

*It's a jungle out there!*



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A woman with short brown hair, wearing a red long-sleeved shirt, is sitting in the cockpit of a plane. She has a wide-eyed, screaming expression on her face, with her mouth open. The cockpit is filled with various instruments, dials, and control panels. The background shows a blurred landscape of green fields and a blue sky. A semi-transparent white text box is overlaid on the right side of the image, containing the title and subtitle.

**PUBLIC BENEFITS AND TRUSTS  
ORIENTATION  
Part I of Presentation**

# Medicaid, SSI . . . And Trusts

## The Orbiting Satellite View

- From the Beneficiary's Perspective:

**AVAILABILITY**

- From the Transferor's Perspective:

**SANCTIONS**

# AVAILABILITY



**LOOK AT THE AVAILABILITY CHART  
ON  
ATTACHMENT A OF OUTLINE**

**The Focus Is Now On The Beneficiary**

**Self-Settled?**

**Third Party?**

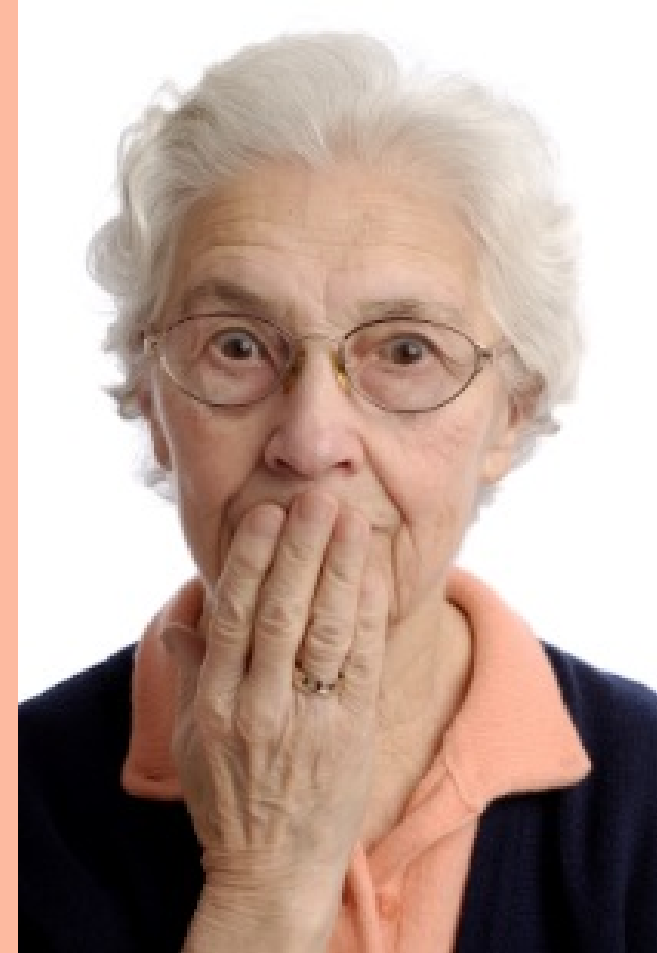
# Self-Settled

- **Key Distinction:**      **Revocable (always available)**  
   **Irrevocable (It Depends)**
- **Key Definition:**      **Individual**
- **Key Concept:**      **Under Any Circumstances**

# Poor Mrs. Edholm . . .

- Power to “Borrow” Assets
- Take Heed:

**Words Mean Things!**





# **Self-Settled** – Common Examples

- **Trust prohibits all distributions to grantor, but allows discretionary to others**
- **Income Only Trust – Allows/requires distributions of income to grantor, prohibits distributions of principal (optional to others)**

# **Self-Settled - BIG EXCEPTIONS**

- **Self-Settled – Payback – D4A Trusts**
- **Testamentary Trusts**

# Third Party

- **Key Concept: It's The Distribution Standard!**
- **Legal Right to Revoke?**
- **Legal Right to Direct for Support?**

# **Third Party** – Common Example

- **Testamentary or Inter Vivos Trust says:**

**Trustee may make distributions within  
Trustee's sole discretion for beneficiary's  
special needs.**

**This Thing is BAD!**



**An “Unadorned”  
HEMS Standard  
in a Public  
Benefits Trust!**



Not so fast, you cheeky little . . .

Someday this will all be yours . . .

