

# Asset Protection Trusts in Texas? Really?

The 2015 Stanley M. Johanson Estate Planning Workshop

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## Who Should Engage in Asset Protection Planning?

- ◆ Asset protection planning is inherent in all estate planning
- ◆ Every client needs asset protection to some degree; although some clients are more at risk:
  - High-risk professions (doctor, lawyer, accountant, investment advisor)
  - High-risk corporate capacities (director/officer of public company)
  - High-risk business (manufacturing items that could cause harm)
  - High-profile positions (entertainer, sports figure, politician)
  - Risky hobbies (recreational pilot, into fast cars/motorcycles)

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## The U.S. Legal System is Creditor-Friendly

- ◆ Plaintiffs don't have any skin in the game
  - Contingency fees
  - No bond requirement, except in appeals
  - No loser-pay system
- ◆ Punitive damages greatly in excess of actual damages
- ◆ Parties in judicial proceedings receive privilege and freedom from civil liability for libel in pleadings, absent a finding of actual malice

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## Is Asset Protection Planning Against Public Policy?

"We . . . admit that there is a just and sound policy . . . to protect creditors against frauds upon their rights . . . But the doctrine, that the owner of property, in the free exercise of his will in disposing of it, cannot dispose of it, but that the object of his bounty . . . must hold it subject to the debts due his creditors . . . is one which we are not prepared to announce as the doctrine of this court."

"[E]very State in this Union has passed statutes by which a part of the property of the debtor is exempt from seizure [for] the payment of his debts. . . . To property so exempted the creditor has no right to look . . . as a means of payment when his debt is created [and] this court has steadily held that [such exemptions are] invalid as to debts then in existence [but] as to contracts made thereafter, the exemptions [are] valid. This distinction is well founded in the sound and unanswerable reason, that the creditor is neither defrauded nor injured by the application of the law to his case, as he knows, when he parts with the consideration of his debt, that the property so exempt can never be made liable to its payment."

*Nichols v. Eaton*, 91 U.S. 716, 725–726 (1875).

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## **Creditor Protection: Fraudulent Transfer Law**

- ◆ General rule
  - A gratuitous transfer of property with the actual or constructive intent to avoid creditors is fraudulent and may be set aside
- ◆ Three classes of creditors
  - Present creditor – constructive intent: gratuitous transfer + insolvency
  - Potential subsequent creditor – actual intent: proved with badges of fraud
  - Unknown future creditor – not protected
- ◆ If found fraudulent as to “any creditor,” not just that particular creditor, transfer will be void

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## **Creditor Protection: Fraudulent Transfer Law (cont'd.)**

- ◆ Statute of limitations
  - State Law: Statute of limitations on fraudulent transfer claims in most states is four years, or, if later, within one year of when the transfer could reasonably have been discovered
  - Bankruptcy Law: A bankruptcy trustee can have a fraudulent transfer set aside if the transfer is made within two years of bankruptcy; certain transfers to a self-settled trust or similar device subject to a ten-year statute of limitations

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