

SELECTED QUESTIONS CONCERNING

ASSET PROTECTION

Donlevy-Rosen & Rosen, P.A.
(305) 447-0061

QUESTION: WHAT IS THE SINGLE GREATEST FINANCIAL CONCERN PLAGUING WEALTHY INDIVIDUALS AND BUSINESSES TODAY?

ANSWER: Litigation. We live in a society where litigation has become a popular tool for the accumulation of wealth - not only by plaintiffs, but by their attorneys as well. Lawyers are now earning from 33% to *over* 50% of the assets they recover!

QUESTION: IS THERE AN EFFECTIVE LEGAL SOLUTION TO THIS CONCERN?

ANSWER: Yes. Properly structured, asset protection planning can effectively protect your assets from potential litigants and creditors. It allows an individual, partnership, LLC, or corporation to protect assets against unanticipated claims, yet maintain a great degree of flexibility.

QUESTION: WHAT IS ASSET PROTECTION PLANNING?

ANSWER: Asset protection planning is the adoption of advance planning techniques which place one's assets beyond the reach of future potential creditors. In our practice, it does *not* involve hiding assets or evading taxes, nor is it based upon fraud or secret agreements. It is based upon proven sophisticated combinations of business and estate planning techniques.

QUESTION: I CARRY SIGNIFICANT LIABILITY INSURANCE COVERAGE - WHY SHOULD I BE INTERESTED IN ASSET PROTECTION?

ANSWER: If you review your insurance policy, you'll find that it does *not cover* you for punitive damages or intentional wrongdoing. In addition, with the ongoing crisis in the insurance industry, the financial stability of liability insurance companies is never certain, and the scope of coverage seems to be decreasing all the time. Finally, a claim can always be made which will exceed your coverage. Prudent planning would include a combination of asset protection strategies and liability insurance.

QUESTION: CAN I REALIZE A SUBSTANTIAL SAVINGS ON MY BUSINESS OR PROFESSIONAL LIABILITY INSURANCE COVERAGE?

ANSWER: Yes. The insurance savings from our asset protection planning can pay not only for its full cost in most cases, but can sometimes do so in the first year alone. For example, asset protection can significantly reduce or eliminate the umbrella coverage

that most business owners and physicians have over and above the minimum liability insurance normally carried. Some of our clients have saved tens of thousands of dollars per year in this manner. The same applies to malpractice and tail insurance.

QUESTION: I ALREADY HAVE A LIVING TRUST. DOESN'T THIS PROTECT MY ASSETS?

ANSWER: NO. The typical “living trust” is a useful estate planning tool, which, properly structured, results in the avoidance of the probate process for the assets transferred to it (in most states), and provides some degree of privacy, but it affords **virtually no protection from your creditors**. If you get sued and lose, a court can order you to revoke the trust and pay the creditor.

QUESTION: HOW DO LAWYERS DECIDE WHETHER TO SUE SOMEONE?

ANSWER: When a potential client consults a litigator, the attorney will analyze the merits of the client's case, and, if the case looks strong, make a determination regarding whether a judgment, if won, can be collected. If the lawyer does not believe he can collect the judgment - the source of his fee - he will not take the case. Sophisticated asset protection planning reduces or eliminates the ability of a creditor to collect a judgment from you, making you an unattractive target for the litigator.

QUESTION: WHY CAN'T I JUST MAKE OUTRIGHT GIFTS TO MY SPOUSE OR CHILDREN?

ANSWER: Of course you can make gifts to anyone. But if you truly give it away, you can no longer enjoy control over the asset, and if you give it to someone other than your spouse, you will also lose the income from the property and possibly incur gift tax consequences. Moreover, the property will then be exposed to the new owner's spouse and other creditors. Finally, if you make the gift when a creditor is nipping at your heels, the transfer can be set aside by a court, unless you (and/or the donee of your gift) commit perjury, which is a crime.

QUESTION: WHY CAN'T I JUST HIDE MY MONEY IN A SWISS ACCOUNT?

ANSWER: While investing funds in a Swiss or other foreign account may prove to be a worthwhile investment, any asset protection planning which depends upon hiding assets or secrecy is doomed to failure. As a U.S. taxpayer, the law requires you to report your financial interest in, or signature authority over, any foreign bank account, securities account, or other financial account. If you comply with this requirement, as you should, a creditor can obtain this information in a lawsuit, and if you lose the suit, the court can order you to bring the funds back to the U.S. to satisfy the judgment. If you intentionally fail to comply with the foreign account reporting rule, you will be committing a serious crime - and the Internal Revenue Service does have the means to uncover non-reporters.

