

The Shocking Truth About Asset Protection Planning

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Some view asset protection planning with a skeptical eye. They believe there is a moral obligation to pay one's debts. They think that asset protection planning is immoral because it prevents a creditor from collecting on a judgment entered by a court.

The truth is the U.S. justice system is unpredictable. Defendants are faced with ever expanding theories of liability, being sued just because they appear to have "deep pockets," and judgments entered against them based on desired outcomes instead of the law.

In this issue you will learn:

- What asset protection planning is, and what it is not.
- Your clients have already engaged in some form of asset protection planning, and usually it isn't enough.
- Attorneys may ethically and legally help clients protect their assets from future creditors, predators, and lawsuits.

What Asset Protection Planning Is, and What it Is Not

Asset protection planning is a legitimate form of wealth planning. Attorneys who engage in asset protection planning help their clients preserve and protect their property in advance of a claim or the threat of a claim.

The goals of asset protection planning are to provide an incentive for settling a claim, improve the client's bargaining position, offer options when a claim is asserted, and, ultimately, deter litigation.

On the other hand, asset protection planning is not about avoiding taxes, keeping secrets, hiding assets, or defrauding creditors.

Planning Tip: Asset protection planning will not be effective to shield property from an existing claim. It must be done long before there is even the hint of a claim. Attempting to help a client protect property after a lawsuit has already been threatened or filed could potentially subject the client's attorney to professional misconduct, malpractice, civil liability, or even criminal punishment.

What Traditional Asset Protection Planning Is, and Why it Often Fails

All of your clients have engaged in traditional asset protection planning at some point during their lives. The most common type of traditional asset protection planning is the purchase of liability insurance – automobile, homeowners, umbrella, officers and directors, malpractice, and the like. Unfortunately, liability insurance may actually encourage a lawsuit since it is perceived as “easy money.” Aside from this, liability insurance often fails due to inadequate coverage, extensive policy exclusions, or the carrier becoming insolvent.

Another common type of traditional asset protection planning is the use of a business entity, such as a corporation, to segregate business assets and liabilities from personal assets and liabilities. While a corporation may shelter personal assets from a lawsuit filed against the corporation, the opposite is not true – if the shareholder of a corporation is personally sued, the shares of stock are not protected from a judgment against the shareholder. Of course, it is possible that if certain corporate formalities are not observed, then the “corporate veil” may be pierced, and the shareholder’s personal assets will become vulnerable.

Finally, many states allow their residents to exempt specific assets from the claims of creditors. This may include protection for property owned jointly by spouses (“tenancy by the entirety” ownership), a primary residence (“protected homestead”), the cash value of life insurance, investments held in a retirement account, and annuities. Nonetheless, these state exemptions are often subject to limitations, such as a cap on the value or land area of the protected homestead.

Planning Tip: Despite their limitations, traditional forms of asset protection planning should not be overlooked:

- *When possible, clients should use liability insurance as the first line of defense against a claim.*
- *While a corporation that fails to observe corporate formalities may not provide adequate protection for the personal assets of its shareholders, other types of business entities, such as limited partnerships and limited liability companies, may be used to shield personal assets from liabilities.*
- *Married couples who are residents of a state that recognizes tenancy by the entirety, or own property located in a state that recognizes it, should make sure their jointly titled property is actually owned as tenants by the entirety and not as joint tenants.*
- *Residents need to be aware of the limitations of their state’s creditor exemptions and expand their protection beyond state exemptions where applicable.*

When Done Right, Asset Protection Planning is Completely Legal and Ethical

Using all legal tools available to help a client protect assets from future claims is consistent with the rules of professional conduct that govern the actions of attorneys. In fact, these rules require attorneys to pursue representation of their clients with diligence and advocacy. What these rules do not allow, however, is assisting or counseling a client in fraudulent or criminal conduct.

In order to ensure that the asset protection plan does not involve any fraudulent activity and will work if it is ever needed, practitioners must carefully interview potential clients to determine if:

- The client is about to be, or has already been, sued.
- The client is about to, or has already, filed for bankruptcy.
- The client is delinquent in reporting or paying taxes.
- The client is being audited by a taxing authority.
- The client is directly or indirectly liable for any loans.
- The client is solvent and will remain solvent after any property transfers.

Planning Tip: Asset protection planning is a complex area of the law. Advisors must be knowledgeable about debtor/creditor laws, fraudulent transfers, tax planning, civil litigation, property laws, bankruptcy, and related areas. Aside from this, advisors must do their due diligence in vetting potential clients and be well versed in both the design and the defense of asset protection plans.

The Final Truth About Asset Protection Planning

Clients may drive carefully and avoid getting into barroom brawls, but they can never completely avoid all activities that create liability. Asset protection planning is not only an ethical and acceptable form of wealth planning, but attorneys and other advisors who do not advocate this type of planning are doing their clients a disservice.

Our attorneys are experienced at creating asset protection plans that are custom-tailored to each client's family situation and financial status. Please call us if you have any questions about this type of planning and to arrange for asset protection consultations for your clients.

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