Asset Protection Planning

By Randall H. Borkus and Barry L. Kohler

Randall H. Borkus and Barry L. Kohler discuss how asset protection planning can safeguard a significant portion of a client's net worth and be integrated with the client's financial and wealth transfer plans.

Introduction

The term "asset protection" too often conjures images of a person trying to hide all of his or her assets from creditors (*especially* from the IRS), or someone who intends to engage in a Ponzi scheme, "play games" with tax reporting, or worse. For others, it conjures images of *The Firm*. And for those of us of a certain age, the expression—especially the term "offshore asset protection"—brings to mind the image of a guy with a ponytail wearing gold chains arriving at night on a Caribbean beach in a cigarette boat with suitcases full of cash.

This reminds me of the grizzled law professor who early in the first year admonished the class: "Remember, when you go to court and someone is going to jail, make sure it is the client." Crude it may be, but still not a bad rule to follow to stay out of serious trouble. So as we consider asset protection in this article, this extreme approach, as portrayed in the movies and the media, is definitely not what we are discussing.

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What we are discussing is planning designed to protect some portion of the client's nest egg in the event of an unforeseen disaster, usually a legal disaster.[1] The amount to be protected is typically between 20–30 percent of total net worth; a sufficient amount of money to start over or to assure a sound retirement.

A colleague in Massachusetts had a client who was a real estate developer. This client became embroiled in a case arising out of a big project where the architect was negligent. The damages sought by the plaintiffs were astronomical. The plaintiffs' lawyers sued everyone in sight (architect, developer, builder, sub-contractors, *etc.*). Although the developer was in no way negligent, it took years and thousands of dollars to resolve this legal mess. For a time, the developer thought that everything she had worked for her entire life would go down the drain. She decided she never again wanted to put herself or her family in such jeopardy.

Many clients face a high litigation risk. Not only must physicians and other professionals have asset protection "on the radar," but owners of businesses, owners of commercial or rental real estate, developers, and others with significant net worth should do so as well. In fact, when planning for every client, we believe asset protection should be explored. Moreover, the argument can be made that an attorney has a duty to inform the client of the available asset protection options.[2] Asset protection strategies can be an important part of financial, wealth transfer, or estate planning, and is usually best integrated with such other planning. Some clients are interested in asset protection planning for themselves; others are interested in protecting what they leave to their children from "creditors and predators." Best of all,

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asset protection strategies can often be incorporated with—and help to accomplish—other wealth transfer or estate planning goals.

To illustrate further the need for asset protection, consider two cases. The first is a divorce proceeding between Husband (H) and Wife (W). During the pendency of the divorce, H's mother (M) died. Under M's trust, a distribution of $1M was to be made outright to H. The court held that H's interest in the trust had vested, under state law was transferable, and therefore, the inheritance was subject to equitable distribution. The court then awarded 20 percent of H.'s inheritance. Imagine M's reaction if she had known her soon-to-be ex-daughter-in-law would receive a portion of the million dollars she intended for her son![3]

In the second case, the decedent left a modest estate to her son, who had a federal income tax lien previously filed against him. He disclaimed the inheritance in a timely manner. Nonetheless, the United States Supreme Court held that the inheritance was a property right under federal law to which the lien attached, notwithstanding an otherwise timely and effective disclaimer.[4]

In both instances proper structuring of the decedent's estate planning documents would have created a significant barrier, if not different result altogether, had the trust instruments provided pure discretionary benefits only for the heirs.

Asset Protection Building Blocks

There is an array of asset protection building blocks.[5] The principal ones (in order of typical use) are:

- Liability insurance,
- Gifting or re-titling property ownership,
- Exemption statutes,
- Use of entities (formerly corporations, now more often family limited liability partnerships (FLLPs) and family limited liability companies (FLLCs)),
- Third party created trusts,
- Domestic asset protection trusts (DAPTs), and
- International structures.

Most asset protection planning involves using a combination of these building blocks. The first step in such planning with each client is to assess the risks the client faces if no additional action is taken. This is the "as is" analysis. The next step is to decide what level of protection is desired and how much effort, money, and complexity to devote to asset protection strategies. At all times, it is important to consider how asset protection strategies might be integrated into the client's other planning, thus helping to accomplish multiple planning objectives.