# TRANSFERS

# **The General Rule**

**42 USC § 1396p(c)**

**The Focus Is Now On The TRANSFEROR**

# How the Transfer Rule Works

- **Medicaid: Value of Transfer ÷ \$6,300**
- **SSI: Value of Transfer ÷ \$735**
- **Non-trust Exceptions: Spouse's, Disabled Child, 2 Year Caregiver**



# **BIG TRUST EXCEPTIONS**

- **Understand 42 USC § 1396p(c)(2)**
- **D4A Trusts**
- **Sole Benefit Trusts**

# TRUSTS AND INCOME UNDER MEDICAID AND SSI



# Medicaid Income Rules Piggyback on SSI



- Medicaid definition of income (1396d) refers to SSI (1382a)
- Medicaid is allowed to be more liberal with LIMITS (e.g., 1396(r)(2)(A))

# **Income in a Trust – Does it count even if NOT distributed?**

- **Self-settled Trusts –  
Any portion/any circumstance**
- **Third Party Trusts – If distributed, maybe**

# Down Home Version



- **Income NOT the same as tax**
- **ANY distribution must be evaluated**
- **4 Types of Distributions**
  - **Cash and 3 Types of “Stuff”**

# Down Home Version

- **Cash reduces benefits**
- **3 Types of “Stuff”**
  - **Stuff that will count next month**
  - **Stuff that is for food and shelter**
  - **Stuff that is neither (Sweet!)**



# In-kind Support and Maintenance Rules (ISM)



- “Stuff” distributed that is food and shelter.

- **FOOD AND SHELTER!**

- If it is NOT food and shelter (or related), it is NOT ISM

# **In-kind Support and Maintenance Rules (ISM)**

- **If it IS ISM, then the Presumed Maximum Value (PMV) rule applies.**
- **Don't be confused by the VTR rule (doesn't apply to trusts)**



# The PMV Rule – Applies to Trusts

- If a distribution of *ANY* ISM during the month, the value is PRESUMED.
- REBUTTABLE Presumption is: 1/3 FBR  
(2017:  $\$735/3 = \$245$ )

# Is a Pet ISM?



**It Depends . . . Are you planning to eat it?**

# POINTERS

- **DON'T DISTRIBUTE CASH**
- **In-Kind (Next Month Rule) - Be careful, think through, probably don't do it**
- **In-Kind for Food and Shelter (ISM) - Up to \$244.33 – CAREFUL, Try to think of Freebies, Go berserk if Beneficiary is over \$244.33**
- **In-Kind (Freebies) - Zero Reduction (SWEET!)**

# VA Rules and Trusts



**Trust Rules  
NOT Same  
As Medicaid**

# VA Rules and Trusts



**Problem: Do Not  
Forget  
Occasional IVM**

**Also: VA personnel  
will not be “grantor  
trust savvy”**

# **Nevertheless . . .**

## **Trusts Are a Handy Tool –**

- **Stepped-up Basis**
- **Capital Gains Exclusion on Sale of Residence**

**PART II of  
Presentation**

**PUBLIC  
BENEFITS  
AND TRUST --  
TAX  
OVERVIEW**



**CHILL!**

**You're here for an  
overview.**



# In Elder & Special Needs Law What ARE We Doing With Trusts?

Just **FOUR** Things!

- Asset protection in general
- Preservation of capital gains exclusion
- Preservation of stepped-up basis
- Possible reservation of an income stream

**AND SOMETIMES . . .**

**It makes sense to use a grantor trust**

**And At Other Times . . .**

**To use a nongrantor trust**

# Non-grantor Trusts

## SOMETHING OF A HYBRID

- Not like C-Corps
- Not like S-Corps, Partnerships, LLCs



# Grantor Trusts

- **An exception to the rule**
- **Treated as the grantor's tax alter ego, in whole or in part**



# Taxing Non-grantor Trusts

- Taxable income = same manner as individuals (with some modifications).
- Trust gets a deduction for taxable income distributed to beneficiaries.
- Rest is taxable income retained by the trust.
- Trust pays tax on any of the taxable income accumulated.
- Beneficiaries report and pay tax on the distributions.
- All taxable income is taxed at some level.

