Steve Leimberg's Asset Protection Planning Email Newsletter - Archive Message #239

Date: 10-Mar-14
From: Steve Leimberg's Asset Protection Planning Newsletter
Subject: Barry Nelson & Why Post-Judgment Asset Protection Is Not a Four Letter Word

"My approach is to integrate asset protection planning with estate planning for clients who are willing to protect themselves from taxes and creditors. I accurately reflect whether we are assisting with asset protection in my engagement letter and timesheets.

It would be difficult, if not impossible, for me to deny that I am involved with asset protection planning after all the articles I have written and presentations I have made. Call it what you want, eventually, a good creditor's lawyer will show that the debtor received advice from an asset protection planner. The critical issue is instead whether the debtor received advice to make fraudulent conveyances from his or her attorney.

Neither our clients nor we, as advisors, should be incapacitated like a deer in headlights when we become aware of a judgment or potential judgment. Yes, there will be clients we cannot help or who may not want our help when we advise that we can only help with planning that is legal and proper. Many clients will appreciate and understand that we, as attorneys, are somewhat limited as to potential planning techniques, post-judgment. Nevertheless, oftentimes we can add significant value, even post-judgment.

I am proud to be an estate planning attorney with skills to integrate asset protection and estate planning, and do not disguise the description of my work in timesheets, client memoranda, our firm's website or marketing materials. With respect to asset protection, there is room for different opinions on how to best assist our clients as seldom is there a 'correct' answer."

In Asset Protection Planning Newsletter #238, **Jay Adkisson** provided members with commentary on Sardis v. Frankel, a case which involved an attorney who assisted a debtor post-judgment where the phrase "asset protection" was used in the attorney's timesheets. Now, **Barry Nelson** provides members with commentary that explains why he believes that in certain situations, limited post-judgment asset protection planning is ethical, legal and proper, depending, in part, on the law of domicile of the debtor.

Barry A. Nelson, a Florida Bar Board Certified Tax and Wills, Trusts and Estates Attorney, is a shareholder in the North Miami Beach law firm of **Nelson & Nelson, P.A.** He practices in the areas of tax, estate planning, asset protection planning, probate, partnerships and business law. He provides counsel to high net worth individuals and families focusing on income, estate and gift tax planning and assists business owners to most effectively pass their ownership interests from one generation to the next. He assists physicians, other professionals and business owners in tax, estate and asset protection planning. As the father of a child with autism, Mr. Nelson combines his legal skills with compassion and understanding in the preparation of Special Needs Trusts for children with disabilities. Mr. Nelson is a Fellow of the American College of Trust and Estate Counsel and served as Chairman of its Asset Protection Committee from 2009 to 2012. Mr. Nelson is named in *Chambers USA: America's Leading Lawyers for Business* as a leading estate planning attorney in Florida. Since 2010, he has been listed as one of less than 10 lawyers receiving their highest rating of "Band 1" in the Florida Estate Planning category. Mr. Nelson has been listed in *The Best Lawyers in America* since 1995 and is a Martindale-Hubbell AV-rated attorney.

As the Founding Chairman of the Asset Preservation Committee of the Real Property,

Probate and Trust Law Section of the Florida Bar from 2004-2007, he introduced and coordinated a project to write a treatise authored by committee members entitled *Asset Protection in Florida* (Florida Bar CLE 2008, 3rd Edition 2013). Mr. Nelson wrote Chapter 5 entitled "Homestead: Creditor Issues." He is a past President of the Greater Miami Tax Institute. Mr. Nelson is a co-founder and current Board Member of the Victory Center for Autism and Behavioral Challenges (a not-for profit corporation) and served as Board Chairman from 2000-2008.

Before we get to his commentary, members should note that a new **60 Second Planner** by **Bob Keebler** was recently posted the **LISI** homepage. In his commentary, Bob reports on PLR 201410010 and nine companion rulings where the IRS approved a Nevada incomplete gift non grantor (NING) trust. You don't need any special equipment - just click on this link.

