HEART OF AMERICA FELLOWS INSTITUTE

ASSET PROTECTION PLANNING

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By

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I. **Introduction**

A. State Specific

1. Most rules governing asset protection are state specific (exception is bankruptcy, which is governed in general by Federal law). This outline covers general principles and specific state law is located at the end.

2. Which state law applies is generally determined by the state of the debtor's residence. But the law of other states where debtor's property is located may govern rights and protection of that property.

3. Keep in mind that clients can move, and planning may include protecting assets from creditors of children who may be residents of other states.

B. Context

1. When you are doing planning (business or estate), this is always a collateral but important consideration (both from a positive and negative standpoint).

2. The planning may be focused directly on asset protection.

3. If the client comes to see you about an immediate, specific creditor concern, refer them to a specialist in bankruptcy/debtor rights.

C. Source of Liability

1. Upstream Protection.

   a. The source of the liability is the asset and you want to prevent the creditor from reaching other assets of the owner.

   b. Examples of assets that generate liability: apartment building with suit by tenants; active business with trade, tort and contract creditors; any entity with employees and potential employment claims.

   c. Having an asset owned by a limited liability entity will cut off upstream liability unless (i) the owner is personally at fault or liable directly such as through a guarantee of debt, (ii) the corporate veil is pierced, or (iii) distributions are "clawed-back" to the extent required by state law.

2. <u>Downstream Protection</u>.

   a. The source of the liability is the debtor and you want to prevent the creditor from reaching assets the debtor owns.

   b. Exempt assets are protected, as well as those not reachable by a creditor because of how owned.

   c. Use of entities to own assets may provide protection.

D. <u>Who is the Creditor</u>?

1. <u>Tort creditors</u>. There are no written agreements or security interests, can be identified in advance only in general (high risk profession, drive a car, etc.), can insure against.

2. <u>Contractual Liability</u>. Contract will spell out the rights of third parties and debtor's obligations. May be secured or unsecured or include personal guarantees. Ability to draft protections in the contract is subject to negotiation strength.

3. <u>Fiduciary Duties</u>. Can identify risk from role as a director, officer, partner, manager, or trustee; avoid by using care and paying attention and being proactive; can insure against.

4. <u>Internal Revenue Service</u>. A different set of rules apply since not restricted by state law. "[One] look[s] to state law to determine what rights the taxpayer has in the property the Government seeks to reach, then to federal law to determine whether the taxpayer's state-delineated rights qualify as 'property' or 'rights to property' within the compass of federal tax legislation." <u>Drye v. United States</u>, 528 U.S. 49, 58 (1999). "In looking to state law, we must be careful to consider the substance of the rights state law provides, not merely the labels the State gives these rights or the conclusions it draws from them. Such state law labels are irrelevant to the federal question of which bundles of rights constitute property that may be attached by a federal tax lien." <u>United States v. Craft</u>, 535 U.S. 274, 279 (2002). State law exempting a debtor's property from creditors does not affect the reach of a federal tax lien. Treasury Reg. §301.6321-1; <u>United States v. Bess</u>, 357 U.S. 51, 57 (1951). Debts for taxes may not be dischargeable in bankruptcy. 11 U.S.C. 523(a)(1).

5. <u>Trustee in Bankruptcy</u>. A different set of rules can apply since the trustee "steps into the shoes" of the debtor, and can set aside non-executory contracts. For example, cases have held that a trustee in bankruptcy can become the general partner of a limited partnership or a member with majority vote. And the exemptions may be quite different.

6. Spouse. Divorce claims, claims against the estate on death. Pre-marital agreements are very helpful if carefully drafted, properly executed, and assets are not later comingled. Consider setting up a self-settled spendthrift trust before the marriage. Obligations to support are often exceptions to otherwise workable asset protection. Divorce court likely to do equity and not always constrained by what is otherwise good asset protection (spendthrift trusts set up by parents) or arguments that the assets are not "marital" property (e.g. brought into the marriage, inherited).

7. Medicaid. Federal law disallows states from making recoveries on the individual estate of the Medicaid recipient until after the death of the recipient's surviving spouse. 42 U.S.C. 1396p(b)(2).

E. Separate Assets from Liabilities

1. Do not have the "safe" spouse own assets that can give rise to liabilities, guarantee debt, serve as director, etc., and avoid spousal guarantees. (How sure can you be that one spouse is "safe?" Don't put all your eggs in one basket.)

2. Consider liability attributable to owner from "toys" such as motorcycles, boat, jet ski, airplane. Should these be owned jointly? If owned jointly, is the liability more likely to be joint and thus the creditor can reach tenants by entirety property? Is a parent liable for what happens when the teen drives a car owned by the parent?

3. Do not give a security interest in assets that are otherwise exempt.

F. What Happens when Creditor Shows Up

1. State Law Remedies.

a. Foreclose liens in collateral.

b. Create and foreclose judgment lien in debtor's property.

c. After obtaining a money judgment, requests a writ of execution be issued to the sheriff or levying officer who seizes and sells the debtor's property.

d. Garnish debtor's wages and funds in bank accounts.

2. Why Debtors End Up in Bankruptcy Court.

a. State law collection methods put immense pressure on debtors who are in default on their monetary obligations. This pressure may come from creditors garnishing wages, repossessing vehicles, and foreclosing on the debtor's house.

b. Debtors commonly file bankruptcy for two reasons. First, to obtain the benefit of the bankruptcy automatic stay. 11 U.S.C. 362(a). Filing a bankruptcy petition operates as a stay of any act to collect or recover a claim against the debtor. The second reason debtors file bankruptcy is to have their debts discharged or adjusted (depending on the type of bankruptcy chapter under which the debtor files). 11 U.S.C. 727.

II. Exempt Assets

A. Certain Assets Exempt

1. Certain assets (known as "exempt" assets) cannot be reached either by a judgment creditor or by creditors in a bankruptcy action.

   a. In a bankruptcy context, federal law permits states to set their own bankruptcy exemptions and to give debtors the choice to use either state or federal exemptions.

   b. In a non-bankruptcy context, state exemptions are available. Which state exemptions apply depends on the laws of the state of the debtor's residence. (See charts at end for various state law exemptions.)

2. In some cases an insolvent debtor may successfully convert non-exempt property into exempt property on the eve of bankruptcy. In re Montanaro, 398 B.R. 688 (Bankr. W.D. Mo. 2008); McConnell v. Wolcott, 70 Kan. 375 (1904).

3. If the debtor gives a creditor a security interest or mortgage in a particular piece of property, even though it is otherwise exempt, that creditor can reach that property for satisfaction of that debt.

B. Special Homestead Considerations

1. Some states have a homestead exemption for the principal residence.

2. Under the bankruptcy law, a debtor cannot exempt under state law a homestead to the extent of an "interest" acquired by the debtor within 1,215 days prior to filing for bankruptcy that exceeds $160,375. 11 U.S.C. 522(p).

   a. Does acquiring an interest include paying down a mortgage on a home purchased before the 1,215 days? This court concluded it was. Central Plains Steel Co. v Bruce Earl Anderson, D. Kan., 5/19/09, 2009 WL 1407786.

b. The Bankruptcy Code prohibits conversion by a debtor of nonexempt property into a homestead exemption with the intent to hinder, delay, or defraud a creditor. 11 U.S.C. 522(o)

3. The homestead exemption in Kansas is not lost if title is transferred to a revocable trust. Redmond v. Kester, KS Supreme Ct, 7/11/07.

