

private client services update

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ASSET PROTECTION

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In these litigious and debt-stressed times, more and more high net worth clients are asking their financial and estate planners to address protection of assets from creditors. Lawyers have responded by creating asset ownership structures which are designed to thwart creditors' liens and claims. Legislators have also reacted, creating innovative laws in a number of states aimed at allowing individuals to avoid attachment of assets. It is important to have a basic understanding of the techniques available to clients in protecting assets, and it is equally valuable to understand that not every person needs extensive asset protection planning.

Simple Steps

Asset protection planning includes measures which vary from very simple and widely known steps to aggressive, untested and complex measures which would be attractive only to very few individuals. Simple planning which lawyers undertake in almost every case includes a review of insurance coverages to assure that liability, umbrella and underinsured motorist policies are in place with adequate limits. Ownership of assets by a husband and wife in the tenants by the entirety form of joint ownership exempts the jointly held asset from most claims by a creditor of one spouse. In Virginia, this protection of tenants by the entirety property, once applicable only to real estate, now extends to personal property, bank and brokerage accounts and the like. Ownership of life insurance policies and retirement plan assets can be structured to protect those assets from creditors.

The Use of LLCs and Other Entities to Shelter Assets

More sophisticated asset protection planning involves transfer of assets into limited liability companies (often called "LLCs"), partnerships and corporations. A person injured, for example, on rental property owned by a properly structured and funded LLC can make a successful claim only against the LLC, while the other assets of the LLC owner are protected. Likewise, creditors face numerous effective legal hurdles in attaching property, stocks, business interests or other assets held by an LLC.

Spendthrift trusts are a technique commonly used to make assets available for the support and use of children or other family members who face liens or who could be pursued by creditors. The assets of a spendthrift trust can be paid to the beneficiary or used to pay unlimited expenses of the beneficiary, but the trust assets cannot be attached by creditors of the beneficiary.

Self Settled Asset Protection Trusts

The use of trusts in asset protection gave rise years ago to offshore accounts as a means of protecting assets from creditors. Foreign governments in the Caymans and Cook Islands created secrecy laws aimed at defying requests for information by creditors. In addition, these countries passed laws providing that debtors' assets held in trust there could not be subjected to collection by their creditors.

Offshore trust use has spawned a movement by certain states in the U.S. to pass similar laws allowing debtors or persons desirous of sheltering assets to create trusts for themselves which are exempt from claims of their creditors. Delaware, Alaska, Wyoming and other states have now enacted statutes which purport to make assets held in a self-created trust to be protected from creditors of the person creating the trust. These schemes are

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increasingly popular, but are very expensive and as yet relatively untested in the courts. Virginia has not enacted legislation allowing these domestic asset protection trusts. Lawyers at Kaufman & Canoles are cautious about this aggressive planning, concerned that the state laws may not stand up and protect assets when attacked in the courts.

Who Needs Asset Protection?

The simplest steps outlined above are appropriate for almost everyone with savings, real estate or investments. To be effective, asset protection planning must be undertaken before debts and liabilities exist.

But not everyone requires or should invest the monies required to use LLCs, trusts and the more sophisticated asset protection planning tools. Business owners, medical professionals, high profile wealthy individuals and large landowners are among the group who should take more extensive action to protect themselves and their heirs. No two clients are exactly alike, and so this question is best answered in consultation with counsel.



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