OVERVIEW OF ASSET PROTECTION TECHNIQUES

Robert N. Miller
FISHER, TOUSEY, LEAS & BALL
501 Riverside Avenue, Suite 600
Jacksonville, Florida 32202

Telephone: (904) 356-2600
Facsimile: (904) 355-0233
Email: rmiller@fishertousey.com

1. What is asset protection planning?

Owning assets in certain ways makes reaching those assets more difficult for creditors, such as judgment creditors; structuring your ownership of your assets to make it more difficult for creditors to reach those assets is asset protection planning.

Neither asset protection planning nor estate planning are disciplines unto themselves. A strong estate plan should consider your asset protection planning goals and a strong asset protection plan should consider your estate planning goals.

2. Eight Biggest Mistakes in Asset Protection Planning.

(a) Not Understanding the Purpose of Asset Protection: Asset protection will not make you "judgment proof."

(b) Waiting Too Long To Begin Planning: Preventive planning is *both* most effective *and* least expensive before you have legal problems. Once attacks have mounted, it is sometimes too late to do any serious asset protection because of the fraudulent conveyance laws.

(c) Believing That It Is Too Late To Protect Assets: It is never too late to improve protection. Anything is better than doing nothing.

(d) Thinking Creditors are Stupid or Lazy: Don't underestimate the skill and intelligence of your adversaries. Creditors and their attorneys are not stupid; some are very smart and have the resources and patience to pursue collection.

(e) Failure to Comprehend Vulnerability of Your Business: The shares of common stock you own in your practice *are* vulnerable to creditor attack.

(f) Fraudulent Transfers and Conveyances: Generally, you cannot protect assets by giving them to family members.

(g) Confusing Estate Planning With Asset Protection: Asset protection is part of estate planning, but a living trust or will *does not* protect your assets from creditors.

(h) Confusing Bankruptcy Law and Asset Protection Law: The new bankruptcy law does not affect Florida's unlimited homestead exemption and other exemptions *outside bankruptcy court.*

3. <u>Federal Bankruptcy Law</u>.

(a) Recent changes in The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("Bankruptcy Reform Act") make bankruptcy less of an option for wealthy persons in many cases.

(i) The Bankruptcy Reform Act makes it much more difficult to eliminate (discharge) consumer debts through bankruptcy. Under the new law, filing bankruptcy requires more paperwork, more supporting documents, more court scrutiny, and because of the increased complexity, more legal fees. The new law will be effective for bankruptcy petitions filed on or after October 17, 2005. A few provisions of the new law, particularly those affecting the homestead exemption, are in effect now. Because the law is so complex, it will take years of court decisions to interpret important provisions and applications of the Bankruptcy Reform Act.

(ii) A debtor will no longer have the ability to extinguish consumer debt by filing a Chapter 7 bankruptcy if the debtor has income above the state median. If a debtor's family's net income (i.e. gross income after deducting permitted expenses that provide only for a modest lifestyle) is greater than the state median, that debtor will be required to file for Chapter 13 bankruptcy, which requires the debtor to repay a percentage of the debtor's debts over a five year period. Specifically, if a debtor's monthly net income exceeds $166.66, the debtor will be presumed to have flunked the "means" test and the debtor cannot file for Chapter 7 bankruptcy.

(iii) If a debtor flunks the means test, the debtor must enter a payment plan under Chapter 13, which would permit the debtor with income exceeding the state median to enter into a 5-year payment plan whereby most, if not all, of the income above a fairly low level and most of the debtor's equity in non-exempt assets would be paid to the creditors. If the debtor's income over the 5 year payment plan is insufficient to pay off the entire debt, the debtor may qualify for a discharge if the debtor has complied with the plan.

(iv) Most affluent debtors would have to spend down exempt assets to make ends meet during this 5-year period, especially if they have children in private schools.

(b) Federal Bankruptcy trumps many state law protections – it does not trump federal law protections.

(c) Remedies of a Bankruptcy Court for failure to comply with an order: those penalties may result in criminal contempt, the penalty for which may include jail.

