

# **CHOICE OF ENTITY: DECISION POINTS FOR INCOME TAX AND BENEFITS PLANNING**

**PREPARED BY:**  
**JAMES M. McCARTEN**  
**BURR & FORMAN, LLP**  
171 17TH STREET, NW, SUITE 1100  
ATLANTA, GA 30363  
TELEPHONE: (404) 532-7236  
FACSIMILE: (404) 817-3244  
EMAIL: jim.mccarten@burr.com

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*Prepared By:  
James M. McCarten  
Burr & Forman, LLP  
Atlanta, Georgia*

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# Choice of Entity:

## Decision Points for Income Tax and Benefits Planning

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**JAMES M. MCCARTEN**  
**BURR & FORMAN, LLP**  
171 17TH STREET, NW, SUITE 1100  
ATLANTA, GA 30363

**I. INTRODUCTION.** Do you ever find yourself wondering if you or a client could use a separate legal entity for some reason? Whether to protect other assets from potential liabilities arising out of a business or rental or investment property, to make management of certain assets easier, to start a new business opportunity or to protect public benefits, the choices are many. So how do you make the right choice? The following will cover the tax and non-tax factors to consider and then identify some public benefit scenarios involving a decision on choice of entity.

### **II. THE CHOICES.**

- A. Sole Proprietorship.
- B. General Partnership ("GP").
- C. Limited Partnership ("LP").
- D. Limited Liability Company ("LLC").
- E. Corporation.

1. "C" Corporations are separate taxpaying entities.

2. "S" Corporations are "flow through" entities; so, the results of operations are reported by owners for tax purposes.

- F. Trust.

1. A "grantor" trust is one designed to act as a flow through entity; the income, gains and losses are reported by and tax thereon paid by the grantor.

2. Almost all other trusts are hybrid tax entities. To the extent income or gains are distributed out, they are taxed to the beneficiary. To the extent not distributed out, the trust pays the tax (at the highest rate after \$12,950).

### III. TAX AND NON-TAX DECISION POINTS.

#### A. Tax Considerations

1. Minimizing and/or deferring the income tax on the profits of the business.
2. If losses are generated, how can those losses best be used by the business or its owners?
3. How is appreciation of the business and/or the assets best protected from income **and** estate taxes (i.e., succession planning)?

#### B. Non-Tax Considerations.

1. Which entity provides the **best management arrangement** (clients look for *flexibility* and *simplicity*)?
2. Which form of entity provides the most flexibility for **designing ownership interests** (and transferring those interests) (for example, preferred returns)?
3. Does state law impose any *limitations* on the type of business which can be undertaken in a given legal form (i.e., LLC, partnership, etc.)?
4. Does the tax law impose any limitations of which individuals and/or entities can be an owner?
5. Does the form of entity chosen provide a *liability shield*?
6. For equity purposes, which entity provides the most flexibility and is preferable for capitalization and financing options?

### IV. THE LIABILITY SHIELD ANALYSIS.

A. Only corporations (C or S), limited partnerships (but only for limited partners), LLPs and LLCs provide liability protection.

B. In Tennessee and other states without an income tax, when the choice of form is an LLC, the trade-off for liability protection is that the LLC is liable for Tennessee's franchise and excise taxes.

C. Remember, an active business owner is always *personally* liable for his/her own negligence.

V. **ORGANIZING THE BUSINESS ENTITY.**

A. Entity Organization.

| <b>Organizing the Entity</b> |  |
|------------------------------|--|
| <b>The Contestant</b>        | <b>How Formed</b>  |
| Sole Proprietorship          | No legal filings, but need tax ID and business licenses  |
| General Partnership          | Can have oral agreements, but best is to have a written Partnership Agreement                                  |
| Limited Partnership          | Certificate of Limited Partnership on file with the appropriate Secretary of State and a Partnership Agreement |
| LLC                          | Articles of Organization properly filed with the Secretary of State and an Operating Agreement                 |
| Corporation (S or C)         | A Charter or Articles of Incorporation properly filed with the Secretary of State and Bylaws                   |
| Trust                        | A trustee, a corpus and a trust agreement  |

