A GUIDE TO ELDER PLANNING

UPDATED AND REVISED EDITION

EVERYTHING YOU NEED TO KNOW TO PROTECT YOUR LOVED ONES AND YOURSELF

STEVE WEISMAN

A Guide to Elder Planning

This page intentionally left blank

A Guide to Elder Planning:

Everything You Need to Know to Protect Your Loved Ones and Yourself

Updated and Revised Edition

Steve Weisman

FT Press

Vice President, Publisher: Tim Moore
Associate Publisher and Director of Marketing: Amy Neidlinger
Executive Editor: Jim Boyd
Editorial Assistant: Pamela Boland
Development Editor: Russ Hall
Operations Specialist: Jodi Kemper
Marketing Manager: Megan Graue
Cover Designer: Alan Clements
Managing Editor: Kristy Hart
Project Editor: Elaine Wiley
Copy Editor: Sheri Cain
Proofreader: Sarah Kearns
Senior Indexer: Cheryl Lenser
Senior Compositor: Gloria Schurick
Manufacturing Buyer: Dan Uhrig

Publishing as FT Press
Upper Saddle River, New Jersey 07458

Printed in the United States of America
First Printing January 2013

ISBN-10: 0-13-309192-9
ISBN-13: 978-0-13-309192-2

Pearson Education LTD.
Pearson Education Australia PTY, Limited.
Pearson Education Singapore, Pte. Ltd.
Pearson Education Asia, Ltd.
Pearson Education Canada, Ltd.
Pearson Educación de Mexico, S.A. de C.V.
Pearson Education—Japan
Pearson Education Malaysia, Pte. Ltd.

Library of Congress Cataloging-in-Publication Data

Weisman, Steve.

A guide to elder planning : everything you need to know to protect your loved ones and yourself / Steve Weisman.—2e.

pages cm

ISBN 978-0-13-309192-2 (pbk. : alk. paper)

1. Older people—Legal status, laws, etc.—United States—Popular works. I. Title.

KF390.A4W45 2013

646.7'9—dc23

2012043869

"Grow old with me, the best is yet to be."
—Robert Browning

This book is dedicated, as is everything I do,
to my dear wife, Carole.

Contents

About the Author

Steve Weisman is a lawyer who hosts the radio show "A Touch of Grey," syndicated to more than 50 stations nationwide, including AM 970 (NYC) and KRLA (LA). A senior lecturer at Bentley University where he teaches Elder Planning, he is a member of the National Academy of Elder Law Attorneys and is admitted to practice before the U.S. Supreme Court.

The legal editor for *Talkers* magazine and RadioInfo.com, he writes for publications ranging from *The Boston Globe* to *Playboy* and earned an ABA Certificate of Merit for excellence in legal journalism. His books include *Boomer or Bust*, *The Truth About Buying Annuities*, *The Truth About Protecting Your IRAs and 401(k)s,* and *The Truth About Avoiding Scams*, which was featured on *Dr. Phil* and CNN. Weisman received a J.D. degree from Boston College Law School. He also operates the website www.scamicide.com, which provides the latest information on scams and identity theft.

This page intentionally left blank

1

Asset Protection

"'Would you tell me, please,

which way I ought to go from here?'

'That depends a good deal on where you want to get to,'

said the Cat.

'I don't much care where,' said Alice.

'Then it doesn't matter which way you go,' said the Cat.

'So long as I get somewhere,' Alice added as an explanation.

'Oh, you're sure to do that,' said the Cat,

'if you only walk long enough.'"

—Lewis Carroll
Alice's Adventures in Wonderland

It is not what you make that counts, it is how much you keep. Protecting your assets from the slings and arrows of outrageous lawsuits or divorces is a concern you share with many people. A single automobile accident or an injury to someone at your home could result in a financially devastating claim against you.

Insurance

At the cornerstone of any personal asset protection plan is insurance. You may be cynical about insurance and find yourself in agreement with Al Bundy of the old sitcom *Married with Children*, who said, "Insurance is like marriage. You pay and pay but you never get anything back."

