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ASSET PROTECTION PLANNING

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Threshold Questions

- Identity of Debtor
 - how risk averse; budget
- Nature of Claim
 - timing; prejudgment attachment; dischargeable in bankruptcy
- Identity of Creditor
 - creditor characteristics – aggressive, lazy, intelligent, etc.
- Nature of Assets
 - liquid, real estate, residence, exemptions

Debt Collection

- Who will be sued?
 - one or both spouses; other business partners, entity owners
- Where will the creditor sue?
- Prejudgment attachment
- Collecting on judgments
 - lien duration; writ of execution; writ of attachment; title to property
- Debtor exam
- Wage garnishment

Voidable Conveyances

- Transfers by debtor that reduce the amount of assets reachable by a creditor
- Transfers involving *actual intent* to hinder, delay or defraud *any* creditors
 - badges of fraud
 - business purpose / estate planning
 - present and future creditors
- Transfers involving *constructive fraud* – less than full consideration and debtor is insolvent
- Remedy / Good-faith exception

Planning in Context of Marriage

- **Common law states** – separate property not liable for debts of other spouse; concept of marital property on divorce
- **Community property states** – liable for debts of either spouse
- Community property - acquired during marriage, other than by gift or inheritance, analyze for titling and commingling
- Determining nature of property
- Plan by splitting assets with a divorce or a transmutation agreement (asset split should be equal by value)

Planning with Legal Entities

- Shares of stock in a corporation are attachable by a creditor
- Interests in partnership-type entities are not attachable
- Creditor's principal remedy is the charging order
- Watch for single member LLCs – charging order limitation may not apply, and easier to pierce
- Inside-out and outside-in piercing and how to avoid
- For an operating business split assets from operations by placing in separate entities
- How to plan when the business is being attacked

Planning with Trusts

- Trust – requires a settlor, a beneficiary, a trustee and trust property
- Ownership of property is split – trustee has legal title, beneficiaries have equitable title
- Creditors can attach any asset that a person owns or can exercise control over for his own benefit
- Assets owned by an irrevocable trust are not deemed owned by the settlor, if the settlor has not retained a beneficial interest

Proper Trust Structure

- A good asset protection trust must meet three requirements
- Trust should be irrevocable – if revocable, settlor deemed owner of trust assets
- Spendthrift provision – beneficiary prevented from anticipating distributions
- Discretionary trust – trustee has discretion in making distributions, can exclude beneficiaries

Self-Settled Trusts

- Self-settled trust – settlor settles a trust for his own benefit
 - If more than one beneficiary, self-settled to the extent of settlor's benefit
- No asset protection benefits to a self-settled trust
- In all other respects, self-settled trusts are valid
- In bankruptcy, there is a ten-year lookback for transfers to a self-settled trust

DAPTs

- DAPTs – referring to the 1997 and later trust legislation in Alaska, Delaware, Nevada, etc.
 - Legislation allows self-settled trusts as a creditor shield
 - Trusts need to comply with certain requirements, like local trustee
- Choice of law – if litigation is in California, the California court is likely to apply California law
- Law selected in the trust instrument is not binding on third-party creditors
- Full Faith and Credit clause – one state has to recognize the laws and the judgment of another state

Foreign Trusts

- Foreign trust – any trust governed by the laws of a foreign country
- Distinguish from income tax definition – a foreign trust is one that fails either the court test or the control test
- Looking for jurisdictions with trust laws favorable to settlors and beneficiaries
- Jurisdiction features – self-settled trusts are effective, favorable fraudulent transfer laws, does not recognize foreign judgments
- Favored jurisdictions

Foreign Trusts

- Choice of jurisdiction – South Pacific, Caribbean, Europe
- Location of assets – must be placed outside the U.S.
- Trust protector must be outside the U.S.
- Selecting an appropriate trustee
- Planning for a possible contempt attack
- Using LLCs to regain control
- Advanced structures – private foundations, hybrid trusts, double trusts

