



WHY IS  
ASSET PROTECTION  
PLANNING IMPORTANT?

BECAUSE . . .

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State Liability Systems Survey  
Lawsuit Climate

“Illinois is ranked #48 in the 2015 Lawsuit Climate Survey: Ranking the States. Within the state, Chicago or Cook County, and Madison County, made the list of cities or counties with the least fair and reasonable litigation environment. Illinois is in the bottom five of every one of the ten elements evaluated in the survey, sitting at the absolute bottom of having and enforcing meaningful venue requirements.”

“The worst jurisdiction was Chicago/Cook County, Illinois.”

Madison Count, Illinois was ranked the fifth worst jurisdiction nationwide. 98% of Plaintiffs did not live in Illinois.

©U.S. Chamber Institute for Legal Reform,  
September 2015

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whocanissue.com

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"As long as I am allowed to redistribute wealth from out-of state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because the in state plaintiffs, their families, and their friends will reelect me."

Justice Richard Neely, West Virginia Supreme Court,  
The Product Liability Mess, Free Press, p. 4 (1988).

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**-WEALTH-**  
Many people seek  
it, but once they  
have it they want to  
hide it.

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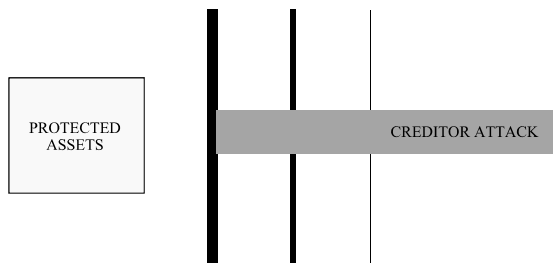
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ESTABLISH THE MOST EFFECTIVE,  
LEGAL, PROTECTIVE BARRIERS. . .



BEFORE THE CREDITOR ATTACK!

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WE KNOW TO USE THE BEST:

1. ENTITIES (Methods of Ownership)  
Corporations, Limited Partnerships, Limited Liability Cos., etc.
2. AGREEMENTS (Document Options)  
Trusts, Operating Agreements, and more..
3. LEGAL SYSTEMS (Systems of Laws)  
Favorable Jurisdictions

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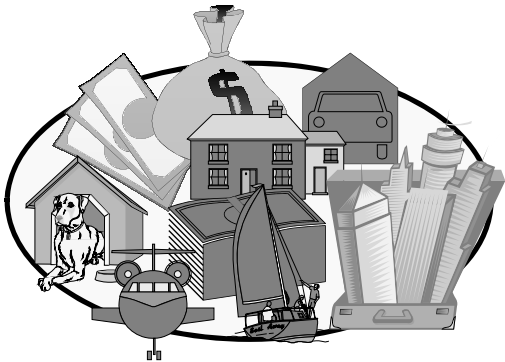
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TYPICAL WEALTH OWNERSHIP



ASSETS ARE ALL OWNED PERSONALLY

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IF YOU OWN IT,  
THEY CAN TAKE IT!

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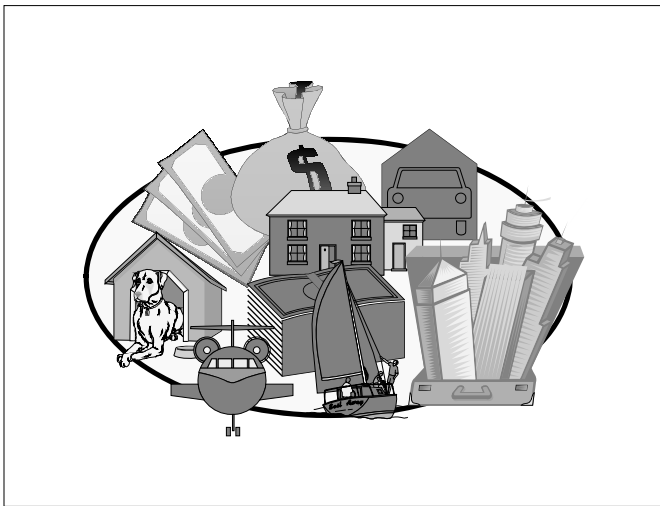
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IF YOU DON'T OWN IT,  
THEY CAN'T TAKE IT!

