THE ESTATE PLANNER

July/August
2022

ASSET PROTECTION
How to shield your wealth from lawsuits and creditors

Moving abroad can upset your tax and estate plans

Single? No kids? Here's why you still need an estate plan

Estate Planning Red Flag
You've been asked to serve as executor

SHUMAKER

Distribution of The Estate Planner is limited to clients of Shumaker and estate planning professionals who request a subscription.

Asset protection

How to shield your wealth from lawsuits and creditors

Much of estate planning focuses on transferring your wealth to loved ones in a tax-efficient manner. But for many people, it's equally important to protect that wealth against frivolous lawsuits or baseless creditors' claims.

If your business, professional or personal activities expose your assets to attack by unscrupulous litigants or creditors, consider incorporating asset protection strategies into your estate plan.

From the simple to the complex

When it comes to asset protection, there's a wide variety of techniques to consider. Here are several, from the simple to the complex:

Buy insurance. Insurance is an important line of defense against potential claims that can threaten your assets. Depending on your circumstances, it may include personal or homeowner's liability insurance, umbrella policies, errors and omissions insurance, or professional liability/malpractice insurance.

Give it away. If you're willing to part with ownership, a simple yet highly effective way to protect assets is to give them to your spouse, children or other family members, either outright or through an irrevocable trust. After all, litigants or creditors can't go after assets you don't own (provided the gift does not run afoul of fraudulent conveyance laws). Choose the recipients carefully, however, to be sure you don't expose the assets to *their* creditors' claims.

Retitle assets. Another simple but effective technique is to retitle property. For example, the law in many states allows married couples to hold a residence or certain other property as "tenants by the entirety," which protects the property against either spouse's individual creditors. It doesn't, however, provide any protection from a couple's joint creditors.

Contribute to a retirement plan. You may be surprised to learn that maxing out your contributions to 401(k) plans and other qualified retirement plans doesn't just set aside wealth for retirement, it also protects those assets from most creditors' claims. IRAs also offer limited protection: In the event of bankruptcy, they're protected against creditors' claims up to a specified amount (currently, over $1.3 million). Outside bankruptcy, the level of creditor protection depends on state law, which varies from state to state.

Set up an LLC or FLP. Transferring assets to a limited liability company (LLC) or family limited partnership (FLP) can be a highly effective way to share wealth with your family while retaining control. These entities are particularly valuable for holding business interests, although they can also be used for real estate and other assets.

To take advantage of this strategy, you simply set up an LLC or FLP, transfer assets to the entity and then transfer membership or limited partnership interests to yourself and other

Beware of foreign reporting requirements

If you decide to use an offshore trust, it's critical to comply with applicable reporting requirements. For example, a U.S. owner of a foreign trust must ensure that the trustee files annual information returns on Form 3520-A, subject to a failure-to-file penalty equal to 5% of the value of the trust assets or $10,000, whichever is greater. In addition, U.S. beneficiaries of foreign trusts must file Form 3520 to report transactions with the trust, including any distributions they receive. The penalty for failure to file is 35% of the reportable amount or $10,000, whichever is greater.

These penalties can be devastating. In one case, the sole owner and beneficiary of a foreign trust liquidated the trust and took a distribution of more than $9 million. He failed to file Form 3520 or 3520-A, resulting in a penalty of more than $3 million.

family members. Not only does this facilitate the transfer of wealth, but it also provides significant asset protection to the members or limited partners, whose personal creditors generally cannot reach the entity's assets. These entities also offer an added level of asset protection: The personal assets of members and limited partners that are held outside the LLC or FLP are shielded against claims by the *entity's* creditors.

Establish a DAPT. A domestic asset protection trust (DAPT) can be an attractive vehicle because, although it's irrevocable, it provides you with creditor protection even if you're a discretionary beneficiary. DAPTs are permitted in around one-third of the states, but you don't necessarily have to live in one of those states to take advantage of a DAPT. However, you'll probably have to locate some or all of the trust assets in a DAPT state and retain a bank or trust company in that state to administer the trust.

The amount of protection provided by a DAPT varies from state to state. Also, the enforceability of a DAPT whose grantor resides in another state hasn't yet been fully tested in the courts. So careful planning is critical.

Establish an offshore trust. For greater certainty, consider an offshore trust. These trusts are similar to DAPTs, but they're established in foreign countries with favorable asset protection laws. For example, these countries typically don't recognize judgments or orders by U.S. courts and otherwise make it difficult for foreign creditors to collect their debts there. Although offshore trusts are irrevocable, some countries allow a trust to become revocable after a specified time, enabling you to retrieve the assets when the risk of loss has abated.

A word of warning

Keep in mind that asset protection isn't intended to help you avoid your financial responsibilities or evade legitimate creditors. Federal and state fraudulent conveyance laws prohibit you from transferring assets (to a trust or another person, for example) with the intent to hinder, delay or defraud existing or foreseeable future creditors. And certain types of financial obligations — such as taxes, alimony or child support — may be difficult or impossible to avoid.