C. IRAs and Qualified Retirement Plans

1. Federal law exempts qualified retirement plans which are subject to ERISA from creditors. 29 U.S.C. 1001 et seq.

2. Many states also have an unlimited exemption for IRAs and qualified retirement plans.

3. Under the bankruptcy law, the state law exemption of an IRA is limited to $1,283,025 for both a traditional and Roth IRA. 11 U.S.C. 522(n). This limit also applies to a rollover from a SIMPLE IRA or SEP. This cap does not apply, however, to an IRA that has been rolled over from a qualified retirement plan or is part of a qualified retirement plan. Therefore, take caution when rolling over any qualified retirement plan to keep it separate from a regular IRA.

D. Inherited IRAs

1. The unlimited IRA exemption does not necessarily protect an inherited IRA from the beneficiary's creditors.

2. The U.S. Supreme Court has held that an inherited IRA is not exempt under the federal bankruptcy exemptions. Clark v. Rameker, 134 S. Ct. 2242, 189 L. Ed. 2d 157 (2014). The Supreme Court defined an inherited IRA as "a traditional or Roth IRA that has been inherited after its owner's death." It went on to note that a surviving spouse has the choice to roll over the funds into his or her own IRA or to keep the IRA as an inherited IRA.

3. States that have opted out of the federal bankruptcy exemptions may have separate statutes which would explicitly protect inherited IRAs.

4. What rule applies to an inherited IRA will depend on the beneficiary's state of residence. Therefore, for example, if the owner of the IRA or retirement plan resides in Missouri, but the beneficiary resides in Kansas, there will be no protection from the beneficiary's creditors after the owner's death.

5. The risk of an inherited IRA being subject to the beneficiary's creditors can be reduced by leaving the IRA in a spendthrift trust for the beneficiary. Such a trust would need to be a "see-through trust" to allow

the beneficiary's life expectancy to be used for purposes of required minimum distributions.

a. Conduit Trusts. Trustee must distribute all distributions received from the IRA to the beneficiary and cannot accumulate distributions from the IRA within the trust. Only the current beneficiary is considered – remainder beneficiaries do not need to be individuals for the current beneficiary's life expectancy to be used for determining minimum distributions.

b. Accumulation Trusts. Trustee has discretion to retain IRA distributions within the trust, maintaining creditor protection. However, all current and remainder beneficiaries must be individuals and income retained in the trust is taxed at the trust tax rates rather than individual rates. Also, only certain individuals may be disregarded for purposes of determining the designated beneficiary for required minimum distribution purposes.

6. It is not clear what rule applies to an IRA in the hands of a spouse, as a spouse beneficiary can either roll over the account into the spouse's own IRA or transfer into an inherited IRA.

a. Based on the Supreme Court's ruling in Clark, a spouse beneficiary who elects to roll an IRA into his/her own IRA will likely still receive the same protection as the original owner, because the spouse can make contributions to the account, is not required to take minimum distributions each year until attaining age 70½, and is not exempted from the early withdrawal penalty by virtue of having inherited the account.

b. However, a spouse who transfers to an inherited IRA is unlikely to receive the same protections and instead will likely be treated the same way any non-spouse beneficiary would be treated.

III. Forms of Ownership

A. Tenants by Entirety

1. Tenants by entirety ("TBE") is a form of ownership between spouses created by state law which includes right of survivorship as well as protection from the creditors of just one of the spouses. Among states that have TBE there can be many variations. For example, Missouri is a full-bar TBE state as to real estate and personalty located in Missouri and intangibles owned by a Missouri resident.

2. Generally TBE protection should extend to real property owned in a full-bar jurisdiction regardless of the residence of the debtor. See In re Cauley, 374 B.R. 311 (Bankr. M.D. Fla. 2007) (holding the mere fact that debtor

was no longer a resident of Florida, where entireties property was located, did not affect his ability to claim entireties exemption therein). But see In re Sumpter, 241 B.R. 640 (Bankr. W.D. Mo. 1999) (holding that because debtors elected Texas exemptions, rather than Missouri exemptions, so tenancy by the entirety is not applicable).

3. Residents of a TBE state should consider owning real estate in a non-TBE state through an entity like an LLC, as an LLC interest is an intangible.

4. TBE ownership has the following requirements, implications:

    a. Having a spouse and giving the spouse the right of survivorship. (Thus it cannot be used to fund a trust for the surviving spouse, except for narrow exceptions given below.)

    b. If the spouses divorce and the property is awarded to the debtor spouse, it will be subject to creditors' claims.

    c. If the non-debtor spouse dies first, then the debtor spouse will own the property outright, thus subjecting the property to the claims of creditors.

    d. If the debtor spouse dies first, then the property belongs solely to the non-debtor spouse, thus escaping the claims of creditors.

    e. Can use to fund a trust for the survivor by having the survivor disclaim the half owned by the predeceased spouse if the applicable estate planning document will pass that half into the trust without direction by the survivor. Depending on the state, however, a disclaimer may be a voidable transfer.

5. Missouri law permits a debtor spouse to convert TBE property to the non-debtor spouse or for both spouses to transfer to third persons without being a voidable transfer.

6. Missouri "Qualified Spousal Trusts" ("QSTs") Mo. Rev. Stat. §456.950, allows married persons to transfer property into a trust and obtain (or retain) the asset protection of TBE ownership. A transfer to such a trust is subject to the Missouri voidable transfers act. The residency of the married couple establishing the Missouri QST may have a material effect on whether the statutory protections apply.

B. Other Forms of Joint Ownership

1. Joint Tenancy with the Right of Survivorship. Provides only minimal protection during life. The creditor of one tenant can reach the tenant's fractional interest at any time during the joint tenancy. There can be an issue regarding contribution. The death of the debtor will protect the

property only if the creditor has not perfected his or her interest before the death.

2. Tenancy in Common. Creditor of a tenant can reach the debtor's undivided fractional interest. Since survivorship is not an element of tenancy in common, the death of the debtor tenant will not prevent a creditor from reaching that tenant's interest. Will have the obstacle of partition if real estate, thus making it somewhat less attractive to the creditor.

3. Joint Trust. If a married couple has a joint trust (and it is not a TBE trust), this may allow a creditor of the deceased spouse to reach all the trust assets if the spouse had rights over all the trust assets, whereas owning the property as joint tenants with right of survivorship would have avoided those creditors.

C. Transfer on Death ("TOD") or Pay on Death ("POD").

1. Depending on state law, This form of ownership can provide some protection for assets otherwise owned by a debtor because instead of passing to the estate on death it will pass to the beneficiary free of the debtor's debts under some state laws.

D. Trusts

1. Revocable Trust. State law generally provides that if a person creates a trust he/she can revoke, that person's creditors can reach the assets in the trust. There would be certain procedural steps that creditors must take to reach those assets after the grantor's death, however.

