

Current Trends in Asset Protection Planning



LEGACY LEGAL

FAMILY WEALTH & BUSINESS STRATEGIES

Overview

- What is Asset Protection?
- Why Asset Protection?
- Goals of Asset Protection
- Asset Protection Methodology
- Techniques



Asset Protection (generally)

Asset Protection is comprehensive personal and business risk management that further a variety of goals which include preserving and protecting assets from involuntary transfer to claimants or creditors

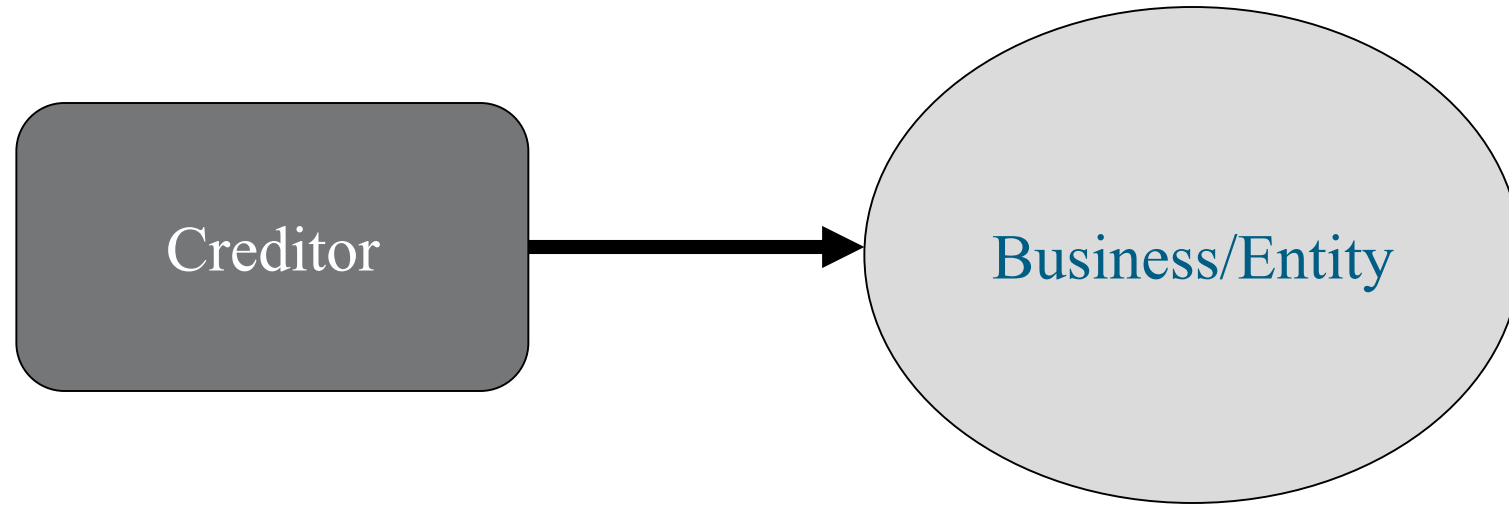


Claimant or Creditors

- Clients of professionals, i.e., malpractice claims, doctors, dentists, lawyers, CPAs, architects, engineers, etc.
- Future claimants of real estate investor or business owner.
- Claims of spouse relative to potential divorce.
- Claimants and creditors of children or elderly parents.
- Claimants of high risk business owner.
- The buyer of a business who subsequently suffers buyer's remorse and goes against seller for fraud, misrepresentation, etc.
- General tort claimants (i.e., traffic accidents, etc.)
- Contract claimants (i.e., personal guarantees, bonding and other contractual claims.)
- Government agencies, i.e., the IRS, state taxing authorities and environment base claims (extra care has to be taken with respect to planning to protect assets against governmental claims).