B. Preprinted Forms. Do not rely on Secretary of State forms except for simplest of corporate or LLC structures.

C. Organizational Structure.

| <b>Organizational Structure</b> |  |
|---------------------------------|--|
| <b>Type of Entity</b>           | <b>How Managed</b>   |
| Sole Proprietorship             | Boss/Owner(s), then everyone else                                    |
| General Partnership             | The general partner(s)   |
| Limited Partnership             | General Partner(s); limited partners often have no governance rights |

| <b>Organizational Structure</b> |  |
|---------------------------------|--|
| <b>Type of Entity</b>           | <b>How Managed</b>   |
| LLC                             | Member Managed or Board Managed (Board of Governors) elect officers; Chief Manager and Secretary. Can also have a Manager Managed structure. |
| Corporation (S or C)            | Owners elect Board of Directors (or "close corporation" status) who then elect officers; President and Secretary                             |
| Trust                           | The Trustee or a Directed Trustee  |

D. Ownership Restrictions.

1. Of the types of entities available as vehicles for conducting a trade or business, only "S" Corporations have any inherent restrictions on who/what can be an owner (restrictions unrelated to the type of business conducted). IRC §1361 and Treas. Reg. §1.1361-1, et. seq.

2. Statutory and regulatory requirements/limitations related to S corp. shareholders.

(a) Shareholders must be individuals, certain trusts and estates.

(b) May not be another corporation, partnership or LLC (unless as a mere nominee).

(c) Must be U.S. citizen or U.S. resident (no non-resident aliens).

(d) What types of trusts?

(i) Qualified Subchapter "S" Trusts ("QSST").

(ii) Emerging Small Business Trust ("ESBT").

(e) No more than 100 shareholders, but certain types of shareholders, like husband and wife, only count as one shareholder for this rule.

## VI. COMPARING THE TAX DIFFERENCES.

### A. Income Tax Issues on Formation.

| <b>Formation Income Tax Issues</b> |  |
|------------------------------------|--|
| <b>Type of Entity</b>              | <b>Income Tax Rules</b>  |
| Sole Proprietorship                | None   |
| Corporations (S and C)             | The 80% Rule (§351).<br>Gain when liabilities exceed basis in contributed property (§357)<br>Carryover basis plus recognized gain (§§358, 362) |
| Limited Partnership                | No 80% Rule (§721).<br>No gain for liabilities in excess of basis (§§752, 723).<br>Carryover basis (§§722, 723)                                |
| LLC                                | No 80% Rule (§721).<br>No gain for liabilities in excess of basis (§§752, 723).<br>Carryover basis (§§722, 723)                                |
| Trust                              | No special income tax rules on formation, but potentially have to be concerned about estate and gift taxes.                                    |

### B. Double Tax to Distribute Income?

|                     |  |
|---------------------|--|
| Sole Proprietorship | No   |
| Limited Partnership | No   |
| LLC                 | No   |
| "C" Corporation     | Always (but can use reasonable salary, rent, etc. to avoid the double tax) |

|                 |  |
|-----------------|--|
| "S" Corporation | Generally, <i>No</i><br>But Built-in gains; §1374 <ul style="list-style-type: none"> <li>• Passive income; §1374</li> <li>• ITC/LIFO Recapture</li> <li>• Accelerate gain on property distributions</li> </ul> |
| Trust           | Generally, no.   |

C. Other Tax Issues.

1. *What Happens With Distributions to Owners?*

(a) Of property owned by the entity (e.g., non-cash distributions) (do they create entity level gain?).

- (i) LLC; None Recognized.
- (ii) Partnership; None Recognized.
- (iii) "S" Corp; Gain Recognized.
- (iv) "C" Corp; Gain Recognized.

(b) Are the Owners taxed?

- (i) LLC; Only if the value of the Distribution > basis of member in membership interest or §751 Property.
- (ii) Partnership; Only if the value of the Distribution > basis of partner in partnership interest or §751 Property.
- (iii) "S" Corp; If > AAA and E&P exists.
- (iv) "C" Corp; You betcha!

