

## ASSET PROTECTION: PROTECTING WEALTH AND INHERITANCES

### Asset Protection in South Carolina

Protecting and preserving accumulated wealth for a secure retirement and a meaningful legacy for family and charities requires thoughtful and deliberate planning. Such planning must be done well in advance of the occurrence of an event which could result in ruinous loss.

In our litigious society, the possibility of becoming involved in a lawsuit is real. Liability may result from negligent acts in the conduct of normal, everyday activities. Suits against businesses, including employee lawsuits, have increased significantly. Physicians are facing a crisis in obtaining affordable malpractice insurance. In addition, the federal government has criminalized some venial errors; for example, liability under HIPPA (Health Insurance Portability and Accountability Act) for innocent disclosure of medical information. Finally, our tort system, which imposes no sanctions on losers of frivolous lawsuits, results in a “lottery” mentality among plaintiffs: “What can I win and what do I have to lose?”

### Few Protected Assets in South Carolina

In South Carolina few assets are protected from judgment claimants. Because the homestead exemption is only \$50,000, it is practically impossible to protect your home from creditors. Federal law protects assets in qualified retirement plans (pension and profit sharing plans) but not assets in an IRA, including rollover IRA's. South Carolina provides only minimal protection for IRA's.

Life insurance cash values and death proceeds paid to a spouse or children are protected from judgment claimants in South Carolina.

### Some Protective Actions are Not Effective

A fundamental tenet of Anglo jurisprudence is that an individual cannot secrete his own assets to deprive existing creditors. The Fraudulent Conveyance Act enables creditors to set aside or reverse transfers made to remove assets from existing creditors. Most importantly, asset protection is not based on hiding assets.

### Ways to Protect Assets

With so few statutory safe harbors, decisive action must be taken to protect your assets. In roughly ascending order of practicality and effectiveness, here are specific actions you should consider to protect your accumulated wealth from predatory claimants.

- **Liability insurance:** This is the first line of defense in any suit. You should review the minimums of your auto and homeowners insurance. An umbrella

liability policy is essential (and inexpensive). Be certain the “named insureds” are properly identified. Consider the services of a qualified risk manager.

- **Life insurance:** Accumulated cash values as well as death proceeds paid to a spouse or children are protected assets in South Carolina, not subject to claims of creditors.
- **Qualified retirement plans:** By federal law, assets in qualified pension and profit-sharing plans, including 401(k) plans, are exempt from creditor claims.
- **Gift transfers:** If you do not own it, no one can take it. However, you lose enjoyment of the asset, and the transferee may be subject to future suits.
- **Corporations and limited liability companies:** *Business activities* and rental properties should be conducted through and owned by an entity. Shareholders and members are almost always protected from personal liability for the torts and liabilities of the business.
- **Limited partnerships and limited liability companies:** *Investment assets*, such as stocks, securities, cash, and investment real estate, should be owned in an entity to protect them from attachment. Judgment creditors may obtain a “charging order” which entitles them only to distributions, if made. Creditors, generally, are not able to become partners or attach the underlying assets of the entity.
- **Protected inheritances:** Lifetime gifts and gifts at death to spouses, children, and grandchildren can be left *in trust*, safe from future predatory claimants against the beneficiaries. Some lawyers assert that no inheritance should be left outright, and thus subject to loss or dissipation.

There are two additional asset protection techniques used by some individuals, especially those in high risk professions or occupations.

- **Domestic asset protection trusts:** Alaska, Delaware, Rhode Island, Utah and Nevada have enacted statutes that purport to recognize irrevocable self-settled trusts. These trusts permit the creator of the trust to retain some discretionary benefit from transferred assets during his lifetime, while placing the assets beyond the reach of future creditors.
- **Offshore asset protection trusts:** The most aggressive asset protection technique, these trusts are effective if done properly, *in advance*, with no intent to defraud existing creditors. These trusts are United States trusts for income tax purposes, and all assets in the trust are included in the Settlor’s taxable estate at death. That is, these trusts are not established for income or estate tax purposes, and no assets are hidden.

## Mistakes to Avoid

The biggest mistake in asset protection is waiting until it is too late. You must plan and act when, in the parlance of asset protection lawyers, the waters are calm. Assets transferred after the threatening event is known may be set aside as fraudulent conveyances. When you have been sued, or threatened with suit, it is too late. Today is the day for asset protection.

Finally, be careful. Obey the rules and live circumspectly; do all things in moderation. Treat others with kindness, truthfulness, and respect. *Keep sound wisdom and discretion, then you will walk securely...your foot will not stumble...and when you lie down your sleep will be sweet.*