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**Start Planning** ▶

## Asset Protection Planning in Virginia:

### A Conversation

by Elizabeth Q. Boehmcke, Esq.

**Client:** I just had the worst week of my life. You have to help me. The other morning I hit the neighbor with my car, and she is severely injured. It was an accident – I just didn't see her jogging past the driveway. And last week, I found out that one of my patients is probably going to sue me for malpractice. I am afraid he has a good case. What should I do?

**Bad Attorney:** My, you have had a bad week. Of course I will help you. Let's create a self-settled spendthrift trust under Virginia law and transfer all your assets to it. The trustee would have discretion to distribute income and principal to you and some other beneficiaries (wink, wink). It will be almost like you still have all your assets, and your creditors won't be able to reach them! Bullet-proof!

Sound like a solid plan? Or does it sound too good to be true? Hopefully, you recognize the latter when you see it. However, with proper advance planning and a cautious approach to funding, asset protection in Virginia may be achievable. Let's rewind the conversation with the Client to about 5 years before this one very bad week:

**Client:** I have a really good life. My medical practice is thriving, and I have settled the only claim ever brought against me by a patient. My marriage and family are strong and healthy. I pay all my bills, and I don't have so much as a dent on my car. I don't know of anything that I have done for which I could be liable professionally or personally. But I am a little concerned about what could happen if I have a bad day sometime down the road.

**HLC Attorney:** Wow! That's really great news. I am glad things are going so well for you. I do understand your concern though. It's hard to think about possibly losing everything you've worked for because of a mistake. How are your finances – plenty of savings?

**Client:** As a matter of fact, yes. My spouse and I have managed to save significantly over the years, and our mortgage is almost paid in full. We have a nice retirement put aside in addition to emergency funds.

**HLC Attorney:** Does your current income cover your bills and do you anticipate that this will remain the case over the next 5 years or so?

## **Asset Protection Planning in Virginia: A Conversation (cont'd)**

**Client:** Yes, I do. Why are you asking all these questions?

**HLC Attorney:** I want to determine whether you are a good candidate to transfer some portion of your assets into an irrevocable Virginia self-settled spendthrift trust. Essentially, the trustee would have discretion to distribute income and principal of the assets to you and your other beneficiaries as the trustee determined. However, the assets would be immune from your creditors. You could think of the trust as a rainy day fund – a hedge against a really bad future day.

**Client:** That sounds amazing! Let's transfer all my assets to the trust!

**HLC Attorney:** No, that would not be advisable. Creditors are generally lumped into two groups: current creditors and future creditors. In Virginia, current creditors can set aside any transfer (into this kind of trust or otherwise) if you are insolvent at the time of transfer or if the transfer itself makes you insolvent. If you transferred all your assets to the trust, you would make yourself insolvent and any current creditor could set aside the transfer and reach your assets. In addition, it could be seen as a badge of fraud, meaning that future creditors could use the transfer as proof of your fraudulent intent to delay, defraud or hinder them and also set aside the transfer. The better course of action would be to transfer only such amount to the trust that equals a reasonable portion of your assets that you can live without and still leaves you with sufficient assets to satisfy all your current and foreseeable creditors. In Virginia, 5 years after the transfer to the self-settled spendthrift trust, creditors can no longer sue to set aside the transfer.

**Client:** Mmm...well, OK. So I can only transfer some of my assets. Is there anything else I can do?

**HLC Attorney:** Of course. You have already done one thing, actually.

**Client:** Really?

**HLC Attorney:** Yes. You and your spouse own the title to your house as tenants by the entirety. That means that if either of you ever had debts in your own names, the creditors of that one spouse could not force you to sell your house and take the proceeds. Thus, if you are ever sued for malpractice and there is a judgment against you, the plaintiff could not take your house away because the judgment is only against you and not you and your spouse. Further, if you should die before your spouse, the house would pass to her by operation of law and would never be available to your creditors to satisfy the debt.

**Client:** Does that mean we can stop paying the mortgage?

**HLC Attorney:** No, because both of your names are on the mortgage. Tenancy by the entirety does not protect against joint creditors.

## **Asset Protection Planning in Virginia: A Conversation (cont'd)**

**Client:** I wish we could do that with our savings account...

**HLC Attorney:** You can. However, you have to keep in mind that you cannot direct how the funds in the account held as tenants by the entirety can be distributed. The balance will all go to the survivor. If the survivor is the debtor, then the creditors will get the funds. And if there is any reason you would want the funds to go into trust for your beneficiaries, you would have to trust that your spouse would take care of that. Depending on your needs, it might make more sense to put the assets into the self-settled spendthrift trust instead of relying on the tenancy by the entirety designation.