It is important to remember that in the type of asset protection planning we are discussing, the goal is not to try to protect "the whole enchilada." This is so for two main reasons:

- Most clients desire to retain unfettered control of their assets, and the most protected assets require relinquishing that level of control (such assets cannot be used as the client's own "piggy bank"); and
- The client (and the attorney) need to avoid "fraudulent conveyance" issues.[6]

"Control" is self-explanatory. However, a related notion comes from the fact that the cases demonstrate the most aggressive asset protection strategies are the ones most likely to cause the worst problems for the client and the lawyer. Many of the cases of failed asset protection strategies involve extreme schemes where the client is trying to protect all of his or her assets.[7] In our view of asset protection planning, the best advice is to encourage the client to be mindful of the old saw: "Pigs get fat; hogs get slaughtered."

The concept of "fraudulent conveyance" is central to effective asset protection planning. Deriving as it does from English common law, it is thus found in the law of almost every jurisdiction that traces its legal origins to England.[8] The basic idea is that a person may not take steps to "hinder, delay, or defraud" a creditor by attempting to place assets beyond the reach of the creditor. In such cases, a court has the power to pull those assets back and to permit a creditor to use them to satisfy a judgment. A related principle is that one cannot incur debts beyond one's ability to pay, nor can one render oneself insolvent in an attempt to avoid paying creditors.[9]

The legal system will allow a person to protect assets from unforeseeable future creditors; it is only present and foreseeable future creditors, to whom the fraudulent conveyance laws apply. Legal precedents help explicate when a creditor is deemed a "present creditor." Further, the laws of every jurisdiction state the period of time that must elapse after a transfer in order to protect the transferred assets from a creditor. The period ranges from two to six years, with the most common length being three years. So, assuming a three year statute of limitations, if I transfer some assets in 2006, and a creditor who to whom I owed money before this time subsequently files a claim in 2008, the transferred assets are at risk. Sometimes

different laws (and different time periods) will apply to the same transfer: for example, state fraudulent conveyance law and federal bankruptcy law.

The practical effect of this is that asset protection planning is most effective when skies are blue and there is not a cloud to be seen. Some examples of when not to make transfers might be helpful.

- Imagine a surgeon who makes a clear mistake during surgery (amputates the wrong leg, for example). Once that happens, it is too late for the surgeon to transfer assets and hope that the transferred assets would be safe from the malpractice plaintiff or plaintiff's lawyer. This is a clear case.
- This time, the surgery does not go as well as hoped. Two weeks after the operation, the surgeon receives a letter from the unhappy patient. The legal precedents are divided, but the conservative view is that transferring assets after the letter arrives will not protect the transferred assets from the potential claim.
- In the final example, the surgery does not go at all well, and the physician knows it. A "bad result" is likely. The surgeon suspects that a claim might be made, but no one has said or done anything yet. This would be "a cloud on the horizon."

Please note that even in the above cases, there may still be strategies available to protect a portion of the doctor's assets, but they are fewer and less certain to be successful. The highest degree of protection can be obtained only long before the possible claim is made; the longer, the better.[10] It does little good to install a smoke detector when the building is already on fire.

The "Simple" Building Blocks

The spectrum of asset protection strategies range from simpler and less expensive to more sophisticated (read, complex) and expensive. The starting point is always consideration of liability insurance questions, such as: does the client have the right amount, what risks are covered, what risks are still exposed, and are personal assets (or "only" business assets), at risk. On the personal side, even these "property and casualty" insurance issues can be tricky, and a consultation with an expert in this area might be advisable.[11] Often the result will be a savings in annual premium costs (for which your client will thank you) and frequently, the result will be better protection from an array of liabilities which you may not have even considered (for which your client and your partners and professional liability carrier will all thank you).