Now, here is Barry Nelson's commentary:

EXECUTIVE SUMMARY:

A recent **LISI** newsletter commented on an attorney who assisted a debtor post-judgment and cautioned against lawyers using the words "asset protection" in timesheets or on memos. This commentary describes situations where it is ethical and proper to assist debtors with certain post-judgment asset protection planning, and questions whether the term "asset protection" should be avoided.

COMMENT:

Asset Protection Planning Newsletter #238 by **Jay Adkisson** reviewed Sardis v. Frankel, a case which involved an attorney who assisted a debtor post-judgment where the phrase "asset protection" was used in the attorney's timesheets. Mr. Adkisson's commentary stated the client should have been told: "You should have done your planning *before* these claims arose. It is now too late for anything like asset protection planning to be done for you." Mr. Adkisson added that: "Sometimes, clients, for their own good, need to be told the cold-hard truth that post-judgment is not the time to start planning, and shown the door." Mr. Adkisson said in his opinion that: "…there is utterly no need to use the two words 'asset protection' in any client matter."

Can Attorneys Assist Post-Judgment?

Those who watch football have heard that it is easy to be a "Monday morning quarterback." In non-sports language, it's easy to criticize the "calls" of a quarterback or coach the day after the game. Mr. Adkisson stated the debtor should have been "shown the door," but this author believes that it is ethical and proper to initiate post-judgment asset protection planning in many situations, albeit, without engaging in fraudulent conveyances. It would be incorrect if, as a matter of course, attorneys told all potential clients, post-judgment, they will not assist with their planning.

For example, if the debtor is married and her husband has significant assets not subject to creditors' claims, shouldn't the attorney suggest that any assets passing upon the death of the debtor's spouse (should she predecease the debtor) pass into a discretionary trust for the debtor and not outright? The same approach should be considered to avoid outright distributions of life insurance on the life of the debtor's spouse or from future inheritances from the debtor's elderly parents' estate plan. Otherwise, the death of the debtor's spouse or parents could serve to enhance the debtor's assets that otherwise could be legally and properly protected post-judgment. Such planning is proper and not subject to fraudulent conveyance attacks. These are only a few examples; there are many more.

Ethical Duties

The most prevalent arguments against an attorney's ethical involvement in asset protection is that an attorney has a duty as an officer of the court and, thus, cannot act to impair collection of a court's judgment; and that assisting a client's fraudulent conveyance is actual fraud.[i] Although not binding on federal or state law, the American Bar Association Model Rules of Professional Conduct (hereinafter "Model Rules") has suggested the following:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.[ii]

A few states have addressed the ethics of asset protection planning. For example, in South Carolina, a proposed transfer from a spouse to prevent the possibility of future creditors recovering against the property is permissible "so long as there is no immediate reasonable prospect of a judgment being entered against the client."[iii] Several cases have found that debtors who engaged in asset protection planning prior to financial or legal difficulties will not result in the debtor being denied a discharge in bankruptcy.[iv]

California is unique in its approach to the ethics of asset protection planning, albeit on an opposite

spectrum than that of Florida. California has criminalized the act of causing a fraudulent conveyance.[v] In Ethics Opinion 1993-1 of the Legal Ethics and Unlawful Practice Committee of the San Diego County Bar Association, the Committee considered the extent to which a member of the State Bar of California could ethically advise or otherwise assist a client in avoiding existing and identifiable creditors' rights and protecting the client's assets. The Committee held that an attorney could not furnish advice or institute asset protection techniques unless the attorney did so in compliance with Rule 3-210 of the California State Bar Rules of Professional Conduct.[vi]

The Committee held that it would be a violation of the California State Bar Rules of Professional Conduct for the attorney to furnish advice or institute asset protection techniques where, as here, the client had existing and identifiable creditors. The Committee noted that under the Rules of Professional Conduct of the State Bar of California, Rule 1-100, Rules of Professional Conduct, In General, "…an Attorney does maintain a duty to protect the public and to promote respect and confidence in the legal profession…[a]t a minimum…the Attorney's assistance with, and facilitation of the Client's expressed, wrongful intent is intolerable as a matter of public policy."[vii]