However, the purpose of liability insurance is not to get anything back, but to protect your other assets if you find yourself in legal jeopardy. In addition, when it comes to your homeowner's insurance or your automobile insurance, you are not only protecting yourself if a claim is made against you; you are also insuring that if harm comes to you or your property, money is available to remedy the situation. This is money that you would prefer not getting, because it means that you have suffered a loss. Proper insurance coverage helps you sleep at night. It is a product that, if success is measured by money, you only win when you suffer a loss.

Homeowner's Insurance

Homeowner's insurance can protect you from losses due to fire, smoke, water, wind, hail, rain, theft, vandalism, or even pestilence. Well, maybe not pestilence, but it does cover a great many things beyond mere physical damage to your home; it may, for example, provide insurance coverage if the mailman slips and falls at your door.

The extent to which a homeowner's insurance policy may be stretched was illustrated by a decision of the Federal Eighth Circuit Court of Appeals (State Farm Insurance v. Burton J. Ewing), in which it interpreted Minnesota law to provide for insurance coverage under a homeowner's insurance policy when the homeowner's mentally ill son killed the homeowner's daughter. The man, who suffered from bipolar and schizoaffective disorders, lived in a cabin that his mother owned. The sister lived with her mother. During a psychotic episode, the man went to his mother's house and killed his sister.

At his murder trial, the man was found not guilty by reason of insanity. Although he was not held criminally responsible, the dead woman's executor sued the man for wrongful death and looked to the mother's homeowner's insurance policy for coverage. The insurance company, not surprisingly, tried to deny coverage, saying that the murder did not constitute a covered occurrence under the mother's homeowner's policy because it was not an accident.

The court, however, disagreed, saying that because the man was pronounced to be mentally ill, he could not possess the ability to control his conduct regardless of any understanding of the nature of the act or its wrongfulness. The court went on to say that because he lacked the ability to control his conduct, the bludgeoning to death of his sister was both unexpected and unintended and therefore qualified as an accidental occurrence, which would be covered under the mother's homeowner's insurance policy.

Life used to be so simple. Homeowner's insurance was a "no brainer." When you bought your home, the bank from which you obtained your mortgage loan required homeowner's insurance, so after a short conversation with an insurance agent, you were all set. But no more. Some insurance companies have actually stopped selling insurance in some parts of the country, particularly where they have experienced significant mold-related claims. Those companies still selling insurance often raise their premiums.

Credit Reports

One disturbing trend involves insurance companies setting premiums or even rejecting applications entirely on the basis of an applicant's credit report. The insurance companies argue that people with bad credit statistically file more claims. Critics of this method of setting rates and denying policy applications have numerous concerns, including a charge that this procedure is a thinly disguised statistical justification for racial bias. Moreover, the formula used by the companies to come up with the insurance credit score is a secret not even provided to the state insurance commissioners for evaluation as to its legitimacy.

It is also important to note that credit scores, as derived from credit reports of the three major credit-reporting agencies, are often inaccurate, which lead to people to be either denied insurance or forced to pay larger premiums through no fault of their own. Hawaii and Maryland ban the use of insurance credit scores for all underwriting purposes; California bans the use of such scores in regard to automobile insurance, while permitting them to be used in regard to homeowner's insurance policies. Many other states are investigating this practice. Although statistics do not lie, they may fib a bit. An Australian study indicates that Geminis had the worst driving records of any astrological sign, whereas Capricorns were the best drivers.[1]

Dog Ownership

According to an old saying, barking dogs don't bite. Unfortunately, the old saying gives no guidance as to a particular barking dog's propensities once it has stopped barking, at which point, the dog just might find it necessary to nibble on someone's leg. According to the Insurance Information Institute, the cost of home-insurance claims for dog bites is more than $300 million annually.[2] Some insurers refuse to insure certain breeds; the usual suspects are Pit Bulls, Rottweilers, Wolf Hybrids, Huskies, Dalmatians, and Great Danes. Other companies do not specifically discriminate by breed.

