



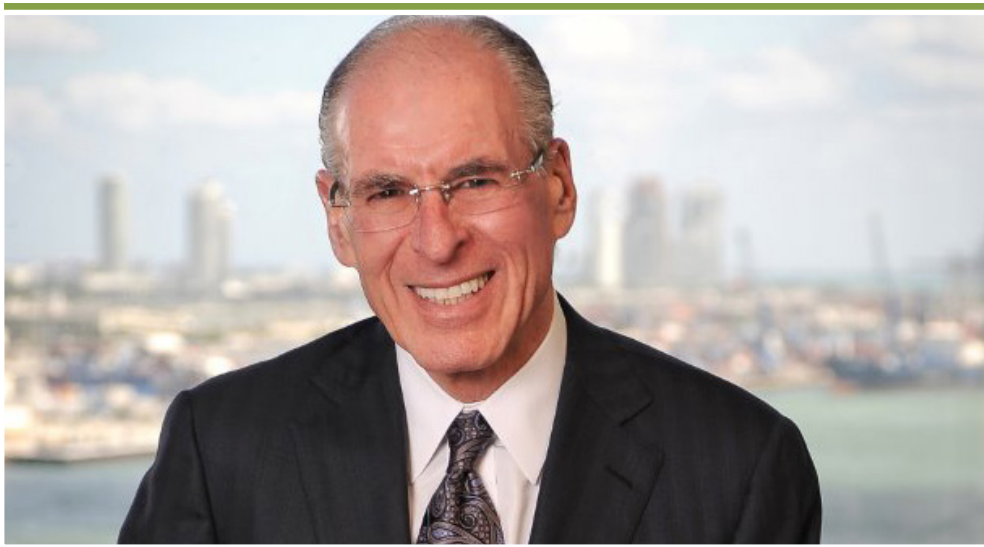
International Asset Protection Planning

The debtor's dilemma - planning for and protecting against future judgments

Virtual Round Table Series, December 2016
Private Client Working Group



Host



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Harry represents domestic and international corporations and prominent, high net worth individuals in complex business litigation matters involving commercial real estate; corporate shareholder and partnership disputes; intra-family business disputes; probate, will and trust litigation; and litigation involving fine art.

Harry is one of 92 lawyers in the state of Florida with dual board certification in civil trial and business litigation. (Certification is the highest level of evaluation by The Florida Bar of the competency and experience of attorneys in the areas of law approved for certification.) In addition, Harry was appointed to the Professionalism Committee for the 11th Judicial Circuit, and chairs the mentoring program subcommittee. In the American Bar Association, he is a member of the Corporate Counsel Committee, Section of Litigation.

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Leslie is a sought-after lawyer and an international authority in her field. She recently co-authored, with Robert W. Chesner, Jr. (Director/COO at GSRP), Bloomberg BNA's Tax Management Portfolio 870, 1st, 'Private Placement Life Insurance and Annuities.'

She primarily represents high net worth private clients and family offices in the U.S. and abroad on many personal wealth and estate planning strategies, including international and domestic trusts, investment structures, and complex life insurance planning.



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Scott is a partner in the Trusts & Estates Group. He represents fiduciaries and individuals with substantial net worth throughout the full range of estate and transfer-tax planning and administration, focusing on the transfer of assets to beneficiaries at the lowest tax cost while achieving overall family and charitable objectives.

Scott advises clients on tax-effective strategies to shift both future wealth and existing wealth, using sophisticated trust planning, family investment vehicles, life insurance and charitable giving.

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Peter specialises in tax and estate planning for private individuals nationally and internationally.

Peter's clients mainly comprise business people and entrepreneurs, whom he advises on structured capital tax planning, inheritance tax strategies, asset protection and long-term succession issues.

He advises on the implementation of off-shore structures, inward investments and issues of residence and domicile; work which involves liaising closely with UK and overseas accountants and other professionals in connection with pre and post-business sale planning.

Peter is a member of the Society of Trust and Estate Practitioners.