Florida's Law: Conversion from One Exempt Asset to Another Not Fraudulent

According to Florida case law, if assets are exempt from creditors under non-bankruptcy law, they are not considered "assets" under the fraudulent conveyance statutes and, thus, conversion from one exempt asset to another form should not be considered a fraudulent conveyance. In *Sneed v. Davis*,[viii] the Florida Supreme Court stated:

> [A] debtor in disposing of property can commit a fraud on creditors only by disposing of such property as the creditor has a legal right to look to for satisfaction of his claim, and hence a sale, gift or other disposition of property which is by law absolutely exempt from the payment of the owner's debt cannot be impeached by creditors as in fraud of their rights. Creditors have no right to complain of dealings with property which the law does not allow them to apply on their claims, even though such dealings are with a purpose to hinder, delay or defraud them.[ix]

In *In re Goldberg*,[x] the Court determined that a debtor could not have formulated the fraudulent intent necessary to commit a fraud on his or her creditors if the source of the conversion was an exempt asset. The court determined that exempt assets were out of the reach of creditors as a matter of law.[xi] Courts in other states have also applied this ruling.[xii]

Based upon *Sneed* and *Goldberg*, even post-judgment planning to further protect already exempt assets should be effective. As a result, it is not uncommon practice to suggest post-judgment that assets held as tenants by the entirety be conveyed to the non-debtor spouse so that, should the non-debtor spouse die first, the debtor spouse will not inherit all of such property outright.

Post-Judgment Homestead Planning

The Constitution of the State of Florida provides unique homestead asset protection benefits, even those that may be obtained post-judgment. The Florida Supreme Court, in *Havoco of Am. v. Hill*,[xiii] stated that a Florida homestead, even if acquired with the intent to hinder, delay, and defraud creditors, is still afforded Florida's constitutional homestead protection unless the funds used for the purchase or improvements were obtained through fraud or egregious conduct.[xiv] Florida's constitutional homestead protection is subject to limitations under federal bankruptcy law in bankruptcy proceedings. Both the Model Rules and the Rules of Professional Conduct of the Florida Bar permit a lawyer to discuss the legal consequences of any proposed course of conduct with the client, and counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Based upon these ethical rules, would it not be appropriate for an attorney, even post-judgment, to respond to a client's question as to the ability to acquire or improve a Florida homestead, post-judgment, with an analysis of Florida homestead law, including the Florida Supreme Court case of *Havoco*, especially a client who already had a Florida residence?[xv] Why would it be more appropriate, based upon these facts, for the client to be "shown the door"? Certainly, this approach could be criticized, especially by attorneys unfamiliar with Florida law.

Yet, the *Havoco* case puts attorneys in a somewhat uncomfortable ethical dilemma when faced with a post-judgment client, as discussed above. I believe the Model Rules and the Rules of Professional Conduct of the Florida Bar provide significant support to, at least, inform the client of the *Havoco* case.

State laws differ significantly on the types of planning available to protect debtors. While Florida has a state Supreme Court decision stating the transfer of non-exempt assets into an exempt homestead with the intent to hinder, delay, and defraud creditors will not result in the loss of homestead protection from creditors, absent limited exceptions, California law provides that every person who is a party to a fraudulent conveyance is guilty of a misdemeanor. No wonder why an attorney practicing in California may have such a difference in opinion on the appropriateness of homestead planning in Florida.

As Billy Joel Said: What's the Matter with the Words I'm Using? (Well, Almost)

Mr. Adkisson is not the only person to suggest that the words "asset protection" should be avoided by asset

protection attorneys. During settlement discussions, creditors' rights attorneys, who have represented my clients, have cringed at the words asset protection, even if such services were rendered before any potential course of action against the current debtor. As a planner, I cannot say such concern is unfounded, especially where effective asset protection results in a debtor having significant exempt assets, yet not able to satisfy a judgment.

However, Asset Protection Committees are now a part of the American Bar Association, the American College of Trust and Estate Counsel (ACTEC), and many state bars, including the Florida Bar. My approach is to integrate asset protection planning with estate planning for clients who are willing to protect themselves from taxes and creditors. I accurately reflect whether we are assisting with asset protection in my engagement letter and timesheets.

