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Asset Protection Planning: Removing Risk From Your Rewards

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Asset protection planning can be an element of your estate plan designed to minimize economic exposure. Individuals generally interested in this planning are professionals (such as doctors, accountants and lawyers) or business owners, as their services are open to risk from unsatisfied or harmed customers and creditors. Asset protection planning involves restricting your own access to property so it is important to fully understand its implications. Asset protection is not "hiding" assets, defrauding creditors, money laundering or tax evasion.

Asset protection planning entails balancing several factors:

1. Asset protection techniques generally involve shifting ownership of assets to others, which results in loss of control over and access to the assets.
2. Determining which risks are present is important as the appropriate techniques will vary.
3. Tax consequences of the particular technique(s) must be analyzed.
4. There cannot be actual or constructive intent to hinder, delay or defraud any creditor.

A common strategy is to create a business entity to shield some or all the risk in connection with an asset. Each entity type affords varying levels of protection. For example, a C corporation protects the business from a shareholder's personal liabilities and the shareholder is only responsible for business liabilities up to the amount of the shareholder's investment. Conversely, a sole proprietorship provides no protection. Not only is the sole proprietor personally liable to business creditors, but the business is also vulnerable to personal creditors. A limited liability company shields the business from each member's personal liability and the members from the business' liabilities. The facts and circumstances surrounding your assets and potential risk will determine which entity type makes sense.

Another common strategy is to transfer assets to an irrevocable trust, generally for the benefit of your family, and <u>not</u> you. Correctly drafted trusts provide several protections. However, once an asset is distributed out of the trust, such protections no longer apply and the beneficiary's creditors (as opposed to your creditors) may have access to the distributed asset.

Some states permit domestic asset protection trusts (DAPTs). DAPTs provide creditor protection for self-settled trusts, meaning you may be a beneficiary of the trust. Typically, an individual or trust company located in the DAPT state must act as trustee. The protections to you, as the trust creator, are similar to those provided to other beneficiaries. States vary on the requirements and protections available of DAPTs so you should consult with an experienced planner to ensure the DAPT is properly drafted. Wisconsin does not currently permit DAPTs, and other states may or may not recognize the DAPT protections.

Regardless of the asset protection technique, the transfer cannot be deemed to have been fraudulently made (a/k/a voidable conveyance). Both state and federal laws provide that if a transfer is fraudulent, it can be disregarded, thereby providing no protection. There may be additional liability for making the fraudulent transfer. Generally, a transfer is fraudulent if there is actual or constructive intent to hinder, delay or defraud any creditor.

After considering the options available, you may decide that the benefits of an asset protection plan do not outweigh the sacrifices. In such situations, you can explore insurance coverage to offset the risk. While not an asset protection technique, insurance may be advisable for those unwilling to shift ownership of assets or who do not have appropriate beneficiaries to accept the assets. Common types of policies include professional liability (E&O), personal liability, property coverage, commercial general liability and umbrella (open-peril) coverage.

Asset protection planning is a long-term solution to shield assets from creditors, which substantially alters property rights. If you have any questions about the strategies discussed above or asset protection planning in general, please contact Matt Ackmann or another member of Reinhart's Trusts and Estates Team.