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Dunstan provides both local and international clients with advice and consultancy in relation to audit, tax and corporate advisory matters. With over 20 years of experience, he has been involved in local and international tax planning, business advisory, financing, mergers and acquisitions, company formations and business structure development. He is the managing partner of WDM International and holds the position of director and company secretary in various Maltese companies.

He graduated as an accountant in 1997 from the University of Malta and in 2014 has successfully obtained a summa cum laude Masters Degree in Business Ethics from the same university. Dunstan holds a practicing certificate in auditing and is a member of the Malta Institute of Accountants, Malta Institute of Taxation, Malta Institute of Management and the Institute of Financial Services Practitioners of Malta.



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João founded the firm in 2001 and leads and coordinates across all departments. His expertise is sought to unlock deadlocks, close deals and propose cross-cutting solutions.

João participates frequently as a speaker at workshops, seminars and conferences in his practice areas. He holds a degree in law from the University of Lisbon and a postgraduate diploma in management and tax law.

Introduction

International Asset Protection Planning

The debtor's dilemma - planning for and protecting against future judgments

Proper asset protection planning is an important consideration for clients with significant personal assets they wish to shelter from future legal judgments.

There is potential for anyone with creditors in a commercial or personal context to be subject to a negative judgment, should those creditors decide the terms of an agreement have been broken, a contract violated or a loan payment missed. Anyone with substantial assets should plan ahead and know how to structure them efficiently.

Residents of Florida will appreciate the following weather metaphor for our increasingly litigious society:

If you know you live in a region prone to hurricanes you should fortify your house to ensure it is sturdy enough to withstand the storm when it strikes. To do nothing is to invite disaster.

With this in mind, IR Global teamed up with Miami, Florida commercial litigator Harry A. Payton, founder of Payton & Associates, LLC, to analyse some of the most important aspects of international asset protection planning.

Harry is a senior member of IR Global's Private Client Working Group. He is board certified by The Florida Bar in business litigation and civil trial, and has more than 45 years of courtroom experience as a commercial litigator in the state of Florida. He recently chaired a virtual round table of professionals from the Private Client Group to discuss how asset protection planning is handled in jurisdictions across the US and Europe.

The following discussion involves IR Global members from the United States - Florida, Texas and New York - plus the European jurisdictions of the United Kingdom, Portugal and Malta.

View from IR Global

This series of virtual round tables is designed to inspire and improve communication between our members. We are passionate about building closer integration and proactive working relationships within the IR community.

In this series we will employ a discussion forum to focus on issues raised within our specific working groups. The aim is to address real issues that you, as experts, have identified and then provide the information, contacts and resources to resolve them.

We believe the power of a global network comes from sharing ideas and expertise, allowing members, in turn, to better serve their clients.

We currently have 12 active working groups: Accountancy, Asia Pacific, Commercial, Disputes, Employment, Insolvency, IP, Latin America, Mergers & Acquisitions, Private Client, Real Estate and Tax.



Ross Nicholls

Business Development Director
IR Global

Round Table Q&A

QUESTION 1

What asset protection planning is provided for under the Constitution of your jurisdiction?

Florida –Harry A. Payton (HP) Private clients who suffer judgments might look for a refuge to preserve assets, or a jurisdiction where they have protection from execution, levy and collection of that judgment. Every state in the US has its own laws in relation to judgments and collection of judgments.

Florida provides some of the best protection, and there are a number of ways judgment debtors are protected. The strongest protection offered under the Florida Constitution is a homestead exemption, where the head of a household may declare his or her primary residence as exempt from any execution and levy. Regardless of whether it is owned by the debtor or the spouse, it is protected from any recovery by a plaintiff.

In Florida, because of the homestead protection, most mortgage lenders require the borrower and the borrower's spouse to waive homestead protection before they will provide funding.

Texas –Leslie Giordani (LG) Texas is very debtor friendly and, like Florida, people seek out residence in the state for that purpose, along with the fact there is no state income tax.

The Texas Constitution provides for homestead protection from creditors. The law is geared towards families who have lost a primary breadwinner and is designed to protect women and children. This idea has a deep history in the Texan legal framework.

