STEALTH WEALTH

Hiding Assets from the Public

A. OVERVIEW

A.1 Overview: Many people are concerned about having other people know about their assets. Some worry about lawsuits and other creditors' claims, but identity theft is also an important issue. This memo briefly outlines some of the basic techniques that can be used to "hide" the true ownership of property. This memo does not address asset protection or the divestiture of assets for welfare qualification.

A.2 Advance Warning: Having assets that no one knows about does not protect those assets against the claims of legal creditors. For example, if someone wins a lawsuit and obtains a judgment against you, you are required by law to answer, under penalty of perjury, questions relating to the nature and extent of all property interests. Any asset-protection scheme that relies on perjury or fraud to succeed is illegal. Rushforth Firm Ltd. ("RFL") advises against any illegal or deceptive scheme and will not facilitate its implementation. Even when a proposed privacy arrangement is legal, RFL will advise against such an arrangement that will trigger complications and expenses that outweigh the anticipated benefits.

A.3 Benefits of Hidden Assets: The perception is that keeping your assets undetected by the public "radar" will make you less of a target of a lawsuit, but that is more a matter of perception than verifiable fact. Legally speaking, there is no benefit from hiding the true ownership of assets. In fact, all schemes that cloak an asset's true owner creates an extra layer or two of legal documentation and practical complication. In some cases, the process of hiding assets exposes them to even greater risks, and it potentially creates extra work for your accountant.

B. BUSINESS ASSETS IN NEVADA COMPANIES

B.1 Generally: Some people want to hide their assets inside business entities and then hide the true ownership of those entities. Nevada law recognizes many types of business entities, including corporations, close corporations, general partnerships, limited partnerships, limited-liability companies, limited-liability partnerships, business trusts, and others.

(a) Generally, the persons who manage Nevada business entities must be shown on the public record. For companies that are managed by the owners themselves, such as general partnerships and member-managed limited-liability companies, the names of the owners are a matter of public record.

(b) In contrast, for entities managed by a board (including a single-member board in some cases), such as corporations, manager-managed limited-liability companies, and limited partnerships, the names of the owners are not part of the public record.

(c) The only way to maintain anonymity is to never serve as board member or officer whose identity must be made part of the public record.

B.2 Corporations: Corporations are usually managed by officers under the direction of a board of directors. In Nevada, the names and addresses of the companies' officers and directors are required to be made public. Out-of-state corporations that have qualified to do business in Nevada are required to publish annually a statement of the corporation's assets and liabilities. The report is to provide a "total" only, and specific assets are not identified.

B.3 Limited Partnerships: A limited partnership always has at least one general partner, and each general partner's name and address is a matter of public record. The identity of the limited partners is not part of the public record.

B.4 Limited-Liability Companies: A limited-liability company (LLC) is like a limited partnership without a general partner. Nevada law allows an LLC to be formed as a manager-managed LLC or a member-managed LLC. People doing business with member-managed LLCs often require all members to sign documents and authorize all company transactions, which makes manager-managed LLCs much more practical. For privacy concerns, the manager-managed LLC also makes sense; however, there is no anonymity for the owner who is also a manager.

C. Basic Asset-Hiding Techniques

C.1 Spousal Ownership: If one spouse in a married couple is perceived as having a higher exposure to lawsuits, it is common to put the assets in the name of the other spouse. Under Nevada law, spouses can agree to transmute community property into separate property; however, any transfer of property rights from one spouse to another is subject to the fraudulent transfers statutes. In addition, the arrangement converting community property into one spouse's separate property would be binding in a divorce, so it is important that each spouse balance the relative risks and rewards of this approach. Also, for all assets that are transmuted from community property to separate property, the spouses lose the benefit of the stepped-up income tax basis of all appreciated property held by the surviving spouse upon the death of the first spouse to die.

C.2 Transfers to Others: Some people think they can hide assets by making other people the owners of them. Gifts to others make them the owners of assets, and may trigger a federal gift tax. If you have an "understanding" that assets will be returned to you upon request, it may be unenforceable, especially if the new owner has creditor problems of his or her own, becomes incompetent, or dies. As mentioned above in conjunction with spousal transfers, any transfer of an asset for anything less than full fair-market value will be considered fraudulent and voidable if the transfer was made to hinder, defraud, or delay a creditor or if it makes the transferor insolvent. If an agreement to return property is enforceable, the existence of that agreement would have to be disclosed in a legal inquiry as to asset rights.

C.3 Businesses, Nesting, and Fictitious Names: It is possible to have multiple layers of entities so that the manager or director of one company is another company. Nevada law also permits companies to do business under one or more "fictitious names". Thus, ABC Company might be the director of XYZ Enterprises, but if ABC files a fictitious name filing that it is doing business as MNO Holding Company, the public records for XYZ Enterprises would show MNO Holding Company and not ABC Company as its director. Sound confusing? It is supposed to.