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-ENTITIZE AND SEPARATE ASSETS-

<p>CO#1 SECURITIES</p>	<p>CO#2</p>	<p>CO#3</p>
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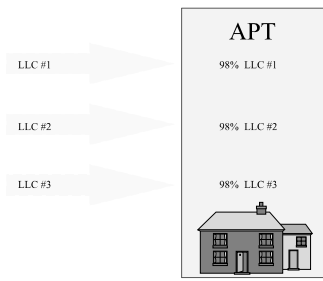
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ASSET PROTECTION TRUST



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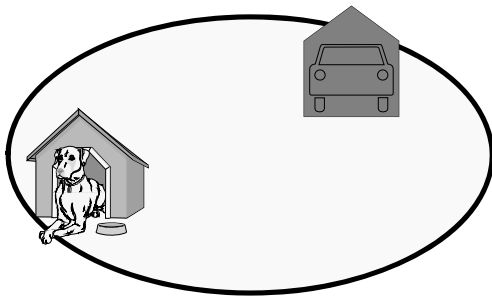
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WHAT'S LEFT FOR THE CREDITORS?



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Badges of Fraud - "Red Flags"

- ⇒ Concealed Transfer
- ⇒ Post - Transfer Insolvency
- ⇒ Less Than Reasonably Equivalent Value (REV)
- ⇒ Transfer to Insiders (Spouse or Children)
- ⇒ Transfer During Litigation
- ⇒ Transfer After Claim Arose
- ⇒ - and the like.

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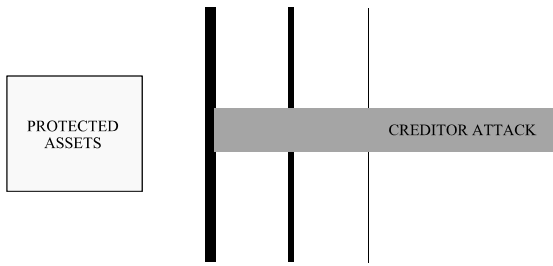
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HOW MUCH PROTECTION IS ENOUGH?



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JURISDICTION

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SECRECY IS DEAD  
(Especially in the U.S.)

1. U.S. Taxes Worldwide Income 1987.
2. IRC 7701 and Reg §301.7701-7 1996.
3. Int’l Conference in Chicago 1996.
4. IRS Raids Grand Cayman Bank - 1997.
5. IRS Sues UBS - Credit Suisse -2005.
6. FATCA (TDF 90-22.1 now FinCEN 114).
7. MOSSACK -FONSECA (“Panama Papers”)

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PICKING A JURISDICTION IS AS SIMPLE AS SAYING:

“This Agreement shall be governed by the laws of [the selected and desired jurisdiction].

JUST BE SURE THE TRUST AGREEMENT YOU DRAFT COMPORTS WITH THE LAW OF THE JURISDICTION YOU CHOOSE AND THE UNITED STATES.

DOMESTIC AP JURISDICTIONS (April 2016)

- 1. ALASKA: A.S. § 34.40.110
2. DELAWARE: 12 Del. Code § 3570, et seq.
3. NEVADA: N.R.S. §166.010, et seq.
4. RHODE ISLAND: GLRI §18-9.2-1, et seq.
5. UTAH: Utah Code §25-6-14
6. MISSOURI: M.R.S. §456.5-505.3 and §460.080
7. OKLAHOMA: 31 Okla. Stat. §10 et seq.
8. SOUTH DAKOTA: S.D.C.L. §§ 55-16-1 - 55-16-17.
9. COLORADO: C.R.S. §38-10-111
10. TENNESSEE: Tennessee Code C.R.S. §35-15-505 and §66-1-202
11. PENNSYLVANIA: In Re Atallah, 95 BR 910, 920 (Bkrcty. E.D. Pa. 1989)
12. NEW HAMPSHIRE: N.H. Rev Stat. § 564-D:1 et. seq.
13. WYOMING: Wyo. Stat. §4-10 et. seq.
14. HAWAII: Hawaii Act 182 (10).
15. VIRGINIA: Va. Code § 64.2-745.1 et.seq.
16. OHIO: Ohio Revised Code §5816.01 et.seq. (effective 3/27/2013).
17. WEST VIRGINIA: WVa. Code § 44D-5-503a et.seq. (effective 6/8/2016)
ILLINOIS ?