2. *Termination of the Business Entity.*

- (a) LLC (and partnerships); 50% or more transferred within 12 months.
- (b) "C" Corp; Entity does not typically terminate, unless being

liquidated; but the S election can, especially by majority shareholder.

3. *Are Special Allocations Available?* Also, can a new owner get the optional basis adjustment? §754, §743, §734

- (a) LLC (and partnerships); Yes.
- (b) "C" Corp; No.
- (c) "S" Corp; No.

4. *Loss Allocations and Basis Rules.*

- (a) Owners get Tax Basis for LLC liabilities. §752
- (b) "S" Corp. limited to direct shareholder transfers (capital & loans). §1366

5. *Bankruptcy and Cancellation of Debt.*

- Exclude gain (and do COD calculation) at partner/member level or at corporate level (but, new 2001 Supreme Court decision in *Gitlitz* provides S corp. shareholders with basis from such income, increasing ability to currently deduct losses).

6. *Tax Years.*

- (a) Permitted tax years (§1378)
- (b) "Majority Interest" Rules (§706)
- (c) The election to close books upon complete termination of a shareholder's interest (§1377)

7. *Self-employment Taxes.* What income is subject to FICA or self-employment tax?

- (a) Sole proprietor - - all earnings from self-employment.
- (b) LLC, partnership - - is the taxpayer-owner active or passive and does business rise to level of a trade or business?
- (c) C Corporations and S Corporations - - wages and bonuses.

## **VII. 2017 TAX ACT CHANGES.**

### **A. Tax Rates Are Generally Reduced.**

- 1. Corporate Tax Rate --- 21%.
  - (a) Down from 35%.
  - (b) No More PSC penalty rate.

2. Capital Gain and Qualifying Dividends...0%, 15% or 20%.  
Note. For 2020, the change from 15% to 20% takes place at \$496,601 of taxable income.
  
3. Individual Tax Rates (2018):
  - (a) Between \$82,500 and \$157,500 --- 24%.
    - **Down** 1% (look at income level breaks).
  
  - (b) Between \$157,500 and \$200,000 --- 32%.
    - A **surprising increase** of 4%.
  
  - (c) Between \$200,000 and \$416,000 --- 35%.
    - For most of this group, an **increase** of 2%.
  
  - (d) Between \$416,000 and \$500,000.
    - **No change.**
  
  - (e) Over \$500,000 --- 37%.
    - A **decrease** of 2.6%.

B. Comparing The Total Tax Burdens.

| <b><u>Type of Entity and Income Distributed*</u></b>                                 | <b><u>Total Tax Rate If Individual in Top Bracket</u></b> | <b><u>Total Tax Rate If Individual is in Modest Tax Bracket</u></b> |
|--|---|---|
| <b>A corporation distributing 100% of its after-tax net income</b>                   | 47.3%   | 40.8%   |
| <b>A corporation distributing 50% of its after-tax net income</b>                    | 36.7%   | 33.4%   |
| <b>No corporate earnings distributed</b>   | 26.0%   | 26.0%   |
| <b>S corporations, partnerships or sole proprietorships (all pass-thru entities)</b> | 34.6% to 45.8%  | 27.4% to 46.2%  |

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C. QBI Deduction; The Qualified Business Income ("QBI").

1. Qualifying for this deduction currently constitutes a large part of small business tax planning.

2. The deduction is only available to the owners of pass-through businesses, including estates and trusts (and sole proprietors).

3. The deduction is 20% of the qualified income from a trade or business passed thru to an entity's owners.

4. Limitations begin to apply once an owners' taxable income exceeds \$163,300 for singles, \$326,600 for married filing jointly.

5. The income from certain businesses, Specified Service Trades or Businesses ("SSTBs"), does not qualify if an owner's taxable income exceeds the above thresholds.

(a) There is a significant difference between the QBI of S corps and partnerships.