Taxation of Foreign Trusts

- Tax treatment of foreign trusts
 - Every trust is a “foreign trust” for tax purposes, unless meets the court test and the control test
 - Court test – a U. S. court must be able to exercise primary jurisdiction over the trust
 - Control test – the person making all the substantial decisions must be a U. S. person
 - Grantor status
 - If classified as foreign, transfers to the trust are taxable sales
- Reporting requirements
 - Forms 3520 and 3520-A
 - Penalties

Retirement Plans

- ERISA qualified plans – Code Section 401 and Department of Labor requirements
 - Anti-alienation requirement defeats claims of all creditors, other than the federal government and former spouses
 - Ability to rollover from IRA
 - To qualify under ERISA, need a non-owner employee other than spouse of owner
- Nonqualified plans – limited protection under California private retirement plan statute; varies in other states
- Qualified plans rolled over to IRAs may retain the protection of the qualified plan

Comprehensive Example

Brown Family Balance Sheet

	<u>Value</u>	<u>Debt</u>
Residence	\$ 1 million	\$ 500,000
Medical Practice	\$ 4 million	\$ 500,000
Apartment Building	\$ 10 million	\$ 8 million
Brokerage Account		
Cash	\$ 1 million	
Securities	\$ 0.5 million	
Retirement Plan	\$ 500,000	

Comprehensive Example

Transmutation Agreement Split

Dr. Brown	Equity	
Medical Practice	\$ 3.5 million	
Retirement Plan	<u>\$ 500,000</u>	
		<u>\$ 4 million</u>
Mrs. Brown	Equity	
Residence	\$ 500,000	
Apartment Building	\$ 2 million	
Brokerage Account	<u>\$ 1.5 million</u>	
		<u>\$ 4 million</u>

Comprehensive Example

- Medical practice – limited value to a creditor
- Retirement plan – if not an IRA - sheltered from creditors
- Residence – consider a sale, an equity strip, or an irrevocable trust
- Apartment building – contribute to an LLC, single-member LLC issues, solve with full or partial trust ownership
- Cash and securities – LLC or foreign trust



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PROFESSIONAL BIOGRAPHY

Jacob Stein, Esq., TEP is the managing partner of Aliant, LLP. He specializes in international tax planning, creative business and private wealth transactions, and asset protection. Mr. Stein received his law degree from the University of Southern California, and a Master of Laws in Taxation from Georgetown University. He is ranked in the Chambers and Partners High Net Worth Guide, holds an AV-rating from Martindale-Hubbell®, has been named a Super Lawyer® by the Los Angeles Magazine for over ten years, and has a TEP designation.

Over the course of his career, Mr. Stein has represented officers and directors of Fortune 500 companies, high-profile entrepreneurs, celebrities, high net-worth individuals, private equity funds, and some of the world's most prominent families.

He is the author of books, dozens of scholarly articles and technical manuals. One of his more recent articles, "Bulletproofing Assets" was published in the April 2022 issues of the Los Angeles Lawyer. Other recent articles include "Creative Planning Strategies Using Irrevocable Trusts," published in the Thomson Reuters Estate Planning Journal and "Foreign Investment in U.S. Real Estate" published in the Journal of Taxation. Books authored by Mr. Stein include *A Lawyer's Guide to Asset Protection Planning in California, Second Edition*; *International Joint Ventures – A Concise Guide for Attorneys & Business Owners*; and *Asset Protection for California Residents, Second Edition*, the first and only book in print on asset protection planning specific to California residents that provides a sophisticated and in-depth look at the law in an accessible manner.

Mr. Stein was an adjunct professor of taxation at the CSU, Northridge Graduate Tax Program for ten years. He lectures frequently to attorneys, CPAs and other professional groups, teaching over 50 seminars per year for state and local bar associations, estate planning councils, and international networking organizations. Mr. Stein is an instructor with the California CPA Education Foundation, Thomson Reuters, the Rossdale Group, Lorman Education Services, Spidell Publishing, and many more.