Asset Protection Planning

Howard W. Neiswender
Sirote & Permutt, P.C.
205-930-5329
hneiswender@sirote.com
Why Do Asset Protection?

- More lawsuits and bad economic conditions
- Not being at fault is not a defense these days
- Expensive and difficult to insure a lot of risks
- Just good business practice
Goals

- Maintain control as long as possible
- Maintain financial independence and cash flow
- Protect assets
- Minimize taxes
- Have structures in place to settle disputes for less money
- Leverage wealth in next generation
Types of Creditors

- Present
- Potential
- Unknown
Strategies That Provide No Protection

- Joint Ownership (except Tenancy by the Entirety)
- General Partnership
- Revocable Trust
Asset Protection Basics

- Avoid Bankruptcy – Different Set of Rules
- Transfer Assets to Others
- Corporations vs. LLCs
  - Consider converting corporations to obtain changing order protection
- Sales vs. Gifts
Exempt Assets

- Generally not reachable by creditors
- Homes are exempt in some states (but not Alabama)
- Qualified pension, profit sharing and 401(K) plans are exempt
- IRAs are exempt in most states (including Alabama)
- Life insurance policies are typically exempt if owned by the insured. Annuities are typically not exempt
Spendthrift Trust Protection

- Must be created for the benefit of one or more persons other than Settlor
- Creditors can only reach funds actually received by beneficiaries or required to be paid to beneficiaries unless there are exceptions
- Alabama Uniform Trust Code provides exceptions for child support and alimony; judgment creditors who provide services to protect the interests of beneficiaries in the trusts; and claims of the United States and Alabama
- Discretionary spendthrift trusts can not be forced by creditors to make discretionary distributions (even where beneficiaries are co-trustees or sole trustees), including distributions subject to ascertainable standards, except where a court has found abuse and orders a distribution for the support of the beneficiary’s child, spouse or former spouse
Beneficiary-Taxed Irrevocable Trust

Parent Client → Spendthrift Trust → Child

Crummey Withdrawal Powers
Inheritance Trust

- Created to hold child’s inheritance after last death of mom and dad
- Child can be sole or co-trustee
- Income and principal typically available subject to ascertainable standards of health, education, maintenance and support
- Child can choose beneficiaries at child’s death by way of testamentary special power of appointment
- Creditor proof as a spendthrift trust.
- Assuming proper allocation of GST exemption, can avoid estate tax for rule against perpetuities period (currently 360 years in Alabama).
Use of F Reorg

**CHANGE FROM:**

Acme, Inc. S Corp.

- Operating Business
- Business Real Estate
- Equipment

**CHANGE TO:**

Owners

Holding Company LLC (S Corp)

- Real Estate LLC
- Equipment LLC
- Acme, Inc. Operating Qsub
Offshore Limited Liability Company

- Typically created by U.S. citizens with offshore managers
- Best jurisdictions are Nevis and the Cook Islands
- Offshore LLC is often owned by an OAPT, a DAPT or a spendthrift trust
- Good tool for international investing
Domestic Asset Protection Trusts

- Self-settled Trust is permitted
- Rule against perpetuities generally abolished
- Requires trust company located in state or individual resident of state to serve as a trustee
- Typically custody of some of the trust property has to be maintained in the state
- Often include in each DAPT trust protector provisions
- Still subject to jurisdiction of U.S. federal and state courts
- Opportunity for a completed gift for gift tax purposes
Offshore Asset Protection Trusts

- Almost always self-settled
- No recognition of foreign judgments. Suit must be brought in jurisdiction where trust is located and contingency legal fees are not allowed
- Shorter statute of limitations for fraudulent transfers
The Modular Structure for Protection

DAPT
Or
OAPT

99% Member

LLC #1
Real Property

LLC #2
Liquid Investments

99% Member

Client
1% Member/Manager

Client
1% Member/Manager
INTEGRATED PLANNING STRUCTURES

- Real Estate
- Investment Portfolio
- Cash
- Management Company
- Benefit Planning
- Offshore Variable Universal Life
- Client 1%
- DAPT 99%
- OAPT