2. Irrevocable Trust. If a spouse or parent transfers assets to a properly drafted trust for the debtor (during life or on death), this is generally effective against the beneficiary's creditors. There may be jurisdictional issues regarding which state's law applies when the beneficiary lives in a different state than that of the trust's governing law.

a. Spendthrift Provision – If state law recognizes the validity of a spendthrift clause (one that restrains either the voluntary or involuntary transfer, or both, of the beneficiary's interest), then that generally protects the trust assets from the beneficiary's creditors. The protection only exists so long as the asset is in the trust. Some states that recognize spendthrift clauses still allow certain exception creditors, such as child support and maintenance judgment creditors, to override the spendthrift protections.

b. Discretionary Trusts – Additional protection may be added, or protection gained in states that do not recognize spendthrift clauses) by providing that all distributions shall be in the trustee's sole discretion.

c. Withdrawal Powers - Creditors may reach assets of a trust over which a beneficiary has a power of withdrawal during the time that the beneficiary may exercise such power.

3. Self-settled Asset Protection Trusts.

a. The general rule for irrevocable trusts in most states is that if the grantor of the trust is a beneficiary, a creditor can reach the maximum amount that can be distributed to or for the grantor's benefit.

b. Some states have changed this rule to allow what are referred to as domestic self-settled asset protection trusts ("DAPT").

c. Residents of states that do not allow DAPTs have attempted to create DAPTs in states that do. This has met with varying degrees of success, depending on whether the case ends up in bankruptcy court (low chance of success), where the assets are located and the other connections to the DAPT state, and whether the resident state has a strong public policy against a DAPT (also a low chance of success).

d. In re Huber, 493 B.R. 798 (Bankr. W.D. Wash. 2013): The debtor was a resident of Washington state and created a self-settled trust under Alaskan law. The case has bad facts because the debtor transferred almost all his assets to the trust, the debtor had a minimal relation to Alaska (opening a $10,000 certificate of deposit there), a substantial relation to Washington (residing in Washington), and all trust assets were located in Washington (except the aforementioned CD). The court held that enforcing the trust would violate Washington's strong public policy against self-settled asset protection trusts.

e. But even if a trust is successfully created as a DAPT, funding the trust must still pass muster under the voidable transfer laws.

f. In re Mortensen, No. A09-00565-DMD, 2011 WL 5025249 (Bankr. D. Alaska May 26, 2011): The debtor created an asset protection trust in Alaska for the benefit of himself and his descendants. Though he was barely solvent at the time of the transfer, he subsequently accrued substantial debt and eventually declared bankruptcy. The court held that the transfer of property to the trust could be avoided because the document explicitly stated asset protection was a purpose of the trust. In addition, the debtor was in the midst of some "very lean years" financially at the time the trust was created, had substantial credit card debit, and used a $100,000 transfer he received from his mother to transfer to the trust and speculate on the stock market rather than paying off existing debt. Therefore, the court concluded he created the trust with the intent to hinder, delay and defraud present and future creditors and avoided the transfer of property to the trust.

E. Exempt Assets POD to Trusts

1. Although in general exemptions are not affected by death, there are some cases (and potentially a trend) that hold paying exempt assets on death to a revocable trust will cause them to be subject to a decedent's creditors. There is Kansas Court of Appeals case to this effect regarding an IRA. Commerce Bank, N.A. v. Bolander, 44 Kan. App. 2d 1, 239 P.3d 83 (2007). The court held that the creditor could attach the deceased settlor's IRAs because the decedent's revocable trust was the beneficiary of the IRA, pursuant to the Kansas UTC provision that a revocable trust is liable for the decedent's creditors after the decedent's death. This holding was reached in spite of the fact that the decedent's creditor could not have reached the IRA during the decedent's life because the IRA was an exempt asset. Most practitioners believe that the exempt status should trump over the trust law provisions with regard to debts of a decedent (as opposed to the issue regarding an inherited IRA where the debts are that of the beneficiary of the IRA).

2. This provides a dilemma if you want to avoid both the decedent's creditors and the beneficiary's creditors. Consider having the beneficiary be a trust that is irrevocable during the decedent's life and is a spendthrift trust for the beneficiary after death. Also consider having the beneficiary be a subtrust set up after death rather than the residue of the trust.

F. 529 Plans

1. Bankruptcy law exempts 529 plans subject to certain limitations and conditions.

   a. For the 529 plan account to be exempt, the account beneficiary must be a child, stepchild, grandchild, or step-grandchild (including a legally adopted child or a foster child) of the individual who files for bankruptcy.

   b. In addition, contributions made to all 529 plan accounts for the same beneficiary are exempt as follows: (i) there is no exemption for assets up to $5,000 if they have been contributed less than 365 days before the bankruptcy filing, (ii) there is an exemption for amounts up to $5,000 if they have been contributed between 365 and 720 days before the bankruptcy filing, and (iii) 529 plan accounts are fully exempt if they have been contributed more than 720 days before the bankruptcy filing.

c. Assets held in a 529 plan account are not exempt from debt for domestic support obligations, however.

2. States may also exempt 529 plans by statute in the non-bankruptcy context.

G. <u>UTMA or Conservatorship/Guardianship</u>

1. These accounts are subject to the beneficiary's creditors.

IV. <u>Planning with Entities</u>

A. <u>Choice of Entity</u>

1. <u>Corporations</u>. Will protect from upstream liability, but not from downstream liability. Exception is one created under a state that has adopted a charging order concept for corporations, like Nevada.

2. <u>General Partnerships</u>. No protection from upstream liability unless a limited liability election is made (if available under state law); does have a charging order concept so some downstream protection.

3. <u>Limited Partnerships</u>. General partner is fully liable for partnership liabilities (i.e. no protection for upstream liability), unless a limited liability limited partnership ("LLLP") election is made (if available under state law), or the general partner is an entity with few assets.

4. <u>Limited Liability Companies</u>. Will protect from upstream liability. Can protect from downstream liability if formed in favorable state, and properly structured and drafted, due to charging order and assignee concepts.

B. <u>Relevant Legal Principles</u>

1. <u>Charging Order</u>. This is a state law creditor remedy which entitles the creditor to receive any amounts otherwise distributed to the debtor member of an LLC. To provide the maximum downstream protection, the charging order must be the exclusive remedy with no right to foreclose on the debtor's interest.

a. Single member LLCs (or other entities) are not advisable for downstream protection as many jurisdictions take the position that a charging order is intended to protect the other "innocent" owners and thus the LLC structure is ignored if a single member.

2. <u>Foreclosure</u>. Not all state statutes refer to this directly, but the concept of foreclosure (or civil law remedy of execution) means the creditor can become the member, either as an assignee or in some cases the substitute member. If charging order is an <u>exclusive</u> remedy, this means the creditor cannot foreclose and become an owner.

3. <u>Forced Dissolution</u>. Some state laws and some bankruptcy cases allow a creditor who has foreclosed to force dissolution.

4. <u>Assignee.</u> Refers to someone to whom the membership interest has been transferred, but who has not been admitted as a substitute member. An assignee has the economic benefits of ownership, but no management or voting rights. It usually takes the unanimous vote of the members to make an assignee a substitute member under state law, so this is the default provision and thus binding on third party creditors.

5. <u>Income Taxation</u>. An assignee is taxed on the distributive share of the taxable income from the entity. This can make assignee status even less attractive, particularly if no distributions are being made that otherwise could be used to pay the tax. It is not clear, and may vary by state, whether a creditor with a charging order is taxed on the distributive share of the taxable income.