QUESTION: WHY CAN'T I JUST SET UP AN OFFSHORE CORPORATION ?

ANSWER: The use of an offshore corporation is generally inappropriate for asset protection purposes. First, you will likely incur a taxable gain on transferring assets to the offshore corporation, second, you will be subject to extensive federal tax reporting requirements (with criminal penalties for intentional failure to comply), and finally, a U.S. court can order you, as the owner of the offshore corporation, to bring the assets back to the U.S. (likely resulting in another taxable gain!).

QUESTION: WHAT IS YOUR APPROACH TO ASSET PROTECTION PLANNING?

ANSWER: In a typical case, our core approach to asset protection planning involves an asset protection offshore trust, sometimes combined with an offshore limited liability company (LLC) - if appropriate to your case. You form the LLC and contribute those assets which are to be protected to the LLC. You become the manager of the LLC, and the LLC member (owner) is the offshore asset protection trust you have also created. As the manager, you retain direct day to day control over the management, investment, and distribution of the protected assets. No third-party consent is required for the purchase, sale, pledge, or in connection with any other transaction in regard to these assets!

QUESTION: I OFTEN BORROW FUNDS FROM MY BANK. WILL THE LLC IMPEDE MY ABILITY IN THIS REGARD?

ANSWER: No. The LLC, if requested by the bank, can be a co-borrower with you, or provide collateral for you on any loan. This would expose the LLC assets or specific collateral to that bank, but to no other creditor.

QUESTION: SHOULD THE LLC OWN ALL TYPES OF ASSETS?

ANSWER: No. An LLC should not own certain types of property. For example, a subchapter S election would be lost if S corporation stock were transferred to certain LLC's. Similarly, the home mortgage interest deduction would be lost if property eligible for that deduction were owned by the LLC. Detailed protection techniques for these types of assets can be addressed in a consultation.

QUESTION: WHY DO I NEED AN OFFSHORE TRUST IN VIEW OF THE PROTECTION AFFORDED BY THE LLC?

ANSWER: As mentioned in the above question, certain assets should not be owned by the LLC; nonetheless, they still need to be protected. These assets can, however, be directly owned by a *properly structured* offshore trust. In addition, although a significant degree of protection is available through the use of the LLC, we can never predict how a local court or jury will act. Sometimes a "result oriented" judge or jury will ignore the fact that your trust is the owner of the LLC (and not you), and somehow pierce the protection. However, significant additional protection is available through the use of an offshore trust as the member (owner) of the LLC. If there is concern

that an unrelenting creditor may convince a result oriented judge or jury to pierce the LLC, then the trust, as the owner, will cause the liquidation of the LLC and move the assets offshore - beyond the jurisdiction of any U.S. court. Where the trust is subject to the laws of an appropriate foreign jurisdiction, the creditor's U.S. judgment will be worthless, and if he is adamant enough (and has the financial means) to attempt to pursue the trust assets, he would have to begin his lawsuit all over again in *the foreign* country -- with one of its lawyers (who, under their law, will not be permitted to take the case on a contingency basis). These geographical, financial, and procedural impediments to reaching the foreign trust will impact significantly on a creditor's decision to chase assets. The United States Federal Trade Commission has tried twice - both times unsuccessfully - to reach assets in a Cook Islands trust.

QUESTION: I HAD MY ESTATE PLANNING DONE SEVERAL YEARS AGO - HOW WILL THE LLC/TRUST COMBINATION FIT IN WITH MY EXISTING PLANNING?

ANSWER: The LLC/trust combination discussed above can be easily integrated with your existing estate plan or, if you wish, it can form the basis of a new estate plan.

QUESTION: I DON'T KNOW IF I'LL FEEL COMFORTABLE WITH MY ASSETS UNDER THE CONTROL OF A FOREIGN TRUSTEE. WHAT PROTECTION IS AFFORDED ME IN THIS REGARD?

