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HOW TO PROTECT YOUR ASSETS AS A BUSINESS OWNER

BY JONATHAN C. KINNEY, ESQUIRE

We often discuss various estate planning tools that can help preserve your assets in the event of a death in the family. It's also important, particularly for those who are business owners, to protect assets during your lifetime.

Most business owners have already structured their business as a corporation, limited partnership or limited liability company in order to protect personal assets from business liabilities. While this is a great first step, in our experience many business owners do not follow the formalities necessary to maintain a limited partnership, corporation or limited liability company as a separate entity. Courts will uphold the distinction between business liabilities and personal liabilities as long as simple requirements are followed. These include maintaining written records of director and shareholder meetings, including issuing stock or membership units, and recording transfers of ownership interests.

Failure to follow the state's annual filing requirements will result in the termination of a corporation, limited partnership or limited liability company. While these entities may be reinstated within a statutory time frame, this is a problem you want to avoid.

When a lawyer brings suit against a business, they're always looking for deeper pockets and most of the time the business owners are those "deeper pockets." Often litigation will attempt to "pierce the corporate veil" – a term meaning that the litigation is seeking personal assets to satisfy business liabilities. However, if you follow the strict rules of maintaining a corporation, limited partnership or limited liability company, personal assets will be adequately protected. However, failure to do simple things such as maintaining minutes of meetings and recording business decisions can lead to undesirable consequences. Failure to maintain a corporation's existence or allowing a partnership or limited liability company to terminate can be disastrous. Although court decisions that actually pierce the corporate veil are not frequent, the consequences can be devastating.

Maintaining separate business and personal bank accounts and credit cards are

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essential, as are filing separate income tax returns, with the exception of single-purpose entities where the business income can be filed as part of your individual tax return.

While a lawyer or accountant can advise you what to do and what not to do, we continue to see individuals who, because of the rush of time and the other demands, simply do not follow these minimum requirements to maintain their business as a separate legal entity.

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SEPARATED BUT NOT DIVORCED: DON'T WAIT TO UPDATE YOUR ESTATE PLAN

BY LORI K. MURPHY, ESQUIRE

Many people have the misconception that they cannot update their estate plan or even prepare a new Will if they are separated but not yet divorced from their spouse. This is not true. An estate plan can be updated at any time so long as the person has mental capacity and is over the age of 18. The fact that someone is separated from their spouse does not bar them from changing their estate plan, but there are points that must be taken into consideration.

Virginia law protects the married couple. To that end, until a divorce is granted and a judge issues a written divorce decree, a spouse is legally entitled to inherit from the other spouse's estate. The general principle is that the living spouse is entitled to all of the deceased spouse's estate if there are no children involved or if all of the children involved are from that marriage and to one-third of the deceased spouse's estate if there are children involved who were born outside of the marriage. This means that if one spouse dies during the period of separation, and if the deceased spouse failed to provide adequately for the living spouse, then the living spouse can elect to file a "spousal elective share" claim against the deceased spouse's estate. There are a few legal principles that get complicated here, such as identifying what is included in the deceased spouse's estate, but Virginia law aims to protect the couple until divorce occurs.

Despite this protection of the marital union, it may still be crucial to update the estate plan once the couple separates. In many cases, a separated individual does not want his or her spouse to continue as the power of attorney/agent in an existing Durable General Power of Attorney or Advance Directive/Health Care Power of Attorney since these documents allow an agent to make certain financial or medical decisions. Thus, it is advisable to prepare new powers of attorney after separation occurs and to deliver notification of termination of existing powers of attorney to the separated spouse through divorce counsel.

Many clients look forward to what life will be like after a divorce. If there are children, significant assets, or real property involved, many clients may prefer to prepare, during the period of separation, a trust as part of their estate plan. A trust acts as a holding place for assets owned by an individual. After divorce, most individuals choose to update the various beneficiary designations on retirement and investment accounts to remove the ex-spouse. In lieu of naming minor children as the new beneficiaries of such accounts, which is a common mistake, the person should consider naming their trust as the primary beneficiary. Further, once a divorce is granted, the individual may update the title to real property pursuant to a divorce decree; for example, the primary residence may be deeded to the individual. Using a trust allows the individual to then deed the home into their trust, which allows the house to avoid falling into the probate process once the individual dies.

If the separated individual fails to update the estate plan and a subsequent divorce is granted, then provisions in an existing Will that favor the ex-spouse are revoked by operation of law. In other words, if the individual fails to take steps to update his or her estate plan, the Commonwealth of Virginia will do it by operation of law. At first glance, this may sound beneficial. However, it can be problematic if children are involved or in amicable divorces where the parties want their former spouse to remain in fiduciary roles. A common occurrence is a situation where the client requests the former spouse to serve as a backup trustee for a trust that benefits their mutual children. In this case, the estate plan must be updated to expressly provide that the nomination of the former spouse in any fiduciary role is to continue post-divorce.

Our firm is well-acquainted with updating estate plans or preparing new estate plans prior to divorce. Please contact us if we can be of assistance to you during a period of separation.

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TALES FROM THE CLIFF: ESTATE PLANNING POLICY FOR 2013 AND BEYOND

BY LAUREN K. KEENAN, ESQUIRE

For those of you watching Congress as 2012 came to a close and wondering what would happen to the economy if we fell off the dreaded "fiscal cliff," you may feel as though you lost a lot of sleep over nothing.

Congress did reach a deal in the wee-hours of New Year's Day and despite several doomsday scenarios, from an estate planning perspective, things stayed pretty consistent. So what did the new deal entail and what does it mean for your ability to plan for the future of your estate?

The Senate bill, H.R.8, passed both houses by a wide-margin and provides for the following:

- The Federal estate tax exclusion, gift tax lifetime exclusion and generation-skipping exemption ("GST exemption") all remain at $5 million dollars, adjusted for inflation (estimated to result in an exemption of $5.25 million per person and $10.5 million for a married couple).

- Estate and gift tax rates increase from 35 percent to 40 percent.

- The unlimited marital deduction is extended, meaning that spouses who inherit from one another will not pay a tax on the death of the first spouse (assuming both spouses are U.S. citizens).

- Portability between spouses is also extended, which allows a surviving spouse to elect to add any unused exclusion from their deceased spouse to their own exclusion amount. This enables a married couple to transfer up to $10.5 million dollars, tax-free. It is important however to note that portability is not automatic and must be elected. To preserve a right to the portability election, an estate tax return must be filed at the time the first spouse dies, even if no tax is owed.

- Annual gift exclusions increase from $13,000 to $14,000 per individual gift recipient or "donee."

Planning has been challenging in recent years, with the looming deadline of extending the prior year's tax cuts and increasing uncertainty as to the future of the estate tax in 2013 and beyond. The passage of this bill quiets

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those concerns, making the new tax rates and exemptions permanent. If Congress wasn't able to reach this deal, tax rates would have spiked to 55 percent and the exemption for Federal Estate and Gift Tax would have dipped back to 2001 levels at just $1 million per individual.

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