Re-titling assets, in our experience, is less effective than gifting, but the latter can be effective only if the client is really willing to give the asset away. The two considerations that arise here are whether the client (1) might want the asset back some rainy day, and (2) the client is really willing to cede complete control. The more "strings" the client tries to retain on any asset "given away," the more likely a creditor will be able to use those same strings to pull the asset back to satisfy a claim or judgment. Again, timing is critical. A sufficient time needs to elapse from the date of the gift for the transferred assets to be able to withstand attack.

As for the use of exemption statutes, unless you are an expert in bankruptcy, you may want to associate (or at least consult) a colleague who is. There are always federal and state law considerations, and sometimes selection of state of domicile is a strategy that is available. For example, Florida has an unlimited homestead exemption for one's personal residence. If your client is already a snowbird who lives part of the year in Florida, there may be both tax and asset protection reasons to explore whether a change of domicile might help the client accomplish his or her goals. That said, approaching asset protection with the idea that if disaster strikes the client will go into bankruptcy is not most clients' idea of successful asset protection planning.

Using Entities

Business planners have long used entities for asset protection purposes as well as to accomplish other purposes.[12] Moreover, asset protection planning should be integrated with other planning objectives to optimize the achievement of multiple client goals. For example, estate planners have for some time been using family limited partnerships (FLPs) and family limited liability companies (FLLCs) to consolidate and transfer assets tax efficiently, primarily through centralized management and valuation adjustments for lack of control and lack of marketability. These entities have also been favored as techniques that allow the owner to move value out of his or her estate without losing all control of the assets transferred. The asset protection aspects of entity planning can often be enhanced by "tweaks," such as choice of entity jurisdiction that have no adverse impact on the estate planning goals.[13]

While many professionals use their home state law when forming an entity, for asset protection purposes,

consideration should be given to using the law of another jurisdiction. Since the laws of another state might offer advantages unavailable under home state law, selecting the jurisdiction where the laws are most favorable to the client could be helpful in the event the client's interests in the entity come under attack.

One of the main advantages in using an FLP or FLLC, from an asset protection perspective, is to choose a jurisdiction where a "charging order" is the sole remedy for a creditor. In most cases, a creditor will have a charging order remedy under state statute to use against the limited liability company (LLC) interest of a debtor LLC member.[14] A charging order gives the judgment creditor the right to receive distributions from the LLC that would have otherwise been distributed to the judgment debtor. However, a charging order will not allow the judgment creditor to reach the debtor's proportionate ownership of the underlying LLC assets. Thus, from a creditor's perspective, a charging order is an unattractive remedy.

> The legal system will allow a person to protect assets from unforeseeable future creditors; it is only present and foreseeable future creditors to whom the fraudulent conveyance laws apply.

Moreover, once successfully attaining the charging order, the creditor may have to accept minimal or no distributions (which can be applied against the creditor's claim) from the LLC, while the assets of the LLC remain intact and unreachable by the creditor. This leads creditors to attempt to pursue more than charging order remedies (when available), and to attempt to find ways to force a disposition of the LLC's underlying assets to generate cash to satisfy the creditor's claim.

Only a minority of states specifically limit a creditor's remedy solely to a charging order.[15] The reality in most jurisdictions is that in addition to the charging order remedy a judgment creditor may also enjoy a "judicial foreclosure" remedy. A judicial foreclosure is a court order to foreclose against the LLC interest of the judgment debtor.[16] The foreclosure order is different from the charging order in two significant ways: (1) it is permanent, and (2) the purchaser at a foreclosure sale enjoys the right to a proportionate share of the entity's assets upon dissolution (because their right is that of a transferee).[17]

Additionally, when a judicial foreclosure is permitted, the price received from the judicial sale of the debtor's interest will typically be less than the actual debt. So now the debtor now must negotiate with two creditors: (1) the original creditor (to the extent the proceeds from the sale of the interest did not satisfy the creditor's original claim); and (2) the purchaser of the interest at the judicial sale.