(i) In an S corp., QBI is calculated on net income which deducts the owner's salary.

(ii) Partnership QBI is not similarly reduced by draws.

(b) No item of capital gain, long and short term, qualifies as an item of QBI, including §1231 gain.

➤ But §1231 depreciation recapture is ordinary income so it is included.

(c) Use of centralized management companies is treated just like the employee leasing rule for the wage limitation.

➤ But if allocated to an SSTB will only provide a QBI benefit if taxpayer's taxable income is below the Threshold Amount.

D. The Partnership Audit Rules.

1. What's Important To Know.

(a) Enacted in 2015, new Code Sections 6221-6241 became effective January 1, 2018.

(b) Replaces the old TERRA Audit Rules.

(c) IRS no longer has to collect underpayments from individual partners, the general rule is now that the partnership pays any tax deficiencies determined on audit; the IRS now audits the partnership and collects tax as if it is a separate entity. No longer does the IRS worry about chasing individual partners.

(d) Most important for many tax professionals is the *small partnership* election out of the new rules regime.

2. *New Definitions.*

(a) *Imputed Underpayment*: The amount of tax owed by the partnership and its partners after adjustments by the IRS.

(b) *Adjustment Year*: The year in which the adjustment becomes final.

(c) *Adjustment Year Partner*: Any person who held an interest in the partnership during the adjustment year (i.e., "current" partners).

(d) *Reviewed Year*: The year under examination by the IRS.

(e) *Review Year Partner*: Any person who held an interest in the partnership during the reviewed year (could be current partners, but may also include former partners).

(f) *Partnership Representative (PR)*: The person with sole authority to represent and act on behalf of the partnership and its partners.

(g) *Designated Individual*: If **Partnership Representative** is an entity, partnership must appoint a designated individual to represent partnership.

3. IRS collects tax in year audit concluded at highest rate.

➤ Shifting burden of tax for the Reviewed Year to **current partners**.

4. The new rules create three alternative processes.

(a) The Default Rules; the new rules.

(b) The Election Out; the old TEFRA rules apply.

(c) The Push Out Election; a hybrid process.

5. *Suggestions for What To Include In Partnership Agreements Because of the New Partnership Audit Rules.*

(a) Require the **Partnership Representative** to engage competent tax professionals to assist in the examination.

(b) Only allow the election for alternative payment of imputed underpayments to be made with express approval of a majority or greater of partners.

(c) Partners must approve extending the statute of limitation.

(d) And, filing suit.

(e) If the **Partnership Representative** is herself a partner, what about conflicts of interest? Should those be waived? Identified?

(f) What about including dollar limitations on the **Partnership Representative's** settlement authority without partnership approval.

6. *Setting the Partnership Representative's Obligations.*

(a) Because the regulations are silent, the partnership or LLC agreement should be clear about what notices the **Partnership Representative** must provide the partnership and/or the other partners, and when.

(b) Because of the importance of the **Partnership Representative**, should that position be compensated when someone is actually serving during an IRS audit?

(c) Should the partnership or LLC agreement indemnify or hold the **Partnership Representative** harmless for actions taken? Must those actions be taken in good faith?

7. *Electing Out of the Partnership Audit Rules.*

(a) Many small partnerships will find it beneficial, if not necessary for the protection of the partners, to elect out of the new partnership audit rules.

(b) Partnerships may only elect out of the rules if the following are true:

(i) The number of tax schedules (Forms K-1) issued is 100 or less.

(ii) The partnership does not have an "ineligible partner," which includes the following: Partnerships, Trusts, Certain Foreign Entities, Disregarded Entities, Estates of Individuals Other Than Deceased Partners, or Nominees.

(iii) Individuals, C corporations, S corporations, and estates of deceased partners are ok.

(c) Practitioner should note that shareholders of S corporations which are partners can be an "ineligible partner." Treas. Reg. Section 301.6221(b)-1(b)(3)(iv), Example 2.

8. *More Drafting Considerations.*

(a) Require an **affirmative** representation that the partner is an *eligible partner* for purposes of the elect out provisions.