OFFSHORE AP JURISDICTION

- 1. Isle of Mann, Common Law with Trust Act 2001(+1000 years common law)
2. Trust Law (Cayman) (1967), Trust (Foreign Element) Law, (1987)
3. Trustee Act (Bermuda) (1975)
4. International Trust Act (Cook Islands) (1984)
5. Trusts (Choice of Governing Law) Act, (Bahama)(1989)
6. The Trustees Ordinance (Gibraltar)(1895)
7. Trust Ordinance (Turks & Caicos) (1990)
8. The International Trusts Law 69/92 (Cyprus)(1992)
9. Belize Trusts Act (1992)
10. Labuan Trusts Act (1996)
11. International Trust Ordinance (Nevis) (1996)
12. International Trusts Act (Saint Vincent and the Grenadines) (1996)
13. Trusts Act (Mauritius) (2001)
14. Trusts Act (Seycelles)(2001)

WHAT DOES THIS MEAN TO BE  
“OFFSHORE”?

AS SIMPLE AS ANYTHING OUTSIDE  
YOUR HOME JURISDICTIONAL  
BOUNDARY.

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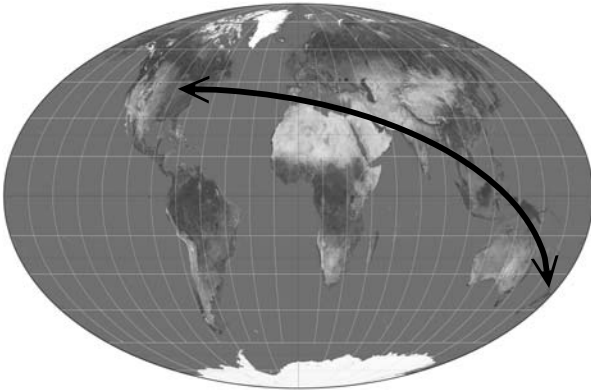
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JURISDICTION AS A BARRIER



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TWO CRUCIAL QUESTIONS

WHAT ASSETS ARE  
THERE TO PROTECT?

FOR WHOM WILL  
YOU BE WORKING?

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## WHAT ASSETS ARE THERE TO PROTECT?

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### WHAT ARE YOU PROTECTING?

#### 1. ARE THEY MOVABLE?

- A. Cash, Brokerage Accounts?
- B. Real Estate?

#### 2. DOES THE LIABILITY FOLLOW?

- A. Aircraft, Boats, Cars?
- B. Lawyers, Doctors, Professionals?

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### ASSETS TO PROTECT

1. CASH ASSETS	\$ 125,000
2. PROTECTED ASSETS (i.e. ERISA, T BY E R/E, L/I)	<del>2,500,000</del>
3. BROKERAGE ACCOUNTS	10,000
4. REAL ESTATE	100,000
5. PERSONAL PROPERTY (STUFF, ART, JEWELRY)	<u>25,000</u>
NET ASSETS TO PROTECT	\$ 260,000

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ASSETS TO PROTECT

- 1. CASH ASSETS \$ 500,000
- 2. PROTECTED ASSETS  
(i.e. ERISA, T BY E R/E, L/I) ~~1,500,000~~
- 3. BROKERAGE ACCOUNTS 2,000,000
- 4. BUSINESS 1,000,000
- 5. REAL ESTATE 1,000,000
- 6. PERSONAL PROPERTY  
(STUFF, ART, JEWELRY) 250,000
- NET ASSETS TO PROTECT \$4,750,000

HOW MUCH DO YOU PROTECT?

