

Florida Asset Protection: 7 Key Strategies For The Small Business Owner And Professional

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In our litigious society anyone can become a target of a plaintiff seeking to get a money judgment against you personally. In today's real estate market, where it is usually impossible to negotiate with the lender, deficiency judgments are a major concern. You may have excellent car or property insurance, but a good personal injury attorney will typically seek to go beyond the insurance limits and name you as a defendant if the damages are substantial. Owning assets that are exposed is an invitation to a lawsuit.

Thanks to the Internet, it is now easy for a creditor to find every piece of real estate that you own. In fact, if you own real estate for commercial or investment purposes, you might as well publish your property holdings on the front page of the *Miami Herald* because it now takes minutes to find what property you own on the Internet.

Let's examine **Five Common Mistakes** and **Seven Tested Asset Protection Strategies** to protect your exposed assets.

Mistake #1: Failure to Establish or Maintain Corporate Records. You are a business person, not a paper keeper; it is not in your nature to keep strict records of your corporate affairs. Unfortunately, this practice is widely known by plaintiff's attorney; at the inception of a suit they will usually ask to examine your corporate books. Many – probably most – owners of small businesses fail to follow the fundamental steps to properly set up a company and then to at least annually update the corporate records. Now is a good time for your due diligence review. We will be happy to review your corporate records at no charge and advise you what, if anything, is needed to make sure that you have a valid corporate shield protecting you.

Mistake #2: Thinking a Revocable Trust Protects Your Assets. A living revocable trust is an important estate planning tool that every person or family should have to take care of your family if you cannot, avoid probate upon death, avoid court intervention upon incapacity, and keep legal control within your family. These are just some of the many advantages of a living trust. However, a living revocable trust does NOT protect your assets.

Mistake #3: Waiting Too Long To Begin Planning. You should plan to protect your assets when "the waters are quiet" – before legal problems begin. Do not wait for creditors to come knocking at your door because it may be too late. A transfer deemed fraudulent may be undone. See Florida Uniform Fraudulent Transfer Act, F.S. 726. Asset protection planning integrated with your estate planning done in a timely fashion is the most effective, least expensive way to protect your estate.

Mistake #4: Transfer to Family Members or Insiders. A seductive approach is to give someone else control of your assets – such as to family members. This is usually not a wise solution. There are likely gift tax consequences – and you may lose control over your wealth.

Mistake #5: Too Much Insurance – Or Too Little Insurance. Too much insurance makes you an inviting target for potential plaintiff. It is like putting a circular shooting range target on your chest. Too little insurance may also be risky. There is a happy medium. You likely need enough insurance to provide a robust defense fund if sued, but not enough to attract a lawsuit.

Seven Asset Protection Strategies

Let's now look at asset protection strategies. A primary goal of all strategies is to transform you from an "attractive target" to a "porcupine". By this I mean you want to be a position that once a potential creditor sees how your assets are protected, said creditor will be disinclined to file suit or pursue the judgment because there are no easy assets to attach.

Good asset protection planning will not make you judgment proof, but it will be extraordinarily difficult for any creditor to collect on that judgment. Not having exposed assets is the best disincentive to a suit in the first place, or at least powerful leverage in negotiating a low settlement.

Note: The solutions discussed here are not designed to protect you from IRS claims or to avoid U.S. income taxes. There are a couple creditors you never want to mess with: one is the IRS, the other is the FTC.

The following strategies are listed in a rough order of quality. Think of each as a rung on a ladder. The higher up the ladder you go, generally the better quality of the protection. However, the real question is what is the right strategy for you, your business, and your budget. There is no such thing as a one size fits all. And most important, there is no substitute for an assessment of your situation except by a Miami asset protection attorney.

Strategy #1. Tenancy By The Entireties or TBE.

Holding property as TBE has certain benefits for married couples. Upon the death of one spouse, all assets flow to the surviving spouse without the need for probate. Holding property as TBE has significant asset protection benefits: such property cannot be reached by creditors unless both husband and wife are liable. If the property is held as TBE, and the creditor has a judgment against only one spouse, then the creditor cannot attack the TBE property.

However, note that this is the lowest quality for asset protection for a reason: it is often over-used and there are traps: If your divorce or one spouse dies, you lose the protection. If a creditor can sue both of you, there is no protection. For more information about TBE, see my article, [Tenancy By Entireties: The Benefits and Five Traps.](#)

Strategy #2: A Florida Corporation

A Florida corporation, properly structured and maintained, can provide a corporate veil over the shareholders and officers. The corporation should keep annual minutes and keep records of the major corporate transactions. However, a creditor has many remedies against a corporation to pierce the corporate veil. For example, a creditor may be able to grab the corporate certificates, demand periodic accountings, challenge the board of directors – in other words become a major pest. For this reason, the corporate entity of choice in Florida is no longer a corporation; rather the entity of choice has now become the limited liability company, or LLC, one step up the asset protection ladder.

