



asset protection planning

WHAT'S THE BEST STRATEGY?

Like New Englanders who complain about the weather, many of us, including business owners and executives, healthcare providers, attorneys, and accountants, often worry about being sued, but don't do anything about it. Although there isn't much you can do about the weather, you can design a plan to place assets beyond the reach of your creditors. The complexity of such a plan—known as an asset protection plan—can range from very simple to extremely complicated, depending on the nature and extent of your assets, your budget, and your pain threshold for dealing with lawyers and paperwork. ►



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GETTING STARTED

The first step in asset protection planning is avoiding a fraudulent transfer. Assets that you transfer fraudulently are still available to your creditors. You can't transfer assets to put them beyond the reach of a known creditor, or to make yourself insolvent. If you're already being sued or are about to be sued, it's too late to do any legitimate planning.

New Hampshire law affords some automatic asset protection to its residents. The state's homestead exemption protects up to \$100,000 of the equity in your home from your creditors. If you're married, your spouse also has homestead rights in your residence, so up to \$200,000 of equity is protected.

New Hampshire law also protects your IRA, 401K, and other qualified retirement plan assets from your creditors. This means that creditors can't reach any of your retirement savings, as long as the assets remain within the retirement plan.

Purchasing an umbrella liability insurance policy is a simple way to obtain additional creditor protection. The umbrella coverage applies when you exceed the limits of your primary auto or homeowner's policy. It's important to remember, however, that liability insurance won't cover everything for which you might be sued, including sexual harassment and other "intentional torts." (Good behavior is excellent asset protection, and it's free!) Even if insurance coverage is available, your personal assets will be exposed to the extent a claim exceeds the limits of your policy.

CONSIDER A TRUST

If your spouse doesn't have the same liability concerns that you do, you might consider transferring some of your assets to him or her. If you're sued, your creditors can't reach assets owned solely by your spouse. The downside to this strategy is that you no longer manage or control the property you give to your spouse. If you divorce, the assets will belong to your spouse, but they'll still be subject to a property settlement. However, if divorce isn't a concern and you expect your spouse to share the use and control of the transferred property, this is a viable asset protection option.

Establishing a trust and transferring assets to it also can put assets beyond the reach of your creditors. In the 1990s, offshore asset protection trusts were in vogue. Clients established trusts in "debtor friendly" places, such as the Cook Islands, and transferred their assets to them. These trusts allowed clients to continue to use and enjoy the transferred assets, but (at least in theory)

protected the assets from the clients' creditors. But administrative complexity (where exactly are the Cook Islands?), expense, and successful U.S. judicial attacks on the efficacy of these trusts make them advisable only for the adventurous.

In recent years, a handful of U.S. states, including New Hampshire, have adopted laws allowing individuals to set up domestic asset protection trusts. New Hampshire has allowed both state residents and out-of-staters to create these trusts since 2009. For some nonresidents, a New Hampshire asset protection trust also may provide state income tax savings, since New Hampshire doesn't tax trusts that have no New Hampshire beneficiaries. Domestic asset protection trusts generally are easier and less expensive to establish and maintain than foreign trusts. However, a domestic asset protection trust may not provide the same level of asset protection as an offshore trust.

Finally, two less exotic strategies available to New Hampshire residents include irrevocable trusts and limited liability companies. If you transfer assets to an irrevocable trust and you neither control the trust as trustee nor retain an interest in the trust as a beneficiary, your creditors can't reach the trust assets. But neither can you, unless the trust is specifically set up as an asset protection trust. Your spouse, however, can be a beneficiary and in some cases the trustee of the trust.

A LIMITED LIABILITY COMPANY

A limited liability company is similar to a partnership, except none of an LLC's members is personally liable for the LLC's debts, obligations, and liabilities. If an LLC member is sued individually, his creditors can't attach any of the LLC's underlying assets. LLCs are now the entity of choice to hold commercial and rental real estate in New Hampshire. Be careful, though—transfers of real estate into and out of LLCs usually are subject to the New Hampshire real estate transfer tax.

The estate plan of any New Hampshire business owner, executive, or professional services provider should include some element of asset protection planning. Using a variety of asset protection strategies will provide the most protection and, hopefully, some peace of mind. 🐾

Amy Kanyuk speaks and writes frequently about tax and estate planning topics and has been selected numerous times by her peers for inclusion in *Best Lawyers in America* in the fields of tax law and trusts and estates.

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