

Asset Protection Philosophy 101

by Steven J. Oshins, Esq., AEP (Distinguished)

Asset protection has become a necessary part of every estate planner's practice. As we see case law develop, it seems that every time a new decision is issued there are numerous blogs and comments made about the case at conferences, whether positive or negative. The litigators generally claim that the new case spells the end of the technique that was used and failed to work in this particular case. They will often claim that a technique "doesn't work" based on one bad case. The asset protection planners generally claim that "bad facts make bad law." So who is right?

The Goal

What is the goal when attempting to protect your assets? Isn't the goal simply to structure your assets in such a way that they are less desirable to potential creditors? This is Asset Protection Philosophy 101. The asset protection structure should not be judged solely based on whether there is a similar structure that did not work when tested in the court system. Each situation stands on its own. No two fact patterns are exactly the same, no two parties to a lawsuit have exactly the same levels of fear and desire for compromise, and no two attorneys will approach the dispute in exactly the same way.

The goal isn't necessarily to take a case through the court system and convince a judge to rule in your favor. The goal is to walk away with some or most of your assets intact. A settlement for substantially less than what could have been lost should be considered a victory. Unfortunately, case law generally glorifies the losing cases — not the winning cases — because the plaintiff tends to press the matter when the facts are more heavily on the plaintiff's side. Therefore, we tend to see the bad results (from the debtor's perspective) in the case law, but the good results (from the debtor's perspective) very often go unreported because the disputes were settled. Those who practice in this area, however, have seen numerous clients settle matters, in large part because of the asset protection structure that was in place — which helped the creditor see the benefits in settling and the uphill battle that may exist without settlement.

Playing the Game

Asset protection is a game of probabilities. Every legitimate wall that is placed around the assets should move the settlement number more in favor of the debtor. And every bad case that comes down the pike should move the settlement number more in favor of the creditor. Uncertainty over collectability causes most disputes to settle long before they reach the trial level. The creditor must assess the probability that he will be able to collect the debt and the

expenses that will be involved in trying to collect, and then make a rational decision about how far to press the dispute and whether to attempt to settle and the likely settlement amount.

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Assuming there is no creditor on the horizon, or that any current creditor is excluded from the asset protection structure and that it is only set up to protect from future creditors, if you were the client:

Would you proceed with an asset protection structure that has a 99% probability of protecting your assets? (Absolutely.)

Would you proceed with an asset protection structure that has a 90% probability of protecting your assets? (Very highly likely.)

Would you proceed with an asset protection structure that has a 75% probability of protecting your assets? (Probably, but you would hope to find a better alternative.)

Would you proceed with an asset protection structure that has a 50% probability of protecting your assets? (Maybe, but you would likely look for other alternatives.)

It is important to remember that nothing exists that assures a 100% probability of success. If hundreds of debtors are able to successfully use a particular asset protection structure to induce creditors to settle disputes and therefore avoid going all the way through the court process, would you avoid using that strategy if one bad case comes down? If two bad cases come down? If three bad cases come down? Each advisor and each client will ask themselves whether the cost and complexity are worth the degree and probability of protection obtained using the particular structure.

Summary

Asset protection planning is about putting the client in a strong negotiating position by using accepted, legitimate techniques so that the client will ultimately settle the dispute for less than the amount that the client otherwise may have lost had the structure not been in place. It is not solely about case law. The asset protection scorecard not only includes case law, but also includes favorable settlements.

To the extent that the asset protection structure has moved the settlement number in favor of the debtor, the asset protection planner has done a good job. Asset Protection Philosophy 101 is to structure the client's assets so that, if the client is ever sued, the client will keep some or most of the assets on account of the structure being in place well in advance of the creditor issue.

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