Asset Protection Planning

By Paula F. Montoya, Attorney at Law

In a society eager to sue, protecting assets from creditors has become of utmost importance. A beneficial asset protection plan erects a protective shield requiring a creditor to overcome multiple obstacles to reach your assets.

Homestead: In Florida, the equity in your home is protected from creditors. However, if you file for bankruptcy, only $125,000 of equity is protected if you have lived in the property less than 40 months.

Tenants by Entireties (TBE): Florida provides a special kind of creditor protection to property, real or personal, jointly owned by a husband and wife as tenants by entireties. A creditor of one spouse cannot involuntarily seize TBE, but if both spouses are jointly indebted to a creditor, that creditor can seize TBE property. TBE ownership has its downsides. Upon a divorce, the share of either joint tenant is available to his/her creditors, and upon the death of one spouse, assets become subject to his/her creditors.

Wages or Salary: Wages and salaries earned by the head of a household are exempt from creditors for six months when the wages are deposited into a bank account and are traceable as wages. A separate wage account makes it easier to identify those funds as wages.

Life Insurance and Annuities: Insurance and annuity contracts are protected from creditor claims under Florida law. If you die leaving insurance on your life payable to named beneficiaries, the insurance proceeds are exempt from your creditors. However, if the insurance is payable to you, your estate or your personal representative, or if you fail to name a beneficiary, the insurance proceeds become a part of your estate and may be subject to claims of your creditors at your death. While you are living, the cash value of any insurance policy you own on your life is exempt from creditor claims.

Retirement Plans: In Florida, retirement funds are protected from creditors. Funds payable to a participant or beneficiary of a qualified retirement or profit sharing plan, such as an IRA or 401(k), are exempt from all claims of creditors of the beneficiary or participant.

Business Entities: Corporations, limited liability companies and family limited partnerships can offer asset protection benefits. However, there are limitations on the protection afforded by each type of entity, which depends on whether the creditor is a company creditor attempting to reach your personal assets or a personal creditor trying to reach your personal and company assets.

Domestic Trusts: Certain trusts can be an effective way to protect assets from creditors. A revocable or living trust will not protect assets from creditors since you maintain control over the trust assets. However, if someone else creates a "protective" trust and names you as a beneficiary, a spendthrift provision will protect your share of the trust from your creditors. You can also achieve asset protection by creating an irrevocable trust and naming an independent trustee, but creditors may still reach any amount that is distributable to you from the irrevocable trust. The downside of irrevocable trusts is that you lose control over the assets.

Offshore Trusts: An offshore asset protection trust may offer the highest level of creditor protection since foreign governments with favorable asset protection laws do not normally recognize U.S. judgments, absent proof of fraudulent transfer. Creditors are less likely to invest the time and expense of locating assets and filing suit in a foreign country.

To be effective, any plan to protect your assets must take into account estate planning, estate tax planning, business planning and the impacts from unforeseen events such as divorce. If you are concerned about asset protection, consult with an attorney experienced in all of these areas who can develop a plan to address your goals.

Paula Ferreira Montoya is a practicing attorney and partner at the Jackson Montoya Law Firm (407-363-9020). Her areas of practice include estate planning, business, real estate and Immigration. Paula brings over 8 years of comprehensive legal experience to the firm along with a multinational perspective in world cultures, politics, economics and business.