Asset Protection Estate Planning

- The Voeller Law Firm
- 19311 FM 2252, San Antonio
- (210) 651-3851
- www.voellerlaw.com

Introduction to Asset Protection Estate Planning

Definition

- *What is Asset Protection Estate Planning?*
  - The planning of one's wealth to protect and preserve it from creditors, predators, taxes, and probate
  - The pre-planning for the future transfer of that wealth to younger generations in a protected form

What are the tools that can protect assets?

- Liability insurance
- Exempt assets
- Corporations & LLC's
- Retirement Plans
- Trusts
- Family Limited Partnerships
- Protected Inheritances

Protecting Assets From Lawsuits

- Creditor Lawsuits
- Divorce Lawsuits
- Negligence Lawsuits – Car Accidents
- Corporate Director's and Officer's Liability
- Business and Professional Liability
  - Employee Lawsuits (wrongful discharge claims)
  - Employee Misconduct
  - General Partnerships or Joint Ownership

Basic Foundations You Must Understand

- *What is Community Property?*
  - All property acquired during marriage except Separate Property
- *What is Separate Property?*
  - Property acquired before marriage
  - Property acquired during marriage by gifts, inheritance, or personal injury recoveries
  - Property acquired by partition of community property

Basic Foundations You Must Understand, Cont.

- Both halves of the Community Property are exposed to creditors of both spouses
- One spouse's Separate Property is not exposed to other spouse's liability
- Beware of Commingling – All Income is CP
- Divorce Courts have no jurisdiction over Separate Property
- How can we create Separate Property?
  - Gifts to a spouse and Partition Agreements

What is a Spendthrift Trust?

- Texas Trust Code
- A Beneficiary of a Trust is protected from:
  - Creditors- can't look to Trust assets to satisfy claims against beneficiaries
  - Himself- No sale, pledge or assignment of beneficial interest in the Trust
- Grantor- Beneficiaries are not protected by Spendthrift Provisions

What is the Uniform Fraudulent Transfers Act?

Effective September 1, 1987

1. Transfer of Non-Exempt Assets;
2. For less than full and adequate consideration;
3. With actual intent to hinder, delay, or defraud a creditor.
4. Post-transfer there must be insufficient non-exempt assets to satisfy claims

What is the Uniform Fraudulent Transfers Act? Cont.

5. What are the Extinguishment Periods (not a Statute of Limitations, but an Extinquishment)
   - A. 4 years after transfer - the general period
   - B. 2 years after a transfer to spouse or child, or,
   - C. 1 year after the transfer could have been reasonably discovered, whichever is the latter

6. Don't procrastinate! – Get the 4-2-1 extinguishment periods running

What Texas laws support the foundations of Asset Protection Estate Planning?

- The Texas Constitution
- The Texas Trust Code
- The Texas Property Code
- The Texas Family Code
- The Texas Business and Commerce Code

What Texas laws support the foundations of asset protection estate planning?

- The Texas Insurance Code
- The Texas Probate Code
- The Texas Business Organization Code
- The Texas Law!

Why engage in asset protection planning?

- We spend lots of time learning how to build a fortune.
- We spend very little time learning how to protect it, insulate it, and keep it out of the reach of creditors

Why engage in asset protection planning? Cont.

- "Sue Society"
  - It's no longer a question of negligence, but rather - "Who can I blame for my misfortune?"
  - Juries play "Robin Hood" - They like to rob from the person or company that has wealth, income and insurance

Why engage in asset protection planning? Cont.

- Peace of Mind
  - Do a better job
  - No reason to quit- keep practicing your best – many professionals stop practicing out of fear of lawsuits

Asset Protection Tools

- **Liability Insurance**
- Exempt Assets
- Corporations & LLC's
- Retirement Plans
- Trusts
- Family Limited Partnerships
- Inheritance

Liability Insurance

- Liability Insurance - First line of defense
  - Covers the loss
  - Provides legal representation
  - Limitations
    - Getting too costly
    - Exemplary damages not covered
    - Insurance company can go broke
    - May someday not be available at any cost
    - May not pay if **gross** negligence is alleged
  - Liability Insurance tail at retirement- Same limitations as above

Asset Protection Tools

- **Liability Insurance**
- Exempt Assets
- Corporations & LLC’s
- Retirement Plans
- Trusts
- Family Limited Partnerships
- Inheritance

Exempt Assets

- Homestead- Texas Constitution
- $50,000 for single person with no family, $100,000 for couple or head of household – Texas Property Code
- Life Insurance and Annuities
  - Proceeds exempt from claims of creditors of the insured and of the Beneficiary (Section 1108.051 of the Texas Insurance Code)
  - Cash Value - Texas Insurance Code provides an unlimited exemption for cash value

Exempt Assets Cont.