There are acreage limitations for homestead protection, with an urban homestead of up to 10 acres protected, while a rural homestead can be up to 200 acres in size with an unlimited value.

Despite strict rules regarding fraudulent transfer of assets, judgment debtors are allowed to pay off mortgages on homesteads, or to sell one homestead and buy another, without being affected. The law provides a reasonable amount of time to reinvest the proceeds of a sale.

New York –Scott Sambur (SS) There are no constitutional protections for assets in New York law, but there is a point worth raising in relation to Florida law. I don't believe Florida homestead exemptions apply to non-citizens or those without a green card, regardless of who they are.

A Florida case in 1992 held that in order to get homestead protection for assets, the individual must have intent to reside in Florida permanently, meaning they need to be a citizen or green card holder.

United Kingdom –Peter Greswold (PG) The United Kingdom is a creditor friendly jurisdiction, not a debtor friendly jurisdiction. There are no constitutional protections against creditors.

Debtors cannot protect assets from creditors, and we find this is more conducive to business relationships because people stick to contracts they enter into.

There are one or two small exemptions, but they are somewhat archaic. For instance, a creditor can't take a debtor's tools of the trade.

As in many jurisdictions, creditors can't take a spouse's assets, and they cannot penetrate the corporate veil, so assets within a company are not liable for a personal debt, even if the company is owned by the debtor.



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Round Table Q&A Continued

The ruling court has discretion over the extent and the timing of enforcement in debtor cases.

Portugal –João Coriel (JC) Portugal is halfway between the UK and Florida in its position on asset protection.

Both the Portuguese Constitution and the European Convention of Human Rights prohibit imprisonment by reason of a debt, provided no criminal activity such as fraud is committed.

Should the debtor be momentarily incapable of meeting their obligations, they can apply for a PER (the equivalent of the US 'Chapter 11') in which case a reduction or rescheduling of debt may be granted. This allows a debtor to retain all their assets until the debt is paid off.

The important point for me, though, is not what's in the constitution or statute books, but what happens in the field.

The question should be, how easy is it for a creditor to get hold of the assets of a debtor?

The agents of a Portuguese court can ask the banks directly if a debtor has accounts and they can seize any money directly, they can also seize tax rebates. They can access records to see how much property is in the debtor's name and seize that.

They cannot touch the tools of the trade, as in the UK, but there could always be an agent working for the creditor who can overstep these barriers and actually seize assets that will cause a debtor permanent damage.

The law regarding tax debt in Portugal was changed recently. Previously the government had the power to seize a debtor's home, regardless of whether it was under homestead protection. Most houses were mortgaged to banks, so the government forced them to acquire the property at a discounted price. The Inland Revenue Service (IRS) got nothing, but it punished debtors who were owing taxes.

Now, if the property is a primary home, it can still be seized by the tax authorities, but not sold on. There is an eight-year statute of limitations regarding tax debts, so if they are not recovered within that time scale the debt goes away.

Malta –Dunstan Magro (DM) If the asset protection is well-structured, a debtor can always avoid trouble, but, equally, creditors have all the mechanisms required to press their claim.

While it is possible in Malta to protect assets, it is important to keep in mind the actual timing of that protection. If an asset protection exercise is undertaken at the same time as a law suit from a creditor, then it might be considered to be null and void by a Maltese court.

Understanding the full range of proper enforcement mechanisms in use is key. In Malta, common enforcement measures usually employed include; the warrant of seizure, the judicial sale by auction, the garnishee order, the warrant of ejection and expulsion from immovable property, and the warrant in factum.



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Round Table Q&A Continued

QUESTION 2

Does the manner in which title to property is held, for example jointly with a spouse, provide any protection from creditors?

Florida –HP In Florida litigation involving jointly-held assets, the major issue is usually with bank accounts. There is typically some sort of litigation by the judgment creditor to access money held in a joint account.

Under Florida law, this money is protected, as long as the bank account clearly designates it as a marital account. If the account is in the name of both spouses, but not designated clearly as 'tenancy by the entirety' (TBE), then the judgment creditor can seize any money it contains, arguing that the money is not a part of the marital estate.