Generally, policyholders are required to answer questions about their pets on the insurance application. Be honest and forthright in responding to these questions, because an insurance company could deny you coverage in the event of a dog bite if the application contained erroneous information. Most often, the insurance company asks whether a dog is vicious, whether it has ever bitten anyone, or whether it has been trained specifically for attack. Merely because your dog has bitten someone in the past, you will not automatically be disqualified from receiving coverage if you take precautions to prevent a recurrence. The insurance company also looks at the seriousness of a previous attack and whether the attack was provoked or unprovoked.

If you have a dog, consult your insurance agent about the company's rules regarding dogs, and be ready to shop around for a policy with which both you and man's best friend will be comfortable.

Valuable Personal Property

If you have jewelry, antiques, or any other valuable personal property in your home, it is important to get a rider to your policy that will specifically cover those items. Without that rider, most homeowner's insurance policies will limit your coverage to around $1,000 for these items. Even then, there is usually a deductible amount before you receive anything.

Make a written inventory of your personal possessions and videotape them in the home. In addition, keep the receipts for any expensive items, because in the event of a theft or damage, you need to prove the value of your property. You may also want to consider getting an appraisal for very expensive items, such as jewelry or antiques that may be worth more than you originally paid for them (this includes collections that typically appreciate in value, such as stamps, books, or even Hummel figurines). The appraisal helps you in the event of a claim.

As always, the devil is in the details, lurking in the fine print of your policy. Some homeowner's insurance policies do not cover a "mysterious disappearance," which sounds somewhat eerie, but actually means that if your diamond ring fell into the toilet, you could be down the drain. Make sure that your coverage is not a mystery to you.

Liability Insurance

Most homeowner's insurance policies provide liability protection of around $500,000 in the event someone is hurt on your property. However, for a small additional fee of about $200 a year, you can get an extra million dollars of protection through the purchase of umbrella insurance, the ultimate protection in the event of a really rainy day.

Umbrella insurance supplements your homeowner's and automobile insurance coverage and kicks in after the full amounts of those insurance policies have been utilized. Umbrella insurance covers you for claims that relate to your personal and business activities. Generally, the insurance company with which you have your automobile insurance or your homeowner's policy will provide you with umbrella coverage after you acquire the maximum in coverage on your regular homeowner's insurance and automobile insurance. Umbrella insurance is perhaps the ultimate protection from lawsuits at a reasonable price.

When you apply for homeowner's insurance, the company looks at the claims history of the home you are buying. A large number of claims in recent years could result in the application being turned down or your premiums being raised. Insurance companies look for patterns suggesting the possibility of future claims. It is prudent to get a copy of the Comprehensive Loss Underwriting Exchange (CLUE—pretty clever, eh?) report of the property before you apply for insurance. A CLUE property report covers the history of the last seven years of claims regarding the home.

Loophole

Only the homeowner and the insurance companies can get this report, so have the seller provide this to you. It can be ordered online at www.personalreports.lexisnexis.com.

Homeowner's Insurance Tips

1. As Smokey Robinson suggested, shop around. Rates vary significantly.
2. Consider increasing the amount of your deductible to lower the amount of your premium.
3. Consider buying both your home insurance and your automobile insurance from the same insurance company, because some companies offer you a lower premium if you purchase both your insurance policies from the same company.
4. Consider installing a home security system, which will not only provide you with a greater home-security protection, but may result in the company lowering your premium.
5. Loyalty is a good thing. Many companies may drop your rates if you have been with them for a long time.
6. Ask your insurer if they give a discount for retirees. Many do.

Prenuptial Agreements

Prenuptial (or premarital) agreements can be of great assistance in protecting assets in the event of a divorce or when a person marries and wants to protect assets for the children of a previous marriage.

History

For many years, husbands and wives were legally prohibited from making any contracts between themselves. Then, in the 1800s, the laws gradually changed to permit husbands and wives to make contracts with each other by which they could agree about what assets would be held separately by either of them during the marriage. Other than that, prenuptial agreements, particularly to provide for property rights following a divorce, were prohibited. The thinking was that premarital agreements were against "public policy" because, it was argued, they encouraged divorce.