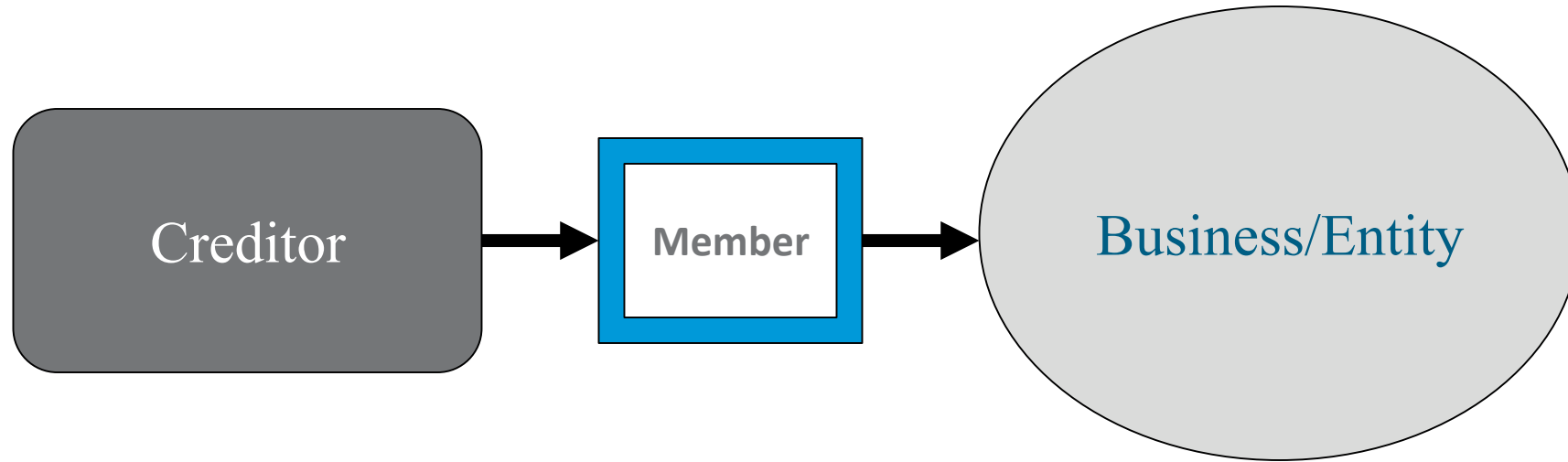
Types of Creditors – Inside Creditors



Inside creditors are those creditors whose claim is directed against the business operation or real estate which is operated and owned inside a business entity.



Types of Creditors – Outside Creditors



Outside creditors are those creditors whose claims arise outside the purview of the business entity and are generally asserted against the business or real estate owner personally.



Primary Goal of Asset Protection

Allow clients to rid themselves of creditors' claims while retaining a substantial portion of their assets



Variety of Goals of Asset Protection Planning

- Favorable Psychology of Settlement
- Subtlety
- Offensive Opportunities
- Transference
- Totality
- Containment
- Flexibility
- Redundancy & Diversity
- Complementary & Efficient



Asset Protection Methodology

- Jurisdictional
- Integrational
- Unbundling & Separation
- Opportunity Shifting
- Structural vs. Transfer
- Challenge Analysis



Jurisdictional Methodology (Forum Shopping)

- Importing favorable law into transaction
- Exporting assets to more creditor-adverse jurisdictions
- Exploiting conflict-of-laws amongst states



Offshore



Wyoming



Nevada

Integrational Methodology

The process by which asset protection planning is combined with the client's existing business and other planning



Unbundling & Separation Methodology

- Protect low-risk assets and use them to drain cash from the high-risk business
- Unbundle and separate complex assets:
 - The asset has value itself
 - Also has income stream value
 - Rent
 - License Fee



Asset Protection Techniques

- Statutory Exemptions
- Share Structures
- Collateralization
- Charging Order Protected Entities
- Trusts
- Modular Planning