Ultimately bank accounts and other assets, such as cars, jewellery, art work or real estate are protected if they are owned for the benefit of the spouse or for the benefit of the marriage. If it is just for the benefit of the judgment debtor, then it is subject to levy and execution for payment of the judgment amount.

Texas –LG The strong community property law concept we have in Texas superimposes itself over other legal concepts. Although it is possible to create a right of survivorship by written agreement between the spouses, Texas does not recognise 'tenancy by the entirety.'

The overriding issue in Texas when it comes to judgments is the character of property. So, one spouse's separate property is not usually subject to the other's liabilities.

Community property may or may not be subject to one spouse's liabilities, depending upon the type of liability involved and which spouse (or spouses) held management rights to the property. Re-positioning property with inter-spousal gifts, that is, holding assets in the name of the spouse who is least likely to have a future debtor issue, is a good strategy. We do often see this strategy implemented, but it is always subject to fraudulent transfer rules.

New York –SS In New York there is also a 'tenancy by the entirety' (TBE) concept that protects against claims on one spouse, but the only property that can be titled as TBE is real estate. The only exception to this is co-op apartments, which as of 1996 are permitted to be held as TBE, despite technically not being an interest in real property.

On another point, the IRS is considered as a super creditor in all states in bankruptcy cases. They can use the US Constitution's supremacy clause to override state constitutional laws and claim against homesteaded property, even if the spouse is a joint owner.

Portugal –JC If only one spouse is on the title of the judgment debt, that spouse is the only one responsible for the debt incurred. However, if individual assets are not enough to cover judgment debt, irrespective of the marital regime, the creditor can chase assets belonging to the other spouse provided they can prove that the debt was incurred with the aim of benefiting both.



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Round Table Q&A Continued

This is not an automatic procedure; if the other spouse does not figure in the title and the creditor wants to execute the judgment debt against both spouses, the other spouse must be summoned by Court to accept or deny responsibility for such debt. If he or she denies such liability, the burden of proof to show that it was incurred for the benefit of both spouses lies with the creditor.

Where property is concerned, there are several ways in which title to property provides protection from creditors. Real assets held under a trust, or under a right of use and residence may be safeguarded.

UK –PG The UK has no community property concept in law, although what one spouse owns the other doesn't, so a claim against one is not a claim against the other.

Where property is held in joint names, there is a presumption that a jointly-owned property is held 50/50, meaning a claim against one spouse exposes half the value of a jointly-owned property. This presumption is rebuttable if a claimant can prove that the joint ownership was purely for the purposes of convenience.

The revenue authorities in the UK do not have preferential status. I am delighted to say that Her Majesty's Revenue & Customs (HMRC) ranks alongside my wine merchant as a normal creditor.

Malta –DM There are three types of matrimonial regimes under Maltese law. These are Community of Acquests (COA), Separation of Estates (SoE) and Community of Residue under Separate Administration (COR-SA).

COA, one common fund of earnings and income accrued during marriage, is the default arrangement unless a pre-nuptial agreement has been signed.

If a spouse has debts in their sole name, those creditors rank after the creditors of the COA. Maltese law also states that if one spouse has outstanding debts from before they were married, creditors may still sue for that money from the spouse's share of the COA.

If the COA is insufficient to satisfy all the debts by which it is burdened, the creditors may enforce their claim against the property of the individual spouses, provided that the debt is due as a civil remedy for a wilful offence committed by either spouse; or the debt has arisen through a trade, business or profession.

For the COA to remain intact under these circumstances, each of the spouses must reimburse it with the full value of those individual debts claimed against it. Spouses also have a right to be reimbursed if individual property has been used to satisfy a debt belonging to the COA. If a COA is terminated, then its assets are divided between the spouses equally.



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Round Table Q&A Continued

QUESTION 3

Are asset protection trusts effective in shielding judgment debtors from creditors?

