Sleeping Well At Night

Arranging Your Personal And Business Affairs

Hosted by Williams, Caliri, Miller & Otley, PC

Asset Protection Planning

What is Asset Protection?

The transfer of ownership of some of the indicia of ownership of assets to a third party thereby making it impossible or even just more difficult for creditors to reach.

Asset Protection Planning

When Should You Do It?

Critical that planning take place before there is a problem, i.e. before a creditor has the ability or right to complain about the transfer(s).

What Does It Matter? [Fraudulent Conveyances]

- Uniform Fraudulent Transfer Act adopted in New Jersey and most States
- Purpose – To prevent debtors from shielding assets from claims of creditors.

General Outline of Fraudulent Conveyance Law

- A transfer (or incurring of an obligation) is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer, if it was done:
  - a) With actual intent to hinder, delay or defraud a creditor, or
  - b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, if
- You are engaged or are about to be engaged in a business or transaction for which the remaining assets were unreasonably small in relation to the business or transaction; or
- You intend to incur or believed or reasonably should have believed you would incur debts beyond your ability to pay as they become due.

Statute of Limitations for Fraudulent Conveyance Claims

- 4 years – if there is actual intent to defraud or where transfer renders you insolvent and you receive less than reasonably equivalent value in exchange for the transfer
- 1 year – where transfer is to insider for antecedent debit.

Key Elements

- Intent
- Time of transfer
- Receipt of Reasonably Equivalent Value
- Intent – A well devised estate plan implemented and carried out over time for valid estate planning purposes with such things as gifts to children and spouse can negate intent
- Passage of time can insulate transfer from attack

How Judgment Creditors Collect Their Judgments

- Once a creditor obtains a judgment:
  - Gives Writ of Execution to Sheriff – Writ is order to go grab assets <u>in the name of the debtor</u> and do something with them.
  - Personal property has to be utilized first and only then can creditor pursue real estate.

BUT – from date of entry of final judgment, the judgment is lien on real estate.

Assets in Name of Debtor

If the assets are not in the debtor's name and they were not transferred in violation of the Fraudulent Conveyance Laws, or if otherwise exempt under law from execution, they are not subject to being grabbed and sold.

How Assets Can Be Held Real Estate

There are different attributes of each which affect creditors' ability to reach, tax treatment and other risks.

How Assets Can Be Held
Real Estate

- Title in personal name – Subject to Claims of personal creditors
- Title in Joint Names with spouse (i.e., Tenancy by the Entireties – Generally only subject to claims against spouses jointly (e.g. mortgage debt owed by both; debt of one spouse guaranteed by the other)
- Title in name with another (Joint Tenancies and Tenancies in Common)
- Title in an entity – LLC, corporation, partnership, trust

How Assets Can Be Held
Overview of Entities

Entity	Attributes
Corporation	Limited liability of owners (stockholders); unless it is Sub-S Corporation, income is subject to taxation at both corporate and shareholder level.

How Assets Can Be Held
Overview of Entities

Entity	Attributes
General Partnership	No limited liability. Partners liable, individually, for partnership obligations. One partner may bind the partnership by his actions even if contrary to the desires of majority. Taxes payable at individual level only.

How Assets Can Be Held
Overview of Entities

Entity	Attributes
Limited Partnership	Hybrid where one or more general partners manage the affairs. Limited partners are divorced from management. No income taxes payable by partnership, only by partners.

How Assets Can Be Held
Overview of Entities

Entity	Attributes
Limited Liability Company	Entity of Choice. [More on this later.]
Trusts	Separates two aspects of ownership. The “legal” ownership is held by the trust which acts through a Trustee. The equitable ownership (that is, the benefits of ownership like income) are enjoyed by beneficiaries. Decision making is vested in Trustee.

How Assets Can Be Held
Personal Property

- Same as real estate, except no tenancy by the entireties for personal property.

Role of Insurance

- Liability Insurance – Can substitute for capital in business
- Life Insurance – Who owns the policy? Cash surrender value as asset of policy owner. Beneficiaries' rights.
- Annuities –Partial exemption from creditor claims

Some Common Asset Protection Techniques

- Separation of ownership of operating business and realty on which it operates
- Use of LLC as opposed to corporate or partnership form
  - Limited liability like corporation
  - Tax treatment like partnership
  - Flexibility of operating structure
  - Separating control from economic benefit
  - Charging liens
  - Availability of corporate stock as asset for creditor to reach

Some Common Asset Protection Techniques

- Trusts – Separates legal and economic benefits
  - Self settled trusts. What they are and why they do not work.
  - Spendthrift trusts
  - Offshore asset protection trusts
  - Issues: Who is trustee? What if they don't do what you want? If you can control trustee you defeat the asset protection.

Some Common
Asset Protection Techniques

- Pre-nuptial agreements
- State law exemptions
  - a. Homestead (Bowie Kuhn)
  - b. Qualified pension plans