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Business Entities in Estate Planning: Asset Protection, Anonymity, and the Corporate Transparency Act

John K. Ross IV

John K. Ross IV

Ross & Shoalmire, PLLC

Texarkana, Texas 75503

john@rossandshoalmire.com

In a letter on March 14, 1538 from Thomas, Duke of Norfolk, to Thomas Cromwell, Thomas wrote that "a man can not have his cake and eat his cake." And yet, 486 years later, the average estate planning client would in fact like to have both their cake and the ability to eat it. The "cake" in this context is a combination of asset protection, anonymity, and retained control. The client would like to continue to manage their assets as they have historically, protect those assets from whatever perceived threats they are concerned about and retain their privacy. From a philosophical standpoint, a person cannot have their cake and eat it because once it is eaten, they no longer have their cake. But from the estate planning context, with the correct combination of trusts and business entities, having one's cake and eating it too is well within one's grasp.

SCOPE

The scope of this paper is specifically focused on the use of business entities in estate planning as related to privacy and asset protection, particularly when combined with trust-based planning. However, the topic of trusts as asset protection vehicles is a topic solely unto itself. One should familiarize themselves with the wonderful world of trust acronyms such as MAPT, SLAT, DAPT, QTIP and their brethren.

BUSINESS ENTITIES FOR PRIVACY

One of the author's clients is a successful author whose books have spawned various television shows. Initially, the client lived in a relatively rural community. As her stardom began to swell, a reporter for a national publication did a piece on the author describing her humble origins. Unfortunately, as her personal residence address was relatively available, the reporter was able to locate her home and then proceeded to describe

the winding road and small five-and-dime store near her house. Within days of the article being published, fans had located the author and were treating it as a tourist attraction.

However, you do not have to be a celebrity to want privacy. Many rental property owners do not want their tenants to know the identity of the landlord. Business owners and professionals often do not want their investments into business ventures or investment properties easily tied to them. Whether the desire is purely personal or whether it is to make a client's assets more difficult to discern in a litigation context, privacy is a legitimate and valid concern for many.

Since trusts are private documents, keeping a trust out of public records can be relatively easy. In cases such as real estate ownership, where a deed transferring property to a trust is a public record, simply naming the trust something other than the beneficial owner's name can make a search difficult if someone doesn't already know the address. And even then, since the terms of the trust are private, even knowing that a particular person is a trustee of a trust that holds land doesn't by itself indicate that they have any beneficial ownership. Even a revocable trust, which is not an asset protection vehicle, provides a level of asset protection if the name is anonymous simply because it makes tying the ownership of the assets to the grantor(s) difficult.

With business entities however, state law dictates what is readily made available to the public. In each state, the certificate of formation (or articles of formation or certificate of organization depending on the state of creation) are made available to the public via each state's Secretary of State. Therefore, for privacy purposes, each state's mandatory provisions for the certificate of formation dictate how easily the ownership or management

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