# An Overview of Asset Protection in Texas

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Although many estate planners think that "asset protection" is a relatively new concept that is distinct from "estate planning," limited liability has always been a fundamental part of our legal system and a core estate-planning concept. The fundamental nature of asset protection in our legal system and in our field of practice can be seen most clearly in each state's statutory and common-law opportunities for sheltering assets from creditors' claims. For example, corporations, limited liability companies, limited partnerships, retirement plans, life insurance, annuities, homestead, and spendthrift trusts are all time-honored estate-planning and wealth-protective vehicles. In short, estate planning by its very nature has always been an exercise in asset protection planning, as its goal is to preserve and distribute wealth from generation to generation.

However, the plaintiff-friendly judicial system that has developed in the United States in recent years has fostered a general attitude that all of a person's assets should be available to his creditors, even those creditors whom the debtor could not have foreseen. This attitude however, is not founded in law. Nothing in our law states that an individual must preserve his assets for unknown future claimants—if this were not the case, *inter vivos* dispositions of all sorts would be prohibited, whether gifts to children or friends, charitable contributions, or the settlement of trusts for the benefit of others.

In order to explore these asset protection concepts, this article will discuss the specific protections provided to debtors under Texas law against the backdrop of the strong protection provided to creditors through fraudulent transfer law.

## Fraudulent Transfer Law

In general terms, a "fraudulent transfer" is a transfer of assets made with the intent to defeat the rights of creditors. If a creditor prevails on a fraudulent transfer claim, the transfer (even to a protected vehicle) can be voided, and the creditor can thus reach the transferred assets to satisfy a debt.

Modern fraudulent transfer law has its origins in the Statute of Elizabeth, a sixteenth-century, seven-paragraph act, which provided that conveyances designed to "delay, hinder, or defraud creditors" were declared "utterly void."[1] In addition to voiding fraudulent conveyances, the Act also provided for criminal and civil penalties. With nearly four and a half centuries of tradition, is it any wonder that "asset protection" can stir the emotions of creditors and their lawyers? Yet those who righteously criticize asset protection as an estate-planning goal should consider the environment of the late twentieth century and early twenty-first century juxtaposed against the environment that produced the Statute of Elizabeth and its modern equivalent, the Uniform Fraudulent Transfer Act.

In 1570, it was extremely difficult to secure detailed information about a borrower or a prospective business associate. Lacking were the Dunn & Bradstreet and TRW services with computer-database power that can furnish extensive business, personal, and financial information, not to mention the modern practice (or requirement, in some cases) of due diligence. Also lacking were laws that provide penalties for supplying false financial data.[2] A strong argument can be made that the modern variants of the Statute of Elizabeth should be interpreted in the current financial atmosphere, which abounds with safeguards for creditors.

Without question, known and reasonably foreseeable creditors should be protected from fraudulent transfers. But is a creditor who is remote in time and events from the moment of a transfer also entitled to such unlimited, broad-based protection? Historically, courts have not so interpreted the statutes. Rather, they have focused on the relative proximity to known, or at least reasonably knowable, creditors. Unknown future creditors removed in years and in events from the transfer have not been protected by the courts and, indeed, should not be. The law simply does not require one to put all of one's assets at risk. Furthermore, if a client passes the "balance sheet test" prior to implementing a wealth-protective estate planning vehicle (i.e., the transfer does not render the transferor insolvent), and there is no claimant on the horizon and no misrepresentation to creditors or claimants, the client is merely prudently positioning assets. The United States Supreme Court recognized this as a fundamental policy of U.S. law in the landmark case, *Nichols v. Eaton:*

> "[T]he 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."[3]

Needless to say, the legal debate on this issue resonates with more than usual emotion.

Currently, most U.S. jurisdictions have enacted some form of the Uniform Fraudulent Transfer Act ("UFTA") by statute or have adopted its general concepts by case law. Texas' version of the UFTA is found in Title 3, Chapter 24 of the Texas Business and Corporations Code, and is substantially similar to the uniform act. As will be shown below, creditors' interests are very well protected under the UFTA. Therefore, the debate over asset protection as an estate-planning goal has become unduly heated because creditors are not focused on the legal protections afforded them by fraudulent transfer law.

