planning. Suppose that Mom and Dad own rental houses in Las Vegas and Reno in addition to the family LLC. Each of

continued on page 20

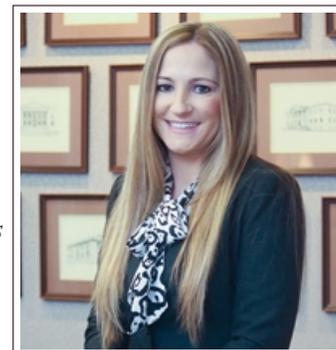


Alverson Taylor & Sanders

Nevada's Law Firm

WE ARE PLEASED TO ANNOUNCE THAT
COURTNEY CHRISTOPHER, ESQ.
IS A PARTNER AT
ALVERSON TAYLOR & SANDERS

Courtney Christopher has extensive experience representing hospitals, nurses and physicians in medical malpractice matters. She also represents clients in the defense of personal injury claims.



ALVERSON TAYLOR & SANDERS

(702) 384-7000 / www.alversontaylor.com

The Use of LLCs in Estate Planning

these properties should be placed into a separate LLC or into a Nevada Series LLC (with each property occupying its own series). This creates risk segregation, because the limited liability shield of each LLC (or series) provides asset protection to every other LLC and to Mom and Dad.

For example, assume a tenant becomes gravely injured on the Reno property. Certainly, such a tenant could sue and potentially levy on the assets of the LLC holding the Reno property, but it would be difficult for such a tenant to obtain the assets of the other LLCs, assuming that Mom and Dad followed all legal formalities. Furthermore, Mom and Dad individually would likely be protected by the limited liability shield of the Reno LLC. And, even if the tenant did obtain a judgment against Mom and Dad individually, the tenant would be confined to a charging order in trying to execute on the other LLCs owned by Mom and Dad.

Out-of-State Property

Clients creating estate plans may also benefit from an LLC by placing out-of-state property—particularly real property—into an LLC. Although clients may initially wish to create a Nevada Self-Settled Asset Protection Trust (NAPT) into which they place their real properties, their counsel must consider whether an out-of-state court would respect the NAPT. For example, California courts

generally find that NAPT's violate public policy, and a California court would likely decline to enforce Nevada's NAPT laws with respect to a piece of California real property. As an alternative, the astute estate planner might suggest that the client place the California real property into a California LLC—an entity that California courts do generally recognize and enforce—before placing the membership interests into the NAPT.

Additionally, placing out-of-state real property into an LLC can prevent the necessity of pursuing an ancillary probate of such property in the foreign state upon the death of the owner (although trusts also accomplish this goal).

Final Thoughts

There are countless other potential uses for LLCs in an estate plan. Perhaps a group of children inherited a cabin or lake house and want to provide for joint ownership and management; the LLC is the perfect vehicle. Moreover, trust funding and administration can be made simpler with the use of LLCs.

As always, the devil is in the details. The drafting attorney should ensure that appropriate operating agreements are drafted, and it is imperative that the attorney impress upon the client that all legal formalities must be followed, lest the veil of limited-liability be pierced. In short, however, in addition to wills, trusts and powers of attorney, the LLC is an invaluable tool for an estate planner. **NL**

Professional Liability Insurance Is

OUR BUSINESS.

Don't Let It Be Your Problem.

→ We handle all your Business Insurance Coverages:

Professional Liability Insurance

Errors & Omissions

Employment Practices Liability Insurance

Directors and Officers

Workers Compensation

Comprehensive General Liability Insurance

Excess and Umbrella Liability



CHARLESTON INSURANCE GROUP

Contact us for your free, no obligation quote

Monica Plaxton Garin, Esq.

9900 Covington Cross Dr., Suite 120 ♦ Las Vegas, NV 89144
702.375.7448 ♦ 702.382.1512 fax

www.charlestoninsurancegroup.com

1. NRS 86.401; *Weddell v. H2O, Inc.*, 271 P.3d 743 (Nev. 2012) (interpreting NRS 86.401).
2. NRS 86.161(1)(d).
3. Please note, however, that I.R.C. § 199A denies the 20 percent pass-through tax deduction for "Qualified Business Income," if such income is in excess of certain phase-out amounts and such income is derived from a "Specified Service Trade or Business," which includes (without limitation) income derived from the practice of law, investment management, trading or dealing in securities, health services, accounting services, actuarial science, performing arts and other services. I.R.C. § 199A.
4. In 2017, the U.S. Department of the Treasury withdrew proposed regulations issued in August 2016 that sought to significantly curb the use of most valuation discounts.

VAR LORDAHL is a member in the Las Vegas office of Dickinson Wright PLLC, whose practice includes estate planning, taxation, nonprofit and probate law. Lordahl obtained his J.D. summa cum laude from the University of Illinois and his LL.M. in taxation from New York University.



HILARY WILLIAMS is an associate in the Las Vegas office of Dickinson Wright PLLC, whose practice includes probate litigation and civil litigation. Williams obtained her J.D. summa cum laude from the UNLV William S. Boyd School of Law.

