ASSET PROTECTION PLANNING

by

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I. WHY ASSET PROTECTION PLANNING?

A. Periodic Recessions, Real Estate and Stock Market Crashes (e.g., 1989-1992 and 2000-2003) Leave High Net Worth Individuals (HNWI) Unexpectedly Facing Creditors and Claims.

Maybe Next: Which Clients Would Be Affected By Collapse of the "Housing Bubble?"

B. Explosion of Lawsuits, Civil Liability: the Average American is Sued 5 Times.

C. Different Sectors of HNWI Periodically Come Under Attack: accountants and lawyers in 1989-1992, tech executives and directors and auditors in 2000-2003, e.g., Arthur Andersen partners after MCI, Enron, collapse of firm.

D. Inadequacy of and/or Exorbitant Cost of Insurance, e.g., Medical and Engineering Malpractice. The Almost Instant Upward Adjustment of Insurance Premiums After a Claim Means that, in effect, All Insureds are Really Self-Insuring.

E. A Means to Start Over After Economic Disaster, Near Bankruptcy/Near Insolvency, a Mechanism to Separate New Assets or "Clean Assets" from Old Liabilities Associated With Other Assets.

F. An Alternative to a Prenuptial Agreement or Possibly a Divorce Property Settlement.

G. To Protect Gifts and Bequests to Family Members from Creditors (and Spouses) of Those Family Members.

H. Clients Want It, according to Survey Reported in September 2003 issue of Trusts and Estates, by Russ Prince and Richard Harris. (See "Shelter From the Storm," attached as Exhibit A.)

II. APPROPRIATE AND INAPPROPRIATE CANDIDATES FOR ASSET PROTECTION PLANNING

A. Good Candidates: HNWI Concerned About Potential Future Creditors. Nervous and Worried, or Just Cautious.

B. Bad Candidates: HNWI Already in Deep Trouble -- Already Been Sued or Threatened for Past Activity, On the Brink or Over the Brink.

C. Can You Help HNWI Already in Trouble? Maybe, But Be Very Careful.

III. ASSET PROTECTION PLANNING SHOULD BE AN INTEGRAL AND INTEGRATED PART OF THE OVERALL ESTATE AND FINANCIAL PLAN.

A. If the Suggestion Does Not Make Sense as Good Estate Planning and Financial Planning in the Absence of Creditor Problems, It Does Not Make Sense.

B. This "Other Business Purpose" -- Estate Planning/Financial Planning -- Will Serve As a Defense Against the Claim that the Transfer Was Motivated by the Intent to Hinder, Delay or Defraud Creditors, and Therefore May Be Set Aside.

C. Consider Using an Affidavit of Solvency to Protect the Client and Protect the Advisor.

A. Keep in Mind that a Reasonable Goal of Asset Protection is to Permit a More Advantageous Settlement With a Future Claimant, Not Necessarily to Completely Protect the Asset.

A. Especially Be Careful of Clients With Problems With IRS or Any Other Federal Agency, or Who May Be Involved in Tax Fraud, Money Laundering, Drug Trafficking, Funding of Terrorism or Other Illicit Activities.

A. Ethical and Malpractice Issues (See "Asset Protection Planning: Ethical? Legal? Obligation?" by Gideon Rothschild and Dannie Rubin, reprinted from Trusts and Estates, September 2003, attached as Exhibit B.1, and and "What Every ACTEC Fellow Should Know About Asset Protection," by Duncan Osborne and Elizabeth Schurig, attached as Exhibit B.2.)

IV. FRAUDULENT CONVEYANCE ISSUES

A. Is the Client's Intent to Hinder, Delay or Defraud Creditors?

A. Will the Donative Transfer Render the Client Insolvent?

A. Badges of Fraud.

V. REAL ESTATE-RELATED LIABILITIES

A. Joint and Several Liability.

B. Guaranties of Collection and Guaranties of Payment

C. General Partners vs. Limited Partners vs. Members of LLC.

VI. BANKRUPTCY - FEDERAL AND STATE EXEMPTIONS AND NEW 2005 BANKRUPTCY ACT

A. In the Last Two Months a New 500-Page Federal Bankruptcy Law has Signed Into Effect. It Was Pushed by the Creditor Industry: Credit Card Issuers, Auto and Retail Lenders to Make the Law More Pro-Creditor. But It is Seen to Be More Hostile to Poor and Middle Class Debtors, Easier on Wealthy Debtors.

