

## Wealth Protection Planning Fraudulent Conveyance

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By Randall Borkus

Over the past year, I received a call or two a month from Advisors telling me their clients want wealth protection advice and the motivation for the call is generated after some feasible liability has arisen. Too often no meaningful planning is available. The reason is that the contemplated transfers involve property with loads of contingent liabilities, so planning with such assets would most likely be undone by a court under fraudulent conveyance laws.

In order to determine whether there has been a fraudulent conveyance a court looks for evidence of fraud or “badges of fraud”, such as the following:

1. Receiving inadequate or fictitious or false consideration for a sale;
2. Property is transferred by a debtor in anticipation of or during a pending lawsuit;
3. Transactions out of the normal course of business;
4. Failure to record a conveyance or an unusual delay in recording or other concealment of a transfer (also known as “pocket deed” planning);
5. Insolvency or substantial indebtedness resulting from a transfer;
6. Transfer of all the debtor's property into a structure that leaves them insolvent or significantly financially impoverished;
7. Failure of party charged with fraudulent conveyance to produce evidence of a transfer;
8. Unexplained retention of possession and enjoyment of property after an alleged transfer;
9. Existence of a blood relationship between the parties to the transfer;
10. Transfer of assets shortly before, or after, a substantial debt is incurred.

Other circumstances that may constitute evidence of fraud would be a transferee's failure to maintain adequate records of loans, or advances made to a friendly transferor; failure to demand repayment when a loan comes due; grossly insufficient description of the property transferred; sending money out of the country; assignment of the property to a purchaser; and soon after transfer, purchaser resells the property at a significantly higher price.

Thus, should your clients have assets they wish to protect, namely real estate, cash and securities, the time to plan is before the storm—there is a lot of value to an “old and cold” transfer. The potential for liability will always exist whether it's a business deal gone badly, an automobile accident, defaulted partners, defaulted loans, injured tenant, personal negligence, professional malpractice, etc...

Wealth preservation or asset protection planning, when properly done, is perfectly legal, and in many cases, is not grossly expensive. However, be sure that you and your client work with an experienced and knowledgeable Wealth preservation professional – there is much too much at stake to do otherwise.

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