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Protecting Your Assets

For most of us, it's not easy to accumulate assets. In the common case, asset accumulation is the result of many years of hard work, while saving and investing what we can for the "future." The prospect, whether real or remote, of losing it all on account of a mishap, a mistake in judgment, or a bad business deal often leads us to seek ways to protect these assets. But just how is that done? Must you give your assets away? Or put everything in trust? What kinds of trusts will work?

Asset protection planning has developed into a sub-specialty in the law. Experienced asset protection attorneys will tell you that methods of protecting assets can range from a simple declaration of homestead to a complicated series of trusts and limited liability companies, depending upon your particular situation and possible exposure to liability. Which method or combination of methods to use depends on the planning attorney's assessment of the exposure and the recommended plan.

But not everyone needs asset protection planning, and those who do need it may not all need it to the same extent. For instance, a retired couple will normally have little exposure to liability other than through an automobile accident, and that exposure can be covered by adequate automobile and umbrella insurance. If, however, one or both members of the couple are retired from a profession, the practice of which exposed them to liability (e.g., physicians, dentists, attorneys, accountants, etc.) then exposure to claims from their practice will continue on for many years after retirement. This is because the law generally allows a person to sue the professional within a period of time after he discovered the problem, even though it may be the result of an act that occurred many years ago. Most professionals are aware of this and will

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purchase a malpractice insurance “tail” to cover them for such post-retirement claims. To the extent the coverage of the tail is insufficient, then, of course, they would need to consider planning to protect their assets.

Contrast the retired, non-professional couple with an active working couple, or individual, in a business or profession that exposes them to liability on a daily basis. People in this situation, as well as those in between, would be well advised to have their situation reviewed by an asset protection planning attorney to determine which, if any, planning steps are advisable.

As mentioned earlier, securing protection, to varying degrees, may be as simple as a declaration of homestead on your principal residence, changing title to a tenancy by the entirety (for married couples only), or transferring your income-producing real estate to one or more limited liability companies. On the other hand, the plan may involve establishing one or more irrevocable (local) trusts, under which your benefits (but not those of your family) are limited, or even trusts in other jurisdictions, where your benefits need not be limited. Again, the specific recommendations would be provided by the planning attorney after a review of your specific situation.

Generally speaking, you are free to dispose of your assets in any manner you wish, and except as noted in the following comments, those transfers will be free from the reach of your future creditors. With that in mind, however, a critical consideration of all asset protection plans is whether there are any claims or potential claims against you that are “pending, threatened, or expected.” While such a situation exists, it will seriously affect (though it may not absolutely preclude) transfers of assets you make pursuant to an asset protection plan. Many people are under the mistaken impression that if no lawsuit has been filed, they are free to make transfers and such transferred assets will be protected (i.e., beyond the reach of the creditor). This is not the case. Such a transfer is likely to be deemed to be a “fraudulent transfer,” and under the law, a court may order the transfer rescinded or it may simply reach the transferred assets directly to satisfy the debt. But note that not all transfers made during the time a claim may be pending,

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threatened, or expected will automatically be considered fraudulent transfers. There are exceptions, and it is through these exceptions that an attorney with the necessary expertise can help you protect assets.

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