Asset Protection Estate Planning

By Darlynn C. Morgan, Esq.

You've heard of Robin Hood, the mythical hero who would take from the rich and give to the poor. In many courtrooms today, juries like playing Robin Hood and our legal system seems to encourage it. It's not a bad gig, unless you are the one being robbed.

Some people think "this could never happen to me because I am careful and competent and therefore I don't have exposure." The reality is that we live in a "sue society," and so it is not a question of negligence, but a question of "deep pockets." It doesn't matter if you are to blame. ***You*** have deep pockets and the insurance company that insures your assets have deep pockets. This makes you a target. You may even be aware of your potential exposure but frankly, you just don’t know what to do about it. Unfortunately, most people have not learned what to do about protecting their fortune from "creditors and predators."

So let's talk about what many people are asking about these days: Asset Protection. Specifically, this article is about asset protection estate planning. Asset protection is a part of an integrated estate planning process where you organize your assets and affairs so that you protect and control your assets during your ***life***, in the event of an ***incapacity***, and direct the distribution at the time of ***death***. Your integrated estate plan protects your assets from liabilities and litigation, disability, guardianship, probate, and death taxes.

There's a statistic out there, that the average American is involved in two lawsuits during their lifetime. That's the *average* American. For many of you, the thought of being sued, or, even worse, having to hire an attorney, is scary! Life is too short live with this kind of fear; and with the legal techniques available, you don't have to.

Now, as with anything, there are gimmicks out there posing as "asset protection" that do not work or are fraught with danger. There are poorly designed and implemented asset protection plans that have led some people to question whether asset protection planning really works. Also, no asset protection technique is a "sliver bullet" - meaning, there is no one asset protection planning tool or technique that universally protects all of a one's assets, so a plan needs to involve a mix of the various tools and techniques. Like an onion, an asset protection plan will have many layers that a potential creditor or predator will have to "peel" in order to reach your assets. Further, if you already have a creditor problem, then it is too late; asset protection works best when done well in advance of any potential problem. Finally, some techniques may be more or less appropriate depending on your individual circumstances and your particular preferences for holding your assets.

The goal of asset protection planning is that you will weather a legal storm better because you have more bargaining power than if asset protection planning had not been done. You will be more likely to avert much of a legal assault, or at a minimum, you will give yourself some leverage so that any creditor will have to come to the negotiating table. This should give you more peace of mind.

Although it is important to know what asset protection planning is, it is equally important to know what it is not. Asset protection planning is not an excuse or vehicle for evading taxes, is not based on hiding assets, and is not an excuse to defraud creditors. A properly devised asset protection plan will not rely on hiding or even obscuring the asset trail to be successful.

So what are a few of the asset protection tools of the trade?

- Exempt Assets
- Insurance
- Corporations & LLCs
- Trusts

Exempt Assets

Some of your assets will be protected by state law; these are "exempt assets" and generally include a small homestead exemption, some personal property items, one car, cemetery lots, social security income, and other items along those lines. If you have any degree of even modest wealth, your remaining non-exempt assets have considerable exposure to creditors. Your investments and rental real estate properties you own are not exempt. There are special estate planning strategies that will assist you in protecting your non-exempt assets.

Insurance Components

In any asset protection plan, the first step to protect your wealth is to be sure you have adequate liability coverage. An umbrella policy may only a few hundred dollars per year. But don't make the mistake of thinking you only need liability insurance in an amount large eough to cover the value of your estate. You actually ned enough liability insurance to cover the amount of the potential judgment that might be rendered against you in a court of law. Read the newspapers to see the size of some lawsuits.

Also, life insurance and long terms care insurance are other vehicles that must be considered to protect your estate.

Corporations & LLCs

A corporation or Limited Liability Company (LLC) is a separate legal entity; only the assets owned by the company are exposed, or liable for debts owed by the company. Generally speaking, this will shield your personal assets from company liabilities so long as you use the corporate tool properly. Otherwise a creditor will be able to "pierce the corporate veil." This means that you must hold the Organizational meeting, adopt By-Laws, follow all formalities and maintain the corporate annual and special minutes (Spend a Few Minutes on your Minutes).

Further, some states other than California offer significant asset protection features that need to be considered in any asset protection planning.

Trusts

Generally, revocable trusts, such as Living Trusts, do not protect the grantor's assets from creditors during the grantor's lifetime. Where you have an ***ir***revocable trust, a creditor may or may not be able to access the assets in that trust, depending on many different factors.

It is well settled law that if you create a trust for another person (your child or even your spouse) then the irrevocable "spendthrift" trust will not be available to the grantor's creditors. There is some great planning that can be done in this area for you and your spouse as well as your children.

For example, if you expect to receive an inheritance, you need to discuss the way you will receive this inheritance with your relatives. There are some easy ways to set it up so that your inheritance will be protected during your life from your creditors. Similarly, if you plan to pass an inheritance on to your children or loved ones at your death, there are easy ways to set up your estate plan so that the inheritance you leave them is also protected from creditors and predators. For example, you can ensure that the inheritance that you worked so hard to pass on to your children does not go to their ex-spouse in a divorce.

A different kind of trust, called a "domestic self-settled asset protection trust" is another type of trust that is available in certain states (not California) to protect assets placed in them from creditor claims. These are still untried, so it is questionable whether these trusts will survive the attack of a creditor where the grantor is not a resident of that state.

When thinking about your asset protection plan, remember: don't procrastinate! You have very few options once you are concerned about a specific matter. Also, clients with a net worth of less than $1 million should use the simpler, less protective asset protection vehicles. Upwards of that, the more you should consider using additional asset protection vehicles.

Darlynn Morgan is an attorney, speaker and Personal Family Lawyer. Darlynn makes it easy for your family to talk about and plan for tough subjects like money, death and taxes. Visit www.MorganLawGroup.com for more resources on how to make sure your kids are totally protected if the unthinkable happens to you.