For the purpose of determining what must be proved in court, the UFTA divides creditors into two categories: (1) present creditors (those whose claims arose before the transfer) and (2) future creditors (those whose claims arose concurrent with or after the transfer). Both present and future creditors can void transfers made with "actual intent to hinder, delay, or defraud."[4] This intent, however, does not have to be proven with regard to the specific creditor making the claim. A creditor can void a transfer as long as he can show that it was made with the intent to hinder, delay, or defraud <u>any</u> creditor.[5] Furthermore, a creditor does not have to prove actual fraudulent intent—the UFTA lists "badges of fraud" from which the court can infer that the debtor made the transfer with the intent to defraud creditors.[6] These badges of fraud include insolvency, transfers to insiders, retention of possession or control by the debtor, and transfer of substantially all of the debtor's assets.[7]

Both classes of creditors are also allowed to void transfers on a "constructive" fraud theory (i.e., without having to either prove actual intent to defraud or to rely on the presence of badges of fraud) if the debtor made the transfer in exchange for less than "reasonably equivalent value," and the debtor was either left with an unreasonably small amount of assets for the business or transaction in which she was engaged (or in which she was about to engage), or the debtor intended to incur debts beyond her ability to pay them when they came due.[8]

In addition to the methods for present and future creditors to void transfers described above, the UFTA gives present creditors even greater protection. Without having to show any intent, a present creditor can void transfers made for less than "a reasonably equivalent value" by debtors who are actually insolvent before the transfer is made, or who are made insolvent by the transfer.[9] The UFTA defines insolvency as either the inability of a debtor to pay debts as they become due ("the income test"), or the circumstance in which the value of a debtor's overall debts exceed the overall value of her assets ("the balance sheet test").[10] Present creditors may also void transfers made by insolvent debtors in respect of antecedent debts to insiders who have reason to know of the debtor's insolvency.[11] For individual debtors, "insiders" specifically include (but are not limited to) relatives, partnerships of which the debtor is a general partner, and corporations of which the debtor is a "director, officer, or person in control."[12] Because the definition of "insider" is not limited to the above-named persons or entities, a creditor could argue that the trustee of a spendthrift trust is an insider and should know that the settlor was insolvent at the time of the transfer.

It must be emphasized that a fraudulent transfer of assets to a protected vehicle is voidable by creditors under fraudulent transfer law. Accordingly, the public outcry over the injustice of wealthy individuals protecting millions of dollars by purchasing exempt homesteads on the eve of judgment is unwarranted. Clearly, such a transfer can be voided by present and future creditors under the UFTA. However, it seems that creditors have not properly focused on fraudulent transfer as a strong remedy. If they did, perhaps the debate over whether asset protection is a valid goal in estate planning wouldn't take on such a controversial tone.

## Bankruptcy Law

Another important legal framework that must be considered in asset protection planning is bankruptcy law because the efficacy of state debtor protections in the context of a bankruptcy will be dependent on whether those protections are preempted by federal law.

Current bankruptcy law in the United States has an interesting history. The way that the colonial legal system dealt with creditors was imported from the English system. Under English practice, debtors who could not pay their obligations faced debtor's prison, where they could expect with certainty to die (because, strangely, indigent debtors were expected to feed and clothe themselves while incarcerated). Granted, this scenario is somewhat better than what debtors could expect under ancient Roman law, which allowed creditors to take chunks of the debtor's body in payment of their debts. But needless to say, the debtor's prison arrangement was not good for the developing colonial economy in America, which was in need of warm bodies to serve as laborers and militiamen, and which couldn't afford to support the families of wage-earners sent to their doom.

Against this backdrop of economic and sentimental concerns over the state of the debt-collection regime in the colonies, the United States bankruptcy system developed in an attempt to balance the interests of debtors and creditors—a direct departure from the English bankruptcy practice, which was decidedly pro-creditor. Accordingly, the underlying purposes of the American bankruptcy laws were to provide equal distribution among all of a debtor's creditors and to also allow the debtor to get a "fresh start" so that he could once again become a productive member of society.

However, in recent years, the bankruptcy system has come to be viewed as a way for individuals to irresponsibly accumulate debt and then thumb their noses at creditors. The debate over whether or not this is an appropriate perception could fill volumes, but for our purposes, you need only to know that, in 2005, it resulted in the most comprehensive reform of the U.S. Bankruptcy Code since its enactment in 1978 via the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"). This attitude toward the bankruptcy system is clear in Congress' stated intent in passing BAPCPA, which was to "improve bankruptcy law and practice with a dominant theme of restoring personal responsibility and integrity in the bankruptcy system."[13]

Most notable among the changes made to the existing Bankruptcy Code under BAPCPA was the implementation of the "means test" for a debtor's eligibility to receive a discharge under Chapter 7 (which results in most debtors now being unable to receive a fresh start). Other significant provisions of BAPCPA expand the list of non-dischargeable debts, extend fraudulent transfer provisions, limit state homestead exemptions under certain circumstances, exempt certain retirement plans from a debtor's estate, and address fraudulent transfers to self-settled (i.e., asset protection) trusts and other similar vehicles. *For a more in-depth analysis of the impact of BAPCPA on asset protection—especially on state-law protections such as homesteads and retirement plans, please refer to the article, "Asset Protection: Dead Or Alive Under The Bankruptcy Abuse Prevention And Consumer Protection Act Of 2005?" by Elizabeth Morgan Schurig, included in your seminar materials.*

In general, Section 522 of the Bankruptcy Code allows individual debtors to elect between exemptions provided by the Bankruptcy Code and those provided by the state of their domicile. Some states have completely opted out of the federal exemptions (like Florida), and others (like Texas) allow debtors to choose between federal or state exemptions. The Bankruptcy Code looks to state law to determine whether the debtor can choose between the exemption regimes. In many cases, state exemptions are more generous than those provided by the Bankruptcy Code, making bankruptcy outcomes partly dependent on state law.