4. Tried and True Techniques for Florida Residents. The following list contains a summary of individual techniques. In addition to these techniques, there are ways to limit exposure to liability, including, but not limited to, foregoing certain investments that may give rise to liabilities (real estate), exercising extra scrutiny in hiring and retaining employees, refusing to loan your automobile to anyone, and refraining from titling your automobile in a joint name. In addition, having sufficient insurance in place to cover you in the event of an adverse judgment is very important.

(a) Homestead Protection.

(i) Florida Constitution.

(1) Generally. The Florida Constitution exempts homestead property from levy and execution by judgment creditors except for judgments on mortgages (foreclosure), judgments for taxes and assessments, and judgments for repairs. Florida courts have liberally expanded definitions of homestead property to include more than just a single-family house. Condominiums, manufactured homes, and mobile homes are also afforded homestead protection.

(2) What Qualifies. The Constitution defines homestead as an individual's principal place of residence up to one-half acre within a municipality and up to 160 contiguous acres outside a municipality.

(3) Residency is Required. To qualify for homestead protection, a debtor must be a Florida resident and the homestead property must be his primary place of residence. Upon the sale of his homestead, a Florida resident may be entitled to homestead protection if he keeps the sales proceeds of his prior homestead in a segregated account for a reasonable period of time while looking for a new homestead. Property purchased as a future residence is unprotected until the property is occupied as a principal residence. A second home or investment property cannot be considered a Florida homestead. Properties titled in the name of LLCs, corporations, or partnerships will not qualify.

(4) Effective Date. Protection of Florida homestead is effective immediately. After purchasing a Florida

homestead and making that homestead a primary residence, the homestead is immediately protected from creditors as long as other facts and circumstances show an intent to make the new homestead a permanent home. There is no waiting period before Florida's homestead protection takes effect to protect the debtor's assets against existing creditors. The new bankruptcy law extends the waiting period to 40 months for homestead equity over $125,000. ***See below for restrictions imposed by Bankruptcy Law.***

(5) Converting Unprotected Assets. What makes Florida's homestead protection such a powerful asset protection tool is its unlimited monetary protection for *state law purposes.* A Florida resident can invest millions of dollars in a large estate and protect the full value of such property under the protection of Florida's homestead provisions. Under a Florida Supreme Court ruling, a person can transfer unprotected, non-exempt assets to his homestead at any time by either buying a new home or reducing the principal balance of an existing mortgage and protect this money under the homestead umbrella even if the asset transfer was clearly designed to hide money from creditor claims. ***Bankruptcy law restricts this ability even though it is permitted by state law – the Bankruptcy court has the ability to deny the discharge. The consequence is that the creditors' claims survive bankruptcy.***

(6) Not Unlimited. Homestead is not protected against tax liens, mortgages, homeowner association assessments, or from mechanics liens associated with labor or materials to repair or improve the homestead property.

(7) Not the Tax Exemption. The law concerning asset protection benefits of homestead should not be confused with the homestead tax exemption.

(8) Not for Property Owned by Corporations, LLCs, and Partnerships. The homestead exemption applies only to property owned by individuals. Although at least one bankruptcy court has ruled that property owned by a revocable living trust does not constitute homestead property, the Florida courts have indicated otherwise.

(9) Bankruptcy. Florida homestead protection may not fully apply if the debtor files bankruptcy. Under the new bankruptcy law, homestead protection is available in

bankruptcy up to $125,000 of equity unless the debtor occupied the homestead property and previous homestead properties for a continuous 40-month period. For example, if a Debtor receives $500,000 upon the sale of his homestead in which he resided for forty (40) months and reinvests that $500,000 in a new homestead, and the value of his replacement homestead has increased to $625,000, when he files for bankruptcy, the entire value of the new homestead is protected from creditors in bankruptcy. Likewise, transfers of cash into homestead within 10 years intended to defraud creditors may be challenged by the bankruptcy trustee. ***See below for restrictions imposed by Bankruptcy Law.***

(ii) Time Limitation. The new law increases the residency requirement from 91 days prior to filing for bankruptcy to 730 days (2 years). Anyone who moves to Florida and files bankruptcy before the 730 days residency limit must use the exemptions of the state from which he moved. This law is designed to stop people from moving to states like Florida with generous homestead exemptions for the purpose of escaping debt in bankruptcy.