It is not a coincidence that, in 1970, Florida, which has a significant population of senior citizens, became the first state to allow spouses to make premarital agreements that would take effect upon a divorce or death. Florida then and now has a large number of senior citizens who marry after having had previous families. These remarrying senior citizens often make prenuptial agreements to preserve assets for children of an earlier marriage should the parent later divorce or die.

Think about it. Marriage is a contract between two people that can end in one of only two ways—either by death or divorce—neither of which sounds particularly attractive. Yet, we still marry. I guess love really does conquer all.

Enforcement

Generally, for a prenuptial agreement to be enforceable, there must be full and fair disclosure of all the assets of both people. An agreement will not be recognized if it was based on fraud, misrepresentation, duress, or compulsion. At the time of the signing of the agreement, the agreement should be fair and reasonable. Most states follow the standard that, for the agreement to be enforceable upon death or divorce, the agreement must not be unconscionable. This term has been defined as occurring when "the inequality is so strong, gross, and manifest that it must be impossible to state it to one with common senses without producing an exclamation at the inequality of it" (Kathleen Short v. Howard N. Short [Missouri Court of Appeals—Eastern District No. ED95663]). For a visual aid in interpreting the standard, I refer people to the scene in the movie *Home Alone* where Kevin slaps shave lotion on his face while staring in the mirror and contorts his face in pain. If the agreement would solicit that effect, it is unconscionable. It is also certainly advisable, although not strictly required, that each person be represented by his or her own lawyer.

Allowable Provisions

About half of the states follow the Uniform Prenuptial Agreement Act, which provides for a number of matters that may properly be the subject of a prenuptial agreement. These include

1. The right to make a contract in regard to property.
2. Disposition of property upon separation, a breakup of the marriage, death, or the occurrence or nonoccurrence of any other event.
3. Modification or elimination of spousal support.
4. Ownership rights and disposition of death benefits from a life insurance policy.
5. The making of a will, trust, or other arrangement.

Provisions for the making of a will are particularly important, because without appropriate provisions in a prenuptial agreement, your surviving spouse is permitted by law to claim a statutory share of your probate estate, usually one-third, if the survivor receives nothing in the will or is dissatisfied with the inheritance.

Loophole

You may want to leave your ERISA pension benefits (employer-sponsored profit-sharing or pension plans) to your children from a previous marriage rather than to your spouse. The law provides that ERISA pension benefits are payable to the surviving spouse of the pension holder unless the surviving spouse has given up the right to receive the pension. You would think that all you would have to do is to have your spouse waive rights to the pension in the prenuptial agreement. But, you would be wrong. Talk about technicalities! A spouse is allowed by law to waive those rights, but the about-to-be-married person is obviously not yet the spouse of the pension holder. The law says that if the prospective spouse signs the waiver before the official marriage ceremony, the waiver is ineffective. So, what do you do? In that situation, it is important to ensure that the appropriate waivers are signed after the marriage has occurred, to supplement the prenuptial agreement.

Medicaid Implications

Senior citizens may want a prenuptial agreement to protect assets for themselves and their children from previous marriages in the event that a spouse goes into a nursing home and Medicaid coverage is sought. Unfortunately, in this instance, the state goes by its version of the Golden Rule, namely, "The state has the gold, so the state makes the rules," and the rule here is that the states are not bound by the provisions of a prenuptial agreement and may consider the assets of both spouses if one requires long-term care through Medicaid.

Living Together Agreements

More older Americans are choosing to live together without getting married. According to Bowling Green State University demographer Susan Brown, in 2006, 1.8 million Americans above the age of 50 lived together as couples without being married, which is an increase of 50 percent from just six years earlier. These numbers may even be higher today. There are many reasons why seniors may choose to live together rather than get married, including, quite significantly, the possible loss of pension benefits from a previous spouse. Some people refrain from remarriage under the false belief that if they remarry, they would lose Social Security survivor benefits derived from the earnings of their deceased previous spouse, but this rule only applies if you remarry prior to the age of 60 (or 50 if you are disabled).