B. Each State May Designate Which Assets Are Exempt for Creditors in Bankruptcy. e.g., Notoriously Florida and Texas Exempt the Full Value of Even Lavish Homes Under the "Homestead" Exemption. The New Federal Law Tightens That Somewhat, Providing Florida's and Texas' Homestead Exemptions Apply Only If a Debtor Has Lived in Those States for At Lease 40 Months Before Filing Bankruptcy. Otherwise the Exemption Is Only $125,000.

C. In the Last 8 Years at least 5 States Have Adopted Asset Protection Trust Legislation: Delaware, Alaska, Rhode Island, Nevada and Utah. Transfers to Such Domestic Asset Protection Trusts Can Still Be Used to Shield Assets From Bankruptcy Creditors, But the New Federal Law Does Permit Bankruptcy Judges to Review Transfers to Such Trusts For Up to 10 Years Before Bankruptcy to See If Such Transfers Were Made With Intent to Hinder, Delay or Defraud the Bankruptcy Creditors. But Proving Such Fraud Is Not Easy. Congress Refused a Proposal to Simply Void Transfers to Such Trusts Over $125,000 With 10 Years of a Bankruptcy Filing.

The New Bankruptcy Law Has No Impact on Offshore Asset Protection Trusts or Domestic "Spendthrift" Trusts for the Benefit of Third Parties.

See Exhibit C "Keeping Some Hiding Places," by Albert B. Crenshaw, The

Washington Post, March 20, 2005.

Limited Bankruptcy Exemptions in Virginia: Tenancy by the Entirety Property; Partnership Interests; § 529 Plans; IRAs to a Limited Extent. See below.

VII. HOW TO AVOID THE CLAIM THAT THE CREDITOR HAS BEEN DEFRAUDED

A. Consider Affidavit of Solvency.

B. Do Asset Protection Planning in the Context of Estate Planning, Tax Planning, Financial Planning, Probate Avoidance Planning.

C. Do Asset Protection Planning Early, Before the Client Has Creditors.

D. Discourage Greed. Be Satisfied to Materially Improve the Client's Position. Hogs Get Fat, Pigs Get Slaughtered.

E. Avoid "Over-the-Line" Transactions Which Are Too Late for Clients Already In Trouble, Beware of Felonious Motives in Your Clients. Know Your Client.

VIII. THE LIST: TWENTY-PLUS WAYS TO PROTECT ASSETS FROM CREDITORS

1. Tenancy by the Entirety
2. Outright Gift
3. Partnerships/Family Limited Partnerships After Stangi and Hackl
   (See "Uses of Family Limited Partnerships in Estate, Financial, Tax and Asset Protection Planning, Including Recent Developments," by Frederick J. Tansill, May 2004, attached as EXHIBIT D)
4. Do Revocable Trusts Work? NO!
5. Gifts to Irrevocable Trusts
   (a) Asset Protection Trusts in the United States:
   Delaware, Alaska, Rhode Island, Nevada (But Consider New Bankruptcy Law Discussed Above)
   (b) Irrevocable Insurance Trusts
6. Gifts to Charity, Charitable Lead and Charitable Remainder Trusts
7. Life Insurance
8. Sale of Asset to Child or to Trust for Child
9. Life Interests and Remainders; Joint Purchases, Gifts, Sales
10. Qualified Personal Residence Trusts (QPRTs), Grantor Retained Income Trusts

(GRITs), Grantor Retained Annuity Trusts (GRATs), and Grantor Retained Unitrusts (GRUTs)