# Tax Rates

- **Actually the same as Individual Rates; Different Margins**
- **Trust Reaches 39.6% at \$12,500**
- **Individual Reaches 39.6% at \$418,400**

**BUT . . .**

# Tax Rates

- **3.8% NIIT to extent trust's AGI exceeds \$12,500  
(Not an issue for humans under 39.6% bracket)**
- **20% CG tax if trust's taxable income exceeds \$12,500  
(Not an issue for humans under 39.6% bracket)**

# **The Capital Gains Issue**

- **Capital Gains Usually Stays in the Trust**
- **Unless Specific Trust Language Mandates Distribution**
- **Or Dealing With a Unitrust or Other Exclusion**

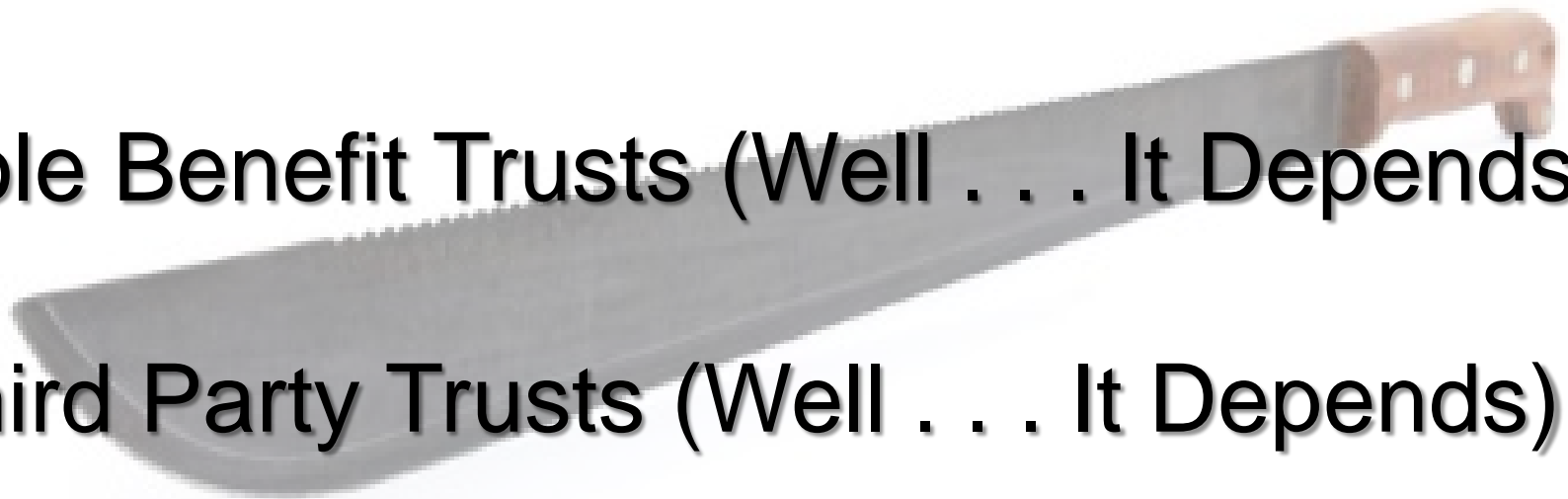


# **Personal Exemption**

**(some trusts are people, too)**

- **Either \$300 (required to distribute all income) or**
- **\$100 (all the rest) unless**
- **Qualified Disability Trust (\$4,050)**