ANSWER: First, with respect to the assets held in your LLC (all of the protected assets, with the minor exceptions discussed above), you (as the manager) will have direct and absolute control. You will write the checks; you will make all the decisions. The offshore trust will be the LLC member (analogous to a shareholder in a corporation), and, as such, it will have no voice in the day-to-day operation of the LLC. With respect to the assets held by the trust (either initially, as discussed above, or, if the LLC is liquidated), an independent "trust protector" company -- will have the power to veto any action of the trustee, and to remove and replace the trustee with or without cause. The trust protector can also require that all trust accounts and assets must have both the protector's signature and the trustee's signature in order for any transfer to take place.

QUESTION: WHAT IF A COURT ORDERS ME TO BRING THE TRUST ASSETS BACK TO THE U.S., OR TO REMOVE THE TRUSTEE AND APPOINT MY CREDITOR AS TRUSTEE?

ANSWER: A court can order you to do almost anything, but it can only hold you responsible if you fail to do something that is within your power. While your protector does have the power to remove and replace the trustee, the trust provides that the exercise of this power will be ineffective if the protector attempts to exercise it under duress (such as under a court order). Similarly, a court cannot hold you responsible for failing to bring the trust assets back to the U.S. – you do not have that power. In addition, your trust protector only has the power to veto trustee actions, not to order them. As a practical matter, of course, if you are not under a court order, the trustee will take whatever action your protector suggests, or the protector will replace him.

QUESTION: WHAT ARE THE TAX CONSEQUENCES OF THE OFFSHORE TRUST AND LLC COMBINATION?

ANSWER: The entire structure is tax neutral. "Tax neutral" means that your income, estate, and gift tax "picture" does not change as a result of establishing this structure. The offshore trust does include the federal estate tax marital deduction and unified credit provisions necessary to obtain the maximum estate tax savings on death for married persons. The LLC will elect under IRS rules to be "disregarded" as an entity for U.S. tax purposes. This means it will not file a U.S. tax return and that all of its income and transactions will be reported on the trust's information tax return. Income tax is only paid on your personal tax return - on the same items you would have paid tax on without the LLC/trust structure.

QUESTION: IS THIS ALL LEGAL?

ANSWER: Entirely. The key to effective asset protection planning is the word "ADVANCE". As long as this type of planning is undertaken in advance of a creditor appearing on the horizon, it is 100% legal to protect yourself. Unfortunately, many people first seek to protect their assets after they have been sued or otherwise incurred an obligation. In such circumstances the planning options are significantly narrowed or eliminated because of fraudulent transfer laws (in all states) which permit a court to set aside transfers made at the "eleventh hour".

QUESTION: WHERE WOULD MY TRUST BE LOCATED?

ANSWER: While the trust property itself may be located anywhere, including your local bank, the trust itself (and the trustee) will be domiciled in the Cook Islands. In the case of a fiscal crisis, the trustee can relocate the assets outside the jurisdiction of a U.S. court.

QUESTION: WHAT CRITERIA DO YOU USE WHEN SELECTING A SUITABLE JURISDICTION FOR LOCATION OF THE TRUST?

ANSWER: Selecting the jurisdiction in which the trust will be located is a very important step. Consideration must be given to a number of factors at that location, including:

- o Healthy economic environment for offshore trusts,
- o Stable political and social system,
- o Favorable trust protection and tax laws,
- o Compatible verbal communication,
- o Quality professional services,
- o Modern telecommunications,
- o Procedural and legal advantages, and
- o **A tried and proven track record.**

The Cook Islands currently satisfies all these criteria.

QUESTION: CAN ASSET PROTECTION WORK IF I AM CURRENTLY IN LITIGATION?

ANSWER: In some cases, yes, although our planning options are ordinarily narrowed under such circumstances (and very often we are unable to accept a case once litigation is on the horizon). Asset protection is a vaccine, however, not a cure, and it is best viewed as *preventive* medicine. So it is advisable to have the legal restructuring completed *before* litigation is on the horizon.

QUESTION: WHOM SHOULD I CONTACT ABOUT MY SPECIFIC CONCERNS AND INTERESTS?

ANSWER: You are invited to call **HOWARD D. ROSEN** or **PATRICIA DONLEVY-ROSEN**, at **(305) 447-0061** to schedule an asset protection consultation. We will discuss with you the legal, tax-neutral and effective plans recommended by accountants, lawyers, and financial planners.