11. Qualified Retirement Plans under ERISA, IRAs, Non-Qualified Deferred Compensation Plans
12. Foreign Situs Trusts - Bahamas, Cook Islands, Gibralter, etc.
    (a) Advantages over Domestic Asset Protection Trusts
    (b) Characteristics, Choice of Jurisdiction
    (c) Enforcement of U.S. Judgments
    (d) Foreign Law of Fraudulent Conveyance
    (e) How does the Creator/Settlor Retain Control
        - Trust Protector
        - Letter of Wishes
    (f) Offshore Trusts with Onshore Contacts (See "No U.S. Connections Allowed With An Offshore Trust? Wrong! Use Onshore Contacts," by Frederick J. Tansill, reprinted from the Journal of Asset Protection, May/June 1996, attached as EXHIBIT E)
    (g) How to put U.S. real estate in an offshore trust
    (h) U.S. Tax Issues, U.S. Tax Treatment
13. Business Interests
14. What Interests Can You Retain
15. Protecting Inheritance
16. Uglifying Assets Otherwise Attractive to Creditors
17. Marital Agreements as a Shield Against Unrelated Creditors
18. Planning for Spousal Claims
19. Planning for Claims of Creditors of Beneficiaries
20. Planning for Claims Against Client's Estate
21. The IRS as a Creditor
22. Umbrella Liability Insurance/Professional Liability Insurance

IX. RECENT FEDERAL AND VIRGINIA DEVELOPMENTS re IRAs

A. Recent Federal Developments Regarding IRAs.

1. As part of the new Bankruptcy law - The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 -- the protection afforded to IRAs has been expanded.

    ? There is a new inflation-adjusted cap ($1 million) on the bankruptcy exemption for IRAs and Roth IRAs, including generally rollover IRAs, 403(b) plans, SEP IRAs, § 457 plans of exempt organizations and Keogh Plans for sole proprietors and spouses, beginning for bankruptcy

cases filed after October 16, 2005. (ERISA Plans are completely excluded from claims of bankruptcy creditors under the Supreme Court decision of Patterson v. Shumate.) The $1 million cap may be increased by the bankruptcy courts "if the interests of justice so require."

Note that the bankruptcy laws of some states completely exempt IRAs, e.g., Maryland, and in those states local law controls to completely protect IRAs.

See Exhibit F, an article published by RIA on May 9, 2005: "2005 Bankruptcy Act Actually Extends Bankruptcy Protection for Debtor's Retirement Funds."

2. A recent Supreme Court Opinion, Rousey v. Jacoway, extended the protection from claims of creditors it has previously applied to ERISA Plans to IRAs, but to a limited extend. But, because of the vague language in the opinion, large IRAs may still be exposed to claims of creditors if the bankruptcy court finds them beyond what is "reasonably necessary" to support the debtor and his or her dependents. (See Exhibit G, a Wall Street Journal article from April 5, 2005, "High Court Rules IRAs Untouchable.")

B. Recent Virginia Developments Regarding IRAs.

1. Virginia's bankruptcy law has never singled out and clearly exempted IRAs from claims of creditors, as the law of 36 other states does.

   Virginia has long provided an actuarially calculated exemption reflected in a statutory age-based schedule whereby a bankrupt could exempt from claims of creditors an IRA having a value that would produce $17,500 of income per year. In 2005 the Virginia legislature raised that limit to an annual income limit of $25,000 per year, and the new calculation for any given age will shortly appear in a revised statute.

Example from the old statute and new as to what total amount may be protected:

	Old Statute Income of $17,500/year	New Statute Income of $25,000/year
60 year old	$89,512	$127,875

As this is less than the $1 million exemption under the new Bankruptcy Act, and almost surely less than what would be exempt under the recent Supreme Court decision discussed above, this change appears to be irrelevant.

2. In addition, Virginia has an alternative unlimited exemption for IRAs if the creditor has no ERISA plans for which exemption is claimed. So the above limited exemption would apply where the creditor also has ERISA plans.

3. Large IRAs, those over $1 million, held by Virginia domiciliaries also holding ERISA plans may be exposed to claims of creditors. As Virginia offers an unlimited exemption for IRAs where there are no ERISA plans, consideration might be given to rolling ERISA plans into IRAs for complete protection, as long as the client plans to stay in Virginia or move to a state with an unlimited IRA exemption.