By adding multiple layers of company ownership and fictitious names, it is possible to confuse all but the most tenacious investigator about who really controls company assets.

C.4 Nominee Ownership: Assets can be owned by a nominee or other agent where the agreement between the true owner and the nominee is private and known only to them. You might arrange with a trusted family member, professional advisor, or friend to hold title in his or her own name with a written agreement between the two of you showing that the assets are really yours and requiring the nominee to act under your direction with respect to the ownership, management, and ultimate disposition of the property in his or her control. One example of this type of arrangement is the "Private Trust"℠, which is discussed in section D of these materials.

D. The Private Trust℠ (Also known as the "Stealth Wealth Trust℠")

D.1 Generally. Historically, a trust was merely an arrangement and not considered an entity. Trust assets were owned by a trustee and not by the trust. Under Nevada law, a trust is a legal "person" that can own assets in its own name, but, as a matter of common practice, most institutions dealing with trusts want to put trust assets in the name of its trustees. If you are the settlor (creator) or the trustee of a trust, it will be difficult to hide your interest in the trust.

D.2 Public Records. Most Nevada trusts are not recorded and made public, but some asset transfers are. The only way to avoid publicity is to have your assets owned by a trust for which you are neither the Settlor nor the Trustee. This is not, however, a perfect solution. By even transferring assets into such a trust, your involvement and continued interest may be traceable. Also, if the trustee is questioned under oath about your interests and involvement in the trust and its assets, the trustee would, as a general rule, be required to divulge the facts.

D.3 Attorney-Client Privilege. Nevada law does recognize the attorney-client privilege, which means that an attorney cannot be compelled to disclose confidential information without the client's consent. An attorney is permitted to reveal confidential information if he or she reasonably believes it to be necessary to "prevent the client from committing a criminal or fraudulent act", to "prevent, mitigate, or rectify the consequences of a client's criminal or fraudulent act", or to "comply with other law or a court order." So long as the attorney is not furthering a criminal or fraudulent act, an attorney need not disclose confidential information — such as the ownership of assets — to anyone.

D.4 Private Trust℠. The "Private Trust"℠ is a trust created by Rushforth Firm Ltd. ("RFL") naming itself as the settlor and as the trustee to hold assets for an undisclosed client, who is the real party in interest.

(a) The Private Trust℠ consists of the declaration of trust and a nominee holding agreement that legally requires the trust to be managed under your direction. The Trust gives you, the client, the full right to compel the settlor (i.e., RFL) to amend or otherwise modify the trust, including the right to change the trustee at any time. The only public record is usually the certification of trust and any transfers to the trust that are, by law, required to be made public, such as deeds and the assignments of trust deeds. The trust is not a public record, and it contains no information regarding the client. If a financial institution requires a copy of a trust to open an account, providing a copy will not compromise the privacy of the arrangement.

(i) The nature and extent of the trust's assets are protected by the attorney-client privilege so long as the client is not pursuing a criminal or fraudulent act.

(ii) The client can be a spendthrift trust under Nevada law, usually a Nevada self-settled spendthrift trust (an "SSST", which also referred to as a Nevada asset-protection trust or "NAPT"). Because a spendthrift trust, by definition, is not liable for creditors' claims, it is easier to assert that the refusal to disclose its assets is not a criminal or fraudulent act.[1] In contrast, an individual client may come under a court order to pay a judgment, and failure to disclose the trust's assets at that point may be fraudulent or criminal. There are complications when an SSST is involved, as discussed in subsection D.5, below.

(iii) Since the client has the right to change the trustees, any attorney or law firm can be named as the successor. When privacy is no longer desired, the client can name himself or herself as the trustee or can revoke the trust and have all the trust's assets reconveyed to himself or herself.

(iv) For a Private Trust℠ to be protected by the attorney-client privilege, the trustee must be an attorney or law firm, and it will be difficult to find one that will not charge substantial fees for the service. Rushforth Firm Ltd. charges a nonrefundable annual fee, payable in advance, and the time spent by RFL attorneys and legal assistants will be billed each month at the firm's standard hourly rates.

(b) The Private Trust℠ has served to purchase property anonymously for high-profile clients who do not want the seller to know the identity of the purchaser. In such cases, once the property has been purchased, the need for secrecy ended, and the trust was terminated.

(c) The Private Trust℠ has served to own property anonymously, but the same thing can be done with fewer complications with a manager-managed limited-liability company ("LLC") where neither you nor someone connected with you (other than perhaps an attorney) is the manager of the LLC.

(d) For real property that is transferred by a client to the Private Trust, there will be a public record of the deed, and little privacy will be accomplished. Some clients have used an intermediary to hold title temporarily, but the paper trail to the original owner remains.