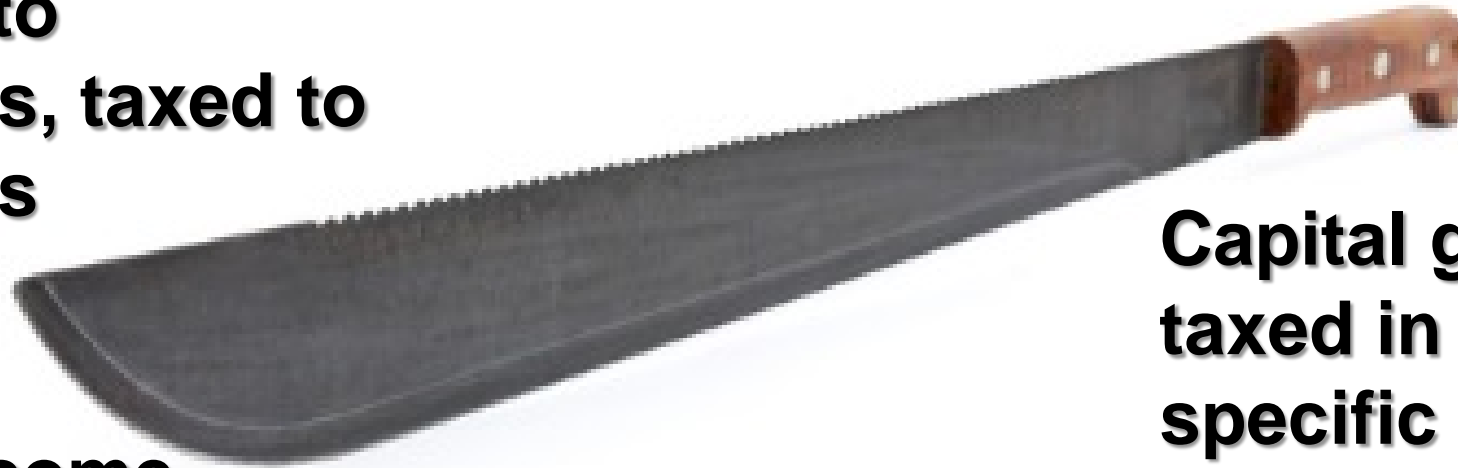
# Famous Non-grantor Trusts

- Testamentary Trusts
  - Sole Benefit Trusts (Well . . . It Depends)
  - Third Party Trusts (Well . . . It Depends)
  - When NONgrantor is a Sound Strategy
- 

# Hacking the Nongrantor Trust Rules

**Ordinary income distributed to beneficiaries, taxed to beneficiaries**

**Ordinary income retained by trust, taxed to trust**



**Capital gains ALWAYS taxed in trust, UNLESS specific language requires distribution of such income to beneficiaries**

# Hacking the Nongrantor Trust Rules

Trusts taxed at lower  
margins:

**39.6% at \$12,400**

**39.6% at \$415,050**



# SO WHAT?



# **GRANTOR TRUST BASICS**

**Results of Grantor Trust Status . . .**

**It's All Yours, Man . . .**

**Or at least part . . .**

# **Why That MIGHT Be Good!**

- **Grantor (Mom? Dad?) Might Well Be at Lower Tax Bracket**
- **Preservation of IRC § 121 Exclusion**
- **Transfers of Nonqualified Annuities**

# **How To Make a Grantor Trust**

## **In a Nutshell . . .**

**Grantor (or Often a “Nonadverse Party”) without an Adverse Party-Crasher**

**Retains Some Benefit or Control**

**Over ALL or SOME of the Trust Assets**



# **Who Is The Grantor?**

**Generally the one who  
funds the trust**

**Who is ADVERSE?**  
**Who is NONadverse?**

# IRC § 672 – ADVERSE PARTY



**MINE!!**

**MINE!!**

*Mine, mine,  
mine, mine,  
mine.*

# IRC § 672 - NONADVERSE



Well . . . I don't really have  
any skin in that game . . .  
But I DO owe Grandma  
Grantor, and my cousins  
are slackers . . .