6. <u>Choice of Law</u>. There are a number of potential jurisdictions whose law may apply: state where entity is formed, state where underlying asset is located or business operates, state of debtor's residence, state where creditor is located, state where the event giving rise to the liability occurred. You do not always know which jurisdiction's law will apply to a creditor's claim at the time you set up an entity, and the facts can change.

7. <u>Bankruptcy</u>. Bankruptcy law has a different set of issues, as the trustee in bankruptcy is not necessarily bound by state law and the "charging order only" feature, particularly if the trustee is allowed to "step into the shoes" of the debtor and thus become the member. The application of the bankruptcy law can vary considerably between circuits and between judges.

8. <u>Piercing the Corporate Veil</u>. This doctrine allows a creditor of the entity to reach the assets of the owner as an exception to the otherwise limited liability aspect of the entity, thus resulting in upstream liability. The doctrine of "alter ego" is a similar concept applied between sister entities. The doctrine is based on the facts and circumstances, but generally failing to follow corporate formalities (i.e. you don't treat the entity as separate), insufficient capital or siphoning off the profit, and transactions not arm's length, are the most significant facts.

C. Planning Tips

1. Entity & Jurisdiction Choice. Use an LLC formed in a state with favorable laws. Since there are several you can select from, select a favorable jurisdiction with as many other connections as practical.

2. Convert Corporation to LLC. If you have an existing entity taxed as a corporation, and there is too big a tax cost to convert to a regular LLC, consider these options:

   a. Convert to a Nevada corporation where there are charging order restrictions to the rights of a judgment creditor under Section 78.746 of Nevada's Private Corporations Statute. Presumably those rights are applicable in the bankruptcy of a debtor shareholder like for an LLC.

   b. Convert to an LLC under state law and make the election to be taxed as an S or C corporation. Great care must be taken, however, to make sure that the entity meets the qualifications for an S corporation, including restrictions on type and number of shareholders and no second class of stock.

3. Separate Assets. Keep "safe assets," like cash, in entities separate from high-liability assets or businesses. If the high liability business has a wholly owned subsidiary with the safe assets, they are fully vulnerable to the business liabilities. Thus, you either need to form a parent that owns subsidiaries, each with separate assets like a business and related real estate. In that structure, the safe assets can be in the parent.

4. Secure Guaranteed Debt. If the client has personally guaranteed company debt, make sure that debt is secured so it gets paid first out of the company assets before un-guaranteed debt.

5. Carefully Choose Directors. Consider whether directors, managers, officers, etc. will have liability in that capacity and decide whether it is better for others to serve; e.g. do not automatically name a spouse who otherwise would not have liability for the business.

6. Owners.

   a. Avoid single member LLCs. In a single owner LLC, the trustee in bankruptcy or creditor may be allowed to foreclose even in "charging order" states, and thus becomes the sole owner and can dissolve the entity. Attempts to have "peppercorn" (sham, token) members to avoid may not work.

   b. Avoid one owner having a majority to minimize the risk that a trustee in bankruptcy or creditor gets the majority vote.

c. Avoid a married couple together having a majority if they are both liable on the same debt, such as bank guarantees.

d. Entities with multiple owners (and with no owner in control) are stronger protection. Consider requiring manager decision (in sole discretion) and approval by a super-majority vote of the members for key actions like distributions.

e. Having the owner be an irrevocable trust as the ultimate protection from downstream liability. Best option is a trust set up by a third party such as a parent or spouse. Another option is a self-settled asset protection trust, subject to jurisdictional and voidable transfer issues.

7. <u>Move Voting Rights.</u> For corporations, consider giving proxies or setting up voting trusts to vote the stock, or issue non-voting stock. Someone has to have the right to vote, however, so can you "guess" who will be the debtor ahead of time, or put this in place at the last minute?

8. <u>No Economic Interest.</u> If state law allows, consider eliminating the requirement that a member have an economic interest in the LLC, so that termination of a member’s economic interest (such as due to transfer to an assignee creditor), will not terminate the member’s right of management, thus the assignee of the sole member(s) cannot force a distribution or liquidation.

9. <u>Personal services</u>. The separation of management from the economic interest distinguishes LLCs from corporations and is a helpful concept when dealing with creditors, particularly in bankruptcy, as personal services are not assignable to a creditor and it makes it harder for the creditors to assume any management role with regard to the LLC.

a. Require current and substitute members to serve as managers/officers and attend meetings, and state that services provided by each owner are critical and unique and failure to perform will result in some penalty.

b. If applicable, state that family members have experience or expertise that makes them uniquely suited to being the managers, and require multi-generation to participate in management to transfer knowledge between family members.

c. Include a provision that automatically terminates an owner's voting and managerial rights upon the bankruptcy of that owner, which should be binding since based on personal trust, etc.

10. <u>Fiduciary Duties</u>. Do you want the managers or members to have fiduciary duties? If the LLC is insolvent, giving the managers a fiduciary

duty may create a cause of action for the creditors of the limited liability company against its managers, and a trustee in bankruptcy of creditor may be able to compel the managers or members to make a distribution if they can show failure to do so is contrary to the best interests of the members. On the other hand, a fiduciary duty supplies more "personal trust" aspects. Some state laws supply a fiduciary duty which cannot be negated by agreement, some do not so can be added (or not) by agreement.

11. Affirmative Obligations. Include affirmative obligations as a defensive measure, such as an obligation to contribute capital (but based on vote of multiple owners with some cap). If the obligation is too remote, hypothetical, or token, it likely will not help, however.

12. Make Distributions Harder. A charging order does not protect assets actually distributed by the LLC, so a creditor with a charging order (or an assignee) will want to force distributions. Therefore, it is best if distributions are discretionary, perhaps by manager decision with member approval. It is also best to require unanimous consent of the members to liquidate.

13. Consider Purchase & Other Rights.

    a. The traditional approach has been to include an option to purchase an interest if transferred to a third party not of a permitted class (such as a creditor), combined with a heavy discount in determining the purchase price and a long term payout with a low interest rate. This is likely not to work if it only applies to a purchase from a creditor, particularly in bankruptcy.

    b. Keep in mind that being bought out for cash, even at a discount, may be more attractive to the creditor than holding a charging order or being an assignee, with uncertainty about when and if distributions will be made and potential for being subject to a share of the LLC's taxable income.

    c. If the operating agreement includes a mandatory purchase or a put, this will be very favorable to and enforceable by a creditor. This is a reason to avoid a mandatory purchase except on circumstances such as death.

    d. If the operating agreement includes a drag-along right, consider what happens if this becomes exercisable by a trustee in bankruptcy or creditor, as this may allow them to sell the entire company and so monetize the interest.

14. Do Not Include *Ipso Facto* Clauses.

   a. Are not enforceable in bankruptcy, and may be contested by other creditors under state law.

   b. Draft buy-sell triggers, purchase price and terms the same regardless of the cause of the transfer or identity of the transferee.

   c. Include reasons why you need buy-sell provisions (other than creditor protection), such as keeping ownership in the family or with employees, and reasons for a long-term payout (the trigger is due to unexpected circumstances and thus company cannot "plan ahead" for the repurchase obligation).