Perhaps the primary reason that many seniors live together rather than remarry is so that, in the event that one has to go into a nursing home, his assets will not be considered in determining eligibility for Medicaid coverage. If they are living together, the partner's assets would not be considered in determining Medicaid eligibility for the spouse entering a nursing home and applying for Medicaid benefits, while if they were married, the income and assets of both spouses are considered in determining the eligibility for either or both of them should either or both require long-term care to be paid for by Medicaid.

It is important for older couples living together without being married to have a cohabitation agreement that clearly provides what their respective responsibilities are in the event of death or separation. They should also be wary of combining assets in joint accounts, such as joint bank accounts, because in so doing, each opens himself or herself up to the debts and liabilities of the other.

Bank Accounts

The old cliché used to be "Safe as money in the bank," but with an increase in recent years of the number of banks failing, people are starting to ponder just what their FDIC insurance protection covers if their bank goes under. According to FDIC, prior to 2011, almost one-third of all bank deposits were not covered by FDIC insurance, thereby putting many people in serious jeopardy should their bank fail.

The Federal Deposit Insurance Corporation (FDIC) believed that three classes of people were uncovered by insurance. The first class was made up of those people who were aware that their funds exceeded the federal insurance protection levels, but had faith in their own particular bank. The second class was made up of those people who, frankly, were given the wrong information by their bank as to their coverage. The third class was made up of those people who just did not understand the FDIC rules.

In response to fears brought about by the recession, the FDIC made a temporary change in the amount of FDIC insurance coverage for bank accounts that would last for the years 2011 and 2012. Under this temporary change, all funds deposited in non-interest bearing accounts would be unlimited. Essentially, this unlimited coverage was limited to traditional non-interest earning checking accounts or demand deposit accounts upon which the bank paid no interest.

For interest-bearing accounts, such as interest-bearing checking accounts, savings accounts CDs, and money-market accounts, each depositor is covered by FDIC interest of up to $250,000 for the combined deposits in each individual bank, he or she may have such accounts.

However, additional FDIC coverage is also available for different types of accounts. For example, in addition to the $250,000 coverage you have for income-earning accounts held in your name individually, you also will be able to qualify for an additional $250,000 FDIC insurance coverage for amounts you have in your share of a joint bank account as well as an additional $250,000 FDIC insurance for your share as a beneficiary of a revocable trust you create.

Finally, you also receive FDIC insurance coverage of up to $250,000 for amounts you hold in retirement accounts, such as IRAs or Keogh plans at the bank.

Trusts

When it comes to asset protection, the motto of many people might be "In trusts we trust." A trust is an entity you can create that can hold title to (a fancy way of saying "own") assets for the benefit of yourself or anyone else you choose. There are many reasons for having trusts, from being able to have your assets managed for you, to avoiding estate taxes, to protecting your assets from the claims of creditors or people who may sue you. There are many different kinds of trusts and the terms and requirements of these many different kinds of trusts vary considerably.

Safeguards for Trusts

An important thing to remember is, as a general rule, if you can get at the assets in your trust, so can your creditors. So, if you have a living revocable trust from which you can get money whenever you wish and the terms of which you can change whenever you wish, the assets that you have in the trust are not protected from creditors. However, you can set up a trust with truly independent trustees who have sole discretion as to the right to assets in the trust and any income earned by those assets. With such a trust, you can protect those assets from the claims of creditors or people who might sue you.

A few states, led by Alaska in 1997, have enacted laws by which you can set up special trusts that can protect your assets from the claims of creditors for multiple generations. You do not have to be an Alaskan resident to establish such a trust, although you must meet specific requirements, including a provision in the law that requires anyone setting up an Alaskan Trust to have at least some money held in an Alaskan bank or other financial institution.

Qualified Terminable Interest Trust

As part of an estate plan, you can set up a special form of trust, called a Qualified Terminable Interest Trust (QTIP), that both saves on estate taxes and provides income for your surviving spouse while ensuring that the assets in the trust will pass to your children following the death of the surviving spouse. A QTIP is a good choice when you want to provide for your spouse after your death, but you have some concerns. For example, you fear that your spouse would not manage money well if left the assets directly. Or you may want to make sure that should your spouse remarry, children from an earlier marriage will be guaranteed to receive your assets after the surviving spouse has died.