(iii) New Bankruptcy Law Limitation. If you have lived in your Florida homestead property for 3 years and 4 months (40 months), you can still protect unlimited amounts of homestead value in bankruptcy under the new law. If you moved from one or more Florida homesteads within the 40 months before bankruptcy, the time you resided in the prior homestead(s) is credited (or added on) to your time of residence in your present house. For new Florida residents, the time you lived in a homestead outside of Florida before moving here is not counted toward your cumulative homestead residence in Florida. If you have not lived in your current and past Florida homesteads for 40 months prior to filing bankruptcy you may exempt only up to $125,000 of homestead equity in bankruptcy. The homestead provisions of the new law does not diminish your unlimited homestead protection outside of bankruptcy in state court collection proceedings. Finally, the Bankruptcy Reform Act permits bankruptcy courts to look back through the ten year period prior to filing for bankruptcy to determine whether any payments on certain residential real estate constitute fraudulent conveyances.

(b) Retirement Plans.

(i) To prepare for retirement and to defer income taxation more and more individuals direct significant wealth into IRA accounts and other qualified retirement plans, such as 401(k) plans. In Florida, the deferral of funds into certain retirement accounts not only defers income taxation but also protects those funds (and any appreciation thereon) from creditors as well. Florida Statute 222.21(2)(a) provides that any money or other assets payable to participant or beneficiary in a qualified retirement or profit sharing plan is exempt from all claims from creditors of the beneficiary or participant.

(ii) The Bankruptcy Reform Act did not materially change the exemption of tax-exempt retirement plans. However, certain IRAs may no longer may be fully exempt. Earnings on amounts accumulated in IRAs (other than SEPs, SIMPLEs, rollovers from qualified plans) are limited to $1 million.

(c) Insurance Products (Life Insurance Policies and Annuities).

(i) Cash value in insurance and all annuities are protected from creditors' claims by Florida Statutes. While a Florida resident is alive, the cash value of any insurance policy he owns on his life or on other Florida residents is exempt from creditors claims. The protection afforded to the cash surrender value of a life insurance policy is only for the benefit of the owner/insured (specifically, if the owner and insured are not the same person, there is no benefit). Death benefits payable to a named beneficiary are protected from claims of creditors of the deceased insured. However, death benefits are not protected from the creditors of the policy beneficiary.

(ii) One of the most popular financial products for asset protection planning is the annuity. Florida courts have liberally construed this statutory exemption to include the broadest range of annuity contracts and arrangements. Private annuities between family members and the proceeds of personal injury settlements structured as an annuity are entitled to the exemption.

(iii) The protection of cash value insurance and annuities extends to proceeds withdrawn by the owner. Florida courts have held that funds withdrawn from a cash value insurance policy and annuity payments received by a debtor remain protected as long as the funds can be accurately traced to a bank account readily accessible to the debtor.

(d) Prepaid College Funds.

(i) Florida prepaid college tuition plans and Florida's 529 college saving plan are protected from creditors by Florida Statute 222.22.

(ii) Educational IRAs are exempt to the extent funds are contributed 365 days prior to filing bankruptcy when (a) the beneficiary of the amount is a child, step-child, grandchild, or step-grandchild, (b) the funds in the account are not pledged to secure credit, and (c) the funds do not represent excess contributions (limited to $5,000 if the funds have deposited less than 720 days but more than 365 days before the filing).

(e) Holding Property with Spouse as Tenants by the Entireties.

(i) Most married persons own property either as joint tenants with rights of survivorship or as tenants by the entireties. To own property as tenants by the entireties, two spouses must acquire the property at the same time; both names must be on the title to the property; they must both have an equal interest in the property, and they must both have a current right to possess the property. Upon the death of one spouse, ownership is vested by operation of law in the surviving spouse. Many married people incorrectly believe that all jointly owned property is protected from their creditors. *This belief is incorrect.* Joint ownership with rights of survivorship provides no asset protection. A creditor of either spouse may seize the interest the debtor spouse holds in joint tenant property. *Unlike joint ownership with rights of survivorship, "tenants by the entireties" ownership affords excellent asset protection benefits.* Tenants by the entireties is not, however, absolute protection; the Internal Revenue Service recently obtained a lien against a husband's interest in certain property he owned with his wife as tenants by the entireties. Tenancy by the entireties is a special form of joint tenancy ownership that is available only to married persons. To qualify as tenants by the entireties property, property must have the following characteristics:

(1) joint ownership and control;

(2) identical interest in the property;

(3) the interest must have originated in the same instrument;

(4) the interest must have commenced simultaneously;

(5) the parties must have been married at the time they acquired the property, and

(6) the surviving spouse will own the property after either spouse dies.