V. Voidable Transfers

A. Uniform Fraudulent Transfer Act ("UFTA")

1. Most states have some form of a uniform act allowing creditors to reach certain transfers. The Uniform Law Commission's most recent amendment has renamed the UFTA as the "Uniform Voidable Transactions Act." This discussion focuses on the general concepts, keeping in mind that there are many state specific nuances.

2. To be a fraudulent transfer, the debtor must have transferred an asset. Generally if the asset is already subject to a lien, is exempt, or held in tenants by entirety, it is not an asset for this purpose.

3. The creditor must establish that the transfer is fraudulent:

   a. Actual intent to hinder delay or defraud any creditor of the debtor - may be established by circumstantial evidence, such as transfer to an insider (i.e. family member), transfer or assets were concealed, timing in relationship to incurring debt or suit or threat of suit, transfer was of substantially all the debtor's assets, transfer was not for reasonably equivalent value, debtor was or became insolvent.

   b. Constructive fraud - transfer for less than reasonably equivalent consideration and debtor was engaging in business/transaction with unreasonably small capitalization or debtor was incurring debts beyond ability to pay.

   c. Deemed fraud – creditors claim arose before the transfer, transfer for less than reasonably equivalent consideration, and debtor was/became insolvent at the time of the transfer.

4. Remedies: (a) creditors can reach the transferred asset by having the transfer avoided, attachment, injunctive relief, appointing a receiver; (b)

you can lose credibility with the court and creditors and opens the door to fraud and other charges; (c) fraudulent activity can prevent discharge in bankruptcy; and (d) possible criminal charges.

5. Issues:

   a. What is a transfer - most states do not view a disclaimer as a transfer for this purpose; conveying property to tenants by entirety or QST can be.

   b. When does a claim arise – some courts have held when the harm first occurs, even for unknown or unasserted claims.

6. Statute of Limitations: There are various statutes of limitations, most of which provide a "look back" period, which makes it challenging to have certainty regarding whether a transfer will escape a creditor's reach.

B. <u>Role of the Attorney</u>

1. Multiple states have disciplined attorneys for fraudulent or dishonest conduct even though the acts did not constitute a fraudulent conveyance. See <u>Matter of Kenyon</u>, 327 S.C. 307, 310, 491 S.E.2d 252, 254 (1997); <u>In re Conduct of Hockett</u>, 303 Or. 150, 159, 734 P.2d 877, 883 (1987). Best Practices for Attorneys to Minimize Risk for Civil or Criminal Liability Suggested by Rosen, Howard D. & Rothschild, Gideon, "<u>Asset Protection Planning</u>," <u>Tax Management Portfolio No. 810 3rd</u> (2011)):

2. Practitioners should know their clients – source of assets, a client's business or employer, the client's motivations for seeking legal advice, whether the client was referred by a reputable source, and what the client's current and future creditor issues may entail.

3. Solvency Analysis - Client should swear or affirm the client has no pending or threatened claims, the client isn't under any government investigation, the client is not involved in any administrative proceeding, the client has no reason to believe any situation has occurred which will lead to legal issues in the future, that the client will remain solvent after any proposed transfers, and none of the assets to be transferred were obtained through any "specified unlawful activities" under the Money Laundering Control Act of 1986.

4. Due diligence regarding the client - including sending an engagement letter defining fraudulent conveyances under local law, the penalties for making such a conveyance, the attorney's unwillingness to participate in potentially fraudulent transfers, the attorney's reliance on the client to be forthcoming at the start and throughout the course of representation, and that the attorney may withdraw from representation should the client fail to provide complete disclosure. The attorney should also require the client

to complete a questionnaire regarding potential creditor issues for the client and any company the client is closely related to, most recent tax returns for the client and any company closely associated with the client, and references from one or more of the client's banker, personal attorney, and personal accountant.

5. Independent search - to determine if the client or the client's companies are defendants in a lawsuit, have had a judgment rendered against them, had any liens filed, or have filed for bankruptcy.

VI. Conclusion

1. Any step that would increase asset protection needs to be examined against application of voidable transfer rules.

    a. Is there another reason for taking this step (such as estate planning)?

    b. Is the step being taken at the time a (real) creditor problem is on the horizon?

    c. The debtor's solvency before and after a transfer is probably the most important factor in determining whether the transfer was fraudulent. Usually, absent actual intent to defraud, a transfer is not considered fraudulent if, following a transfer, the debtor retained sufficient non-exempt assets to satisfy the claims of creditors. It is for this reason that a transfer of all of one's assets to an offshore trust or other asset protection devise runs a high risk of being ineffective.

2. As one court observes, "there is a principle of too much; phrased colloquially, when a pig becomes a hog it gets slaughtered." (*Albuquerque National Bank v. Zouhar* (*In re Zouhar*), 10 B.R. 154 (Bankr. D.N.M. 1981), quoting *Dolese v. United States*, 605 F.2d 1146, 1154 (10th Cir. 1979).

3. Three Little Pigs: Are you building a house of straw, sticks, or bricks? What happens when the wolf huff and puffs?

MISSOURI LAW

Exemptions

Required to use State Exemptions over Federal	Mo. Rev. Stat. §513.427	
Household Furnishings, etc.	Mo. Rev. Stat. §513.430(1)	Primarily for personal, family, or household use not to exceed $3,000
Jewelry	Mo. Rev. Stat. §513.430(2)	Wedding ring not to exceed $1,500, other jewelry held primarily for the personal, family or household use not to exceed $500
Other Property	Mo. Rev. Stat. §513.430(3)	Not to exceed $600
Implements, professional books or tools of the trade.	Mo. Rev. Stat. §513.430(4)	Not to exceed $3,000
Motor Vehicle	Mo. Rev. Stat. §513.430(5)	Not to exceed $3,000
Mobile Home	Mo. Rev. Stat. §513.430(6)	Used as principal residence, but not on or attached to real property in which debtor has fee interest, not to exceed $5,000
Unmatured Life Insurance Contract other than a Credit Life Insurance Contract and Interest	Mo. Rev. Stat. §13.430(7), (8)	
Matured life insurance proceeds	Mo. Rev. Stat. §513.430(7)	For actual funeral, cremation, or burial expenses where the deceased is the spouse, child, or parent of the beneficiary. Not to exceed $15,000.
Professionally prescribed health aids	Mo. Rev. Stat. §513.430(9)	For such person or a dependent of such person
Right to Receive Social Security, Veteran’s benefit, Disability, Illness, or Unemployment benefit	Mo. Rev. Stat. §513.430(10)(a)-(c)	
Right to Receive Alimony, Support or Maintenance	Mo. Rev. Stat. §513.430(10)(d)	Not to exceed $750 a month
Atock bonus plan, pension plan, disability or death benefit plan, profit-sharing plan, non-public retirement plan	Mo. Rev. Stat. §513.430(10)(e)	
Retirement Plan qualified under 401(a) 403(a) 403(b) 408 408A or 409 of Internal Revenue Code	Mo. Rev. Stat. §513.430(10)(f) Mo. Rev. Stat. §513.430	Generally unlimited - with certain bankruptcy exceptions for contributions to a plan deemed to be fraudulent transfers made within three years prior to the filing of a bankruptcy. Inherited IRAs likely exempt by specific reference
529 Plan Exemptions	N/A	Not available.
Right to receive, or property that is traceable to a payment on account of the wrongful death of an individual whom the debtor was a dependent	Mo. Rev. Stat. §513.430(11)	
Workers Compensation	Mo. Rev. Stat. §287.260	
Homestead	Mo. Rev. Stat. §513.475(1)	Not to exceed $15,000
Right to receive an annuity or similar plan or contract on account of illness, disability, death, age or length or service	Mo. Rev. Stat. §513.430(10)(e)	To the extent reasonably necessary for the support of such person and any dependent of such person unless established by an insider that employed such person at the time such person's rights under such plan or contract arose; such payment is on account of age or length of service; and such plan or contract does not qualify under 401(a), 403(a), 403(b), 408, 408A or 409 of the Internal Revenue Code of 1986, as amended.
Other (“wildcard” exemption that can be used on any property)	Mo. Rev. Stat. §513.440.	$1,250 for a head of household plus $350 per dependent child under the age of 21