Strategy #3. LLC: Florida Limited Liability Company.

LLC's are one of the most popular planning tools for protecting your assets. They generally provide more flexible tax planning and are more difficult to penetrate than corporations. Florida law gives creditors limited remedies against an LLC interest: in fact there is only one remedy. Assuming the LLC has a well drafted operating agreement – see Note below – a judgment creditor is limited to a charging order against LLC cash distributions. If the LLC manager (you are usually the manager) decides not to make a distribution, the creditor stands on the sidelines and receives nothing. On top of this, the creditor could be liable for taxes on the LLC income even though the creditor receives no distributions. These features make the LLC an effective asset planning tool if properly structured. This last point is critical. An LLC structured as a single member LLC without an over-arching entity is generally not as strong as a multi-member LLC. For more information about Florida LLC's see: [Beware of Single Member LLC's](#).

Note: Numerous companies offer to establish an LLC for you for \$350 or less. Avoid these schemes. The “guts” of the LLC is a good asset protection operating agreement which must be drafted by a Florida attorney. Anything less is false security.

Strategy #4. FLLLP: Family Limited Partnership

The next step up the asset protection ladder is a Family Limited Partnership: the technical name is a mouthful – family limited liability limited partnership. The FLLLP is a powerful legal tool that offers multiple benefits, such as minimizing estate taxes and making gifts to children without giving them cash or any control. However, another major benefit of the FLLLP is asset protection. The FLLLP is often used as an umbrella or holding company over family entities, adding a second layer of protection that is extraordinarily difficult to penetrate for any would-be creditor. For more information about the FLLLP, see [Eight Key Benefits of the FLLLP](#).

Strategy #5. DAPT: Domestic Asset Protection Trust

A. SLAT: Spousal Lifetime Access Trust

A SLAT is an excellent safe haven to protect your assets for your spouse and children as long as your marriage is strong. It is also a proven strategy to take advantage of the \$5.25 million federal gift and estate tax exemption.

The SLAT is an irrevocable trust to benefit the trustmaker's spouse and children.

You cannot be a beneficiary of this trust, but you have indirect access to the trust assets through your spouse.

Such trusts also provide a secure haven for your children by helping to ensure that every dime goes to your children, and not to their spouse or a creditor. For more information see: [Spousal Lifetime Access Trust](#).

B. Nevada Hybrid Domestic Asset Protection Trust

Nevada has the strongest asset protection laws in the country. Employing the strengths of the Nevada law, a Domestic Asset Protection Trust or DAPT is an exceptionally strong structure for protecting family assets. By itself, this Nevada trust provides excellent protection. However, Steve Oshins, a highly respected attorney in Nevada, has introduced a significant enhancement over traditional DAPT's called a Hybrid DAPT.

The Hybrid strategy makes one key change in the traditional DAPT: the trustmaker or settlor is not an initial discretionary beneficiary, but rather a person who can be added later to the trust as a beneficiary. The Trust can be set up initially for the trustmaker's spouse and/or children. If the Trustmaker is not married, there may be other options to consider. For more information about this trust see [Nevada Hybrid Asset Protection Trust](#).

Strategy #6. Nevis Island LLC

An increasingly popular off-shore jurisdiction is Nevis Island, since it has enacted strong LLC laws similar to our Florida statute. To attack an interest in a Nevis Island LLC, a creditor has to go to a Nevis court to get a charging lien. It is unclear whether a Nevis Court would even recognize a Florida judgment: Officials in Nevis have told one commentator they know of no instance where a U.S. creditor has obtained a charging lien in Nevis to enforce a U.S. judgment.

Using a Nevis LLC, you can retain control of your assets as the LLC manager. You can invest anywhere in the world. You can use a Nevis LLC to hold your U.S. bank accounts, or if you like, you can invest in a Swiss or London bank, or any bank in the world.

So where is this place? Nevis Island is located southeast of the Virgin Islands. It is part of the Federation of St. Kitts and Nevis. It is an active member of the British Commonwealth and United Nations. It has a stable democracy based upon British law. It may be best known as the birth place of Alexander Hamilton.

Strategy #7. Cook Islands or Nevis Trust

In 1984 the Cook Islands ushered in the modern asset protection era, and has remained the premier jurisdiction. The highest quality of asset protection is probably a combination of a Nevis Island LLC and a Cook Islands Trust. The Nevis Island LLC would have a pull-the-plug provision that would transfer assets to the Cook Islands. Properly structured and administered, no court in the United States will have power to undo the plan. The Cook Islands are a cluster of 15 islands located northeast of New Zealand. They are a self-governing parliamentary democracy in free association with New Zealand.

Take-Away Points

1. Virtually all families should do some level of asset protection planning. However, do not rely upon your local banker, realtor, or CPA for this work.
2. We have examined seven asset protection strategies. One or more may be the best option for your family. However, the only way to determine which is the best strategy for you is to consult with an experienced Miami asset protection attorney.

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