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Guarding Your Legacy – Asset Protection Strategies

Imagine that you have spent a working lifetime accumulating a significant level of assets in order to leave a financial legacy to your loved ones. Perhaps you have built a substantial and respected medical practice, a thriving manufacturing business, or a prosperous farming or ranching operation. Consider also that this legacy could be impaired or lost altogether in a relatively short time. We live in a litigious society and successful individuals have always been good targets. As a wise person once said, "It's not how much you earn, it's how much you keep." In this article, we are going to explore a couple of techniques that can help you guard that legacy.

Asset Titling

A common and relatively easy asset protection planning technique involves proper titling of both personal and business assets. An individual may title personal or real property in the name of his or her spouse. A primary residence may be owned as tenants by the entireties, which shields the residence from creditors as long as both spouses live there. Business property should be titled in the name of a corporation, limited liability company (LLC), or limited liability partnership (LLP). Remember, however, that the general partner of an LLP has unlimited liability for the acts of the partnership. Ideally, different classes of business assets should be held by separate entities.

The ability to protect assets through appropriate titling varies from state to state and may have limitations when it comes to estate planning and asset protection. For example, a spouse may have liability exposure issues of their own, and a divorce can throw a well-conceived plan out the window. Therefore, it is always important to discuss this technique with advisors who are well-versed in the details of this technique.

Domestic Asset Protection Trusts

The Domestic Asset Protection Trust (DAPT) is an increasingly popular vehicle for effective asset protection that has the additional potential benefit of state income tax savings. Structured correctly, assets held in a DAPT cannot be reached by creditors of the grantor.

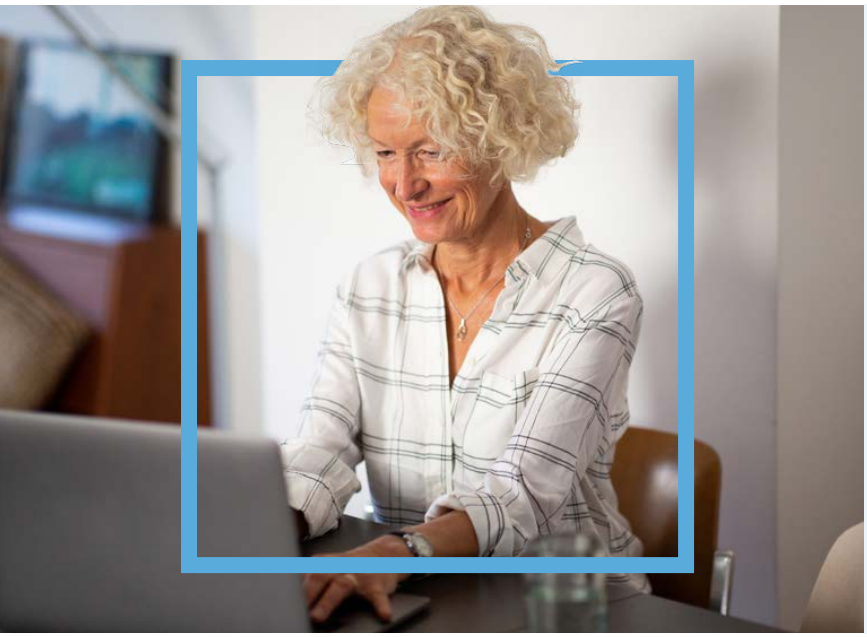
A number of states, including South Dakota, have adopted legislation authorizing DAPTs. Common requirements of enabling legislation include naming that state as the trust situs for purposes of determining its validity, construction, and administration, naming a trustee in that state, and having the assets custodied and trust administration occur in that state. The DAPT grantor may have the power to direct investment, authorize or veto distributions, and replace the trustee, custodian, or investment advisor, although the grantor him or herself may not serve as trustee. However, the grantor may be a beneficiary of the trust, with the ability to receive payments of principal and income and to exercise a limited testamentary power of appointment. In addition to being one of the most trust-friendly jurisdictions, South Dakota also has the advantage of no fiduciary income tax.

Assets that are typically placed in a DAPT include cash and securities, LLCs, hard and soft business assets, real estate, and big-ticket items such as boats, motor homes, and aircraft. These are the types of assets that would be most exposed to the claims of creditors and litigants. Often, these assets are held in LLCs that are registered in the state of trust situs to bolster the trust's relationship to that state, rather than the grantor's state of residence.

Conclusion

It is critical to note that an efficient asset protection strategy requires planning well in advance of the existence of any potential claim against the grantor's assets. The Uniform Fraudulent Transfer Act provides that a transfer of assets to another person or entity is fraudulent if done with the intent to hinder or defraud a creditor, or if there was not reasonably equivalent consideration given for the transfer. If an incident has occurred which might give rise to a claim against the owner of the assets, it is too late for any of these techniques.

It cannot be emphasized enough that good planning in this area requires the active involvement of one or more specialists, including attorneys, accountants, and perhaps appraisers and insurance professionals. However, the result can be a legacy that can not only provide for you but also for generations to come.



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