Start planning now

To be effective, asset protection strategies should be implemented as early as possible. Their protection extends only to unanticipated future claims. Once a claim exists or is reasonably foreseeable, it may be too late. ▮

Moving abroad can upset your tax and estate plans

If you and your spouse have decided to retire to another country, or perhaps you're pulling up stakes to move overseas for a job opportunity, it's in your best interest to consider the income, gift and estate planning tax consequences of making such a move.

Effects on income and estate tax

If you're a U.S. citizen, you'll still owe U.S. income tax, even if you're earning the money abroad. The United States taxes you on your worldwide income, not just your U.S. income. Because you'll likely also owe income tax to the foreign country where you reside, you're effectively facing a double tax hit.

At least you can generally offset some U.S. income tax with a credit for taxes paid to a foreign country. Furthermore, you may qualify for a foreign earned income exclusion. The amount for 2022 is $112,000. To qualify, you must spend at least 330 days out of the country during a 12-month period. Also, you may be eligible for a foreign housing exclusion. And, if the country where you're residing has a binding treaty with the United States, you may benefit from a reduced tax rate there.

If you're a U.S. citizen, you'll still owe U.S. income tax, even if you're earning the money abroad.

Similarly, you can't avoid gift and estate tax consequences just by moving abroad. As with income tax, your worldwide assets are still subject to federal gift and estate tax. So, if you buy a home abroad and suddenly die, the home is included in your taxable estate. Again, depending on the law of the foreign country, it could be a double tax whammy.

Outcomes of becoming an expatriate

One possible way to avoid double taxation is to renounce your citizenship and become an expatriate. This isn't a decision to

be made lightly, especially if you envision returning full time to the United States at some point. But it does put you in a position to obtain some tax relief.

When you become an expatriate, you no longer have to pay income tax on worldwide income. Your U.S. tax obligations are limited to earnings from sources within or connected to the United States. This may reduce your overall income tax exposure. Comparable rules apply to your taxable estate. But you don't simply get a free pass if you're treated as a "covered expatriate" for tax purposes.

Notably, you'll be assessed an exit tax if you're still earning a living and you were a U.S. citizen or permanent resident for at least eight of the last 15 years. For 2022, the exit tax applies to an expatriate who:

- Has had, for the last five years, an average income tax liability exceeding $178,000,
- Has a net worth of $2 million or more, and
- Fails to certify compliance with all U.S. tax obligations for the preceding five years.

Briefly stated, covered expatriates are treated as if they'd sold all their worldwide assets at fair market value. This can result in a significant tax liability, especially when you add in the value of retirement accounts.

Saving grace: There are several key exceptions to the exit tax. The most prominent is a generous inflation-indexed exclusion on unrealized gain ($767,000 for 2022).

Finally, if you renounce your citizenship, you forfeit the benefit of the gift and estate tax exemption. For 2018 through 2025, the exemption is $10 million, indexed for inflation ($12.06 million in 2022). Instead, you're stuck with a relatively paltry $60,000 exemption for nonresidents.

Preserve your assets

Developing asset protection strategies is a vital component to your estate plan because the more assets you can hold on to, the more you'll be able to pass on to your heirs. Moving overseas may subject your assets to additional taxes. Discuss your plans with your advisor before making your move. ■

Single? No kids? Here's why you still need an estate plan

There's a common misconception that only married couples with children need an estate plan. In fact, estate planning may be even more important for single people without children. Why? Because for married couples, the law makes certain assumptions about who should make financial or medical decisions on their behalf should they become incapacitated and who should inherit their property if they die.

Estate planning is still important for married couples to ensure that their wishes are carried out, but for single people who die or become incapacitated without a plan, undesirable consequences are far more likely.

Who'll inherit your assets?

It's critical for single people to execute a will that specifies how and to whom their assets should be distributed when they die. Although certain types

have no say in who the court appoints, but the process can be costly and time consuming.

Who'll make medical decisions on your behalf?

You should prepare a living will, a health care directive (also known as a medical power of attorney), or both to ensure that your wishes regarding medical care — particularly resuscitation and other extreme lifesaving measures — are carried out in the event you're incapacitated. These documents can also appoint someone you trust to make medical decisions that aren't expressly addressed.

For single people with substantial assets, it's important to consider employing trusts and other estate planning techniques to avoid, or defer, gift and estate taxes.

Absent such instructions, the laws in some states allow a spouse, children or other "surrogates" to make these decisions. In the absence of a suitable surrogate, or in states without such a law, medical decisions are generally left to the judgment of health care professionals or court-appointed guardians.

How will you minimize gift and estate taxes?