# IRC § 672 – NONADVERSE . . . AND INDEPENDENT



Neither a parent, issue, sibling, or corporate employee of grantor



# What Is Portion Control? (Bob's Term)



**IS THIS PART  
OVER YET?**

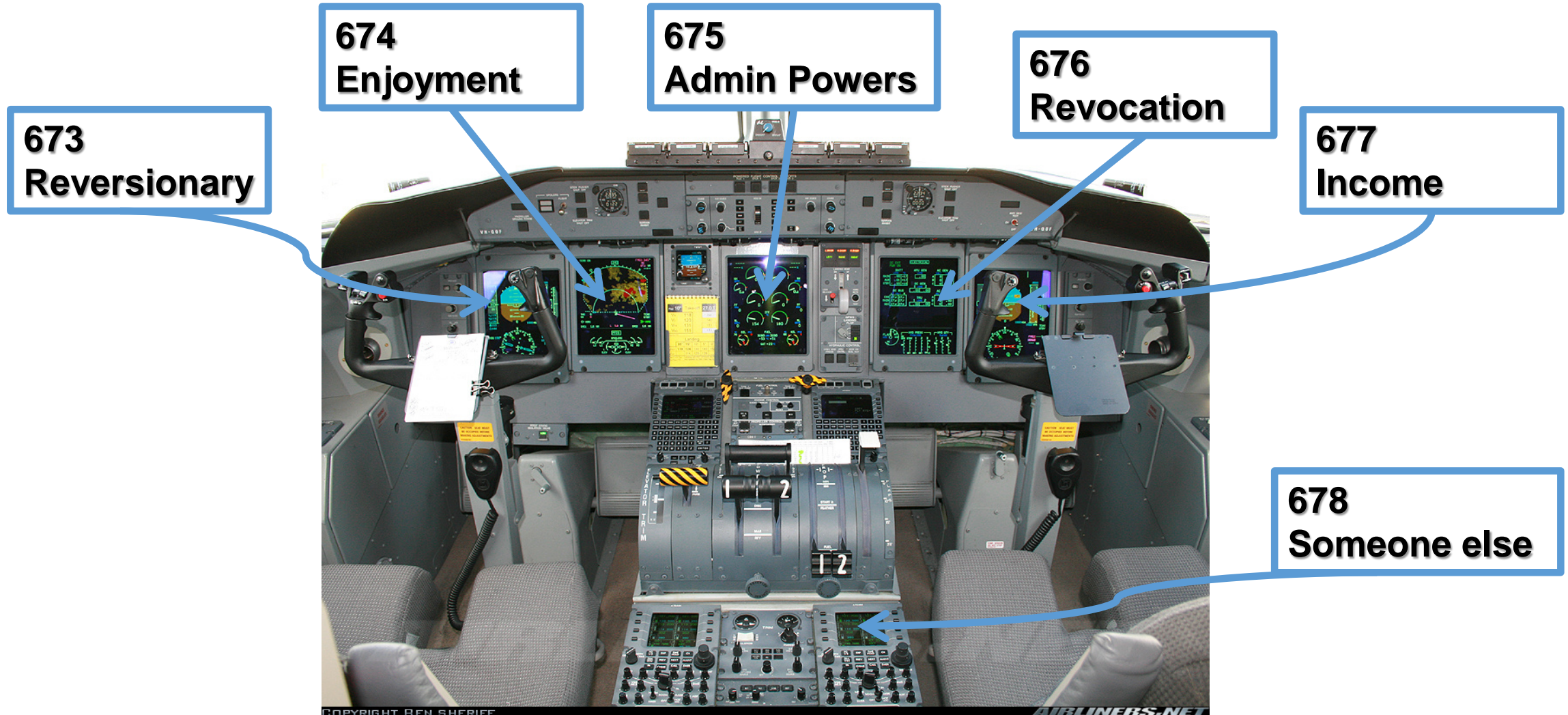


*Not A  
Chance,  
Baby!*



# Overview of Grantor Trust Provisions

## The Dashboard



**ESTATE  
INCLUSION**

**STEPPED-UP  
BASIS**

**Happy  
Halloween**



# Insuring Stepped Up Basis

- **Stepped Up Basis Rules**
- **Grantor Trust Automatically Steps Up?**  
**(NOPE!)**
- **Inclusion in Gross Estate**  
**(YEP!)**

# Insuring Stepped Up Basis

- **IRC § 1014 Stepped-up Basis Rules**
- **IRC § 1015 Transferred Basis Rules**
- **IRC § 1014(b)(9) “Required to be included in determining” gross estate**

# Gross Estate Inclusion – Two Main Rules

- **IRC § 2036(a)(1)**

- Retained an Interest for Herself
- A Retained Income Interest Will Trigger

- **IRC § 2036(a)(2)**

- Retained Right, Alone or With **ANY** Other Person
- To Designate Possession, Enjoyment, Income

# Gross Estate Inclusion – Two Main Rules

- **IRC § 2038**
  - **Retained Right to “Alter, amend, revoke, or terminate”**
  - **Alone or With ANY Other Person**
  - **A Testamentary Power of Appointment Will Trigger**

**And So . . . ?**

**Trying to Avoid Grantor Trust Status **BUT** . . .**

**Trying to Trigger estate Inclusion, **NOTE** and **COMPARE** -**

**Grantor Trust Rules: **Adverse** Party Crashers**  
**Estate Inclusion Rules: **ANY** Party**

# Want The Slides?

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