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# Fundamentals of Asset Protection

By

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## Typical Client's Objectives

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*“I want to be able to enjoy what I (we) have accumulated, and I want my spouse and children to enjoy it. I want to pay the least amount in taxes – none if possible. I want to be sure that no creditors can reach any of these assets, and of course, I don't want to give up control while I'm alive – but keep it simple!”*

# Asset Protection Planning

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*Planning that seeks to place a client's assets  
beyond the reach of future unknown creditors.*

# Asset Protection Strategies

**Simple**

**Complex**

Liability  
Insurance

State and  
Federal  
Exemptions

Outright  
Gifts

Gifts in  
Trusts

LLCs

Beneficiary  
Controlled  
Trusts

Domestic  
Self Settled  
Trusts

Offshore  
Self Settled  
Trusts

Captive  
Insurance  
Companies

# Fraudulent Transfer Laws

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*Laws that declare void transfers that are intended to delay, hinder or defraud “creditors”.*

# Fraudulent Transfers

- Two Ways to Prove a Transfer is Fraudulent
  1. Insolvency Transfer
    - A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the debtor made the transfer without receiving a reasonably equivalent value in exchange for the transfer and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer.
  2. Actual Intent

# Fraudulent Transfers

- Some factors that are considered to prove “actual intent”
  1. Before the transfer was made the debtor had been sued or threatened with suit;
  2. The transfer occurred shortly before or shortly after a substantial debt was incurred;
  3. The transfer was to an insider;
  4. The debtor retained possession or control of the property transferred after the transfer;
  5. The transfer was disclosed or concealed;
  6. The transfer was of substantially all the debtor’s assets;
  7. The debtor absconded;
  8. The debtor removed or concealed assets;
  9. The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred; and
  10. The debtor was insolvent or became insolvent shortly after the transfer was made.

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# Types of Creditors

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1. Existing Creditors
  2. Future Known Creditors
    - ❑ Those creditors one can reasonably expect to face
  3. Future Unknown Creditors
- You Can Protect Against Future Unknown Creditors



# Solvency Analysis

Dr. Jane and Mr. Mom Smith

Total Assets	\$5,000,000
- current debts (existing creditors)	500,000
- claims, guarantees, contingent liabilities, threats, etc. (future creditors)	600,000
- Protected Assets (401K, Life Insurance)	1,000,000
Unprotected Net Worth	<hr/> 2,900,000

- This is the **maximum** amount available for Asset Protection Planning against future unknown creditors

## Solvency Analysis (Continued)

- Unprotected Net Worth Consists of the Following:

1. Marketable Securities	\$1,200,000
2. Apartment Complex	800,000
3. Retail Shopping Center	500,000
4. Personal Residence	400,000

\* All assets owned jointly

## State and Federal Exemptions - Non-Bankruptcy

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- ❑ Homestead – Limited
- ❑ Personal Property – Limited
- ❑ Certain Life Insurance Policies (cash value and death benefit proceeds)
- ❑ Annuities – Limited
- ❑ Tax Favored Retirement Plans (ex: 401K, IRA, etc.)

## State and Federal Exemptions – Bankruptcy

- Same as non-bankruptcy except:
  1. Non-Rollover IRAs – limited to \$1,000,000
  2. Section 529/530 Plans – Limited

# Business Entity Planning

- ❑ Protection from liabilities which arise out of certain activities
  1. Corporation
  2. LLC
- ❑ Protection from other liabilities
  1. Corporation – No charging order
  2. LLC – Charging order only
- ❑ Respecting the business entity – critical
- ❑ See fraudulent transfers

## Estate Planning Opportunities with Asset Protection Benefits

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- Outright Gifts
  - Spousal Gifts
  - Non-Spousal Gifts
  - See Fraudulent Transfers
- Gifts to Intervivos Trusts
  - Spendthrift provision is critical

# Beneficiaries

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- Who can be the Beneficiary
  1. Client
  2. Spouse
  3. Children
  4. Grandchildren

# Beneficial Interests

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- Some types of beneficial interests
  1. Subject to a standard vs. non standard
  2. Mandatory vs. discretionary
  3. One beneficiary vs. multiple beneficiaries



# Trustees

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- Selection of Trustee
  1. Independent vs. non-independent
  2. Beneficiary as trustee or co-trustee?
  3. Grantor/Settlor as trustee or co-trustee?

- Duration of Trust
  1. Until beneficiary reaches certain age
  2. For beneficiary's lifetime
  3. Dynasty Trust (subject to rule against perpetuities)

# Questions???

*The information contained herein should not be construed as legal advice or a legal opinion with respect to any specific facts or circumstances, and is not to be used as a substitute for the advice of counsel.*