It would be difficult, if not impossible, for me to deny that I am involved with asset protection planning after all the articles I have written and presentations I have made. Call it what you want, eventually, a good creditor's lawyer will show that the debtor received advice from an asset protection planner. The critical issue is instead whether the debtor received advice to make fraudulent conveyances from his or her attorney.

We May Provide Guidance Even Post-Judgment?

Asset protection is a term that encompasses a broad spectrum of potential planning alternatives. Certain planning initiated post-judgment or pre-judgment when the potential creditor and/or claim is known, such as the transfer of almost all of the debtor's assets to a foreign asset protection trust, after an accident or malpractice discovery should be set aside and attorneys should be responsible if they aided or abetted the debtor. However, there are many other situations, whether prophylactic or post-event, where there is likely to be some liability post-judgment that may or may not be covered by insurance and the debtor has significant other assets. Should the debtor be advised to come back after his or her case is resolved?

I do not believe an attorney needs to show such a client the door and instead, the attorney may want to attempt to quantify potential exposure and suggest planning for other assets after reserving sufficient sums for the debtor. Reflecting such planning in timesheets as asset protection/estate planning does not create a "timesheet slip up," but rather creates an accurate reflection of a proper and legal plan to protect the client/debtor, at least with respect to future creditors.

Neither our clients nor we, as advisors, should be incapacitated like a deer in headlights when we become aware of a judgment or potential judgment. Yes, there will be clients we cannot help or who may not want our help when we advise that we can only help with planning that is legal and proper. Many clients will appreciate and understand that we, as attorneys, are somewhat limited as to potential planning techniques, post-judgment. Nevertheless, oftentimes we can add significant value, even post-judgment.

Conclusion

It's easy to criticize, especially after a case where the specific holding is adverse to one component of an overall asset protection plan. The objective of this commentary is to help provide a balanced analysis of the benefits and burdens of assisting clients post-judgment and to question the notion that the phrase "asset protection" should be avoided.

Florida's homestead law has been referred to as a "legal chameleon." [xvi] Out of state lawyers frequently do not understand its nuances. The potential for effective post-judgment homestead planning is counter intuitive and lawyers in Florida need to carefully assess the ethics of advising clients about the *Havoco* Florida Supreme Court decision.

Based upon the discussion, above, my practice is to advise clients who call post-judgment or after a contingent liability exists, that while we are limited with the possible techniques as compared to what would be available before the liability came to light, it would be worthwhile to have a conference to examine whether any legal planning could be taken. Most clients believe the consultation was helpful, and they learn what they legally can and cannot do, and what assets are currently protected and those that are not.

I am proud to be an estate planning attorney with skills to integrate asset protection and estate planning, and do not disguise the description of my work in timesheets, client memoranda, our firm's website or marketing materials. With respect to asset protection, there is room for different opinions on how to best assist our clients as seldom is there a "correct" answer.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Barry Nelson

TECHNICAL EDITOR: DUNCAN OSBORNE

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CITATIONS:

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[i] See *Freeman v. First Union National Bank*, 865 So. 2d 1272 (Fla. 2004).

[ii] Model Rules of Prof'l Conduct R. 1.2(d) (1983), *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_2_scope_of_representation_allocation_of_authority_between_client_lawyer.html (each state has its own set of ethics rules, which should be considered in determining each attorney's exposure to ethical violations).

[iii] South Carolina Ethical Advisory Committee, Opinion 84-02 (May 25, 1984).

[iv] See *In re Oberst*, 91 B.R. 97 (Bankr. C.D. Cal. 1988); *Klein v. Klein*, 112 N.Y.S. 2nd 546 (N.Y. Sup. Ct. 1952); *Wantulak v. Wantulak*, 214 P.2d 477 (1950). See also Connecticut Informal Opinion 91-22 (Dec. 5, 1991)("… a lawyer may not counsel or assist a client to engage in a fraudulent transfer that the lawyer knows is either intended to deceive creditors or that has no substantial purpose other than to delay or burden creditors." "…while all fraudulent transfers are generally thought of as illegal and can be set aside, the Rules do not apply to all illegal conduct but rather to conduct that is known to be criminal or fraudulent.").

[v] Cal. Penal Code § 531.