When it comes to taxes, married couples have some big advantages. For example, they can opt to use their lifetime gift and estate exemptions (currently, $12.06 million per person). Also, the marital deduction allows spouses to transfer an unlimited

of assets can pass to your intended recipient through beneficiary designations, absent a will, many types of assets will pass through the laws of intestate succession.

Those laws vary from state to state, but generally they provide for assets to go to the deceased's spouse or children. For example, the law might provide that if someone dies intestate, half of the estate goes to his or her spouse and half to the children. If you're single with no children, however, these laws set out rules for distributing your assets to your closest relatives, such as your parents or siblings. Or, if you have no living relatives, your assets may go to the state.

By preparing a will, you can ensure that your assets are distributed according to your wishes, whether it's to family, friends or charitable organizations.

Who'll make financial decisions on your behalf?

It's a good idea to sign a durable power of attorney that appoints someone you trust to manage your investments, pay your bills, file your tax returns and otherwise make financial decisions should you become incapacitated. Although the law varies from state to state, typically, without a power of attorney, a court would have to appoint someone to make these decisions on your behalf. Not only will you

amount of property to each other — either during life or at death — without triggering immediate gift or estate tax liabilities.

For single people with substantial assets, it's important to consider employing trusts and other estate planning techniques that can be used to avoid, or at least defer, gift and estate taxes.

Don't put it off

If you're single and haven't prepared an estate plan, don't assume that you can put it off until you're married with kids. Talk to your estate planning advisor about basic documents you should put in place now to ensure your wishes are carried out should the unexpected happen.

ESTATE PLANNING RED FLAG

You've been asked to serve as executor

If you've been named as executor of the estate of a friend or family member, be sure you understand the responsibilities and potential risks before you agree to serve. You're not required to accept the appointment, of course, but once you do it's more difficult to extricate yourself should you change your mind.

Here are some questions to consider:

- What's your relationship to the deceased? If he or she was a close family member, consider not accepting the appointment if you think your grief will make it difficult to function effectively in the executor role.
- Are you willing and able to take on the duties of an executor? Generally, an executor is responsible for arranging probate, identifying and taking custody of the deceased's assets, making investment decisions, filing tax returns, handling creditors' claims, paying the estate's expenses, and distributing assets according to the will. Although you can seek help from professionals — such as attorneys, accountants and investment managers — it's still a lot of work, usually for little or no compensation. Be sure to ask whether the estate has set aside funds to pay for professional advisors.
- What's your location? If you live far away from the place where the assets and beneficiaries are located, your job will be more difficult, time consuming and expensive.
- Do you have a good relationship with the beneficiaries? If not, accepting the appointment may put you in a difficult position, especially if you're also a beneficiary and the other beneficiaries view that as a conflict of interest.
- Will the estate pay your expenses? Even if you receive no fee or commission for serving as executor, be sure the estate will pay, or reimburse you, for any out-of-pocket costs.

This publication is distributed with the understanding that the author, publisher and distributor are not rendering legal, accounting or other professional advice or opinions on specific facts or matters, and accordingly assume no liability whatsoever in connection with its use. ©2022

Experience. Responsiveness. Value.

At Shumaker, we understand that when selecting a law firm for estate planning and related services, most clients are looking for:

- A high level of quality, sophistication, and experience.
- A creative and imaginative approach that focuses on finding solutions, not problems.
- Accessible attorneys who give clients priority treatment and extraordinary service.
- Effectiveness at a fair price.

Since 1925, Shumaker has met the expectations of clients that require this level of service. Our firm offers a comprehensive package of quality, experience, value and responsiveness with an uncompromising commitment to servicing the legal needs of every client. That's been our tradition and remains our constant goal. This is what sets us apart.

Estate planning is a complex task that often involves related areas of law, as well as various types of financial services. Our clients frequently face complicated real estate, tax, corporate and pension planning issues that significantly impact their estate plans. So our attorneys work with accountants, financial planners and other advisors to develop and implement strategies that help achieve our clients' diverse goals.

Shumaker has extensive experience in estate planning and related areas, such as business succession, insurance, asset protection and charitable giving planning. The skills of our estate planners and their ability to draw upon the expertise of specialists in other departments — as well as other professionals — ensure that each of our clients has a comprehensive, effective estate plan tailored to his or her particular needs and wishes.

SHUMAKER

We welcome the opportunity to discuss your situation and provide the services required to help you achieve your estate planning goals. Please call us today and let us know how we can be of assistance.

www.shumaker.com

The Chair of the Trusts and Estates Department is responsible for the content of The Estate Planner. The material is intended for educational purposes only and is not legal advice. You should consult with an attorney for advice concerning your particular situation. While the material in The Estate Planner is based on information believed to be reliable, no warranty is given as to its accuracy or completeness. Concepts are current as of the publication date and are subject to change without notice.

IRS Circular 230 Notice: We are required to advise you no person or entity may use any tax advice in this communication or any attachment to (i) avoid any penalty under federal tax law or (ii) promote, market or recommend any purchase, investment or other action.