Portugal –JC Asset protection trusts (APTs) are effective if a debtor is entering into a risky business transaction and wants to protect existing assets from a possible future debtor judgment, but if funds are transferred after debt is acquired, it may fall foul of fraudulent transfer rules.

Malta – DM A trust in Malta will not be void or voidable in the event of bankruptcy or liquidation, therefore providing asset protection from creditors. However, the trust may be set aside by its creditors if it is proven, to the satisfaction of a Maltese court, that the trust was made by the settlor with the intent to defraud its creditors.

Florida –HP In Florida, any assets put into a protected environment, such as a trust, could be subject to fraudulent transfer claims. This can be defeated, however, if a debtor can demonstrate a history of making transfers over a period of time. The case law protects those transfers.

New York –SS New York does not permit asset protection trusts, however, many New York residents will create a trust in another jurisdiction that allows protection. At present, the primary US states that permit APTs are Delaware, Nevada, South Dakota, Alaska and Wyoming, although 17 states currently permit some form of asset protection trust.

A debtor can set up a self-settled trust in those jurisdictions, as long as they can prove the transferred amount doesn't render them insolvent. Those assets will then be protected.

The practice is generally viewed as somewhat shady, but people do it if they are entering into business with a high degree of risk. The structure should, of course, be set up before a claim is raised against the debtor in question, and each state has a "curing period" of various lengths in which assets in an APT can be claimed by creditors depending on when the claim arose.

Texas –LG The thing to keep in mind about asset protection trusts is that they have a distinct vulnerability to judgments rendered in states other than that which the debtor resides. So-called foreign judgment creditors from a different state can come to the APT state and attempt to enforce their judgments under the Full Faith and Credit clause of the US Constitution.

Recent changes in Texas law do offer asset protection opportunities through the use of inter-spousal trusts, but debtors who want more robust protection should consider asset protection provisions in jurisdictions outside the US, where there is no opportunity for cross-border judgments between states.

New York –SS My experience in Delaware is that the Courts of Chancery are very hesitant to enforce a foreign judgment against a Delaware trustee of an asset protection trust.

If a debtor holds physical property in an APT, the state in which that property is located can enforce a judgment and can bypass the asset protection trust held elsewhere.

Texas –LG We have seen cases where the court has, more or less, ignored the law of the state where the APT exists. If there is an egregious situation where the debtor has set a structure up that succeeds in defeating the rights of legitimate creditors, then the courts will go to great lengths to find a result in the creditor's favour.



Round Table Q&A Continued

QUESTION 4

Are there any other asset classes besides property that are protected by statute rather than constitutional law?

Florida –HP Certain assets, like the wages of the head of a household, may be protected from garnishments. Life insurance is also protected, as are disability payments and pension accounts including 401K and IRA accounts. They cannot be reached by creditors.

The head of household exemption in Florida protects the wages, salary, bonus or income of an employee who makes at least 51% of the total family income and has at least one dependent (usually the other spouse and/or child).

A judgment debtor can pay off his mortgage and increase his homestead equity as a way of transferring assets from unprotected to protected status.

New York –SS New York has specific statutes, or laws, in place that benefit a judgment debtor, called ‘exemptions’ but they are somewhat limited and archaic. For personal property, the exemptions include home heating equipment, certain domestic animals and food for those animals, certain limited jewellery, one car, tools of trade, and, in certain circumstances, US\$ 1,000 of cash.

All retirement accounts are also exempt, to include any contributions made prior to 90 days before the judgment and not determined to be a fraudulent transfer. Life insurance is exempt as well. There are also significant restrictions on income garnishment, income is usually 90% exempt, depending on a court determination of what is necessary for the reasonable requirements of the judgment debtor and his/her dependants. For real property, there is a monetary homestead exemption, which varies between US\$ 75,000 and US\$ 150,000 depending on the county.

Texas –LG Subject to fraudulent transfer law, Texas has unlimited exemptions for life insurance and annuities (including cash value, death proceeds, and conversions), IRAs and qualified plan assets, current wages for personal services, spousal maintenance payments, professionally-prescribed medical aids, and a bible.

