GOODBYE LIVING TRUSTS, HELLO ASSET PROTECTION

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If you are following the speeches that are available in the area, you will find out that Living Trust Seminars are on the way out, and Asset Protection Seminars are on the way in. Why is this?

Living Trusts are merely a tool to hold your property. They do not protect assets from creditors. However, if you structure some type of asset protection strategy, and ultimately are found to be liable for various debts, you might not have to pay them! Is this legal? Yes! As long as you do not defraud a creditor, or intend to deceive a creditor, your assets can be protected, if you follow proper legal procedures from experienced counsel.

What type of people need asset protection? The essential type of person that needs asset protection generally tends to be a professional person, either in a licensed profession, medical, legal, accounting, dental, architectural, etc., or a high-wage earner, or business owner. All of these categories are at very high risk for law suits. Insurance, although it can cover part of the risk, can never fully protect every interest that could be attached.

Exotic Asset Protection

When most people think about asset protection, they think of tax haven countries. These are generally considered to include the Cayman Islands, Panama, Bahamas, Channel Islands, Lichtenstein, as well as others. The reason many of these countries are considered havens, is that they do not report banking transactions to the Internal Revenue Service and they do not recognize United States or other "foreign" (to them) judgments. Therefore, the date you transfer your assets to a trust, Corporate or other tax haven vehicle, your assets cannot be seized, generally, to satisfy U.S. judgments.

This is an over-simplification of a complex area, but that is the end result. The majority of the foreign tax haven jurisdictions at issue have bank secrecy acts such that if the source of your assets is legal, earnings, profits and other transactions, then the banks will not disclose any information to a party that obtains a judgment against you, a judgment creditor. Further, the jurisdictions will not recognize a U.S. judgment. Additionally, the types of issues that people seek to prove, defaulting of a loan, malpractice, negligence, did not occur within the foreign jurisdiction. Therefore, the court cannot enter a judgment against the foreign assets. Thus, a judgment creditor could not attach your property in the foreign jurisdiction if it was previously transferred into a properly structured foreign corporation or foreign trust.

Standard Asset Protection

What about more garden variety things you can do without leaving the country? The following is a listing of some ideas, that with proper execution and guidance, can protect your assets:

<u>1) Property Leasing. Don't buy, lease.</u>
If you have a valid lease on various items of property, you do not have any ownership in such property. Therefore, automobiles, computers and other equipment that you may in theory utilize are not owned by you. In light of this, the assets cannot be attached.

Note: The equipment your business or you personally are leasing may be owned by family members or other relatives that they, in turn, lease such to you. Providing that this is a bona fide business transaction with a fair market value at arm's length prices, the property may still be maintained by your family, but is not subject to attachment for the tax liability from your business, within certain parameters.

2) Limited Partnerships.
Limited partners have an interest in the partnership entity, not directly in partnership assets. There is no additional liability for further partnership contributions or other partnership debts of limited partners. If a family business is a limited partnership, only the general partner would be liable for partnership debts. (This could be a corporate partner which limits the liability to the corporate assets). All other partners, limited partners, have a limitation on their liability. If your interest in a business was solely as a limited partner, and you had a personal tax liability, or other debt, the utility of the creditors seizing your limited partnership interest would be greatly diminished. Since you would not own any of the assets outright that you transferred to the partnership, the creditor could not seize the assets or your interest in the partnership outright. This could still allow a business or other venture (e.g., a building) to function. This is becoming more common with family businesses or ventures.

3) Tenancy by the Entirety.
Tenancy by the entirety is a form of

property ownership that has specific rights to joint parties. It is only available for real property owned by a husband and wife. If a creditor is present, who is owed a debt from one party namely, a creditor of the husband or the wife, they cannot generally seek property owned in tenancy by the entirety. Tenancy by the entirety does have specific differences from joint tenancy property. Additionally, state laws vary on how tenancy by the entirety is treated and the type of property which may be held as tenants by the entireties.

4) Irrevocable Trust.
If you previously transferred property, well before a creditor arose, to an irrevocable trust, you no longer own the assets. This is notwithstanding the fact that such property may be benefiting your family and heirs. Concern must be given to the timing of such transfer or the issue as to fraudulent conveyance can be raised. If, however, the transfer was properly structured, recorded and gift tax returns, if necessitated, were filed, then such trust may be exempt from attachment.

5) Loans.
If all your available assets have loans against them prior to a creditor filing a lien or other collection actions against you, then your net equity value may make it undesirable for a creditor to proceed against such properties. If the amount of funds a creditor may obtain is less than the cost of such transaction, and any type of state exemptions as to homestead or other exemptions are present, then it is doubtful that collection activity would proceed against your property.

6) Bankruptcy.
Federal protection is available for all debts and certain taxes within specific requisites. Contact tax counsel to analyze if your taxes are dischargeable.

7) Exemptions.
State law provides for exemptions against judgment. Illinois, for example, provides exemptions for homestead, $7,500.00 per person, tools of a trade or profession, as well as other various other exemptions against creditors. Utilization of a proper state situs, for example, Texas and Florida have unlimited homestead exemption, can provide a debtor to own a multi-million dollar residence, and still be liable from all creditors.

Strategies

The optimum strategy usually combines many of the foregoing vehicles. Today, the combination of structuring an offshore trust in a jurisdiction that has a short statute of limitations, relative to reviewing the trust, preferably two years or less, in combination with a domestic limited partnership, appears to be the vehicle of choice. This, in essence, allows a client to take all of their assets and place them in an offshore jurisdiction for ownership purposes. The offshore trusts, in theory, in turn, becomes a limited partner with the client who is the general partner. With specific provisions contained within the limited partnership agreement and trust, the trust then reinvests the foreign funds within the limited partnership. Therefore, as general partner, the client still controls all funds, but now has a very nominal ownership interest, generally one percent of the total. This, in essence, makes the client judgment proof. It further allows the negotiation of any debt to a nominal settlement; therefore, protecting the client's structure.

Conclusion

These are some of the techniques available to help protect your assets against seizure. If, however, times arise when collection defense is necessitated, then competent counsel knowledgeable in tax and asset protection can assist you in defense and structuring of your assets.