The debtor will never be able to enjoy his or her interest in the entity property unless the debtor buys the interest back from the judicial foreclosure sale purchaser. This explains why virtually all of the reported cases dealing with court-ordered judicial foreclosure sales of entity interests result in a settlement on terms unfavorable to the debtor.[18]

Notwithstanding these potential limitations, FLPs and FLLCs remain the mainstays of domestic asset protection planning. Yet, there are many cases of attacks on planning entities. For example, both single member LLCs[19] and multi-member LLCs[20] have been under fierce attack by the bankruptcy courts in recent years. So, planners need to be familiar with both the benefits and the limitations on the use of entities as an asset protection tool. Fortunately, a close reading of the cases enables practitioners to enhance the likelihood that the entities they create for their clients will be successful in accomplishing the intended purposes.

Using Trusts

Third-Party Settled Trusts

Third-party settled trusts (as opposed to "self-settled" trusts) have long been a vehicle to protect assets from creditor claims. A third-party trust is one established by someone (a third party) for the benefit of someone else, while a "self-settled" trust is one which a person creates for his or her own benefit. Spendthrift trust provisions have a well-established legal history. Yet, when third-party settled trusts contain mandatory distribution provisions, there is no asset protection as to the assets distributed. Support trusts can also be problematic, depending upon the degree of control the beneficiary may have over the trust or the trustee. Where there is a pure discretionary standard, such trusts can work well ... until a distribution is made. Once such a distribution is made to the beneficiary, the distribution becomes available to a creditor.

Nonetheless, we frequently suggest that in their estate planning, clients leave assets intended for children in a trust. What is new (at least for many lawyers) is an idea that many clients love: the "convenience trust." Typically, a trust for a child ends at a specified age. The idea behind the convenience trust is that at the specified age, instead of forcing out the final distribution, the beneficiary is given the unfettered right to *direct* the trustee to make whatever distribution(s) of income or principal the beneficiary desires. Alternatively, some convenience trusts are drafted so that at the specified age, the beneficiary becomes the sole trustee of the trust. Under the Uniform Trust Code, a creditor of the beneficiary of such a trust with a spendthrift provision cannot obtain a court order directing the beneficiary as trustee (or the beneficiary in his or her own right) to request a distribution in order to satisfy the claim of a creditor.[21]

While many professionals use their home state law when forming an entity, for asset protection purposes, there are good reasons to consider using the law of another jurisdiction.

Another useful idea employing a third-party created trust for asset protection is for the client who anticipates an inheritance. Assume your client Sally knows that Grampy plans to leave her a substantial inheritance when he passes. After talking it over with Grampy and getting his permission, you (as Sally's representative) go to Grampy's lawyer. You ask that Grampy's estate plan be changed so that instead of leaving the inheritance outright to Sally, it will instead go into a trust established by Grampy under his Will for the benefit of Sally. If the provision is properly drafted, the assets then have a much higher degree of asset protection than if the assets were inherited by Sally and she transferred them into a self-settled trust.

Self-Settled Trusts

There are only a couple of variations of self-settled trusts that should be considered in asset protection planning: domestic asset protection trusts (DAPTs) and international trusts.

Domestic Asset Protection Trusts. DAPTs are all the rage in asset protection planning, but are really just another aspect of considering in which jurisdiction to establish an entity or trust. An increasing number of states have enacted laws designed to provide enhanced asset protection for self-settled trusts.[22] If the home state law authorizes DAPTs, using this strategy does not add much complexity to the planning. For those whose home state law does not incorporate DAPT legislation, it gets more complicated.

Part of the comfort in using DAPTs is familiarity. Almost all clients know about "Delaware corporations" and understand the notion of using the law of a state which offers advantages that home state law may not. Keeping assets in the U.S. (even if not in the home state), also offers comfort. But there is one big disadvantage of DAPTs as of this writing, and it is a really big one: there are simply no legal precedents establishing how effective such trusts really are. Attacks on DAPTs will be based on a number of theories, including, as one noted expert on asset protection has summarized: " ... arguments based on jurisdiction, conflict of laws, and constitutional issues, the last including the full faith and credit clause, the supremacy clause, and the contract clause."[23]

International (Off-Shore) Trusts. Using international structures offer more opportunities for protection than using only domestic strategies,[24] as discussed at greater length below.