There is also limited protection of up to US\$ 100,000 for other classes of family personal property, including home furnishings, jewellery, two firearms, farming and ranching vehicles, and certain numbers of livestock and breeding animals.

New York –SS I saw a case in New York where a client was concerned about looming claims. He put US\$ 50 million of premiums into a private life insurance policy in order to protect the money. The claim hadn't yet arisen, so it wasn't classed as a fraudulent transfer.

UK –PG In the UK, if you make a disposition with a view to putting assets out of the reach of creditors, whether the claim was foreseeable or not, it can be set aside by the court. We have seen claims that go back 20 years, although the longer the time span the harder it is to do.

The UK is not a place to be a debtor, but it is a place to do business because you can enforce your debts.

Malta –DM Wages may not be attached or assigned. Garnishee orders against salaries may not be issued unless the creditor is suing for maintenance. In such case, a garnishee order may be issued against part or the balance of one's wages which exceed €698 a month unless the employee proves to the court that the wages which are attached are needed for their subsistence or for the maintenance of their family. However, the law goes on to provide that wages may be attached to ensure payment of maintenance due to the wife, minor, incapacitated child or ascendant of the employee, without providing a limit which the employee must receive notwithstanding the maintenance order.

In the case of pensions, the creditors of a contributor may not enforce their rights over the contributor's interest in a retirement scheme, nor may such creditors attach or subject such interest to any precautionary or executive warrant, unless it shall be deemed that any creditor of such contributor is, at law, deprived of any rights granted to such a creditor.

Round Table Q&A Continued

QUESTION 5

What protection is offered to debtors by a corporation or a limited liability company (LLC)?

Malta –DM To understand the role a corporation or LLC plays in shielding an owner from the collection of judgments, we have to distinguish between owner and company.

If a debtor with a judgment against them is also the owner of a company, then that ownership stake would qualify as an asset and would have to make good the debt.

If the debt is in the name of the company, then, as a limited liability shareholder, the owner is not liable for the debts of the company, unless they are a director, in which case they can become personally liable if the debt is a result of fraudulent trading.

In tax matters, such as income tax or VAT, the directors are personally liable, regardless of whether the company has sufficient funds or not. If the director is also a shareholder of the company, they cannot hide behind limited liability.

Portugal –JC Bearer shares and assets held within a Portuguese limited liability company are, in principle, shielded from a judgment against an individual. If the shares are nominative, the creditor might seize or execute such shares, but not the property itself. If the property held by the company is subject to tenancy or right of use and residence restrictions, then the beneficiary of these liens is shielded from eviction.

Florida –HP In Florida, there is a corporate shield doctrine in which a judgment against a company, such as a corporation or limited liability company, is solely against the company and not the owner; and vice versa, in which the judgment against an owner is solely against the owner personally and not the company.

If there is a judgment against an owner personally, the judgment creditor can request a charging lien or charging order on the company whereby the judgment creditor is entitled to the owner's equity distributions or dividends up to the judgment amount.

UK –PG I have one small point to make in defence of the UK. Although, on the face of it, we are a creditor-friendly jurisdiction, there is some good structuring to be done openly and legitimately to protect family wealth. We are currently doing an awful lot of work through the use of companies to protect against trade creditors and divorce settlements.

Texas –LG Stock in a Texas corporation, membership interests in a Texas LLC, and interests in a Texas partnership are all personal property under Texas law. A judgment creditor may generally levy and seize corporate stock, but with respect to LLC and partnership interests, a creditor is generally limited to a charging order.

As such, subject to the Fraudulent Transfers Act, an LLC or limited partnership may be useful in shielding assets from future creditors.

New York –SS In New York, shareholders of a corporation and members of a limited liability company are not responsible for the debts of the entity, including satisfaction of judgments against the entity. However, it is possible in New York to 'pierce the veil' of the entity, if the owner has not respected the formalities of the entity and is treating the entity as an alter ego.

If there is a judgment against an owner personally, the judgment creditor can levy against the owner's shares, or get a charging order against the owner's interest in an LLC.



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