PRYOR CASHMAN LLP

LEGAL UPDATE

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NEWLY ENACTED ASSET PROTECTION STATUTES

On July 1, 2007, Nevada enacted a new statute, which is the first of its kind in the United States, limiting the exclusive remedy for judgment creditors of stockholders in certain corporations to a charging order with respect to the shares in the corporation. As a result of this law, creditors will have a claim only against actual dividends paid from the corporation, not against the corporate assets. Before this statute was enacted, this exclusive remedy was available only for Nevada's limited liability companies and limited partnerships.

This new legislation will make life more difficult for creditors of individuals who own shares of private companies.

For shareholders of private companies to take advantage of this extra protection, the corporation must (1) have fewer than 75 shareholders; (2) not be a subsidiary of a publicly traded corporation; and (3) may not be organized as a professional corporation to render professional services.

In addition to Nevada, last year Tennessee and Wyoming became the eighth and ninth states, respectively, to permit self-settled trusts for asset protection planning purposes. State legislatures are responding to the increasing need for and interest in asset protection planning.

Asset protection planning is the technique of organizing one's financial affairs in such a manner as to safeguard assets from the reaches of creditors and other risks. Asset protection planning is best suited for business owners, executives, and professionals who have significant exposure to lawsuits and creditors, such as doctors, lawyers, architects, hedge fund managers, and business owners. Asset protection planning involves transferring some of the client's assets from an unprotected form of ownership to a protected form of ownership. Examples of unprotected forms include, but are not limited to, property held directly in an individual's name, or held in the name of some types of trusts, or even owned in a improperly formed business entity. A protected form can be a properly formed limited liability company, corporation, certain kinds of trusts, limited liability partnerships, and other such "limited liability entities". Asset protection planning is legal, provided that it is not done in a fraudulent manner or with fraudulent intent.

Until recently, asset protection was only offered offshore in such places as the Cayman Islands, Cook Islands, Bahamas, and Switzerland. On April 2, 1997, however, Alaska became the first state to enact legislation offering asset protection planning opportunities onshore. Delaware, Nevada, Rhode Island, Utah, Missouri and South Dakota quickly followed.

On July 1, 2007, Tennessee enacted the Tennessee Investment Services Act of 2007. At the same time, Wyoming enacted legislation into its Uniform Trust Code aimed at creating domestic asset protection. Under both new laws, an individual can create a "self-settled trust" (i.e., a trust created by and for the benefit of the grantor) and fund it with his own assets, yet be a beneficiary of the trust and be entitled to receive certain distributions of the trust assets and/or income. In a majority of states, New York included, a "self-settled trust" is exposed to the reaches of a creditor to the extent that the trustee has discretion to distribute to the grantor. Incidentally, a properly drafted "third-party trust" (i.e., a trust created by an individual for the benefit of someone else) receives widely-accepted asset protection.

To qualify under either Tennessee or Wyoming law, the trust agreement must (1) expressly provide that it's governed by the respective state's laws; (2) be irrevocable; and (3) contain spendthrift provisions. In addition, for both states, some or all of the trust property must be maintained in the state, at least one of the trustees must be resident of the state, and the grantor may not act as trustee. There are other simple requirements and provisions that can be discussed in more detail.

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The foregoing is merely a discussion of newly enacted Asset Protection statutes and is not intended to provide legal advice. If you would like to learn more about this topic or about how Pryor Cashman can serve your legal needs, please contact Jeffrey A. Asher at jasher@pryorcashman.com or 212-326-0817.

About The Author

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Jeffrey A. Asher joined Pryor Cashman in April 2008 as a partner in the Trusts and Estates Group and head of the Elder Care Practice. Mr. Asher concentrates primarily in the areas of Estate Planning, Estates and Trusts Administration, Probate, Elder Law, Medicaid Planning, and Asset Protection. His impeccable reputation for honesty, compassion, and diligence has earned him the trust and respect of the ever-growing number of attorneys, financial advisors and accounting professionals who consult with him regularly. Representative matters in which Mr. Asher is involved include:

- Represents clients in connection with their desire to transfer assets with minimum exposure to estate, gift and generation-skipping transfer taxes
- Preparation of wills, living trusts, irrevocable life insurance trusts, and other trust agreements, stockholders' agreements, buy-sell agreements, and all other documents necessary to implement an overall estate plan, as well as living wills, health care proxies and powers of attorney
- Preparation of advanced estate planning techniques, including grantor retained annuity trusts, qualified personal residence trusts, family limited partnerships, and intentionally defective grantor trusts
- Represents large estates and charitable-minded estates in connection with charitable gift transactions, bequests, and creation of trust arrangements including charitable lead trusts, charitable remainder trusts, private foundations, public charities and other tax-exempt organizations
- Represents executors, trustees, and other fiduciaries in connection with their probate, tax, accounting and other obligations, and assists them in carrying out their duties
- Represents families and fiduciaries in the probate process, preparation of estate tax returns, fiduciary income tax returns and accountings, as well as coordinates and prepares post-mortem tax planning techniques
- Represented several well-known artists in the creation of their estate plans, which included creation of private foundations and one of which was centered around a public museum created as a N.Y.S. education corporation chartered as a public museum by the Board of Regents for and on behalf of the N.Y.S. Education Department
- Successfully represented clients before the Internal Revenue Service and other taxing and governmental authorities in connection with the creation of tax-exempt entities and public charities
- Acts as fiduciary in connection with probate matters, living trusts, irrevocable life insurance trusts, and other trust and property arrangements
- Represents individuals in connection with their long-term healthcare decisions, disability protections, and need for advanced medical directives
- Represents individuals and assists them in obtaining benefits from the Medicare and Medicaid systems to pay for long-term home care and nursing home care

Other representative matters in which Mr. Asher has been involved include:

- *Estate of Juanita Joy Jackson* (N.Y. Co. Surrogate's Court): Successfully defended the estate against claims for legal fees filed by outgoing attorneys on basis that such outgoing attorneys failed to prove that they provided worthwhile services to the executor
- *Estate of Rosemarie Beck Phelps* (N.Y. Co. Surrogate's Court): Represented the son of a well-known artist-decedent as executor in connection with various renunciations of probate and non-probate property designed and intended to result in the funding of a N.Y.S. education corporation chartered as a public museum by the

Board of Regents for and on behalf of the N.Y.S. Education Department; as a result, a substantial taxable estate was rendered non-taxable

- *Estate of John Doe* (Queens Co. Surrogate's Court and Charlotte Co. Probate Court, Florida): Successfully represented the sole distributee/fiduciary in connection with the probate of decedent's estate in New York and Florida and defended the sole distributee/fiduciary against claims filed by brothers of decedent and uncles to the sole distributee/fiduciary
- *Estate of Jane Doe* (Westchester Co. Surrogate's Court): Successfully represented income beneficiary and several remainder beneficiaries of a testamentary trust in connection with their application to remove a very large and prominent, but ultimately hostile and negligent, national financial institution as trustee of testamentary trust

Mr. Asher is a 1996 graduate of Touro Law School, where he was Editor-in-Chief of the Suffolk County Bar Association's *Journal of the Suffolk Academy of Law* and received Touro Law School's Outstanding Service to the Community award.