(b) Require that partners agree that the partnership will elect out of the partnership audit rules.

(c) Each partner should affirmatively agree to not transfer his/her/its membership or partnership interest to an ineligible partner (alternatively, or in addition, provide rights of first refusal to the other partners).

(d) Add provisions which make it clear what actions need partner approval or notice if the partnership or the partner is audited; be as detailed as the partners need.

(e) Are the state audit rules different? Do they need to be addressed?

(f) Limiting the **Partnership Representative's** powers to make elections, settle audits, or extend statute of limitations without partner participation or, alternatively, having partners acknowledge the **Partnership Representative's** broad powers.

(g) Provide express requirements for the **Partnership Representative**, but equally important, the partners, to obtain and provide information that may reduce the partnership's inputted underpayment liability.

(h) Consider requiring those who were partners in the reviewed year(s) to file amended returns when appropriate.

(i) If the partnership needs to "push out," make sure the **Partnership Representative** has the ability to contact former partners.

(j) Specify partners' notice and participation rights in connection with federal or state audits.

(k) Extend partner indemnification obligations for a period of time after the sale of a partnership interest.

(l) Terms and conditions for amending partnership or LLC operating agreements to address possible changes or updates to the new rules.

## **VIII. THE TAX FACTORS IN THE CHOICE OF ENTITY DECISION.**

- A. Individual Income Tax Rates.
- B. Applicable Capital Gain and Qualified Dividend Rates.
- C. The 3.8% Net Investment Income ("NII") Tax.
- D. The 3.8% Medicare Tax on Wages and Self-Employment Income (over the social security minimum).
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- N. The Potential Benefit of Providing Services as a Sole Proprietor, through a Disregarded Entity or as the Sole Owner of an S Corporation.

## **IX. THE 2020 ELECTION AND ITS LIKELY EFFECT ON CHOICE OF ENTITY.**

- A. Much of The 2017 Tax Act Expires. First, Remember Most of the Provisions of the 2017 Tax Act Expire At Midnight December 31, 2025.

B. Vice President Biden's Proposals.

1. *Individual tax rates:* The top tax rate is currently 37%, down from the highest rung of 39.6% (prior to 2017). Mr. Biden wants to restore the 39.6% rate beginning with taxable income above \$400,000.

2. *Itemized deductions:* The 2017 Tax Act limited certain itemized deductions while raising the standard deduction. Mr. Biden has proposed a provision that would effectively cap the tax benefit of itemized deductions at the 28% rate.

3. *Capital gains and dividends:* The tax law provides favorable tax treatment for long-term capital gains and qualified dividends. Under Vice President Biden's plan, those benefits disappear when the taxpayer's income reaches \$1 million.

4. *Individual tax credits:* Current law includes a maximum \$2,000 Child Tax Credit (CTC), plus a \$500 dependent credit, and a maximum dependent care credit of \$600 (\$1,200 for two or more children). Mr. Biden would hike the CTC to \$8,000 (\$16,000 for two or more children).

5. *Education:* Generally, student loan debt is taxable to the taxpayer if it is forgiven. Vice-President Biden proposes a special tax exclusion for student loan forgiveness.

6. *Corporate tax rates:* The 2017 Tax Act replaced the graduated corporate structure with a flat 21% rate and repealed the corporate alternative minimum tax (AMT). Mr. Biden has proposed raising the flat rate to 28% and reinstating the corporate AMT on profits of more than \$100 million.

7. *Payroll taxes:* VP Biden has floated the idea of a 12.4% Social Security payroll tax, split between employers and employees, on earned income above \$400,000. It would feature a "donut hole" between the prevailing wage base (\$137,700 for 2020) and \$400,000.

8. *Estate tax:* Under Mr. Trump's 2017 tax changes, the \$5 million estate tax exemption was doubled from \$5 million to \$10 million (\$11.58 million for 2020 after indexing). Mr. Biden proposes to allow the estate tax exclusion to revert \$5 million (possibly even changing it earlier than 2026). More importantly, he reintroduces the idea of eliminating the step-up in basis for inherited assets.

