

# Why use an asset protection trust

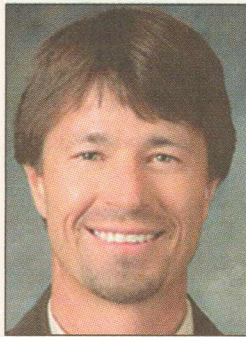
Commentary

| By Steve Telford

Occasionally in my practice, I am asked, "Why should I consider creating an asset protection trust?" Frequently, the person posing this question then proceeds to provide me with reasons why such an asset protection planning technique is not for them.

Most, if not all, of the objections presented to me are really misconceptions.

In the past, I have written several articles explaining the advantages of using a trust established in a jurisdiction outside the United States to protect assets. Here are the misconceptions I hear on a regular basis, and my reasons why I think that they are unfounded.



Steve Telford

## • I will lose control of the protected assets.

When a trust is under attack from unexpected creditors, this may be true. Ironically, your lack of control will be a major factor in keeping the protected assets out of the "grabbing hands" of unwanted creditors.

However, while the "waters are calm," most offshore asset protection structures allow you to exert a great deal of control over the protected assets through the use of an Idaho family limited liability limited partnership or a limited liability company established in Delaware, Nevada or Wyoming.

In addition, a local or foreign protector can act as a "watchdog" for you and your family as beneficiaries of the trust. Specifically, such a protector can have significant veto powers over most of the key decisions to be made by the offshore trustee. A local trustee can also be appointed to make decisions in conjunction with the offshore trustee, but the ability to timely remove the local trustee when any trust assets come under an assault from a local creditor is critical. Consequently, you may want to refrain from using this last form of control.

## • I will be unable to benefit from the protected assets.

While this may be true in most places throughout the United States where you create a trust and you want to be a beneficiary of that trust, it is not true in several other countries throughout the world. For example, the Cook Islands in the South Pacific and Nevis in the Caribbean both allow you, as a trust creator, to be a primary discretionary beneficiary of a trust holding protected assets.

Although Alaska, Delaware, and Nevada have enacted legislation appearing to allow "rainy day" discretionary

asset protection planning, the "Full Faith and Credit Clause" of the United States Constitution greatly restricts the actual asset protection offered to you, unless you happen to be a resident of one of those particular states. There are no reported cases resolving this sticky issue. Realistically, there is no substitute for the type of protection offered to you offshore in places like the Cook Islands or Nevis.

## • I cannot protect my real estate.

Obviously, your real estate, which is comprised of dirt and any improvements sitting on or in the dirt, cannot be "moved" offshore when an unwanted creditor is searching for assets to seize from you. However, your equity in such assets can be protected through the use of a standing equity loan line of credit secured by a mortgage, deed of trust or other similar debt instruments permitting loan proceeds to be placed in the hands of an offshore trustee. If the protected real estate assets come under an attack and the loan proceeds have to be sent to the offshore trustee for protection, the offshore trustee will make any debt payments coming due during the attack directly to the lender. The key to making this technique effective is to have the planning in place before an unwanted creditor appears on your doorstep with a claim.

## • I will get in trouble for creating such a trust.

This statement is true where you create a trust to avoid taxes you are legally obligated to pay.

It may also be true where you create a trust after an unwanted creditor's claim arises, and the assets placed in the offshore trust leave you without sufficient local assets to meet your debts as they come due.

Finally, it may be true where you simply retain too much control over the management of the trust.

However, where you create an offshore trust with assets comprising your "nest egg" when the "waters are calm" and you are solvent, then you have a legal right, according to the United States Supreme Court, to protect your assets. As a result, offshore asset protection planning works best when it is done in advance of any unexpected claim or contingency.

## • I do not want to hide assets.

One of the keys to effective offshore asset protection planning is full disclosure. This includes full disclosure to the IRS through appropriate annual tax reporting forms. It also includes honestly answering all questions on financial statements or while under interrogation during any civil, criminal, or bankruptcy proceeding.

Proper offshore asset protection planning is not based on secrecy. It is built on valid legal principles selected by you in a favorable jurisdiction. Throughout the United States, pru-

dent people have been doing this for years. For example, some folks form corporations in Delaware, Nevada or other states due to tort law recovery restrictions. Individuals forming trusts to take advantage of asset protection legislation adopted in Alaska and Nevada also fall in this category.

Establishing a homestead in Florida or Texas where the asset protection for such an asset is unlimited is yet another example.

• **My existing family limited partnership or limited liability company provides adequate protection.**

This is probably the most dangerous misconception I hear. While it is true that such partnerships and limited liability companies can be a source of limited asset protection in Idaho when properly implemented and updated, there are decisions appearing all across the U.S. where these types of legal entities have unexpectedly come under attack. In that regard, it is prudent in Idaho to convert any existing family limited partnership to a *limited liability* limited partnership. This process is fairly simple to implement. It may also be prudent to migrate any existing Idaho limited liability company to another jurisdiction where the charging order is the exclusive remedy for creditors trying to attack

the structure from the outside.

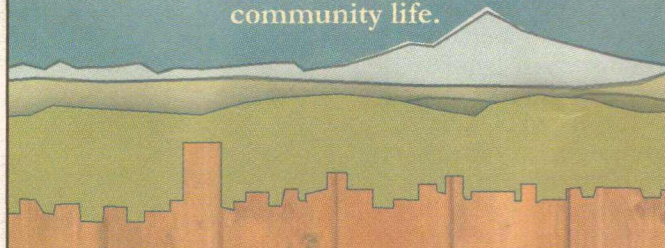
In that regard, aggressive attorneys are asserting new and creative legal equitable theories, arguing in favor of entity “veil piercing,” or against partner or member “charging order protection,” in cases brought before judges or juries with “sympathetic ears.” It is precisely this unpredictable nature of such decision makers that first fostered the search for an alternative form of asset protection with adequate predictability, such as the offshore trust. There is no question in my mind that the strongest asset protection strategy will take advantage of such partnerships and limited liability companies in conjunction with an offshore trust. In fact, a limited liability can be formed offshore in favorable jurisdictions where the charging order is the exclusive remedy for an outside attack, such as the Cook Islands and Nevis.

Should you consider using an offshore trust in your asset protection strategy? If you have any wealth worth protecting from an attack by an unexpected and unwanted creditor, you really need to consult with a qualified professional and competent advisor on this subject. This is definitely one instance where sooner is better than later.

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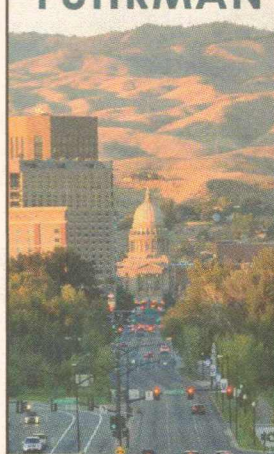
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