(ii) In the case where both spouses are jointly indebted to a particular creditor, that creditor can involuntarily seize tenants by the entireties property. Tenants by the entireties protection exists only if a creditor has a claim against only one of the spousal owners. However, the Internal Revenue Service has been able to seize an interest in property owned by a husband and wife as tenants by the entireties in satisfaction of the husband's personal tax obligations.

(iii) In Florida, *unlike most other states*, all types of property, including all real property, tangible personal property, and intangible personal property, may be owned by a married couple as tenants by entireties. *Whether a married couple owns property as unprotected joint tenants with survivorship or as protected tenants by the entireties depends on the intent of the spouses.* The Florida Supreme Court has said that any real or personal property owned jointly by a husband and wife is presumed to be owned as tenants by the entireties. A creditor could rebut this presumption by showing that the property ownership does not possess all six entireties characteristics or that the husband or wife indicated an intent to own the property in some other manner. Therefore, if you intend to own property as tenants by the entireties, you should clearly indicate such ownership on all documents, including deeds, account statements, etc.

(iv) In Florida, tenancy by entireties is the quickest and simplest asset protection for married persons. This form of ownership, however, may not provide secure asset protection over the long term. First, a divorce between the spouses immediately converts the tenancy by entireties into a tenancy-in-common between the former spouses. In that case, the assets of the debtor spouse would immediately be exposed his or her creditors. Likewise, a death of one spouse terminates the tenants by the entireties and vests the property solely in the surviving spouse. If the surviving spouse has creditors, the asset protection afforded by the tenants by the entireties ownership is lost. Secondly, tenants by the entireties ownership may create problems for estate planning and may interfere with estate tax minimization.

(v) Many states exempt real property owned by husband and wife as tenants by the entireties from creditor claims where only one spouse

is a debtor. In those states, a married couple's house will still be absolutely protected from the creditors of one spouse if it is held as tenants by the entireties. For example, if a multi-million dollar judgment is placed against a husband who owns a home as tenants by the entireties with his wife, then upon filing bankruptcy, there will be no limitation on protection of the home because of the tenancy by the entireties rules.

(vi) Tenancy by the entireties presents planning opportunities. For example, if a husband and wife own their stock portfolio as tenants by the entireties and one spouse is the subject of a large debt, the transfer by the debtor spouse of his interest in the stock portfolio is not a fraudulent conveyance and the non-debtor spouse would take the property free of any liens of third parties, whereupon she could ensure that it passes to a spendthrift trust for the benefit of the debtor spouse.

(vii) Tenancy by the entireties is a common law rule of property ownership, and bankruptcy law has traditionally deferred to state property law.

(f) Limited Liability Partnerships, Limited Liability Limited Partnerships, and Limited Liability Companies.

(i) Overview. There are three asset protection tools that have substantial benefits for asset protection planning and estate planning. These are the limited liability partnerships ("LLPs"), limited liability limited partnerships ("LLLPs") and limited liability companies ("LLC").

(ii) LLP. A limited liability partnership is a general partnership that has registered as a limited liability partnership with the Secretary of State of the State of Florida. An LLP has one class of partners – general partners. By qualifying as an LLP, partners generally are not liable for the debts of the partnership; generally, a partner's risk is limited to his investment in the LLP. The general partners control the partnership's investments, distributions and other business decisions.

(iii) LLLP. A limited liability limited partnership is a limited partnership that has registered as a limited liability limited partnership. An LLLP has two classes of partners, general partners and limited partners. A general partner has general liability for all partnership debts and has the responsibility and authority to manage partnership business; by registering as a limited liability limited partnership, the general partner's liability is limited to the value of

its investment. The general partner controls the partnership's investments, distributions and other business decisions. A limited partner has an investment interest in the partnership and plays a passive role in partnership business. An individual can be both a general partner and a limited partner in an LLLP; however, we recommend that a corporation serve as the general partner to ensure continuous management in the event of the death of the individual who would otherwise be the general partner.