(e) The existence of a Private Trust℠ or other nominee-holding arrangement complicates transactions with the trust:

[1] While RFL is willing to defend the attorney-client privilege and your right of confidentiality to the extent permitted by law, all time expended to do so will be billed by the hour. As long as RFL is acting as the trustee of a trust, RFL will comply with a court order unless there are legal grounds to challenge the court order and you agree to pay the legal fees and costs necessary to do so. Sometimes, it simply is not worth the cost to fight, even if you are legally right.

(i) The Private Trust℠ will have a tax identification number of its own and tax returns will need to be filed. The annual tax returns (IRS Form 1041) will reflect that the trust is a grantor trust as to the client, and the client's social security number will be provided to the IRS. The client's individual tax return (IRS Form 1040) will need to report all trust income.

(ii) If a nominee other than a trust is used, IRS Form 1099s are usually given by the nominee to make sure that the client pays the tax on income earned in the name of the nominee.

(iii) Unless the Private Trust℠ or other nominee is holding only land that produces no income, the trust will have to have its own bank or other financial accounts, and there will be a paper trail through that financial institution if distributions are made to you. When RFL serves as the Trustee of a Private Trust℠, our practice is to make all distributions to clients through our firm's trust account, and those transactions should be protected under the attorney-client privilege. This means that there is an extra layer of paperwork, and it will take extra time for checks to clear or other transfers to be made or an extra expense for wire transfers.

(iv) It is impractical, if not impossible, to purchase assets in the name of the Private Trust℠ on credit.

(v) Similarly, it will be virtually impossible for a Private Trust℠ to hold real estate or other asset that is subject to a loan secured by a mortgage, trust deed, or loan-collateral agreement without triggering the due-on-transfer clause that is contained in almost all such loan documents. This gives the lender the right to call your loan due, in full, at any time the lender determines it can get a higher interest rate by either forcing you to accept a higher rate or by forcing you to pay off the loan so the funds can be lent to others at a higher rate. As to your primary residence, we can argue that transfers to this trust are covered by the Garn-St. Germain act, but putting your personal residence in a nominee-type trust makes no sense because your occupancy of the property ties you to the trust and to the other assets owned by the trust.

D.5 Privacy or Protection. Most people have competing estate-planning objectives. In the case of the Private Trust℠, the cost of privacy may be a lack of protection for a self-settled spendthrift trust, at least as to creditors that exist when a transfer to such a trust is made. For this reason alone, we generally recommend against creating such a trust.

(a) NRS 166.170(1) provides that a creditor whose claim exists when a transfer to a spendthrift trust occurs has two years after the transfer to challenge that transfer or, if longer, six months after the transfer is discovered or should have been discovered. Private transfers would not be discovered, which means that an existing creditor could challenge the transfer up to six months after the transfer is discovered, which would probably not occur until after a judgment had been won. This makes the two-year look period (i.e., statute-of-limitations period) almost meaningless.

(b) The 2007 Nevada legislature clarified the two-year look-back period by adding a provision that a transfer is deemed "discovered" when "a public record is made of the transfer". This gives those who have a self-settled spendthrift trust a difficult choice: (1) make the transfers public and limit the look-back period to two years for each transfer or (2) keep the transfers private and run the risk that a claimant may be able to challenge a transfer that is more than two years old because the claimant was unaware of the transfer.

(c) The 2009 Nevada legislature made additional clarifications. Each transfer of assets is treated separately. Even if one asset transfer is deemed unprotected, other assets transfers remain protected. Even if one creditor is successful at challenging a transfer, it does not make that transfer invalid as to any other creditor.

E. CONCLUSION

E.1 Ideal vs. Practical: Because of the existence of public records and because of the Internet, complete privacy about one's assets is very difficult to obtain, especially if your use of the assets is public. There are methods to make asset discovery more difficult for a would-be claimant or identity thief, but if a judgment is obtained against you, it will be you who will be required by law to divulge the information about your asset holdings.

(a) Once you have made your decision, you will have to live with the consequences. If you put your assets in your spouse's name, for example, a divorce may make that transfer permanent. If you put your assets in the name of a nominee who proves untrustworthy, the cure may have been worse than the disease (so to speak). If you have a self-settled spendthrift trust and keep its assets private, you will have to be concerned about past acts that may give rise to lawsuits years later.

(b) If you elect to set up a Private Trust℠ because you want to keep the public eye off of your assets, you will have to handle all trust-related transactions through someone else at added expense and with increased delays. Although we are willing to set up such a trust for clients who understand the costs and ramifications, such trusts have rarely been beneficial except in limited and temporary situations.

E.2 Do It Right. Whatever technique you use, do it right. Learn about the advantages and disadvantages, learn about what is legal and what is not, and implement your plan with the advice of counsel.

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