Using Advanced Asset Protection Strategies

The more important the goal of protecting the nest egg, the more complex the strategies that can be deployed. The analogy here is to building a wall (or even walls) to rebuff a future creditor. Such barriers can discourage a creditor from spending the time and money trying to collect a judgment. Moreover, in many cases even where the success of the creditor's attack cannot be predicted, the creditor may be willing to accept a settlement of less than the full amount due in order to avoid the delay, cost, and uncertainty of collection.[25] (In asset protection planning, this still counts as a "win.")

Effective asset protection planning almost always involves combining multiple strategies. One common structure is the transfer of assets to an entity (typically an LLC), and the subsequent transfer of LLC interests to a trust.

Using international structures provide the law to supercharge an asset protection plan. Again, it is im-

portant for the client to understand that the conservative approach to international asset protection discussed here is not a tax strategy (it is tax-neutral) and is not designed to hide assets; the goal is to protect assets.

Among the advantages of using international planning:

- U.S. courts are required to give full faith and credit to judgments of sister states (one of the big unknowns is how this will play out in DAPT cases). On the other hand, international courts in many countries are not required to recognize judgments from other countries; therefore, U.S. courts have no power over international trustees.[26]
- The time period needed to protect the transferred assets is longer in the U.S. than in many international financial centers. Stated another way, some international jurisdictions have a short statute of limitations for challenging the creation of an asset protection trust as well as a statutory presumption that all transfers are not fraudulent.[27]
- Under U.S. law, the debtor (transferor) has the burden of proving that there was no fraudulent intent. In the preferred international jurisdictions, the burden of proving fraudulent intent is on the creditor. Indeed, many international jurisdictions have a presumption against fraudulent transfer if the settlor remains solvent after the transfer of assets.[28]
- Many international jurisdictions require a higher standard of proof (reasonable doubt) than is required in the typical U.S. civil suit (preponderance of the evidence).[29]
- Preferred international financial centers will provide statutory certainty that the asset protection trust remains valid even if a transfer is deemed fraudulent as to a specific creditor. That is, even if a portion of the trust corpus is deemed available to satisfy Creditor X, the trust is still valid and the balance of the assets therein protected against the claims of other (future) creditors.[30]
- U.S. law generally allows creditors to engage attorneys on a contingent fee basis, which encourages collection efforts. Many international jurisdictions do not permit contingency fees. This adds to the costs of collection where the creditor will be forced to engage local counsel to prosecute collection efforts.
- In the U.S., typically the costs to begin a lawsuit are quite low, while some international jurisdictions require a substantial bond (for example, $25,000 US) before suit can be filed.[31]

In addition to selecting a jurisdiction that offers the advantages noted above, it is also important to assure that the selected jurisdiction provides statutory certainty that a settlor can be a beneficiary (*i.e.*, self-settled trusts are recognized), and the host country must also have an economically and politically stable government with its legal system well-grounded in English common law. While there are a number of international financial centers from which to select, the "ideal" jurisdiction will be the one that offers the greatest number of the advantages stated above.[32]

Costs

As with all planning, it is important for the client to be aware that there is an initial cost for the planning, and almost always annual costs to maintain the plan. All asset protection strategies involve some cost, even if the "only" cost is the payment of liability insurance premiums. For clients using trusts and LLCs in their estate planning, the cost of asset protection enhancements adds little to the overall cost of the planning project.

In our view, the "best" planning in complex cases can be accomplished only by working in a collaborative fashion. Associating experts in related fields (such as, property and casualty insurance, bankruptcy) may add to the cost of the planning, but will not increase it significantly. On the other hand, for international asset protection planning, the costs can be significant. Fortunately, it makes sense in almost every case to work in phases. The client has no obligation to proceed to the next phase unless he or she is satisfied that it makes sense to do so.

- Phase I: Data Gathering, Due Diligence and Asset Risk Assessment
- Phase II: Asset Protection Plan Design
- Phase III: Asset Protection Plan Implementation
- Phase IV: Ongoing Maintenance and Monitoring

Obviously, the greater the amount to be protected, the more cost-effective international planning becomes. It probably does not make economic sense until the amount to be protected is in excess of $500,000, with $2M being more typical. Using the 10–30 percent of net worth rule as the maximum for this type of asset protection planning, international structures will thus be of greatest interest to clients whose net worth is $5M or more.