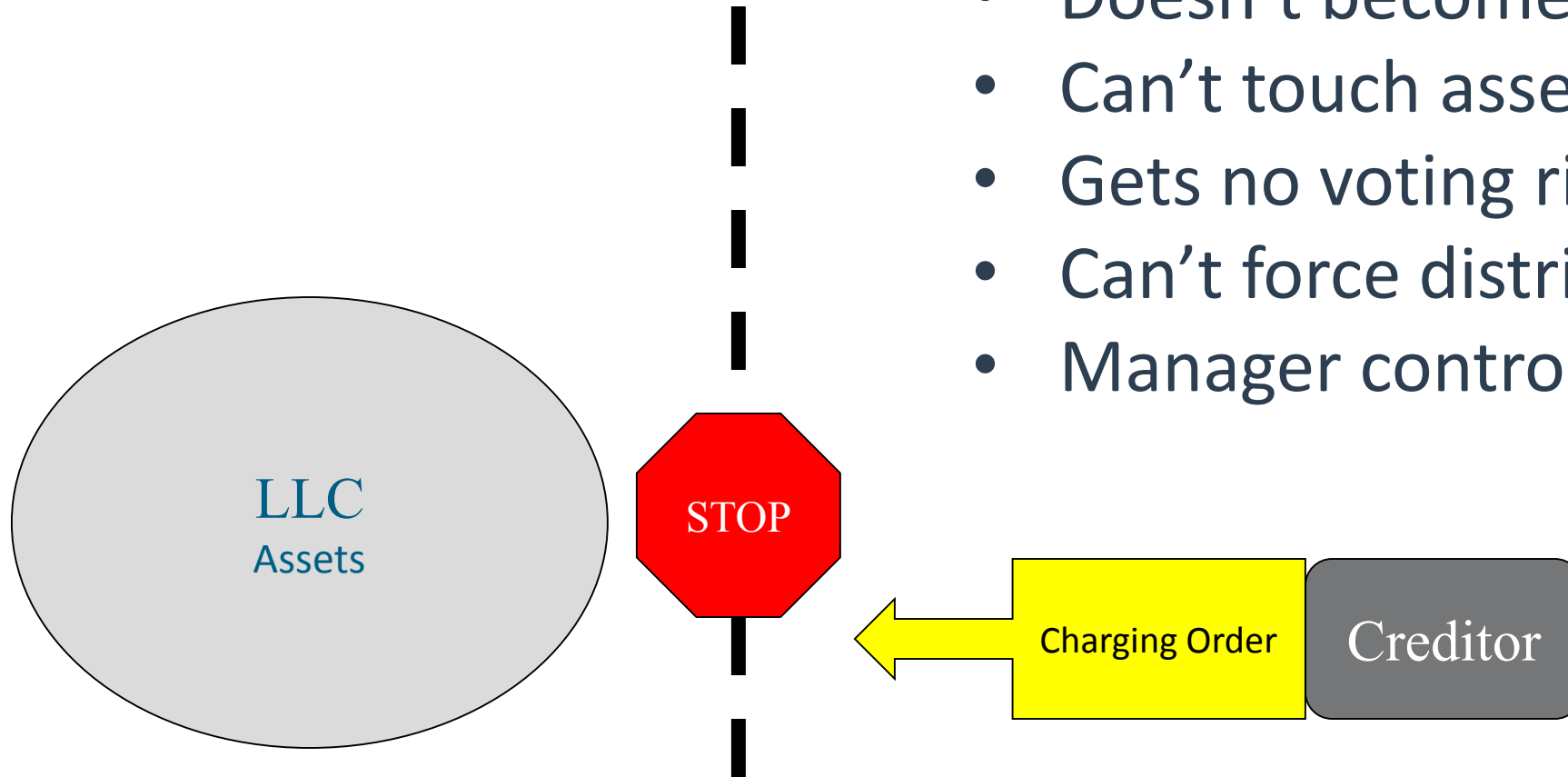
Charging Order Protected Entities

Entities that restrict the remedies of a creditor of an owner to a “charging order” that entitles the creditor to distributions made in respect of that ownership interest