C. President Trump's Proposals.

1. *Individual tax rates:* President Trump intends to maintain the top tax rate at 37%. In addition, he would implement a 10% rate cut for middle-income taxpayers, effectively lowering the 22% rate to 15%.

2. *Itemized deductions:* Under the President's plan, the 2017 Tax Act changes for itemized deductions would be extended beyond 2025 and made permanent.

3. *Capital gains and dividends:* Without offering any specifics, Mr. Trump has indicated he would reduce tax rates for capital gains, index gains for inflation and create a capital gains tax holiday for a limited time.

4. *Individual tax credits:* Mr. Trump hasn't proposed any major changes for these benefits.

5. *Education:* Under current law, you generally can't realize tax benefits for contributions to state-authorized organizations sponsoring scholarships (other than a possible charitable deduction). The President would provide a tax credit for individual and corporate donations to such organizations.

6. *Corporate tax rates:* The President wants to preserve the status quo.

7. *Estate taxes:* Mr. Trump has stated that he will push to extend the more generous estate tax exemption past December 31, 2025 and strenuously opposes any change to the rules relating to a step-up in basis.

X. **BENEFITS PLANNING AND CHOICE OF ENTITY.**

A. The Role of Choice of Entity in Benefits Planning.

1. *What Role Does Choice of Entity Play In Business Planning?* When working with a client interested in setting up a business or entity to hold investment or rental property or another asset (e.g., a family vacation property or a Montana ranch), the Choice of Entity discussion primarily focuses on the following:

- (a) Management structures,
- (b) Income and estate tax minimization;
- (c) Exit planning strategies,
- (d) The needs of or structures to attract investors, and
- (e) Liability concerns.

2. *What's Different in the World of Public Benefits?*

(a) How often are you, whether an attorney or a trustee, concerned about Choice of Entity?

(b) Seldom, I suspect, when first analyzing an individual's eligibility for benefits.

(c) Maybe occasionally when looking at the most efficient structure for managing assets and the associated tax obligations inside a special needs trust ("SNT").

(d) More likely, it occurs when considering how to hold property inside a trust and to reduce the exposure of the trust and/or trustee to liability.

3. *A Unique Benefit Scenario: Business Ownership.*

(a) In last year's excellent presentation at this conference by Linda Landry from the Disability Law Center in Boston on how to help an individual with a disability go to work, thereby increasing the individual's self-esteem and self-worth, without losing, at least immediately, the individual's SSI or SSDI but more importantly, his/her health benefits, we learned about the very helpful work incentive programs Social Security makes available. Linda Landry, *What Is The Effect of Work on SSI and SSDI Recipient Eligibility?* 2019 Stetson National Conference on Special Needs Planning and Special Needs Trusts.

(i) One example of such incentives is the Plan to Achieve Self-Support ("PASS") program.

(ii) Another is the Ticket to Work program.

(iii) And other opportunities and programs were covered.

(b) But what about the individual who wants more actual control over benefits eligibility and/or does not want to use/rely on any of the above work incentive programs?

(i) Is there any business structure which, if owned by the individual with a disability, allows for control of the income and resource values associated with the business so that, under POMS SI 00810.05 and SI 01110.100, benefits are not jeopardized?

(ii) What about a business owned by or in conjunction with a relative and/or the individual's SNT? In other words, can a business structure allowing ownership by the individual and/or a relative or the individual's SNT thread the needle of control over the amount of earned

income and noncountable resources to ensure continued eligibility for benefits?

B. Structures To Consider for Real Estate.

1. Whether the real estate at issue is a personal residence, usually a non-countable asset, or rental/investment property, the first issue is whether the person needs assistance managing the property.

2. *A Personal Residence.*

(a) As a noncountable asset, it can be owned, individually or jointly, by a person eligible for SSI and/or Medicaid.

(b) Even ownership of a personal residence is impacted by federal, state and local law.

(i) The exclusion of gain on the sale of a personal residence under IRC §121, and

(ii) Homestead property tax exclusions.

