

Protecting Your Assets: Strategies for Creditor Protection

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Protecting personal assets is a very real concern for physicians today. In our litigious society, nearly all physicians run the risk of being sued at some point in their career and malpractice insurance may not be enough to cover the damages. Fortunately, there are strategies that can place your hard-earned assets out of the reach of creditors. What follows is a very basic overview of methods you can employ to protect your personal assets. Much of estate planning is based on your marital status, so we will discuss options available to both married and single individuals.

Individuals Who Are Married. Individuals who are married enjoy a level of creditor protection that is not available to singles. When a husband and wife own property jointly, it is owned as *tenants by the entirety*. This means both spouses own the asset, thus during the lifetime of both spouses, creditors of an individual spouse normally cannot seize or attach assets held as tenants by the entirety.

If the spouse who committed the act that gave rise to the judgment dies first (the "Doctor"), then a creditor can never collect against the jointly owned asset, as the jointly owned assets passes to the "Innocent Spouse" outside of the probate estate. If, however, the Innocent Spouse dies first, then the Doctor receives the assets. When the Innocent Spouse dies, the tenancy by the entirety ceases to exist and therefore creditors can then attach or seize the assets. It is also worthwhile to note that if a judgment is obtained against husband **and** wife, the entirety property is liable for the debt. So, while tenants by the entirety offers some creditor protection, this planning option can fall apart if the wrong spouse dies first.

However, there are other options for married couples to avoid this scenario. One estate planning option that is available for married couples is to transfer and maintain ownership of assets in the Innocent Spouse's individual name, removing the joint tenancy. Examples of these types of assets are cash, securities and real estate. If the Doctor is sued and found liable in an action, creditors cannot reach assets owned solely by the Innocent Spouse. As part of an overall creditor protection/estate plan, the Innocent Spouse should also have a will prepared that leaves all of his or her estate in a trust for the benefit of the Doctor/surviving spouse. Assets held in a properly drafted trust are not subject to attachment by the creditors of the trust's beneficiaries. If the Innocent Spouse's will leaves everything outright to the Doctor, then the assets become subject to the creditors of the Doctor upon the Innocent Spouse's death (in the same manner as the tenancy by the entirety example). In conjunction with holding assets in the sole name of the Innocent Spouse, the couple should ensure that umbrella policies provide adequate coverage.

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Individuals Who Are Single or Widows or Widowers. Creditor protection strategies for single individuals are also available. If a single person gives assets away, the future creditors cannot make claims against these assets. However, be aware that if you give assets away, current creditors may still make claims to assets given away as Fraudulent Conveyances.

Of course, giving assets away is not always optimal. In that case, Delaware Asset Protection Trusts ("DAPTs") can be utilized. On July 9, 1997, the State of Delaware amended its code to permit individuals to create spendthrift trusts for their own benefit. This means that the State of Delaware now allows you to place assets into a trust and retain certain rights to income and principal distributions, but to have the assets in the trust not be subject to the claims of your creditors. DAPTs are not a magic bullet. They will not be enforced with respect to child support or alimony orders. Nor will they be protected from a creditor who became a creditor of the settlor in reliance upon an express written statement of the transferor that any property that was transferred to the trust was available to satisfy a debt owed by the settlor to the creditor. Finally, they will not protect from claims that arose on or before the date of the transfer to the trust or actual fraudulent transfers. But in most other instances, they are an extremely effective means for protecting assets.

When creating a DAPT, the Trustee must be a Delaware trust company or bank for non-residents. Non-resident individual can act as an "advisor" to the trustee and an advisor can be an investment advisor, a distribution advisor, or other advisor. The settlor can not be a distribution advisor if such settlor has a right to income or principal. Although the trust must be irrevocable, the settlor can retain the following rights: veto right on distributions; special testamentary power of appointment; the right to income and principal in the sole discretion of a trustee who is not the transferor nor a related or subordinate party within the meaning of the Internal Revenue Code Section 672(c) (Being: the grantor's spouse, parent, issue (children, grandchildren, etc.), sibling, or an employee); and the right to the income or income and principal based on an ascertainable standard. Adding to the attractiveness of DAPTs, transfers to a DAPT can be complete or incomplete gifts and DAPTs can be created as income tax neutral or separate entities.

Considering the myriad of legal action that physicians face today, it is prudent to investigate thoroughly all the options available to protect what you have worked so hard to earn. Trusts, and specifically Delaware Asset Protections Trust, are a vehicle well worth investigating as a part of your personal financial plan.