NEST EGG!



TWE!



FUNDING

- |                            | <u>AP</u>      | <u>EP</u> |
|----------------------------|----------------|-----------|
| 1. CASH AND EQUALS         | X (LLC)        |           |
| 2. INVESTMENT REAL ESTATE  | X (LLC)        |           |
| 3. BUSINESS INTERESTS      | X (DEPENDS)    |           |
| a. C CORP                  | X (LLC or APT) |           |
| b. S CORP                  | X (APT)        | X         |
| c. LLC or LP INTERESTS     | X (APT)        | X         |
| 4. PRINCIPAL RESIDENCE     | EQUITY(APT)    |           |
| 5. TOYS (CARS - AIRPLANES) | X (LLC)        |           |
| 6. COLLECTIBLES (ART, ETC) | X (LLC)        |           |

## FOR WHOM WILL YOU BE WORKING?

37

### HOW WELL DO YOU KNOW THAT PERSON?

1. WHERE ARE THEY FROM?
2. WHAT HAVE THEY BEEN DOING IN PERSONAL PURSUITS, ACTIVITIES AND BUSINESS?
3. MONEY IS FROM WHERE?
4. "IF YOUR MOTHER SAYS SHE LOVES YOU, CHECK IT OUT".  
Arnold Dorf



38

### WHEN DO YOU BEGIN DRAFTING?

1. FIRST CONTACT  
Phone, E-mail, Website, Client/Professional Introduction.
2. QUESTIONNAIRE  
Reveals Assets to Protect, Lawsuits or Claims, Life Situation(s)
3. OFFICE CONSULTATION  
Your chance to look them in the eye.
4. AFTER DUE DILIGENCE  
Confirm truthfulness. . . or lack thereof.

39

DUE DILIGENCE

- 1. Google.
- 2. MoneyLaundering.com
- 3. SAS - AML
- 4. America e-Find
- 5. World-Check.
- 6. Search the Web for more.

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USA PATRIOT ACT

Uniting and Strengthening America by Providing Appropriate Tools  
Required to Intercept and Obstruct Terrorism Act of 2001

The act expands the authority of US law enforcement agencies for the stated purpose of fighting terrorism in the United States and abroad. Among its provisions, the Act increases the ability of law enforcement agencies to search telephone, e-mail communications, medical, financial and other records; eases restrictions on foreign intelligence gathering within the United States; expands the Secretary of the Treasury's authority to regulate financial transactions, particularly those involving foreign individuals and entities; and enhances the discretion of law enforcement and immigration authorities in detaining and deporting immigrants suspected of terrorism-related acts. The act also expands the definition of terrorism to include domestic terrorism, thus enlarging the number of activities to which the USA Patriot Act's expanded law enforcement powers can be applied.

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CFT DIRECTIVES

- 1. Office of Foreign Assets Control ("OFAC").  
(<http://www.treas.gov/ofac/t11sdn.pdf>)
- 2. Treasury Dept. List of Specifically Designed National and Blocked Persons.  
(<https://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx>)
- 3. U.S. Department of State's List of Designated Foreign Terrorist Organizations.  
(<http://www.state.gov/j/ct/rls/other/des/123085.htm>)
- 4. UNSC Resolution 1390.
- 5. European Union's Lists of Terrorists.  
(<http://www.consilium.europa.eu/en/policies/>)

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AML DIRECTIVES

1. The USA PATRIOT Act.
2. The Financial Services and Markets Act of 2000.
3. The Proceeds of Crime Act of 2002.
4. Basel II and Basel III Accords.
5. EU Second and Third Money Laundering Directives.

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FATF 40+9 Recommendations.

Recommendation 2

Countries should ensure that:

- a) The intent and knowledge required to prove the offence of money laundering is consistent with the standards set forth in the Vienna and Palermo Conventions, including the concept that such mental state may be inferred from objective factual circumstances.
- b) Criminal liability, and, where that is not possible, civil or administrative liability, should apply to legal persons. This should not preclude parallel criminal, civil or administrative proceedings with respect to legal persons in countries in which such forms of liability are available. Legal persons should be subject to effective, proportionate and dissuasive sanctions. Such measures should be without prejudice to the criminal liability of individuals.

