Scene One

Characters: Abby Post, physical therapist; Walter Stevens, attorney; Louis Pfiffer, accountant

Setting: In Walter Stevens's office

Stevens: Abby Post? Nice to meet you.

Post: Thank you, Mr. Stevens, for fitting us in on short notice.

Stevens: Of course.

Post: This is my accountant Louis Pfiffer.

Stevens: Louis. Pfiffer?

Pfiffer: That right. Nice to meet you.

Stevens: So what can I do for you, Ms. Post?

Post: I have a physical therapy practice with a receptionist and two other therapist that work for me, and I fell behind on my taxes. Withholdings, FICA – that kinda stuff. It wasn't intentional at first, and Louis here said that it wasn't a problem because I let him know early. He helped me put the house in my husband's name, and most everything in my practice is rented.

Pfiffer: She's judgment proof, you see. It's simple arithmetic – the IRS can't take what you don't have.

Post: Which, funny enough, let me and my husband live a little. When the old Datsun finally died, I took some of the money that I would have paid to the government and got a Land Rover. In my husband's name, of course. We also went on my dream vacation to the Great Barrier Reef. We owe it all to Louis.

Pfiffer: Just showing her how the game is played.

Post: I got a bunch of letters from the IRS, initially, just telling me what I owe, and then a notice of lien, I think. Louis says that it's nothing out of the ordinary and that nothing is going to happen. But the letters still make me nervous. Eventually, I decided to give you a call.

Pfiffer: The plan is for Abby to make employment tax payments going forward and avoid any accusations of tax pyramiding where the IRS might shut down her business or worse. I know how to manage the IRS. So can you please let Abby know that she's getting savvy advice, and, if anything, she should be giving her accountant a raise.

Stevens: Well, before we get there, I have a few questions. How much do you owe, Ms. Post?

Post: About $60,000.

Pfiffer: That's right.

Stevens: Are you enrolled as a Medicare provider?

Post: Sure – accounts for about half my practice.

Stevens: And do you do a lot of traveling?

Post: I'm an avid scuba diver. The Great Barrier Reef was special, but we do lots of vacations to dive – in Belize, the Bahamas, places like that.

Stevens: So, there are a couple of issues I want to mention. The first is that your tax debt could cause you to lose your passport because of a new enforcement tool Congress enacted in 2015. The passport revocation provision, section 7345, applies to "seriously delinquent tax debts," which means tax, penalties and interest subject to lien or levy in excess of $50,000, adjusted for inflation. Currently, the threshold amount is $52,000, and so your debt qualifies. Once the IRS certifies a seriously delinquent tax debt to the State Department and gives the taxpayer notice, the State Department may revoke a passport after 90 days. And certification by the IRS is automatic – there is no talking the IRS out of it.

Pfiffer: No problem, no problem. Abby will save some money over the next couple of months, and when she receives the notice of certification, she'll pay down her debt below $52,000 and keep her passport.

Stevens: It doesn't work that way. The IRS reverses a certification only if a debt is fully payed, becomes legally unenforceable, or if the taxpayer enters into an installment agreement or offer-in-compromise. The IRS also has discretion to reverse a certification based on hardship or if the taxpayer declares bankruptcy. But I strongly suspect that the IRS would not do so here, given that Ms. Post travels for pleasure, and made herself insolvent by putting her assets in her husband's name. A bankruptcy trustee has authority, under section 548 of the Bankruptcy Code, to claw back fraudulent transfers made within the 2-year period prior to the filing of a petition for bankruptcy, for example, if the debtor intended to avoid or delay collection, or if the transfer made the debtor insolvent or occurred when the debtor was already insolvent. If Ms. Post declared bankruptcy, the IRS would likely file a proof of claim, and the proceeding would quickly turn to Ms. Post's pre-petition activities. The IRS is not going to reverse certification of her seriously delinquent tax debt under those conditions.

Pfiffer: There's gotta be another way.

Stevens: The IRS also reverses certification if the taxpayer dies.

Post: I've got some personal misgivings about that one.

Stevens: The second issue is that you could be denied reenrollment in Medicare. In 2010, Congress added language to section 6103 allowing the IRS to tell HHS whether a Medicare applicant has an outstanding tax debt subject to a lien. My understanding is that the agencies are still working out how information will be shared and how to ensure that the information is matched with the correct Medicare applicants. So providers are not being denied enrollment just yet, but it's a risk.

Post: It would kill my practice.

Stevens: And short of being denied enrollment, the IRS can levy up to 30% of your Medicare payments.

Pfiffer: That on the other hand is just a flesh wound, and, really, what are the chances?

Stevens: Finally, there is a serious problem of transferring all your property into your husband's name to make yourself judgment proof. It really isn't that simple.

Post: What do you mean?

Stevens: Well, if you still actually control the property, which I assume is what is intended even though your husband has legal title, and the transfers to your husband's name were made to avoid the tax debts to the IRS, the IRS could assert that the property was still yours for purposes of paying the tax debt. The nominee status might be particularly easy for the IRS to prove because the transfers were made to a close relative for no consideration after the taxes were already delinquent.

Post: That can't possibly be right. You never told me that Louis.

Pfiffer: I don't think the IRS would get very far with a nominee theory. Everyone knows that you and your husband don't get along very well so he's almost a third party – nothing like a nominee.

Stevens: I don't think that the IRS or a Court would view a consideration-free transfer to your husband as the same as a transfer to a third party. I think there is a real problem here, in addition to the passport and Medicare problems we discussed.

Pfiffer: I still say don't worry about all this – the IRS will never figure out the title of the property. It all looks pretty clean on the face of the ownership.

Stevens: But the IRS probably won't believe the husband is the true sole owner of all the property of a married couple. Moreover, I don't think that your discussions with your client, including emails and other correspondence, would be privileged. Clearly, there would be no attorney-client privilege and advice to make a taxpayer "judgment proof" would probably not constitute "tax advice" that is eligible for the limited privilege for accountants under Section 7525 of the Code. I'll bet there are some juicy emails between you and you client regarding the property transfers.

Pfiffer: You mean the IRS might actually get to read the emails we exchanged on this? That would be really bad – someone could go to jail.

Post: How did the discussion shift from "not a problem" to going to jail?

Stevens: You may want to see if there is some way you could pay this liability.