**Client:** Anything else?

**HLC Attorney:** Certain of your assets, such as retirement accounts and life insurance, have built-in creditor protections. Generally speaking, creditors cannot reach your ERISA retirement accounts but can only reach the distributions actually made to you. An ERISA plan is typically a 401k plan, a deferred compensation plan or a profit-sharing plan. However, in Virginia, your rollover IRA is treated like an ERISA plan and therefore is protected. Traditional and Roth IRAs are protected only to approximately \$1,000,000. Creditors generally cannot reach the proceeds of life insurance at all unless they are payable to your estate. Another option may be the creation of a limited liability company or family limited partnership to shelter certain assets from your creditors. Of course, the initial transfer of property into such entities would be subject to the same fraudulent transfer rules that would apply to transfers to the self-settled spendthrift trust.

**Client:** Hmm...Well you have given me something to think about. Can we discuss the self-settled spendthrift trust in more detail?

**HLC Attorney:** Of course. There are more details that we need to discuss including statutory requirements for who can act as trustee and how the trust should be administered for maximum protection. There are certain powers that you can retain in the trust (such as the ability to remove and replace the trustee) and certain powers that you cannot (such as the power to veto distributions by the trustee). We will need to discuss all the details further. In addition, there are some federal estate and gift tax issues that we should discuss in more detail as well. The law establishing the self-settled spendthrift trust in Virginia is quite new (only 3 years old) and there are still some questions that need to be resolved, risks that need to be understood before we begin this process. But you could be a good candidate to benefit from the protections that the law provides because you are planning well in advance of having creditor issues and because we would not try to shelter the majority of your assets. Remember the old adage: "Pigs get fat; hogs get slaughtered." Let's talk some more.

If you would like to discuss asset protection planning as part of your comprehensive estate planning, please contact the attorneys at Hook Law Center, P.C. We will be glad to continue the conversation with you.



## Lively Underground

**Hook Law Center:** Kit Kat, what can you tell us about the life of moles?

**Kit Kat:** Well, these quiet, industrious creatures are much maligned for no good reason. Part of the problem is that they are often confused with voles. However, moles primarily consume insects and earthworms, and their lives are largely spent underground. Most of their needs are met there, and they seldom leave the underground. Some amazing facts about moles is that they are incredibly hard-working. They also have a team spirit, and will take turns sleeping in 4-hour shifts while they are tunneling. According to Rob Atkinson in his 2013 book Moles, "Moles are stronger than human athletes, capable of lifting 20 times their own body weight." For centuries, moles have been treated as pests, but they really shouldn't be. They consume ground grubs and other insects and keep their numbers in check. Even their tunnel dirt visible above ground can be used for enriched soil in flower pots and as a host for butterfly larvae.

On the other hand, voles are the ones in our backyards that do plant damage. They feast on plants and bulbs. You could call them the vegetarians of the underworld. They make holes in your grass, though they do not make the mounds usually associated with moles. My sister, Misty, used to love to catch voles in our yard. She would catch them and shake them until they expired. Then, she would bring her trophy to our side door or near a garage door and leave it there, so our parents could see her handiwork. She was quite proud of herself! My parents don't let me out. I have a mostly white coat, and I would be easy prey for larger animals. Misty was what's called a tri-color tabby, so she easily blended in with the mulch around the perimeter of the house.

So there you have it! Don't blame moles for destroying your plants! Moles may create a few raised tunnels, but that is really harmless in the scheme of things. It's the vole who is the real culprit in plant destruction!

(Nancy Lawson, "Underground Wonder," All Animals, March/April 2015, p. 26-29)



**May is Older Americans Month!**

For more information, visit  
<http://www.acl.gov/NewsRoom/Observances/oam/Index.aspx>

**Upcoming Events**

- **June 18 & 30, 2015** – The HLC Monthly Seminar for **June** is **Securing Your Retirement: Transforming Social Security Into a Winning Retirement Strategy**. The seminar is scheduled at 10 a.m. on Thursday, June 18, 2015 in Suffolk and at 10 a.m. on Tuesday, June 30, 2015 in Virginia Beach. To register and reserve your seat, please call 757-399-7506 and ask for Debbie or register online at [www.hooklawcenter.com/seminars](http://www.hooklawcenter.com/seminars).
- **June 25, 2015** – Andrew H. Hook will be speaking to a group at the Virginia Beach Psychiatric Center in Virginia Beach, Virginia.
- **August 12, 2015** – Andrew H. Hook will be speaking to a group at Maryview Hospital in Portsmouth, Virginia.
- **August 21, 2015** – Andrew H. Hook will be speaking to a group at DePaul Hospital in Norfolk, Virginia.
- **August 27, 2015** – Andrew H. Hook will be speaking to a group at Mary Immaculate Hospital in Newport News, Virginia.
- **September 9, 2015** – Andrew H. Hook will be speaking at a Virginia Continuing Legal Education seminar, location TBA.
- **October 26, 2015** – Shannon Laymon-Pecoraro will be speaking at the National Business Institute's seminar on The Probate Process from Start to Finish in Virginia Beach, Virginia.



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