Trusts and Other Nonprobate Transfers

Revocable Trust	Mo. Rev. Stat. §456.5-505	Subject to claims of the settlor's creditors.
Irrevocable Trust with Spendthrift Provision	Mo. Rev. Stat. §456.5-503	Subject to exception creditors.
Discretionary Trust	Mo. Rev. Stat. §456.5-504	Provides creditor protection, a trust is considered discretionary even if there is an express standard of distribution.
Withdrawal Powers over Trust	Mo. Rev. Stat. §456.5-505.6	Holder of power of withdrawal is treated as a settlor of revocable trust; upon loss of power the creditor's reach is limited to the greater of 5% of the trust or $5,000.
Domestic Asset Protection Trusts	Mo. Rev. Stat. §456.5-505	Allowed
POD Accounts Available in Banks and Trust Companies	Mo. Rev. Stat. §362.471	Payment made by a bank or trust company on such an account shall be entitled to full credit without necessity of determining whether any other person shall have an interest in the account, unless the bank or trust company has been served with process restricting payment on the account.
Nonprobate Transfer Recovery by Creditors	Mo. Rev. Stat. §461.300 et seq.	Property is reachable if it was reachable by creditors immediately before the decedent's death, but only to the extent of the decedent's contribution to the value of the property.

Entity Formation

Limited Liability Partnership	Mo. Rev. Stat. §358.510	May form under Missouri law.
Limited Liability Limited Partnership	Mo. Rev. Stat. §359.011	Permits limited partnerships to become an LLLP by registering with the state.
Limited Liability Company	Mo. Rev. Stat. §347.015	May form under Missouri law.
Charging Order	Mo. Rev. Stat. §347.119	Available, but silent on whether it is an exclusive remedy.

Miscellaneous

Uniform Fraudulent Transfer Act	Mo. Rev. Stat. §428.005	
Claims Against Recipient's Estate for Assistance Provided During Life	Mo. Rev. Stat. §473.398 et seq.	
Tenancy by Entirety	Mo. Rev. Stat. §456.950	Full-bar state as to real estate and personalty located in Missouri and intangibles owned by a Missouri resident

KANSAS LAW

Exemptions

Required to Use State Exemptions Over Federal	K.S.A. §60-2312(a)	Provides exceptions for when Federal exemptions may be used.
Homestead	K.S.A. §60-2301	Unlimited if <160 acres of unincorporated farming land. Unlimited if <1 acre within town or city limit.
Household Furnishings etc.	K.S.A. §60-2304(a)	In person's present possession, and reasonably necessary at the principal residence one year
Jewelry	K.S.A. §60-2304(b)	Not to exceed $1,000
Implements, professional books or tools of the trade	K.S.A. §60-2304(e)	Not to exceed $7,500
Motor Vehicle	K.S.A. §60-2304(c)	Not to exceed $20,000 per individual (exception if designed for handicapped persons)
Unmatured Life Insurance Contract And Interest	K.S.A. §60-2313(a)(7)	Generally unlimited if issued more than 1 year ago
Right to Receive Social Security, Unemployment Benefit, Public Assistance, Veteran's Benefit, Disability, Illness, Unemployment Benefit	•K.S.A. §60-2312(b) by 11 U.S.C. §522(d)(10); K.S.A. §60-2313(a)	Federal exemptions permitted as an exception to Kansas' state exemptions requirement. State exemptions for unemployment benefits and public assistance.
Payment under a stock bonus plan, pension plan, disability or death benefit plan, profit-sharing plan, non-public retirement plan	K.S.A. §60-2312(b) by 11 U.S.C. §522(d)(10); K.S.A. §60-2308(a); K.S.A. §60-2313(a)	Federal exemptions permitted as an exception to Kansas' state exemptions requirement. If received within 3 months before attachment, need proof pension money is necessary for the maintenance of the debtor's support or a family support. State Retirement Programs.
Right to Receive Alimony, Support or Separate Maintenance	K.S.A. §60-2312(b) by 11 U.S.C. §522(d)(10)	Federal exemptions permitted as an exception to Kansas' state exemptions requirement. Reasonably necessary for the support of debtor and dependent
Retirement Plan qualified under 401(a) 403(a) 403(b) 408 408A or 409 of the Internal Revenue Code	K.S.A. §60-2308(b)	Generally unlimited – with certain bankruptcy exceptions. BUT: inherited IRAs not exempt - In re Mosby, 532 B.R. 167 (Bankr. D. Kan. 2015)
529 Plan	K.S.A. §60-2308	If the designated beneficiary is a lineal descendant to the account owner, the account is exempt to creditors, subject to limitations.
Crime Victims Compensation	K.S.A. §60-2313(a)(5)	
Burial Plot	K.S.A. §60-2304(d)	
Workers' Compensation	K.S.A. §60-2313(a)(3)	
Fraternal Benefit, Charity, Relief Aid	K.S.A. §60-2313(a)(8)	
Other	K.S.A. §60-2304(f) K.S.A. §36-202 K.S.A. §48-245 K.S.A. §84-2-326	•Exempts personal property listed below. •Detained baggage. •KS Nat'l Guard uniforms, equipment, arms. •Goods held on approval.
Wages	K.S.A. §60-2310	Generally, 25% of the debtor's disposable earning or 30 times the federal minimum hourly wage, or equivalent multiple thereof, whichever is less.

Trusts and Other Nonprobate Transfers

Revocable Trust	K.S.A §58a-505	Subject to claims of the settlor's creditors.
Irrevocable Trust with Spendthrift Provision	K.S.A. §58a-502	Not subject to exception creditors.
Withdrawal Powers over Trust	K.S.A. §58a-505(b)	Holder of power of withdrawal is treated as a settlor of revocable trust; upon loss of power the creditor's reach is limited to the greater of 5% of the trust or $5,000.
Domestic Asset Protection Trusts	K.S.A. §58-505	Not allowed.
TOD and POD provisions	K.S.A. §39-709(g)	Do not address creditors specifically, except to provide that these statutes do not limit the rights of creditors but SRS can go against certain TOD assets to recover Medicaid payments, but not others.