(iv) LLC. A limited liability company is a business entity created pursuant to Chapter 608 of the Florida Statutes. An LLC is typically controlled by a manager. The manager directs the LLC's business affairs and determines the amount and timing of cash distributions. The investment interest in an LLC is held by members. Members invest the initial capital in the LLC and incur gains or losses from the LLC's business. An individual can be both a manager and a member of an LLC.

This outline will refer to LLPs, LLLPs, and LLCs as LLEs (limited liability entities).

(v) Assignment of LLP, LLLP, and LLC Interests. An LLE interest is intangible property and is assignable and transferrable subject to restrictions of the agreement governing the LLE.

(vi) Asset Protection Benefits of an LLE. Each multi-member or multi-partner LLE offers some degree of asset protection. The investment interests in an LLE are not "exempt" from levy by creditors of the partner or member. There are no constitutional or statutory provisions in Florida that protect a partner's or member's investment. Asset protection is available by virtue of the limited procedural remedy given to creditors to levy upon a debtor-partner's or debtor-member's interest in the LLE.

(vii) Single Member LLE's Probably Not Safe. We believe that LLEs with only a single member (i.e., a single member limited liability company or a partnership with the same individual owning all of the interests in the partnership directly and indirectly (i.e., through a trust or another limited liability company)) are insufficient to provide any degree of asset protection benefits. We are concerned that courts will look at the ownership structure of the entity and determine that the single individual controls the entity, and, as such, will disregard the entity and treat the assets of the entity as if they are the individual owner's assets. Consequently, we often include a spouse and/or child, either directly or indirectly (i.e., through a trust, a corporation, or another partnership).

(viii) What is the Remedy that Makes LLEs Attractive? A creditor has no right to seize property within an LLE to satisfy the debt of a partner or member. Moreover, in a properly drafted governing agreement of an LLE, a creditor has no right to vote or inspect the books and records of the LLE and certain insolvency events trigger options pursuant to which the solvent partners/members can purchase an insolvent partner/member's LLE interest for a discounted amount, paid over time, with interest at the lowest rate allowed by law. Under Florida law, a creditor's rights are limited to receiving distributions of cash or other property made from the LLE to partners or members (though this limitation is less certain for LLCs than for LLPs and LLLPs). In most LLEs, when one partner or member has a creditor problem, the other partners or, for an LLC, the manager, will retain profits inside the LLE and make no distributions so that the lurking creditor receives no money. If the managing partner/manager does not order distributions of cash or property, then the creditor gets nothing. In addition, a creditor with an active charging lien may incur income tax liability. A 1997 Revenue Ruling suggests that where a creditor has a charging lien on an LLE interest and the managing partner/manager does not distribute income, *the creditor, not the partner/member, is responsible for paying the tax on allocated income*. The charging lien may become a "poison pill" as long as the creditor receives no money but incurs income tax liability in his effort to collect a judgment debt. One practical limitation with the LLE charging lien protection is that cash and assets can remain trapped inside the entity by a "patient creditor" holding a charging lien. Even though the creditor cannot get assets inside the entity, neither can any partner or member. A member or partner may need access to cash from the entity to maintain a normal lifestyle or pay taxes from the LLE's income.

(g) Family Limited Liability Limited Partnerships.

(i) Similar to Regular LLLPs. Family limited liability limited partnerships ("FLPs") are just like LLLPs; however, the partnership agreement usually contains substantially more specific terms, which include the family's goals. FLPs usually provide significant estate tax benefits in addition to asset protection benefits.

(ii) Structure Usually Limited to Family and Family Controlled Entity. An FLP typically is an LLLP that consists of members of an immediate family - extended family members may also participate in these types of partnership. In a FLP, a responsible child, either directly or indirectly, or an irrevocable trust, managed by a trusted

family advisor, forms a corporation or an LLC to serve as the general partner. Because of a long line of judicial decisions in tax cases, *we typically recommend against the family member with funds serving as the general partner, directly or indirectly.* The family members with significant assets, typically the parents, usually have limited partnership interests. At formation, the family members with assets typically own almost all of the limited partnership interests, which represent 99% of the interests in the partnership, and the corporate general partner owns the entire general partnership interest, which represents 1% of the interests in the partnership.