Difference between being a shareholder of a corporation and a member of an LLC is often overlooked



What a Charging Order Means



- Doesn't become member
- Can't touch assets
- Gets no voting rights
- Can't force distributions
- Manager controls

LLCs – Recent Updates

- California LLC Case
 - 2 unrelated members
 - Charging Order against one member
 - Debtor-member claims that manager should have made distributions to prevent foreclosure of charging order
- Do the managers or the non-debtor member have a fiduciary duty to take steps to protect the economic interests of a debtor-member?

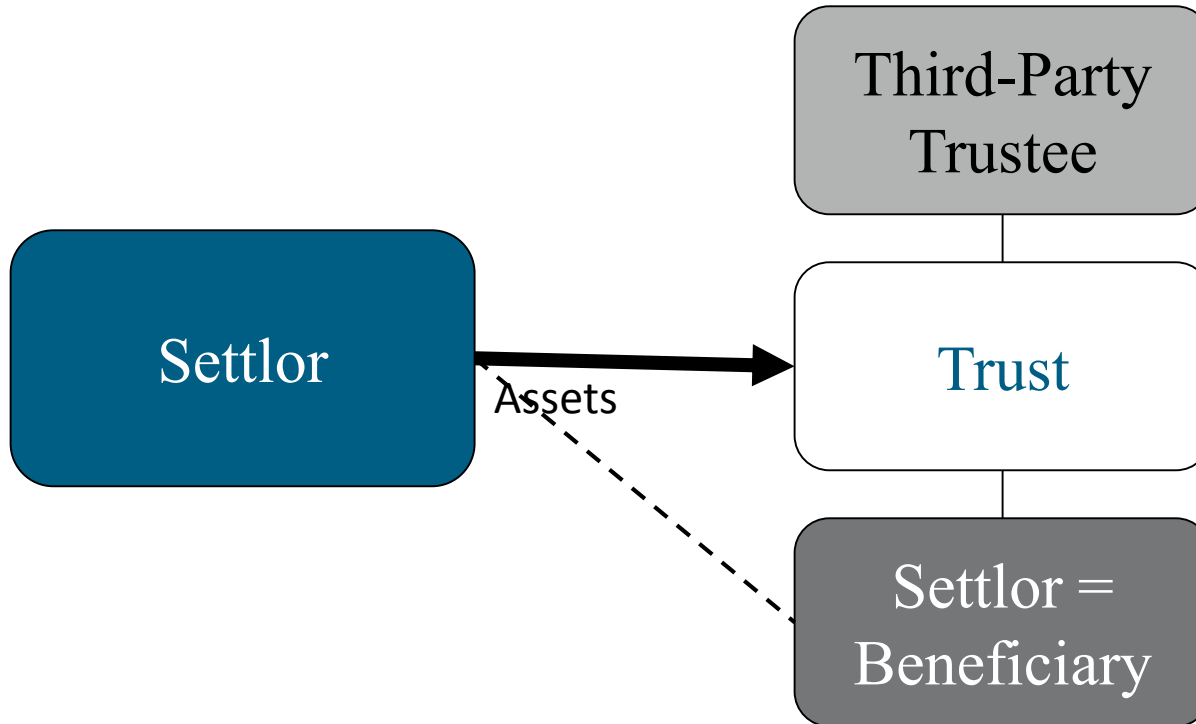


Asset Protection Trusts

- Self-Settled Spendthrift Trust
- Irrevocable
- Discretionary
- Settlor is beneficiary



Asset Protection Trusts



To control something without legally owning it is the best financial position anyone can ever be in.



