



TIPS OF THE TRADE: ASSET PROTECTION PLANNING

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High-net-worth clients, or clients who are engaged in high-risk professions, should consider asset protection planning, including the use of Nevada asset protection trusts and limited liability companies, a vital and necessary part of their overall estate plan. When properly structured, asset protection planning can be a useful tool for protecting a client's valuable assets from potential creditors. On the other hand, a poorly executed plan can be detrimental, allowing creditors to reach a client's assets, exposing clients to unfavorable court orders and even potential incarceration. To increase the probability that an asset protection plan will be successful and will sustain a challenge by a creditor, it is imperative that the planning is done correctly. To ensure proper planning, consider the following when assisting a client with an asset protection plan:

Plan in Advance of Potential Problems

The best way to avoid liability is to establish an asset protection strategy long before it is ever needed. Once a claim against a client arises or a client is served with a lawsuit, it is often too late to implement any effective asset protection strategies. Planning becomes moot at this stage, because any transfers made with the intention to hinder, delay or defraud creditors are considered fraudulent conveyances.¹ If a transfer is deemed fraudulent by a court, then the law provides that the transfer can be undone. As such, the best time to institute asset protection planning is well before a potential lawsuit is on the horizon.

Nevada Asset Protection Trust (NAPT)

Nevada is unique in that it is one of a handful of states that allows an individual (settlor) to establish a trust in which the settlor is a permissible beneficiary and the assets of the trust are protected from that individual's creditors. Under Nevada law, the assets of a spendthrift trust will be protected if the trust document is:

1. Irrevocable;
2. Does not require that any part of the principal or income of the trust be distributed to the settlor; and
3. Was not set up with the intention to hinder, delay or defraud known creditors.²

Assuming there are no known creditors at the time assets are transferred to the trust, the client's assets should be protected from creditors two years after the assets are transferred to the trust.³



Business Entities

Various business entities, such as limited partnerships or limited liability companies, may be used to provide a layer of creditor protection. Such entities do not necessarily have to be engaged in an operational business and are often used to protect investment assets, such as brokerage accounts. Not all entities are created equal, so when setting up entities for asset protection, it is imperative to choose the right type of entity. Under Nevada law, the sole remedy of a judgment creditor of a debtor member/partner is a “charging order.” A charging order essentially acts as a lien against a debtor member/partner’s interest in the business entity. A creditor cannot execute on the charging order unless a distribution is made to the member/partner. If a client has planned properly, a charging order can be a powerful tool for forcing the creditor to agree to a favorable settlement. In Nevada, certain shareholders of corporate stock may also benefit from the charging order, but Nevada is the only state that recognizes this remedy. Therefore, clients should still consider the use of a limited liability company or limited partnership. Note that general partnerships should never be used for asset protection planning purposes as they do not afford the same protection that a limited liability company or limited partnership provides.

Maintain Formalities

It is important to maintain the integrity of the established entity to ensure asset protection. For example, if a client sets up a Nevada Asset Protection Trust, the trustees must uphold their fiduciary duties as outlined by the trust document. All trust distributions should be authorized in writing by the distribution trustee prior to being made. If the formalities of the trust document are not followed and a client is sued, a court

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could potentially pierce through the trust using an equitable remedy such as the “alter ego” theory. Likewise, it’s vital for business entities to follow corporate formalities. For example, business assets owned by the entity should not be co-mingled with an owner’s/member’s personal assets. Further, all major transactions and investments should be approved and documented by the owners/members of the entity and the owners/members should hold annual meetings and follow all of the operating requirements as provided in the governing documents of the entity.

Assets Protected By Law

State law provides that several classes of assets are protected by law and are therefore exempt from judgment. A complete asset protection plan should also take advantage of any federal or state law exemptions. For example, in Nevada, a client can protect up to \$550,000 of the equity in their personal residence by filing a homestead.⁴ Additionally, retirement accounts are protected up to \$500,000, as are all monies, benefits, privileges or immunities accruing, or in any manner growing out of, any life insurance.⁵

Clients work hard to build their wealth and it is essential that they give proper care and consideration to asset protection planning in order to protect their hard-earned assets. There is no single planning tool or technique that will universally protect all of a client’s assets, so the most effective asset protection plan involves a mix of the various tools and techniques available to clients. By planning far in advance of any potential problems and by following the formalities and requirements of any asset protection entities, clients can significantly increase the likelihood that their plan will withstand any potential challenges by creditors. More importantly, they will sleep soundly knowing the wealth they have amassed is protected. ■

- 1 NRS 112.180
- 2 NRS 166.040(1)(b)
- 3 NRS 166.070
- 4 NRS 21.090(l)
- 5 NRS 21.090(k)

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