- Wages and Salaries cannot be garnished from employees
  - Another reason for incorporating or staying incorporated – to attain or to maintain employee status.
- Qualified Retirement Plans: Art. 42.0021 of the Texas Property Code exempts “Qualified Plans” from claims of creditors

Asset Protection Tools

- **Liability Insurance**
- Exempt Assets
- Corporations & LLC’s
- Retirement Plans
- Trusts
- Family Limited Partnerships
- Inheritance

Corporations & LLC’s
The Texas Corporation Act

- Non-tax reasons – Limited Liability
- Outside and Inside Liability Protection
- Use the corporate tool properly or creditor darts will pierce the corporate veil
  - Hold the Organizational meeting
  - Adopt By-Laws or Company Agreement
  - Follow formalities to assure liability protection
  - Maintain annual and special minutes
- LLC’s are easier to use than corporations and are more flexible – Single Member LLC

Asset Protection Tools

- **Liability Insurance**
- Exempt Assets
- Corporations & LLC's
- Retirement Plans
- Trusts
- Family Limited Partnerships
- Inheritance

Retirement Plans

Article 42.0021 of the Texas Property Code exempts Qualified Plans from Creditors.

- Examples:
  - Qualified Pensions
  - Qualified Profit Sharing
  - Qualified Defined Benefit Plans
  - ESOP's
  - IRA's (including inherited IRA's)
  - ROTH IRA's
  - 529 Plans

Retirement Plans

- Periodic payments are exempt so don't elect lump sum distribution. But, if you do, you still can rollover into an IRA
- Exceptions:
  - Disqualified plans
  - Non-Qualified plans
  - Voluntary non-tax-deductible contributions to Qualified Plans and IRAs
  - Inherited IRA's (non-Texas residents)

Asset Protection

- Liability Insurance
- Exempt Assets
- Corporations & LLC's
- Retirement Plans
- Trusts
- Family Limited Partnerships
- Inheritance

Trusts – The Texas Trust Code

- What is a Trust? – legal relationship – 3 parties (Grantor, Trustee, Beneficiary)
- Why use an irrevocable trust?
  - Take advantage of spendthrift trust planning
  - Trusts can be used to utilize sound estate planning techniques such as QTIP, By-Pass Trust Planning to reduce or eliminate estate taxes

- To avoid probate - Why avoid probate?
  - Lack of privacy – Probate is a Public Record
  - Expense – While Texas death Probate is relatively simple, it costs more than trust administration after death
  - Delays - Probate can extend grieving process
  - Avoid Guardianship – "Living Probate"
  - Easier to Challenge
  - "Probate is a lawsuit that you file against yourself, with your own money, for the protection of disgruntled heirs and creditors."

Asset Protection Tools

- **Liability Insurance**
- Exempt Assets
- Corporations & LLC's
- Retirement Plans
- Trusts
- Family Limited Partnerships
- Inheritance

Family Limited Partnership

- Chapter 153 of the Texas Business Organizations Code
- General Partner and Limited Partners
- Does not violate the Fraudulent Conveyance Statute
  - This will work even if you are being sued
  - Converts red juicy apples into sour lemons
  - Charging order is the creditor's sole remedy

Family Limited Partnership

- Allows you to maintain 100% control while assets are out of reach of creditors
- Reduces Estate and IncomeTaxes
- Wise to use multiple entities to protect one group of assets that could be tainted by liabilities produced by another group of assets

- Features- To frustrate creditors-
  - No Partner can demand a distribution
  - No Partner can transfer their Partnership interest without the consent of all partners
  - No termination without unanimous consent
  - No new partners can be admitted without unanimous consent
  - No distribution of income unless General Partner directs it
  - Charging order is the exclusive remedy to a creditor
  - (TBOC Section 153.256, TLLCA Art. 4.06, IRS Rev. Rul. 1977-13)

Non- Exempt Assets Placed in Family Limited Partnership

- Farm and Ranch Property
- Rental Real Estate
- Mineral Interests
- Investments
- Separate entities should be used for each asset so that any liability produced by one asset doesn't taint the other assets

Asset Protection Tools

- **Liability Insurance**
- Exempt Assets
- Corporations & LLC's
- Retirement Plans
- Trusts
- Family Limited Partnerships
- Inheritance

Potential Inheritance – How Can Your Potential Inheritance Be Protected?

- Have your relative set up an irrevocable trust in their will or a living trust during their lifetime
- Upon their death, your interest will stay in the trust for your life with a remainder interest passing to your children at your death
- You can be the Trustee
- The SpendThrift provision protects the assets of the Trust from your creditors

Protected Inherited Trust

- Protects against spouse's next marriage
- Protects children's inheritance from lawsuits, divorce, bankruptcy, bad decisions
- This is not "ruling from the grave." This is saying, "I love you enough to leave you an inheritance that can not be taken away!"

Estate Planning Asset Protection

- Your clients are worried about losing their nest-egg
- You are in a unique position to direct them to an attorney who can design a plan
- They will thank you later!
- Let us help you, help them, help themselves to all of the protection that the law allows!

Thank You!

- Jim Voeller, the Voeller Law Firm
- 19311 FM 2252, San Antonio
- (210) 651-3851
- www.voellerlaw.com