Every person who is a party to any fraudulent conveyance of any lands, tenements, or hereditaments, goods or chattels, or any right or interest issuing out of the same, or to any bond, suit, judgment, or execution, contract or conveyance, had, made, or contrived with intent to deceive and defraud others, or to defeat, hinder, or delay creditors or others of their just debts, damages, or demands; or who, being a party as aforesaid, at any time wittingly and willingly puts in, uses, avows, maintains, justifies, or defends the same, or any of them, as true, and done, had, or made in good faith, or upon good consideration, or aliens, assigns, or sells any of the lands, tenements, hereditaments, goods, chattels, or other things before mentioned, to him or them conveyed as aforesaid, or any part thereof, is guilty of a misdemeanor.

[vi] Cal State Bar Rules of Prof'l Conduct R. 3-210 (1992) , *available at* http://rules.calbar.ca.gov/Rules/RulesofProfessionalConduct/CurrentRules/Rule3210.aspx ("A member shall not advise the violation of any law, rule, or ruling of a tribunal unless the member believes in good faith that such law, rule, or ruling is invalid.").

[vii] Ethics Opinion 1993-1 of the Legal Ethics and Unlawful Practice Committee of the San Diego County Bar Association, *available at https://www.sdcba.org/index.cfm?Pg=ethicsopinion93-1*.

[viii] 135 Fla. 271 (Fla. 1938)

[ix] *Id.* at 276-77.

[x] 229 B.R. 877, 882 (Bankr. S.D. Fla. 1998).

[xi] *Id.* at 882. See also *In re Simms*, 243 B.R. 156, 160 (Bankr. S.D. Fla. 2000)

In addition to homesteads and annuities, Florida exempts wages of the head of a family, cash surrender values of life insurance policies, pension plans, individual retirement accounts, tenancy by the entireties property (immune from execution by creditors of one of the joint tenants in a tenancy by the entireties), certain types of government benefit plans, etc.

[xii] See e.g., *McKillip v. Farmers' State Bank*, 151 NW 287 (N.D. 1915); *Cook v. Carter*, 160 P. 877 (OK 1916); *Simunek v. Millay*, 195 NW 507 (S.D. 1923); *Morse v. Andrews*, 28 A.2d 393 (VT 1942); *Fourth Bank of Garden City v. Alex*, 794 P.2d 1177 (Ct. App. KS 1990).

[xiii] 790 So. 2d 1018, 1029 (Fla. 2001).

[xiv] Article X, §4 of the Florida Constitution provides as follows:

(a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person:

(1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality; or if located within a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or the owner's family...

(b) These exemptions shall inure to the surviving spouse or heirs of the owner.

[xv] See also *Conseco Servs., LLC v. Cuneo*, 904 So. 2d 438, 440 (Fla. 3d. DCA 2005) (quoting *Havoco*); *Pelecanos v. City of Hallandale Beach*, 914 So. 2d 1044, 1047 (Fla. 4th DCA 2005)

The homestead provision of our Constitution sets forth the exceptions and provides the method of waiving the homestead rights attached to the residence. These exceptions are unqualified. *They create no personal qualifications touching the moral character of the resident nor do they undertake to exclude the vicious, the criminal, or the immoral from the benefits so provided. The law provides for punishment of persons convicted of illegal acts, but this forfeiture of homestead rights guaranteed by our Constitution is not part of the punishment*. [*emphasis added*]

[xvi] Florida's homestead provisions have been characterized as the State of Florida's "legal chameleon." See *Chames v. DeMayo*, 972 So. 2d 850 (Fla. 2007) (quoting *Snyder v. Davis,* 699 So. 2d 999, 1001-02 (Fla. 1997)). Readers of LISI have been previously warned about Florida's unique homestead provisions, see Rubin, Chuck Rubin: Restrictions on Transfers of Florida Homestead Property Chart, LISI Asset Protection Planning Newsletter #210 (Oct. 4, 2012) at http://www.leimbergservices.com and Baskies, Jeff Baskies: Please Don't Plan with Your Clients' Florida Homesteads, LISI Asset Protection Planning Newsletter #209 (Sept. 24, 2012) at http://www.leimbergservices.com.