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FATF 40+9 Recommendations.

Recommendation 12.

The customer due diligence and record-keeping requirements set out in Recommendations 5, 6, and 8 to 11 apply to designated non-financial businesses and professions in the following situations:

- d) Lawyers, notaries, other independent legal professionals and accountants when they prepare for or carry out transactions for their client concerning the following activities:
  - buying and selling of real estate;
  - managing of client money, securities or other assets;
  - management of bank, savings or securities accounts;
  - organisation of contributions for the creation, operation or management of companies;
  - creation, operation or management of legal persons or arrangements, and buying and selling of business entities.

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NECESSARY DOCUMENTS

1. SOLVENCY AFFIDAVIT
2. AFFIDAVIT OF INTENT
3. PATRIOT ACT AFFIDAVIT
4. MONEY LAUNDERING AFFIDAVIT
5. RECOMMENDATION LETTER

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SO WHAT  
ABOUT AP  
TRUST  
PLANNING IN  
ILLINOIS?

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**RASSST**  
Rule Against Self-Settled, Spendthrift Trusts

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ARE TRANSFERS TO AP TRUSTS *PER SE* FRAUDULENT?

*Crane v. Illinois Merchants Trust Co.*, 238 Ill.App. 257 (1925),  
and *Barash v. McReady* ( In re Morris ),  
151 B.R. 900, 906-07 (Bankr.C.D.Ill.1993)  
Crane court held that self-settled spendthrift trusts are fraudulent  
and *per se* void and may be reached by other creditors.

*Crane*, 238 Ill.App. at 262-63

**\*\*Uniform Fraudulent Transfer Act, January 1, 1990\*\***  
740 ILCS 160/1 *et seq.*

*Rush Univ. Med. Center v. Sessions*, 956 N.E.2d 490  
353 Ill.Dec. 628 (Aug. 5, 2011)

Uniform Fraudulent Transfer Act requires a creditor to satisfy the  
conditions of either section 5(a)(1) or section 5(a)(2) to bring a  
successful fraudulent transfer claim. Transfer is not *per se* fraudulent.

*Rush*, 956 N.E. 2d at 497

*Rush Univ. Med. Center v. Sessions*, 2012 IL 112906 (September 30, 2012)  
(We hold that the Uniform Fraudulent Transfer Act did not displace or  
abrogate the common law trust rule with respect to self settled trusts. We also  
conclude that under the undisputed facts of this case, plaintiff was a "creditor"  
of Sessions for purposes of the common law rule.

*Rush*, 2012 IL 112906 at p. 16

*Crane v. Ill. Merchants Trust Co.*,  
238 Ill.App. 257 (1925),

"The general rule is well settled that a person cannot settle his  
estate in trust for his own benefit, so as to be free from liability  
for his debts. The fact that the grantor is a spendthrift is of course  
immaterial. Property so settled is assets in the hands of the  
trustee for the payment of debts; and the giving of unlimited  
discretion to the trustee does not take the case out of the general  
rule. \* \* \* The rule is founded upon the self-evident proposition  
that a man's property should be subject to the payment of his  
debts, although he has vested a nominal title thereto in some  
other person. The intention of the parties to such transfer,  
whether honest or fraudulent, is wholly immaterial."

*Crane*, 238 Ill.App. at 262-63

“Traditional law is that if a settlor creates a trust  
for the settlor's own benefit and inserts a  
spendthrift clause, the clause is void as to the then  
existing and future creditors, and creditors can  
reach the settlor's interest under the trust.”

*Rush*, 2012 IL 112906 at p. 7, quoting *Bogert's Trusts and Trustees*,  
§ 223, at 42467 (3d ed. 2007).

*Rush Univ. Med. Center v. Sessions*, 2012 IL 112906  
(September 30, 2012)

“ . . . it is not a fraudulent transfer of funds that renders the trust void as to creditors under the common law, but rather it is the spendthrift provision in the self-settled trust and the settlor's retention of the benefits that renders the trust void as to creditors.”