Conclusion

Not every client is a "fit" for asset protection planning. Due diligence on the part of the advisory team is essential—especially for the attorney. Key concerns include:

- Do you really know the client?
  - Where is the client from?
  - What has the client been doing in personal pursuits, activities, and business?
  - What is the source of the assets to be protected; that is, where is the money from?
  - Will the assets transferred render the client insolvent or unable to meet foreseeable financial obligations?
- Are you willing to stake your reputation, financial security, and freedom on your client? In addition to a more traditional fraudulent conveyance and solvency analyses, where international planning is considered, there are duties and liabilities arising from laws countering the financing of terrorism,[33] anti-money laundering,[34] and other federal and international laws.

The first step in the analysis is, as always, to determine what is right for the client. The next step is to establish whether the client is eligible for this type of planning. The third step is to determine how much of this planning you can, should, and desire to do alone. This means considering when and how to associate co-counsel or other experts, or whether to refer out this aspect of the planning. But whether we are planning internationally or only using more familiar (domestic) strategies, for those clients for whom the fit is right, asset protection planning can provide the peace of mind that—almost no matter what happens—there will at least be a start-over fund, sufficient assets to assure a sound retirement, or a legacy for children or other heirs.

Endnotes

1 The terms "creditor" and "judgment creditor" are used interchangeably throughout this article. It is also important to recognize that some classes of creditors have more rights than others, especially (1) the federal government and (2) spouses and dependents. Thus, while the asset protection strategies discussed in this article (and in the literature generally) may be effective as to ordinary creditors, no *legal* asset protection strategy will defeat all creditors in every case.

2 The U.S. Supreme Court stated in *In re Griffiths*, 413 U.S. 717, 724 (1973) "[t]he duty of the lawyer, subject to his role as an 'officer of the court,' is to further the interests of his clients by all lawful means, even when those interests are in conflict with the interests of the United States or of a State. But this representation involves no conflict of interest in the invidious sense. Rather, it casts the lawyer in his honored and traditional role as an authorized but independent agent acting to vindicate the legal rights of a client, whoever it may be." ; *See also* Model Code, DR 7-101, Representing a Client Zealously, which provides that "[a] lawyer shall not intentionally fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules ... ."

3 *Dryfoos v. Dryfoos*, 2000 Conn. Super. Lexis 2004, 2000 WL 196339 (Conn. Super. July 28, 2000).

4 *Drye Family 1995 Trust v. U.S.*, 152 F.3d 892 (8th Cir. 1998), aff'd, 528 U.S. 49 (1999).

5 Randall H. Borkus, Esq., Presentation, University Club, Chicago, Illinois, July 30, 2008.

6 Fraudulent transfer law in the United States, although originally derived from the English common law, is now largely governed by one of two codifications promulgated by the National Conference of Commissioners on Uniform State Laws: the Uniform Fraudulent Conveyance Act (UFCA) and the substantially more recent Uniform Fraudulent Transfer Act (UFTA). The UFCA was promulgated by the National Conference of Commissioners on Uniform State Laws in 1918 and remains in effect in only six jurisdictions. The UFTA was approved by the National Conference of Commissioners on Uniform State Laws in 1984 and is in effect in 37 jurisdictions.

7 *In re Lawrence*, BC-DC Fla., 238 BR 498 (1999), *FTC v. Affordable Media, LLC*, CA-9, 179 F.3d 1228 (1999) (Known as the Anderson case), and *SEC v Bilzerian*, 131 F. Supp. 2d 10 (DC 2001) are great examples of why asset protection planning should never be based on hiding assets and defrauding creditors.