Life insurance policy	K.S.A. §40-414	Free from claims of the insured or insured's creditors; the claims of any policy holder or policyholder's creditors; all taxes; and the claims and judgments of the creditors of any person named as beneficiary in the policy. Nonforfeiture value is not exempt from bankruptcy claims within one year of the policy issue date and the claims of creditors with executed judgments within one year of the policy issue date.

Entity Formation

Limited Liability Partnership	K.S.A. §56a-1001	May be formed under Kansas law.
Limited Liability Limited Partnership	K.S.A. §17-78-102	Recognized as an entity in Kansas, but does not have a statutory section addressing formation.
Limited Liability Company	K.S.A. §17-7663	May be formed under Kansas law.
Charging Order	K.S.A. §17-76,113	Exclusive remedy by which a judgment creditor of a member or of a member's assignee may satisfy a judgment out of the judgment debtor's limited liability company interest.

Other

Uniform Fraudulent Transfer Act	K.S.A. §33-201	
Claims Against Recipient's Estate for Assistance Provided During Life	K.S.A. §39-719b	
Tenancy By Entirety	N/A	Not available.

ARKANSAS LAW

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Exemptions

Choice between State or Federal Exemption	Ark. Code Ann. § 16-66-217	Option to select state or federal property exemption laws so long as debtor has right to claim federal exemptions.
Burial place	Ark. Code Ann. § 16-66-207	Family graveyard or public burial place must be filed with county clerk. Not more than five (5) acres shall be so exempted
Wages	Ark. Code Ann. § 16-66-208	First $25 per week of net wages exempt. Could get all wages for 60 days exempt if file sworn statement that states debtor does not have sufficient personal property which, when combined with the sixty days' wages, amounts to less than the constitutional exemption
Life, health, accident and disability insurance proceeds	Ark. Code Ann. § 16-66-209	Life insurance proceeds exempt from seizure (no cap). Cash surrender value of life insurance is capped at the Arkansas constitutional limit for personal property exemption at $200 to $500, depending of the head of household or marital status of the claimant. A.C.A. § 23-79-131(a)(1): The lawful beneficiary or assignee of the life insurance policy, other than the insured, or person effecting the insurance or the person effecting the insurance, shall be entitled to its proceeds and avails against the creditors and representative of the insured and those of the person effecting the policy whether or not the right to change the beneficiary is reserved or permitted and whether or not the policy is made payable to the person whose life is insured.
Homestead	AR Const. Art. 9, § 3 – § 6 Ark. Code Ann. § 16-66-210	Must be married or head of the household. Exemption is unlimited, but urban AR residences cannot exceed 1/4 acre, and rural property is limited to between 80 to 160 acre, both classifications exempt up to $2500.00. See In re White, 460 BR 744, 747 (8th Cir. BAP 2011) (if homestead exceeds $2500.00 in value, the debtor may still claim homestead if property does not exceed acreage maximum for urban and rural respectively).
Personal property	AR Const. Art. 9, § 1 Ark. Code Ann. § 16-66-218	Personal property of person not married or head of family is exempt up to $200.00 + all wearing apparels. Married or head of household is up to $500.00 + wearing apparel of the debtor. Note, however, that no property is exempt from execution for debts contracted for the purchase money of the property. Ark. Const. Art. 9 § 1.
Implements, Professional Books, or Tools of Trade	Ark. Code Ann. § 16-66-218	up to $750 in value for professional books, tools of the trade, or trade of dependent debtor. *But see* In re Kelly, 455 B.R. 710 (Bankr. E.D. Ark. 2011 (ruled unconstitutional any personal property exemption over $200 [or $500], per Ark. Const. Art. 9).
Motor vehicle	Ark. Code Ann. § 16-66-218	Not to exceed $1,200
Retirement Plan Assets	Ark. Code Ann. § 16-66-220	Protects IRAs and other retirement accounts from attachments, executions, and seizures regardless of the balances in or value of such accounts. See Clinical Study Centers, Inc. v. Boellner, 411 S.W.3d 695 (Ark. 2012). However, contributions to an individual retirement account that exceed the amount deductible under applicable provisions under the Internal Revenue Code and any accrued earnings on such contributions are not exempt under the exemption statute, A.C.A. § 16-66-220(b)(1), unless

		otherwise exempt by law. But, the limitations do not apply to IRAs established and qualified under I.R.C. 408(A). In Bankruptcy proceedings, Arkansas law allows an exemption for retirement benefits for pensions of firefighters, police officers, school employees, and IRAs deposits up to $20,000. See A.C.A. §§ 24-10-616, 24-11-814, 24-6-223, 24-10-616, 24-11-417, 24-7-715; 16-66-218(b)(16).
Annuities	Ark. Code Ann. § 23-79-134	Generally, the benefits, rights, privileges, and options under any annuity or variable annuity contract are exempt. Note, however, that if the annuities due and payable exceed the personal property exemption provided for under law ($200/$500), a court could order the annuitant to pay to a judgement creditor the excess portion it finds just and proper. Walker v. Walker, 791 S.W.2d 710, 712 (Ark. 1990).
Stipulated premium insurance benefits	Ark. Code Ann. § 23-71-112	Stipulated premium insurance benefits are not liable to attachment or other process to pay any debt or liability of a policy or certificate holder or of any beneficiary named in the policy or certificate.
Mutual assessment insurance benefits	Ark. Code Ann. § 23-72-114	not to exceed one thousand dollars ($1,000)
Fraternal benefit society benefits	Ark. Code Ann. § 23-74-403	Fraternal benefit society benefits are not liable to attachment or other process to pay any debt or liability of a member or beneficiary
Assets of delinquent insurer	Ark. Code Ann. § 23-68-120	No garnishment or attachment against delinquent insurance company during pendency of proceedings
Rights to unemployment benefits and benefits received but not mingled with other funds except for debts incurred for necessities furnished during the time of unemployment	Ark. Code Ann. § 11-10-109	Unemployment benefits exempt from debt collection except for child support obligations
Workers' compensation benefits	Ark. Code Ann. § 11-9-110	The right to compensation shall not be assignable and shall not be subject to garnishment, attachment, levy, execution, or any other legal process, except for child support obligations and moneys retained by the Department of Correction under Ark. Code Ann. § 12-30-406(a)(1).
Wedding Band	Ark. Code Ann. § 16-66-219	wedding bands, including diamonds mounted thereon not to exceed 1/2 carat weight
529 Plans		No Arkansas statute but see Federal exemption under 11 U.S.C. §541(b)(6). (Ark. Code Ann. § 16-66-217 allows you to choose federal.)