Asset Protection Trusts

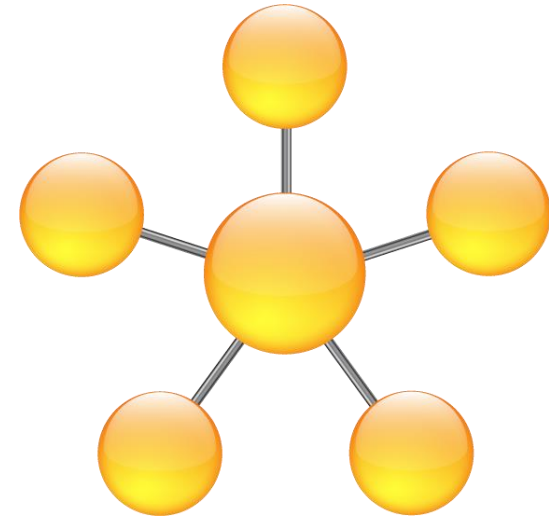
- Jurisdictional Methodology
 - Domestic (DAPT) vs. Foreign (FAPT)
 - 9th Annual Domestic Asset Protection Trust State Rankings: 17 States (Missouri tied for 4th)
See www.oshins.com
- Major issue for FAPTs is being held in contempt for failure to repatriate

See <https://www.forbes.com/sites/jayadkisson/2018/05/12/bankruptcy-trustees-compromise-with-offshore-trust-fails-to-win-court-approval-in-olson/2/#1f56d532c6a3>



Modular Planning

Combine the utilization of the Asset Protection Trust (DAPT or FAPT) with a Charging Order Protected Entity



Discretionary Trusts

- Trusts that provide that the Trustee has the discretion as to whether or not to make distributions of principal and income
 - Trustee should be independent (not a related party under IRC § 672(c))
 - May seek to have separate “Distribution Trustee”
 - No “withdrawal right” by Beneficiary



Discretionary Trusts (recent update)

US vs. Harris

- Harris was a beneficiary under a discretionary trust
- Convicted of 8 criminal counts
- Ordered to pay federal restitution
- Federal restitution is a lien in favor of the US

Gov't always wins



Tenancy by the Entirety

- Tenancy by the Entirety is the law in 26 states (Missouri)
- Property acquired by two spouses together in many states is presumed to be a Tenancy by the Entirety
 - If one spouse dies, the property automatically passes to the surviving spouse by operation of law
 - If one spouse gets sued, that creditor cannot attach tenancy by the entirety property, it's deemed to be owned by the couple as a whole and therefore is not subject to the creditors of just one of the spouses



Tenancy by the Entirety – con't

- Missouri has adopted the “qualified joint spousal trust”
 - Allows Tenancy by the Entirety property to be transferred in trust and maintain creditor protection



Creditor Protection for IRAs

Clark v. Rameker: Creditors have access in bankruptcy to a debtor's interest in an inherited IRA

Options: Use trusts as the beneficiary of qualified plans

1. Client's Revocable Living Trust – Required Minimum Distributions (RMDs) must be distributed to beneficiary
2. Stand Alone Retirement Trust – RMDs may accumulate (i.e. “Discretionary Trust”)



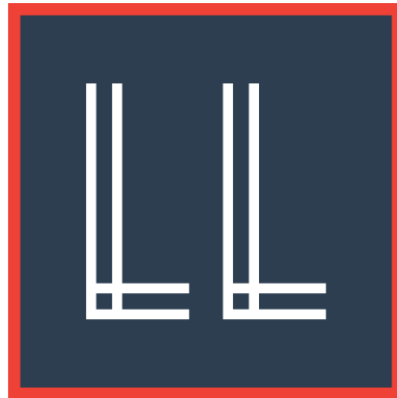
Summary

Asset Protection Planning may help to lower a client's financial profile.

- ✓ Must be done when the skies are clear
- ✓ Typically a combination of techniques
- ✓ No plan is perfect
- ✓ Beware of fraudulent transfers
- ✓ Bankruptcy causes issues
- ✓ Gov't always wins



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