8 The earliest known prohibition against the transfer of property with the "intent to delay, hinder or defraud creditors" is the English Statute of Elizabeth of 1571, 13 Eliz. 1, c.5. The Statute of Elizabeth provides, in pertinent part, "that all and every feoffment, gift, grant, alienation, bargain and conveyance of lands, tenements, hereditaments, goods and chattels, or for any of them, or of any lease, rent, common or other profit or charge out of the same lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise, and all and every bond, suit, judgment and execution, at any time had or made ... to or for any intent or purpose before declared and expressed, shall be from henceforth deemed and taken ... to be clearly and utterly void, frustrate, and of none effect; any pretence, colour, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding."

9 John E. Sullivan III, Future Creditors and Fraudulent Transfers ... *Important Limits to Fraudulent Transfers Law for the Asset Protection Planner*, 22 Del. J. Corp. L. 955 (1997).

10 The longest "look back" provision of concern to most planners comes from Section 548 of the Bankruptcy Act of 2005, which permits the bankruptcy trustee to request the Court to set aside transfers to trust that occurred within ten years before the beginning of the bankruptcy proceedings. Even this may not be as big an obstacle as first appears since the bankruptcy trustee is required prove that the settlor, at the time of the transfer, had an actual intent to hinder, delay, or defraud creditors. Also, the ten year statute only applies where bankruptcy proceedings are taken within that ten year period.

11 Throughout this article there will be suggestions for consulting with different types of specialists as needed. When planning for more complex client situations, in our view, there should always be an advisory team. Aside from the main advisors (legal, tax, and financial), asset protection planning might require the services of, for example, a property and casualty (P&C) insurance expert in addition to the attorney specializing in asset protection planning.

12 The idea of using multiple entities to segregate risks is well established in the business world. A developer will often, for example, use a different company for each project so that if there is a problem with Project X, the assets exposed to the creditors of that project will (hopefully) be limited to the assets

Endnotes

owned by Company X. Ideally, the assets of the other companies (that is, those allocated to other projects) and the business owner's personal assets will be protected.

[13] In certain cases, estate planning goals are dramatically enhanced by choice of jurisdiction. *See*, Clay D. Geittmann, *Using a Wyoming Close LLC Instead of a Traditional FLP*, Estate Planning Journal (WG&L), Dec 2003. ("[T]he Wyoming Close LLC can obtain just as deep a valuation discount, if not deeper, than a typical limited partnership due to the language of the Wyoming default statutes pertaining to the withdrawal of a member or the restrictions on the transfer of a member's interests in the Close LLC"). *See* also Richard W. Nenno, *Delaware Law Offers Asset Protection and Estate Planning Benefits*, Estate Planning Journal (WG&L), Jan 1999.

[14] *See* Mark Merric, JD, CPA, MT, Asset Protection Planning, Las Vegas, Nevada (May 9, 2008), p. III-11 – III-15 (Nebraska, Louisiana and Rhode Island LLC statutes have no charging order language); David J. Cartano, Federal and State Taxation of Limited Liability Companies, CCH, Wolters Kluwer p. 768–770 ¶ 2401.02, (2009).

[15] In our view, the most popular sole remedy jurisdictions are Alaska, Delaware, Nevada and South Dakota.

[16] Limited Liability Company Act. (805 ILCS 180/30-20) Rights of creditor. Illinois law provides "A charging order constitutes a lien on the judgment debtor's distributional interest. The court may order a foreclosure of a lien on a distributional interest subject to the charging order at any time. A purchaser at the foreclosure sale has the rights of a transferee."

[17] *Id. See* also David J. Cartano, Federal and State Taxation of Limited Liability Companies, CCH, Wolters Kluwer p. 770 ¶ 2401.03, (2009).

[18] Mark Merric, JD, CPA, MT and William Comer, *LISI Asset Protection Planning Newsletter* # 112 (August 8, 2007) available online at *www.leimbergservices.com.*

[19] *In re Ashley Albright*, BC-DC, No. 01-11367 (04/04/2003) The sole member filed for personal bankruptcy, and the court held that charging order protection afforded under the state law would not prevent the Bankruptcy Trustee from reaching the assets of the entity to satisfy her creditor's claims. We are also seeing swift movement by other Bankruptcy courts where the Bankruptcy Trustee was able to surpass all charging order protections solely because the LLC was a single member LLC *See In re A-Z Electronics, LLC*, BC-DC Id., 350 B.R. 886 (2006). and *In re Modanlo*, BC-DC Md 2007 WL 2609470 (2007); *See* also, Chief Counsel Advise 200836002, Levy on LLC for Flow-through Income of Single Member; The Florida Supreme Court held oral argument in *Shaun Olmstead v. Federal Trade Commission*, SC08-1009 in which the court would decide the faith of another single member LLC. (As of September 2009, we still await the court's decision.)

