



Asset Protection Trusts and Agreements

Duncan E. Osborne, Frederick J. Tansill

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Although it may be legal malpractice not to recommend asset protection planning to clients for whom it is obviously appropriate, asset protection planning often involves difficult fact situations—and difficult clients.

In *Asset Protection Trusts & Agreements*, Frederick J. Tansill and Duncan E. Osborne help practitioners avoid these Seven Deadly Sins of asset protection and many other traps:

Insolvency

Make sure the transferors retain post-transfer solvency, disclose transfers whenever possible, and avoid making transfers immediately before increasing their risk exposure. An attorney who allegedly assists an insolvent client in shielding assets from creditors may find himself or herself a defendant in collateral litigation with creditors. *Banco Popular North America v. Gandi*, 876 A.2d 253 (N.J. 2005) (refusing to dismiss negligence claim alleging that attorney misrepresented the debtor's finances). To help avoid this trap, the book includes a sample Affidavit of Solvency that practitioners can customize to meet particular client needs. Both Tansill and Osborne discuss this topic in detail.

Sloth

Plan ahead: Remember that for Medicaid asset protection purposes any assets added to the trust will be subject to a five-year look-back period. Allow trustees and others to add additional assets to the trust, so that initial assets may be granted protection. Attorney who fails to explain the limits of Medicaid asset protection to clients may get into trouble if a client's trust assets are considered "available assets" for Medicaid qualification purposes.

Collusion

Choose trustees and successor trustees who will exercise their discretion (without considering their personal interests) in order to preserve assets, but be sure to avoid any collusion or advance agreements or "side agreements" between settlors and beneficiaries. Attorney may be subject to liability to creditors for helping debtors conceal assets.

Unlimited Powers

Perhaps permit the Trustee to exercise a limited—not unlimited—power of appointment to provide maximum flexibility in naming contingent beneficiaries. *Ahern v. Thomas*, 248 Conn. 708, 739, 733 A.2d 756, 775 (1999) (trustees did not have a general power to distribute trust principal; the trust was not an available resource).

Rigidity

Allow the trustee flexibility in determining investment strategies, including the ability to invest for capital appreciation or income. Depending on the needs of the beneficiaries, the settlor may wish to choose investments that yield little or no income (if he or she is likely to apply for Medicaid in the future) or substantial income if the trust is designed to cover the beneficiary's living expenses.

One-Size-Fits-All

Determine if the client needs an income-only trust. If so, prohibit the trustee from (1) treating capital gains as income, (2) adjusting between income and principal, or (3) converting principal and income to a unitrust amount. If not, permit the trustee to invest for total return without regard to distinctions between income and principal. The trust may need to prohibit reliance on any state law statute or doctrine that would otherwise give the trustee the power to convert any part of a trust into a total return unitrust.

Disrespecting Elders

Allow distributions to children or others who might then choose to pay privately for an elder's care. For example, the trust might give the settlor a special limited power of appointment over the trust corpus in favor of the settlor's children or other relatives—who may be inclined to provide the settlor with personal, financial, or emotional care and assistance.

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