*Rush*, 2012 IL 112906 at p. 7

52

PUBLIC POLICY ACCEPTS SOME  
“SELF-SETTLED SPENDTHRIFT TRUSTS”

ERISA PLANS - ANTI-ALIENATION

IRAS - A KIND OF TRUST

ENTITY FORMATION

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“SELF-SETTLED,  
SPENDTHRIFT  
TRUST”

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**SELF-SETTLED  
~~SPENDTHRIFT TRUST~~**

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**~~SELF-SETTLED~~  
SPENDTHRIFT TRUST**

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**SPENDTHRIFT PROVISION**

The trust agreement contains a provision, or clause (commonly called a spendthrift clause or provision), which stipulates that no trustee can be forced to make distributions or an assignment of income and/or principal to any named or classified beneficiary entitled to benefit from distributions of income and/or principal the trust estate in or any third party.

Further, that spendthrift provision should be drafted such that a beneficiary cannot force the trustee to make a distribution of trust income and/or principal to a beneficiary in advance of the time or date that the trust agreement stipulates for distribution.

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**THIRD PARTY TRUSTS**

Sec. 2-1403. Judgment debtor as beneficiary of trust.  
No court, except as otherwise provided in this Section, shall order the satisfaction of a judgment out of any property held in trust for the judgment debtor if such trust has, in good faith, been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor.

735 ILCS 5/2-1403 (from Ch. 110, par. 2-1403)

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**SUPPORT TRUST**  
**VS.**  
**DISCRETIONARY TRUST**

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**USEFUL IRREVOCABLE TRUSTS**

- Intentionally Defective Grantor Trusts ("IDGT")
- Beneficiary Defective Grantor Trusts ("BDGT")
- Qualified Personal Residence Trust ("QPRT")
- Beneficiary Taxed Irrevocable Trust ("BETIR")
- Beneficiary Defective Inheritor's Trust ("BDIT")
- Irrevocable Life Insurance Trust ("ILIT")
- Good Old Fully Discretionary Irrevocable Trust ("GOFDIT")
- Third Party Fully Discretionary Irrevocable Trust ("TPFDIT")

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PLANNING DIFFERENCES  
BETWEEN ESTATE AND ASSET PROTECTION

**ESTATE PLANNING**

1. EVERYONE NEEDS.
2. REVOCABLE BY GRANTOR.
3. GOAL -DISTRIBUTION AND EFFICIENCY.
4. RETAIN DIRECT CONTROL.
5. EFFECTIVE - DEATH.
6. COMPREHENSIVE.
7. LITTLE/NO DUE DILIGENCE.
8. EVERYONE WILL LOVE YOU.

**ASSET PROTECTION**

1. USEFUL TO ONLY SOME.
2. IRREVOCABLE BY GRANTOR.
3. GOAL - PROTECTION.
4. DIRECT CONTROL DENIED.
5. EFFECTIVE - NOW.
6. SELECTIVE.
7. EXTENSIVE DUE DILIGENCE.
8. JUDGE/CREDITORS WILL NOT.

**IF YOU ARE TALKING WITH  
YOUR CLIENTS ABOUT  
PLANNING THEIR ESTATE OR  
WEALTH OWNERSHIP  
WITHOUT AT LEAST  
DISCUSSING ASSET  
PROTECTION PLANNING:**

**ITS MALPRACTICE!**

The “next wave of creative malpractice actions could well be against estate planning attorneys who fail to advise clients about asset protection alternatives.”

Duncan E. Osborne and John A. Terrill, II, *Fundamentals of Asset Protection Planning*, 31 ACTEC Journal 319, 320 (Spring 2006).

“[F]ailure to so advise a wealthy or at risk client may constitute malpractice if the client’s assets are needlessly exposed to a subsequent judgment or other legal claim.”

Mario A. Mata, *Asset Protection Planning for the Family Business Owner, Estate Planning for the Family Business Owner* (ALI-ABA July 2005)