(iii) Age related property tax reductions or caps.

(c) Do you need to be concerned about your client or perhaps a relative taking advantage of her/him mortgaging or taking some other action regarding the residence not in the client's best interest (which presumes the client does not have a court appointed guardian/conservator)?

(i) Consider a grantor trust, maybe even a first-party SNT, with a family member or professional serving as the trustee.

➤ Is any special language required to maintain the property tax homestead exemption?

(ii) Does a single-member LLC accomplish the same goals if managed by another (but can't the manager be removed)?

➤ Again, what about preserving the tax benefits reserved for personal residences?

(iii) If jointly owned, consider the following:

➤ A joint tenancy agreement;

➤ Multi-member LLC (liability protection);

➤ A combination of the above.

(d) Is there any difference if the property is owned by a third-party SNT (or traditional support trust)?

(i) Management and liability concerns may still make a separate trust or single-member LLC a good idea.

(ii) Is there any impact on the tax benefits and which is more important and why?

3. *Cars, etc.* Other non-countable assets (e.g., automobiles) raise the same liability, though probably not tax concerns.

4. *Rental or Investment Property.*

(a) Should not be held directly or indirectly by an individual applying for or receiving SSI and/or Medicaid due to the income and resource limits.

(i) A first-party SNT is likely the most viable exception.

(ii) The trustee may wish to use an LLC to minimize liability concerns.

(iii) If there are completely separate properties, a trustee should consider separate LLC's for each.

(b) When such property is part of a gift or inheritance,

(i) A third-party SNT is always the best choice.

(ii) *See* Section X(B)(3)(a)(iii) above for other planning strategies.

C. A Business For The Individual with a Disability.

1. *What factors should go into the decision?*

(a) Liability protection.

(b) SSI, SSDI and Medicaid income limits.

(c) SSI, SSDI and Medicaid resource limits.

(d) Management.

(e) State law requirements for the business.

2. *The resource limit.*

(a) Easy to identify and recognize; the applicable limit is \$2,000.00.

(b) How can you keep the value of a business interest below \$2,000.00?

(i) Have a third party own 100% of the business, either a trust (an SNT) or a relative.

(ii) But what if the individual wants to "be an owner" or state law requires it?

➤ For example, Georgia's rules for real estate agents provide that the agent must own twenty percent (20%) of the company to which commissions are paid. OCGA §43-40-25(b)(17)(c).

(c) The value of an asset (its CMV, current market value) under the POMS is "the going price for which it can reasonably be expected to sell on the open market in the particular geographic area..." SI 01110.400.

(i) Restrictions on the ability to sell an asset can apply. *See*, e.g., POMS SI 01140.220 (stocks) and its cite to RS 02101.510 (Corporations).

(ii) Discounts, especially in the organizational documents should therefore be expressly included.

(iii) Generally, SSA may not disregard corporate structures even if formed for the purpose of securing coverage. RS 02101.510.

(iv) So, preferred stock, preferred interests in an LLC or a partnership provide some planning opportunities.

(v) If liquidation value not restricted to \$2,000 or less, someone may have to keep track of the entity's overall value.

### 3. *The income limit.*

(a) The monthly earned income limit is 2X Federal Benefit Rate (\$783/mo. in 2020) + \$85.0. SI 00810.350.

(b) The monthly unearned income limit for interest, dividends, etc. is the FBR + \$20.00. *Id.*

(c) C corporations are the easiest form of business entity in which to control the earned income received by an individual eligible for and/or receiving SSI; the wages paid are set and other distributions are not required or are easily restricted based on the structure of the entity.

(i) If same class of stock, dividends must be pro rata based on number of shares owned. So, it can prove difficult to control the stock value or income received if a single class of stock is chosen.

(ii) Flow thru entities are, by their tax structure, more difficult to use when trying to control the amount of income from or the value of an interest in the business.

D. The Traditional Trade-Off When Deciding What Form of Entity To Use and Why.

- Income Tax Planning vs. Social Security and Medicaid Rules.