(iii) Restrictions on Limited Partners. To maintain the limitation on his liability, the limited partner is prohibited from participating in any management or control over the partnership's assets or business.

(iv) Asset Protection Benefits of a FLP. The interest of a limited partner in a limited partnership is not "exempt" from levy by creditors of the limited partner. There is no constitutional or statutory umbrella in Florida that protects a limited partner's investment in a limited partnership. Nevertheless, Florida limited partnerships provide an excellent asset protection vehicle for the limited partner. This asset protection is available by virtue of the limited procedural remedy given to creditors to levy upon the debtor-limited partner's interest.

(v) The Remedy that Makes an FLP Attractive. The creditor's rights under the Act are limited to a charging order, which gives the creditor the right to receive distributions of cash and other property from the partnership to the debtor-limited partner. The Act requires a creditor of a limited partner seeking to seize distributions from a partnership to apply to a civil court and obtain a charging lien against partnership distributions that would otherwise be paid to the debtor-limited partner. The court upon application will issue a charging order against the partnership granting a lien to the creditor on any distributions earmarked to the debtor-limited partner. If the general partner awards no distributions to limited partners, then the creditor gets nothing. Moreover, in a properly drafted partnership agreement, a creditor assignee can be given no rights to inspect the books and records of the partnership so that he is unaware of partnership income or partnership business. In addition, the other partners or the partnership can be given the right to purchase the debtor-limited partner's interest for a discounted amount, which will be paid over time at the lowest rate of interest allowed by law. In a family partnership, the general partner is unlikely to order distributions where a limited partner's creditor is lurking. Where a charging lien exists, the general partner likely will hold money in the partnership

and find other alternatives to transfer money out of the partnership to family partners.

(vi) Exclusive Remedy. Florida appellate courts have affirmed that a charging lien is a creditor's exclusive remedy against a debtor's limited partnership interest, and more particularly, a creditor may not resort to a judicial foreclosure of a limited partnership interest. *See Givens v. National Loan Investors, LP*, 724 So.2d 610 (Fla. Dist. 5, 1998). A creditor may have greater rights to a debtor's interest in a general partnership.

(vii) Tax Issues. Under general partnership taxation principles any income earned by a limited partnership is taxable to the limited partners on a flow through theory regardless of whether the income is actually distributed to limited partners. If a limited partnership has taxable income and the general partner decides to retain the income within the partnership, the limited partners are still liable for the income tax. Revenue Ruling 77-137 indicates that where a creditor has a charging lien on a limited partnership interest, and the general partner does not distribute partnership income, the creditor, not the debtor limited partner, is responsible to pay the tax on the allocated income. In this manner, a charging lien can become a "poison pill" whereby the creditor of the limited partner receives no money from distributions, but incurs tax liability in his effort to collect a judgment debt. Therefore, given the limited nature of the charging lien remedy and the exposure to partnership taxation, most creditors are reluctant to pursue a judgment against a debtor's interest in a limited partnership. The limited rights of the creditor/assignee makes the family partnership an effective asset protection tool. The family partnership agreement is a complex asset protection device which should be drafted by an attorney experienced in asset protection law.

(viii) Downside. To maximize the estate planning and asset protection planning opportunities available, it is necessary for the affluent family member (i.e., the parents) to cede control over family assets to their children via the children's control of the corporate general partner. Many people just are not ready to place so much trust and confidence in their children. In those cases, a trust managed by a trusted family advisor or attorney may be the best choice for a general partner.

(h) Domestic Trusts.

(i) Revocable Living Trusts. Revocable Living Trusts provide no asset protection benefits during the grantor's lifetime or upon the

grantor's death if the assets in the grantor's probate estate are insufficient to cover claims against the grantor's estate.

(ii) Irrevocable Trusts. A creditor of the settlor of an irrevocable trust can reach the maximum amount that can be distributed to or for the settlor's benefit.

5. Fraudulent Conveyances.

(a) What are fraudulent transfers and conversions?

(i) The most important issue in any asset protection plan is whether previous planning transactions constitute fraudulent transfers or fraudulent conversions as defined by Florida Statutes.

