Asset protection planning can take many forms. It may include basic advice, which is inherent in common estate planning strategies including gifting, testamentary trusts, revocable trusts, and postmortem planning. It is one of the major motivations in creating limited liability entities for new businesses and to hold family assets. It impacts family lawyers who prepare premarital agreements, as well as real estate lawyers contemplating taking title to acquired property, as well as lawyers counseling clients contemplating filing for bankruptcy protection.

At the other end of the spectrum are transactions strictly and solely related to removing assets from the easy reach of unknown and potential subsequent creditors, which include domestic and foreign asset protection trusts. It is the intent of this handbook to make any practitioner engaging in a transactional practice aware of those strategies from the most minimally invasive, such as utilizing tenancy by the entirety for the marital residence, to a multi-entity business organization. The editors believe this advice has become more important to our clients, and therefore to ourselves and our malpractice insurance carriers, for several reasons. First, our society has become more litigious. How did the United States become the most litigious country in the world? Perhaps one of the factors was our failure to adopt the British system of assessing litigation attorneys’ fees to the loser, thus posing a significant disincentive to bringing frivolous and borderline frivolous lawsuits. Perhaps, too, it is due to the evolution of a belief system founded on the premise that nothing is ever “my fault.” The huge verdicts in tobacco cases, long after the Surgeon General’s warning, are an example. And maybe there are, as some critics claim, “too many” lawyers given the volume of legitimate lawsuits?

Many clients have been oblivious to the need for asset protection planning. Others recognize the need but do not comprehend the parameters and limitations that must accompany an effective strategy. Clients who engage in asset protection planning are both pessimists and optimists, and sometimes both. Actually, we need both types. After all, the
optimist built the airplane, but the pessimist designed the parachute. Clients engaging in asset protection planning recognize the potential threat that may happen to them, but want the best for their families.

Unfortunately, asset protection planning has often been linked to fraudulent transfers. The detractors will say that asset protection planning is too risky for the lawyer since the fraudulent transfer laws are protective of “potential subsequent creditors” who cannot be identified when the work is done and that the attorneys as well as the clients are subject to sanctions, including criminal consequences in some states, for violations of fraudulent transfer laws. They will also say that many of the strategies, such as domestic asset protection trusts, are too new and not fully approved for use in all states.

Proponents of asset protection or wealth management planning would say that the courts have not strained to find fraudulent transfers for the most part. When there is no timing issue or other evidence of fraudulent intent, such as would be the case when the transfer occurs after the liability-causing event, the courts in general and bankruptcy courts in particular have been quite permissive in protecting assets. There is no inherent duty to preserve one’s assets for the benefit of potential and unknown creditors. In fact, it would arguably be negligent to advise clients regarding many transactions, such as setting up a new business, without discussing the benefits of utilizing a strategy or entity to reduce personal liability. The fraudulent transfer statutes focus on intent to defraud known creditors, and that intent should not inure to the benefit of an unknown creditor.

It should also be noted that certain assets such as homesteads, retirement plans, and some life insurance have been statutorily deemed exempt from creditors. There is protection for these specified essential assets. A properly structured asset protection trust, created with due regard for known creditors who are entitled to protection and limited to surplus assets not needed to satisfy foreseeable obligations, should receive the same protection. The vast majority of honest, ethical clients consulting ethical attorneys, who are legitimately concerned about exposure of accumulated wealth, need and deserve competent advice on protecting and preserving their “nest egg” for themselves and their families.

As to the suggestion that asset protection trusts are too “extreme” or should be done only as a “last resort,” we would remind practitioners that there may be only this one chance to achieve that protection. The
incident of malpractice or negligent driving may occur next week, and then it would be too late.

Some will no doubt argue that there is now a duty imposed on practitioners to point out the advantages of structuring the trust that will hold assets for families, such as a credit shelter trust, or utilizing a limited liability entity to hold certain family assets, in such a way as to frustrate potential and unknown creditors of the recipients of those assets. Whether asset protection planning rises to the level of a duty for transactional attorneys may be debated. However, the potential benefits to those family members, should a catastrophic liability-causing event occur, cannot be denied.

Your General Editors,
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