Offshore Trusts

For people seeking the ultimate in asset protection, offshore trusts are increasingly popular because of the combination of financial privacy laws and asset protection laws in these foreign countries. Many of these offshore trust havens are located in beautiful Caribbean islands, such as the Cayman Islands or Nevis, where it can be most enjoyable to take a trip to visit your money. The Cook Islands provide the strongest laws for protecting assets from the claims of creditors. The Cook Islands are located in the Pacific Ocean, east of Australia and south of Hawaii. My theory is that if you cannot find a place on the globe, you should not have a trust there.

Establishing an offshore trust is unnecessary for all but the wealthiest of people. In addition, although utilizing such trusts is perfectly legal, a significant number of people abuse these trusts to avoid income taxes, thereby raising the ire and the interest of the IRS. You may remember from when you prepared your income tax return the specific section where you must state whether you have an offshore trust. Even if you are operating your trust entirely properly, you may be inviting greater scrutiny of your income tax return by indicating that you have an offshore trust. And if you indicate that you do not have an offshore trust although you really do, you have committed perjury, which is a serious crime.

Homestead Protection

When many people think of the word "homestead," they may think of where Roy Rogers and Dale Evans might have lived, but in fact, a homestead is a legal concept by which your home or a significant amount of the equity in it is protected from the claims of most creditors. Florida and Texas are two states that protect the entire value of the home from the claims of creditors. In addition, most states will allow you, subject to certain time limitations, to sell your home and take the proceeds from that sale to purchase another home, which in turn will be protected from your creditors through homestead protection.

Because the states, when they passed homestead laws, continued to adhere to their version of the Golden Rule (if you have the gold, you make the rules), the homestead protection laws do not protect your home from debts owed to any form of government for things such as real estate taxes or income taxes. Homestead protection and the procedures for establishing it vary from state to state.

In addition, and most important, many people mistakenly think that a homestead declaration protects their home from Medicaid. It will not.

Fraudulent Conveyances

In an effort to protect their assets from the claims of creditors and lawsuits, many people give those assets away, usually to other family members or friends. It is not against the law to do this to protect yourself from people who may have a claim against you in the future, but it is illegal to do so to shelter your assets from present and past creditors or other people who may already have a claim against you (for example, someone with whom you have had an automobile accident). Such a gift is called a *fraudulent transfer*.

In a famous divorce case, Yacobian v. Yacobian, a woman accused her husband of fraudulently giving away substantial amounts of his assets to his children from a prior marriage eight years before their separation to prevent her from having those assets considered for division in their divorce. The court denied her claim, saying that because the gift was made so long before their divorce, it constituted appropriate gift giving. However, the court did say that if gifts had been made at a time when a divorce was imminent, such gifts might qualify as fraudulent transfers.

The laws against fraudulent transfers go back to the Statute of Elizabeth, an English law passed in 1571. According to that law,

"...feofments, gift, grants that have been and are devised and contrived of malice, fraud, covin, collusion or guile to the end purpose and intent to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties will result in forfeiture of the personal property transferred."

To ensure that I was not violating any old English laws (you just can't be too careful), I looked up the word "covin" in the dictionary. It means a treacherous conspiracy of two or more people to defraud someone. I just thought you should know. In an early version of the governmental Golden Rule, under the Statute of Elizabeth, the Queen got half of whatever was recovered through the use of that law.

Assets Protected by Law

With some variations and exceptions, all the states have laws that protect life insurance policies and annuities from the claims of creditors. As usual, the IRS has its own loophole that allows it to get at the cash value of a delinquent taxpayer's life insurance policy.

Another good way to protect life insurance from the claims of creditors is through an Irrevocable Life Insurance Trust (ILIT). This is a great estate and financial planning tool and is described in detail in Chapter 4, "Estate Planning." In addition, Employee Retirement Income Security Act (ERISA) pensions, which are employer-sponsored pension and profit-sharing plans, are protected by law from the claims of creditors, even in a bankruptcy. However, an important exception to this pension protection law is that the IRS is allowed to take pension assets for unpaid taxes. Protection of non-ERISA plans, such as IRAs and Keoghs, vary significantly from state to state.

