

Financial Preventive Care – 6 Steps to Maximize Asset Protection

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Like people who are in good health and believe they do not need to see a doctor or engage in preventive medicine, many who are healthy financially, often are not too concerned about protecting their assets from the claims of creditors. However, potential exposure from unanticipated liabilities lurks around many corners.

In a litigious society, we all are subject to liability for negligence claims where there is no insurance coverage, or the coverage is insufficient, such as from motor vehicle or other accidents or malpractice claims against professionals. No one ever sets out to suffer a business failure, but sometimes unexpected economic downturns, industry changes or national or world events can blind side even the most capable and experienced business person. (Need I mention the many stalwart companies and smaller companies and businesses that ended up in bankruptcy or went out of business during the Great Recession?)

Losses from real estate ventures or other investments can result in claims on personal guaranties for loans, leases or other obligations. Many of these types of business and investment liabilities are "joint and several," meaning that each maker or guarantor must pay the entire amount, even if others also agreed to be liable. There are times when your business or investment partners do not have the assets you thought they had, and the creditor will simply go after the deepest pocket to get paid quickly.

Asset protection planning involves positioning your assets to eliminate or reduce exposure to unexpected liabilities or unanticipated events and should be pursued before a claim, suit or judgment arises. Many people start to focus on protecting their assets after a claim has arisen, when it is often too late. In fact, the transfer of assets when faced with a pending claim, suit or a judgment very well could constitute fraud. Actions taken to delay hinder or defraud your creditors from collecting a valid claim against you could result in denial of a discharge in bankruptcy, which may be the best protection available under certain scenarios.

This kind of planning is best done in conjunction with estate, tax and other financial planning to allow for consideration of what can be competing considerations. Owning assets (for example real estate) in one way may be advantageous for tax and estate planning purposes, but may have adverse asset protection ramifications. However, there also are times when those interests are aligned. Each person's situation is different and should be carefully considered after reviewing all the facts and circumstances.

Below are some basic steps which many people can take to maximize the protection of their assets:

1. Most retirement plans such as 401ks and IRAs (up to \$ 1,245,475 in 2016), as well as 529 savings plans, are exempt from the

claims of creditors, so you would want to maximize your contribution to these plans in a manner consistent with your financial plan.

2. If you are married, real estate which you own with a spouse as tenants by the entirety with right of survivorship is exempt from the claims of the individual creditors (except for the IRS) of either spouse, regardless of amount of the debt or the value of the property. This exemption also can apply to many forms of personal property. For example, if the institution you deal with will do so (some do not), you should have your joint bank and stock accounts with your spouse titled as tenants by the entirety. Of course this protection does not apply to the joint debts of a married couple (such loans or guaranties where both spouses have signed), so you would want to avoid joint debts where possible.
3. A new law, which went into effect in Virginia on July 1, 2016, appears to exempt from the claims of creditors the proceeds and other benefits from insurance policies (including cash surrender value) and annuities. While the statute is still being vetted, it appears it could make life insurance policies and annuities additional asset protection vehicles. To underscore the need for advance planning, the new law places limitations on these assets if they are acquired with "the intent to defraud creditors" or within six months of the filing of bankruptcy.
4. You should be sure you have sufficient insurance coverage in all areas in which you are exposed to potential liability, whether it

be personal or business. It often pays to secure more than the minimum coverage offered, and you should obtain umbrella coverage where available.

5. If you are operating a business, be sure you are operating with an entity that protects you from individual liability, such as a corporation or limited liability company and that you observe all the appropriate legal formalities with respect to that entity.
6. Placing assets in certain kinds of trusts (such as Qualified Personal Residence Trust or Qualified Terminable Interest Trust) can protect those assets from the claims of your creditors as well assist with estate planning. Also, under certain circumstances, Virginia will now allow you to create a trust for your own benefit with your own assets that will be free from creditor claims – the "Virginia Asset Protection Trust." These need to be carefully considered in the context of your individual financial and estate plan.

These steps are just some of the asset protection alternatives available. Careful planning in advance can help protect your hard-earned assets when unexpected events or economic downturns occur. Like any kind of preventive care or maintenance, it can be worth it to take the time now to be sure you have done all you can to protect what you have.

To learn more about protecting your assets, estate planning, entity formation for business real estate and investment purposes, and other business planning needs, contact our attorneys at Sands Anderson's for assistance.



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