Trusts and Other Nonprobate Transfers

Revocable Trust	Ark. Code Ann. § 28-73-505	Subject to claims of the settlor's creditors.
Irrevocable Trust with Spendthrift Provision	Ark. Code Ann. § 28-73-505 Ark. Code Ann. § 28-73-502	With respect to the settlor, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. A creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary.
Discretionary Trust	Ark. Code Ann. § 28-73-504	Whether or not a trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution that is subject to the trustee's discretion. A creditor may not reach the interest of a beneficiary who is also a trustee or cotrustee, or otherwise compel a distribution, if the trustee's discretion to make distributions for the trustee's own benefit is limited by an ascertainable standard.
Withdrawal Powers over Trust	Ark. Code Ann. § 28-73-505	Holder of power of withdrawal is treated as a settlor of revocable trust; upon loss of power holder is no longer treated as settlor

Domestic Asset Protection Trusts	Ark. Code Ann. § 28-73-505(a)(2)	No protection from creditors
POD Accounts Available in Banks and Trust Companies	Ark. Code Ann. § 23-47-204	Arkansas allows POD accounts. The surviving joint tenant of accounts owns them by operation of law, in the absence of fraud. Williams v. Davis, 2009, 373 S.W.3d 381, 2009 Ark. App. 850. Bank must receive notice of adverse claim which meets requirements of § 23-47-205
Claims Against Estates	Ark. Code Ann. § 28-50-101 et seq.	Allows the commencement or continuance of separate actions against the estate for the debts and other liabilities of the decedent, if commenced or revived within the periods stated in § 28-50-101.
Inter Vivos QTIP	Ark. Code Ann. § 28-73-505(c)	Property contributed deemed not to be contributed by settlor if settlor is beneficiary after death of settlor's spouse. Meaning creditor can only reach assets once distributed to and received by beneficiary.

Entity Formation

Limited Liability Partnership	Ark. Code Ann. § 4-46-1001	Permits partnership to become LLP by filing statement of qualification with the state
Limited Liability Limited Partnership	Ark. Code Ann. § 4-47-201	Permits limited partnerships to become an LLLP by stating in the certificate of LP that it is an LLLP.
Limited Liability Company	Ark. Code Ann. § 4-32-202	May form under Arkansas law.
Charging Order	Ark. Code Ann. § 4-47-703; Ark. Code Ann. § 4-32-705	Partnership – Exclusive remedy by which a judgment creditor of a partner or of a partner's transferee may satisfy a judgment out of the judgment debtor's partnership interest. LLC - Available, but silent on whether it is an exclusive remedy.

Other

Uniform Voidable Transactions Act	Ark. Code Ann. § 4-59-201 et seq.	Formerly cited as the Uniform Fraudulent Transfer Act.
Tenants by the Entirety	Ark. Code Ann. § 4-59-201	Arkansas allows both real and personal property to be held as tenants by the entirety. A third party may execute against the debtor's spouse's interest in tenancy by the entirety, but the non-debtor spouse still retains the rights of possession, survivorship, and interest and half the rents and profits. See Morris v. Solesbee, 892 S.W.2d 281 (Ark. App. Ct. 1995); Lowe v. Morrison, 711 S.W.2d 833 (Ark. 1986). See e.g., Ford v. Felts, 624 S.W.2d 449 (Ark. Ct. App. 1981) ("Arkansas follows the rule that a homestead may be acquired in land held by a husband and wife as tenants by entireties.") The definition in this Act requires exclusion of interests in property held by tenants by the entirety that are not subject to collection process by a creditor without a right to proceed against both tenants by the entirety as joint debtors.
Claims Against Recipient's Estate for Assistance Provided During Life	Ark. Code Ann. § 20-76-436 Ark. Code Ann. § 28-13-103	Department of Human Services may make claim against the estate of a deceased recipient of federal or state benefits, unless recovery works an undue hardship on heirs or devisees

OKLAHOMA LAW

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Exemptions

Required to Use State Exemptions Over Federal	31 O.S. §1	
Homestead	31 O.S. §1.A.1 and §2	Unlimited up to 160 acres outside city limits Unlimited up to 1 acre within town or city limit.
Household Furnishings etc.	31 O.S. §1.A.3	All household and kitchen furniture held primarily for the personal, family, educational or household use of such person or a dependent of such person, including a personal computer and related equipment
Wedding and anniversary rings	31 O.S. §1.A.8	Not to exceed $3,000
Farm Implements, professional books or tools of the trade; books and pictures; wearing apparel	31 O.S. §1.A.5-7	Implements of husbandry necessary to farm the homestead and tools, apparatus and books used in any trade or profession not to exceed $10,000 in total value; all books and pictures held for personal and family use; wearing apparel up to $4,000 in total value
Motor Vehicle	31 O.S. §1.A.13	Not to exceed $7,500 in one motor vehicle
Unmatured Life Insurance Contract And Interest, Life Insurance, Proceeds, Proceeds from Health of Accident policy, and Annuities	36 O.S §3631.1	No limit on value.
Right to Receive Alimony, Support or Separate Maintenance	31 O.S. §1.A.19	Reasonably necessary for the support of debtor and dependent
Retirement Plan qualified under 401(a) 403(a) 403(b) 408 408A or 409 of the Internal Revenue Code	31 O.S. §1.A.20	Generally unlimited, subject to Uniform Fraudulent Transfer Act, with certain exceptions.
529 Plan	31 O.S. §1.A.24	All interest in an Oklahoma College Savings Plan.
Guns	31 O.S. §1.A.14	Not to exceed $2,000 in value
Burial Plot	31 O.S. §1.A.4	Any lots or lots in a cemetery
Claim for bodily injury, death or worker's compensation	31 O.S. §1.A.21	Up to $50,000 (not to include exemplary or punitive damages)
Federal Earned Income Tax Credit	31 O.S. §1.A.23	
Livestock and Forage	31 O.S. §1.A.10-12, 15-17	• 5 milk cows and their calves under 6 months old. • 100 chickens. • 2 horses and 2 bridles and saddles. • 10 hogs. • 20 sheep. • All provisions and forage on hand or growing for home consumption for the use of exempt stock for 1 year.
Wages	31 O.S. §1.A.18	Generally, 75% of the debtor's wages or earnings earned during last 90 days, except as provided for in garnishment proceedings for child support.

Trusts and Other Nonprobate Transfers

Revocable Trust	60 O.S. §175.41	Subject to claims of the settlor's creditors.
Irrevocable Trust with Spendthrift Provision	60 O.S. §175.25	Not subject to creditors, except for child support claims.
Domestic Asset Protection Trusts	31 O.S. §10 et seq.	Oklahoma Family Wealth Preservation Trust Act • Must have Oklahoma bank or trust company as trustee or co-trustee. • May be revocable or irrevocable.

		• Must have only “qualified beneficiaries”(does not include grantor). • Majority of assets must be “Oklahoma assets”. • Subject to UFTA. • Other requirements found in statute.
TOD and POD provisions	71 O.S. §910 58 O.S. §1252 et seq.	• TOD for securities subject to claims • Real estate transfer-or-death deed not subject to elective share of person who became spouse after execution of deed.
Life insurance policy	36 O.S. §3631.1	Free from claims of the insured’s or beneficiary’s creditors.

Entity Formation

Limited Liability Partnership	54 O.S. §1-1001	May be formed under Oklahoma law.
Limited Liability Limited Partnership		No statutory section addressing formation.
Limited Liability Company	18 O.S. §2000 et seq.	May be formed under Oklahoma law.
Charging Order	18 O.S. §2034	Exclusive remedy by which a judgment creditor of a member or of a member’s assignee may satisfy a judgment out of the judgment debtor’s limited liability company interest.

Other

Uniform Fraudulent Transfer Act	24 O.S. § 112 et seq.	
Tenancy By Entirety	60 O.S. §74	

IOWA LAW

See “Asset Protection (for the Rich And Not) in Iowa”
https://www.dickinsonlaw.com/assetprotection

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