Joint Ownership

Joint ownership means multiple people own the same property (which can be real estate, bank accounts, stocks, or whatever) in such a way that if one of the owners were to die, the others would automatically inherit the deceased co-owner's share without having to probate that person's co-ownership interest. Designation of joint ownership may be made by the words "joint owners," "joint tenants with right of survivorship" or "JTWROS."

Although many people choose joint ownership as a simple way of avoiding probate, there are considerable risks involved with this form of owning property. First, it drastically limits your ability to do estate tax planning with the property. Second, and perhaps more important, putting someone's name on your account may make your account subject to claims of that person's creditors (including, of course, the IRS, who, not surprisingly, have extraordinary powers to deal with assets held jointly by someone from whom they are trying to collect payments). For these reasons, one of my professors at Boston College Law School always advised, "Stay out of expensive joints." I think he also may have wanted us to be frugal, but that's another story.

Tenancy by the Entirety

Under old English law, a man and a woman became one person when they married. What a romantic concept. That one person, however, was essentially the man. Married women did not have the right to own property. Under this old law, known as tenancy by the entirety, the husband had a superior right of possession in the marital home. If he wanted to kick the wife out of the home, he could do so. In addition, any income earned from the marital home through rents or otherwise belonged to the husband. About the only right the wife had was the right to inherit the home should she outlive her husband. But, there was a significant advantage to the tenancy by the entirety, namely, the marital home was protected from the claims of the wife's or husband's creditors.

Note that a tenancy by the entirety will not protect the home from the claims of joint creditors of the husband and wife. So, if the husband owed a credit-card debt or was sued successfully, for example, as a result of an automobile accident, the house could not be reached by his creditors if title to the home were held through a tenancy by the entirety. However, if the husband and wife jointly owed a credit-card debt or both were held responsible for an automobile accident, the house could be reached by their creditors even if it were owned as a tenancy by the entirety.

In many states, this anachronistic law was abolished, although 25 states still allow it to be chosen as a way for a husband and wife to hold title to their home. In some states, such as Massachusetts, the sexist aspects of the law have been abolished so that husbands and wives have equal rights in the home during their lifetimes, but the survivorship and creditor protection provisions of the law have been maintained.

Family Limited Partnerships

A Family Limited Partnership is a valuable estate and financial planning vehicle, which also has significant asset protection capabilities. A Family Limited Partnership is an arrangement that permits the division of the partnership's interest between those partners designated as limited partners and those partners designated as general partners. General partners are those partners or entities, such as trusts, that manage and control the partnership's assets and actions. Limited partners have no say in the ordinary operations of the partnership and have no personal liability beyond their interest in the partnership for any of its debts. Portfolio management of investments may be the business of the partnership.

Establishment of the Partnership

A Family Limited Partnership is established by a general partner or partners having a general partnership interest in a small amount, usually between 2–5 percent of the value of the partnership. A trust may be the general partner so that you can avoid probate and reduce estate taxes on the general partner's interest. The remaining interest in the partnership is held by the limited partners. The general partner may also be a limited partner. In a family setting, the parents often will be the general partners and give limited partnership interests to their children.

Protection of the Partnership's Assets

Family Limited Partnerships afford great protection of assets from creditors. A creditor of a partner is not entitled to any of the assets that are in the name of the partnership, because the personal debt that a partner has is not a debt of the partnership. A creditor is generally only entitled to what is known as a *charging order* against the partnership interest of the indebted partner, meaning that the creditor can only receive the distributions from the partnership that the indebted partner would receive. In circumstances in which there are claims against a partner, it is common for the general partner to stop making distributions in an effort to thwart the collection efforts of the creditor. Often, this leads to a significant compromise of any claim against the indebted partner.

Endnotes

1. http://sitesninemsn.com.au/minisite/testaustralia/drivingknow.asp, quoting a Suncorp Metway 2002 study.
2. www.iii.org.

Index

F

G

H

N

O

P

S

T

U