(ii) A fraudulent transfer is *a debtor's transfer of legal title to his real or personal property to a third party with the intent to hinder, delay or defraud a present or future creditor.*

(iii) *A fraudulent conversion is a debtor's conversion of non-exempt real or personal property subject to creditor attack to a different type of property, still owned by the debtor, which new property is exempt or immune from creditor attack.*

(iv) Florida Statutes provide that a creditor can sue to overturn a fraudulent transfer or conversion up to fours years after a conveyance was made or obligation incurred. Asset protection planning and transfers become immune from fraudulent conveyance suspicion four years after the planning takes place.

(v) Although at least one court ruled that a creditor was not entitled to the funds converted from non-exempt assets to exempt assets, other courts have ruled that converting assets to exempt assets will jeopardize a discharge in bankruptcy. This can be disastrous because the debtor will suffer the public humiliation of the bankruptcy process without receiving the benefit of the discharge. Whether courts will deny a discharge depends on the facts and circumstances of a given case.

(vi) In determining whether to deny a discharge in bankruptcy, the courts consider several factors, including (i) the extent to which the debtor made misrepresentations to creditors in an effort to delay them while the debtor engaged in asset protection planning, (ii) the extent to which the transfers left the debtor solvent or insolvent, (iii) the proximity of the debtor's filing of the bankruptcy petition and the transfers.

(b) <u>What is the consequence of making a fraudulent transfer or conversion</u>?

(i) Florida Statutes provide courts equitable remedies to undo fraudulent asset protection planning. Fraudulent transfers or conversions may be undone and reversed by a court's putting the property back in the debtor's hands where the property becomes subject to the creditor collection process.

(ii) The Statutes provide several equitable remedies to assist the creditor's collection of these converted assets including injunctions against further transfers, imposing a receivership on the assets, or imposition of a constructive trust.

(iii) A creditor alleging fraudulent conveyance may sue not only the debtor transferor but also the transferee who received the property to undo the transfer. Consequently, a fraudulent transfer to a friend or family member is likely to make that friend or family member a defendant in a creditor's fraudulent transfer lawsuit. *Fraudulent conveyances are not prohibited and are not illegal.* The subject statutes do not provide for awards of additional damages against the debtor, and the statutes certainly do not impose criminal fines or penalties. Florida courts interpreting these statutes have pointed out that a debtor's monetary liability cannot be increased because the debtor made a transfer or conversion later determined to be a fraud against present or future creditors.

(iv) The Bankruptcy Reform Act permits courts to look at all transfers made in the two-year period before filing for bankruptcy.

(c) What makes a transfer or conversion a fraud against creditors?

(i) Not all transfers or conversions that move assets beyond a creditor's reach are fraudulent and subject to reversal. Whether or not a transfer or conversion is intended to hinder, delay, or defraud creditors depends on the debtor's purpose and his intent behind the transfer or conversion. To ascertain the debtor's purpose and intent of a property transfer, courts look to factors that are often indicative of intent to avoid creditor claims.

(ii) Courts will consider (i) whether any particular transfer was made to a debtor's family member; (ii) whether a transfer was concealed; (iii) whether the debtor retained effective use or control over the property transferred; and (iv) whether the transfer rendered the debtor insolvent. All of these above factors suggest that a transfer was a fraudulent conveyance that the courts should reverse.

(d) Defense against fraudulent conveyance allegations.

When a creditor is trying to collect money from a debtor who has previously engaged in asset protection planning and has little or no assets easily subject to creditor collections, a creditor will almost always institute an action attacking one or more of the debtor's prior transfers as fraudulent transfers or conversions. Just because a creditor believes a conveyance was intended to defraud creditors does not mean a court will set aside the conveyance. A debtor can show many legitimate reasons to convey assets other than avoiding creditors.

(e) How does the fraudulent conveyance issue impact asset protection planning?

Just the possibility of a creditor's allegations of fraudulent conveyance should not deter asset protection planning prior to time a judgment is entered by a court. People have a constitutional right to control or transfer their property until such time as a judgment creditor obtains a legal interest in the property. This is why the applicable statutes do not prohibit or make illegal fraudulent conveyances. Because a court cannot increase the amount of the judgment damages already awarded against a debtor because of a debtor's fraudulent conveyance, there is little or nothing to lose by planning to protect your property even if some planning might be subsequently challenged or even reversed.

00100459_6