Portable Offshore Asset Protection Trusts

M. Wayne Patton

[Editor’s Note: This is a guest post from Wayne Patton, an “asset protection” attorney. We have no financial relationship at this time. Be sure to read the entire post and all the comments below it for multiple perspectives on the subject.]

At its core, asset protection is nothing more than risk management. Unlike liability or malpractice insurance, asset protection is active planning that covers all sorts of liabilities from professional to personal, and if done properly, it will also allow you complete control over the investments inside your plan along with the option to remove your assets from the plan without any sort of penalty. For that reason alone, asset protection planning is far superior to whole life insurance.

Separate Ownership From Control

The legal basis for asset protection planning is the age-old concept of separating legal ownership from beneficial use and control of assets. Most physicians and almost all entrepreneurs take advantage of this legal separation every day without consciously thinking about it. Any time you direct the actions of an LLC, S Corporation, or a limited
partnership, you are managing assets, employees, and liabilities that don’t belong to you personally. That’s true even though you personally benefit from the profits and capital gains appreciation of the underlying business entity. From this example, let’s set out Rule #1 of Asset Protection Planning:

**It is legally permissible to separate legal ownership from beneficial use and control.**

For purposes of protecting your wealth, there is no tool better suited to take advantage of Rule #1 for the protection of personal wealth than a Portable Asset Protection Trust, which very effectively removes individuals from legal title while allowing them to retain exclusive control and use of the assets. The reason this protects the assets is that if you don’t technically, legally own an asset, that asset cannot be taken from you, even if you have the right to use and benefit from the asset.

**Different Place, Different Laws**

Before we dive too deeply into specifics, let’s first identify Rule #2 of Asset Protection Planning:

**You have the legal right to determine the choice of law that governs a trust.**

Rule #2 is what allows so many promoters to legally tout and create offshore trusts for their clients. To be sure, there are many benefits to being offshore. It is certainly an ironclad form of asset protection available for non-exempt assets (i.e. assets outside of a 401(k) or homestead exemption, for example).

Offshore trusts work like this: Assets are titled in the name of an offshore trust of which you are a beneficiary (and which you control). If you are personally sued and have a judgment entered against you, the assets in the offshore trust are off
limits. Sure, an aggressive attorney or even the court might send letters to the offshore trust company demanding payment from trust assets, but those letters will be put in an offshore wastebasket!

Is It Legal?

When I describe this to potential clients, the first question asked is “How can that be legal?” Well, reference Rule #2 of Asset Protection Planning above. You have the legal right to choose the jurisdiction that governs a trust. If the jurisdiction you choose happens to have a law in place that says it will ignore judgments of U.S. courts, that rule will be respected.

At this stage of the game, a lot of people ask if they can be held in contempt of court if an offshore trust doesn’t pony up on a judgment. Courts certainly have gone to this extent in the past, but in the majority of cases, the answer is “No.” I’ve never had a client held or even threatened with contempt. In the reported cases where contempt has been used as a remedy, the timing of trust creation or funding has been questionable to say the least (i.e. trusts were created or funded after a claim or lawsuit was filed). All of my clients also benefit from other customized tools I’ve developed that are intended to reduce the likelihood of contempt to a minuscule risk.

Don’t Go Offshore Just Yet...

What most proponents of offshore trusts won’t tell you is that maintaining an offshore trust is extremely expensive. It requires an annual accounting to the I.R.S., which usually costs between $3,000 and $5,000, and it requires that you have an offshore trustee on retainer (about $3,500). That’s obviously significant. In order to curb those costs, I put many of my clients into Portable Offshore Trusts. The benefits
of this type of trust are that it’s initially a U.S. based trust, it is ignored for tax purposes, and it can be moved offshore without consequence if a threat to assets ever arises. While it’s generally not okay to create or fund a trust when there’s legal trouble on the horizon, there is nothing wrong with moving an existing trust offshore to take advantage of favorable international laws in the face of potential litigation, so long as the trust is properly structured on day one.

Benefits of a Family LLC

While every situation is different, in many cases asset protection plans have two components. The first is a Family Limited Liability Company or Family LLC. The Family LLC usually holds “safe assets” directly. Safe assets consist of cash, stocks, bonds, precious metals—pretty much anything that can’t generate a liability. “Risky assets” (e.g. rental real estate, airplanes, etc.) are best compartmentalized into sub-LLCs (i.e. an LLC that is owned by the Family LLC).

The Family LLC is wholly owned by a Portable Offshore Trust. This structure gives you the most privacy available under the law, and it gives you the option to legally upstream your assets into the Portable Offshore Trust and into a foreign jurisdiction without any hiccups if you’re ever threatened with a lawsuit.

Insurance Can Encourage Lawsuits

I’m a fan of insurance. Buy a reasonable amount for general personal liability and as required by law. That said, insurance is not an adequate substitute for asset protection planning. Insurance actually encourages litigation! Asset protection discourages (or even dissuades litigation) and certainly provides an incentive for quick and reasonable settlements. I have talked to many malpractice defense and
plaintiffs attorneys about this issue, and one thing is clear: Physicians without insurance do not typically get sued! So going bare has its benefits, especially if you have asset protection planning.

If you have more questions about asset protection planning, feel free to give me a call at (850) 803-1166. Please mention that you found me via The White Coat Investor. Finally, here’s a quick video that basically sums up this article with a quick comparison to bear bags used while camping.

What do you think? Have you “gone offshore?” Do you have enough non-exempt assets to make this worthwhile? Have you formed a family LLC? Comment below!