



PROTECTING ASSETS AND LIMITING EXPOSURE TO LIABILITY

Elina Kollatou, Associate at Elias Neocleous & Co LLC, discusses the proper focus of asset protection and the scenarios that can put your wealth at risk, how to limit its exposure to liability and the ways in which creditors can use a debtor's assets for satisfaction of liability.

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hy do you need to protect your assets and when should you start?

Asset protection planning involves the appointment of one's assets in a legal, practical and efficient manner, beyond the reach of potential future creditors and other claimants, thus protecting them from potential misuse or other emergencies. Protection planning, however, is not a means of hiding assets or defrauding creditors. This is why any transfer of assets with such an intention would usually be voidable in the instance of any person thereby prejudiced. Nor is asset protection planning about putting together a set of multi-jurisdictional techniques to enable a client to avoid financial responsibility for any wrongdoing that he/she may have committed. The proper focus of asset protection planning is to protect against the unin-

tended creditors of the future and not the intended creditors of the present. It is never too early to start planning.

What kind of scenarios can put your wealth at risk?

There can be no doubt that we live in an uncertain world. So, engaging in a proper asset protection planning exercise is a way to insure and guard against future fiscal emergencies, such as the expropriation of assets, the imposition of damaging exchange controls or other governmental regulations, economic coercion or duress and, most importantly, a business or professional failure which may put the financial security of the family at risk. Another main reason that has created the need for asset protection planning is the explosion in litigation, which is often accompanied by inflated jury awards and tort damages on both sides of the Atlantic.

In what ways can you limit your wealth's exposure to lia-

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bility (creditors, an expensive lifestyle, etc.)?

Wealth exposure to liability may be limited through the employment of a prudent and careful asset protection planning strategy. Such a strategy will obviously be created by a team of professional advisors who have the necessary experience and expertise in this field and will take into account the personal needs, objectives and characteristics of the family and its members. Inevitably, the implementation of such a strategy would involve the creation and maintenance of various vehicles, depending on the facts of each case, such as trusts, foundations and partnerships. The precise vehicles used will have such attributes as are necessary to align the structure with the objectives of the family and its members.

Are there differences in the approach required to protect personal and business assets?

It would actually work better if assets that are used for personal reasons – and do not generate substantial income – are separated from business-owned assets, to ensure that personal property is not exposed to business risk. This may provide security in protecting one's personal assets in case the business runs into trouble and, on the other hand, business assets (including real estate, cash and other assets) may be protected in case the risk or failure is of a personal nature. It is crucial that legal structures involving the ownership of both personal and business assets are created and administered properly if they are to meet the objectives of their creation.

What are the basic rules and laws relating to a creditor's ability to use a debtor's assets for satisfaction of liability?

The answer to this question largely depends on whether the debt is secured or not, and whether a creditor will pursue a lawsuit against

the debtor. The courts have discretionary powers to issue disclosure orders, assuming that certain conditions are satisfied. In the event that a creditor has already obtained a judgment in his favour and the judgment for the payment of money remains wholly or partly unsatisfied, the judgment creditor may, under certain conditions, apply that the debtor be examined with respect to his/her ability to make the payment. The Court has

the same powers to compel the attendance of a judgment debtor for examination, as well as the attendance of a witness in a civil action. It may also be possible to conduct searches against the publicly available registry, if registrable. The Fraudulent Transfers Avoidance Law, CAP 62 of the Laws of Cyprus as amended should also be noted. Section 3 of this law states that any type of transfer or disposition of property made by any person with intent to hinder or delay creditors shall be deemed to be fraudulent and invalid and the Court has the jurisdiction to set aside such fraudulent transfers. According to sections 46 and 47 of the Bankruptcy Law, any settlement of property – with the exception of a settlement made in favour of a purchaser in good faith and for valuable consideration – shall be void against the trustee in bankruptcy if the settlor of the property becomes bankrupt within two years from the date of the settlement. Similarly, under the Cyprus Companies Law, any type of disposition of the property of a company which is made within six months before the commencement of its winding-up would be deemed a fraudulent preference of its creditors and be invalid accordingly. Finally, a number of multilateral and EU Conventions on the Recognition and Enforcement of Foreign Judgments in Civil, Commercial and Family matters are also relevant in this area and would need to be considered in the context of cross-border activities.

CASE STUDY

A central European entrepreneur set up a discretionary Cyprus International Trust in line with the Cyprus International Trusts Law of 1992 (as amended). Various assets were contributed to the Trust for the benefit of the beneficiaries. One of the beneficiaries was also the settlor of the Cyprus International Trust. The settlor and his wife entered into divorce proceedings following their breakup. The wife of the settlor asserted that she was entitled to half of the settlor's property, including assets which were held by the trustees of the Cyprus International Trust, thereby challenging the validity of the Trust. Her claim on the Trust assets was unsuccessful. The Cyprus International Trust was held to be valid and in force. It was provided that the settlor, being one of the discretionary beneficiaries of the Trust, had no equitable proprietary interest which could be subject to enforcement action. The settlor's rights were limited to asking the trustees to consider exercising their discretionary powers in his favour, subject to taking into account that such exercise of power would be to the benefit of the beneficiaries and the Trust. Accordingly, the settlor depended on the exercise of the discretionary powers of the trustees and had no right on the assets which were held by the trustees under the Cyprus International Trust, until the trustees had exercised such discretionary powers. Thus, the settlor's wife had no right to claim any of the assets which were held by the trustees for the Cyprus International Trust.