[20] *In re Ehmann*, BC-DC Az., No. 2-00-05708-RJH (12/07/2005), the court held that an operating agreement was not an executory contract under Bankruptcy Code Section 365. As a result, the Court found that the LLC interest was nothing more than a property interest under Bankruptcy Code Section 541 and the Bankruptcy Trustee succeeded to all interests and rights that the debtor owned. In addition to receiving voting rights, the Court allowed for the appointment of a receivership as well as allowing the Bankruptcy Trustee the power to control the LLC management.

[21] *See* Uniform Trust Code, Section 504 and Comments, especially the 2004 Amendments, which modified Section 103(11) and added subsection (e) to Section 504. Read together, these provisions were intended specifically to deal with the issue of "beneficiary controlled trusts," the formal name for what we have called "convenience trusts." As stated by the Commissioners, "The purpose of this amendment is to preclude a claim that the power of a trustee-beneficiary to make discretionary distributions for the trustee-beneficiary's own benefit results in an enforceable claim of the trustee-beneficiary's creditors to reach the trustee-beneficiary's interest … ." National Conference of Commissioners on Uniform State Laws (NCCUSL), 2004 Amendments to the Uniform Trust Code (2000), at 44.

[22] At last count, the leading contenders in this arena were Alaska, Delaware, Nevada, Rhode Island, Utah, South Dakota, Tennessee, Oklahoma, Wyoming and Missouri.

[23] *Protecting Assets: Will a Domestic Trust Do It? With or Without a Protector?* Alexander A. Bove, Jr., Esq., a presentation to The Maine Estate Planning Council (May 17, 2007).

[24] *Braswell v. Ryan Investments, Ltd.*, No. 3D06-2827, Fla. App. 3 Dist., July 9, 2008, provides an example of a U.S. trial and appellate court both respecting an international wealth protection structure even where the structure at issue held real estate located in the United States. Moreover, this case provides strong support for the proposition that international wealth protection plans—implemented in the right circumstances, structured, maintained, and administered in an appropriate manner—may be a powerful asset protection tool that will be respected by domestic courts.

[25] Michael T. David, Managing Director, Allied National Debt Collection Services, Chicago Bar Association presentation, explained that "in his business, the low-hanging fruit is always the most attractive." May 28, 2008.

[26] *See* Nevis International Exempt Trust (Amendment) Ordinance, 1995, Part 5, No. 28.

[27] *See supra* note 19, Part 5, No. 24 & Part 9, No. 44.

[28] *See supra* note 19, Part 9, No. 46.

[29] *See supra* note 19, Part 5, No. 24 specifically requires a "beyond reasonable doubt" standard.

[30] *See supra* note 19, Part 5, No. 26.

[31] *See supra* note 19, Part 8, No. 55.

[32] The jurisdictions most often considered for international asset protection planning these days include the following: Bahamas, Belize, Bermuda, Cayman Islands, Cook Islands, Cyprus, Gibraltar, Isle of Jersey (officially, the Bailiwick of Jersey), Isle of Man, Labuan, Mauritius, Nevis, St. Vincent and the Grenadines, Seychelles, Turks &Caicos.

[33] *E.g.*, The USA Patriot Act, UNSC Resolution 1373 (2001), the UK Terrorism Act of 2000, U.S. Executive Order13224, FATF 40+9 Recommendations.

[34] *E.g.*, The USA Patriot Act, The Financial Services and Markets Act of 2000, The Proceeds of Crime Act of 2002, Basel II and Basel III Accords, EU Second and Third Money Laundering Directives.