## **Specific Texas Protections**[14]

With the backdrop of fraudulent transfer and bankruptcy law in mind, we can now look more closely at the debtor protections provided under Texas law. As you will see, Texas is clearly a protective state.

### **Homestead**

One of the most generous protections provided by Texas law is the homestead exemption. This exemption is provided for in Sections 50 to 52 of Article XVI of the Texas Constitution and Section 41.001 of the Texas Property Code. Except as limited by federal law, the exemption is unlimited in amount and promotes the welfare of the state by securing a shelter for the family and a place for the head of the family to operate a business.[15]

**Rural and Urban Homesteads.** The homestead exemption applies to both urban and rural homesteads. In the case of an urban homestead, up to 10 acres of land and the improvements thereon of a family (which consists of a head of the family and one or more related family members who are dependent on the head of the family for support[16]) or a single adult qualify for the exemption. The 10 acres may consist of one or more contiguous lots, and can include property used as a place of business.[17] A homestead is considered to be "urban" if it is located within a city, town, or municipality and has access to fire protection and public utilities at the time the homestead designation is made.[18]

The amount of land exempted in a rural homestead depends on whether it is the homestead of a family or a single adult. In the case of a family, the homestead may consist of up to 200 acres and improvements.[19] A single adult, on the other hand, is entitled to a homestead of up to 100 acres and improvements.[20] Unlike the urban exemption, the tracts of land in a rural homestead do not have to be contiguous.[21] A homestead is "rural" if is not served by fire protection and public utilities when the designation is made.[22]

**Designating and Maintaining the Homestead.** A homestead is not acquired by merely designating a piece of property as a homestead. Instead, the claimant must currently use the property as his homestead, and must intend for that property to be his homestead.[23] Both elements are critical—neither current use without intent, nor intent without current use will establish a homestead.[24]

Although no formal declaration of homestead is required, a voluntary designation of homestead may be filed if the claimant's property exceeds the statutory acreage limits. The designation is filed with the county clerk of the county in which part or all of the property is located.[25] In addition, the receipt of a homestead property tax exemption under Section 11.43 of the Texas Tax Code is sufficient to designate property as a homestead.[26]

Once a homestead is established, its exempt nature continues until (i) the homestead is abandoned, whether by conveyance or cessation of use, (ii) another homestead is acquired, or (iii) the claimant's death, provided the claimant is not survived by a spouse, a minor child, or an adult unmarried child.[27] The temporary renting of the homestead property does not extinguish its exempt character, provided that another homestead is not established.[28] In the case of spouses, the family's homestead cannot be abandoned without the intent of both spouses to do so.[29]

**Nature of Homestead Protection.** Except as provided by the Texas Constitution, the homestead is protected from forced sale or seizure by the creditors of the homestead owner. The only permitted encumbrances on a homestead are:

1. purchase money;
2. taxes due on the property;
3. amounts incurred for home improvements;
4. owelty of partition;
5. refinance of an existing homestead lien, including a Federal tax lien;
6. home equity loan; and
7. reverse mortgage.[30]

All other encumbrances are void.[31]

**Additional Homestead Protections of Spouses and Minor Children.** In addition to, and independent of, the homestead exemption described above, spouses and minor children are provided certain homestead protections. During marriage, both spouses must join in any transactions that result in a transfer of ownership or an encumbrance upon the property.[32] If both spouses do not join in the transaction, then the transaction is inoperative so long as the property remains the family's homestead or until ratified.[33] This rule applies regardless of whether the homestead is the separate property of one of the spouses or is community property.[34]

Upon the death of a spouse, the deceased spouse may devise his interest in the homestead to anyone he chooses.[35] However, his heirs will take title to the property subject to the exclusive occupancy rights of the surviving spouse and any minor children.[36] Again, this rule applies regardless of whether the homestead was community property or the decedent's separate property.[37]

The survivor's occupancy right lasts until she dies, sells her interest in the residence, or decides to no longer occupy the residence. This right is not affected by the survivor's subsequent remarriage so long as she (and presumably her new husband during her lifetime) continues to occupy the residence.[38] The children's occupancy right ends when the youngest child has reached the age of majority.[39] Thus, it is possible that the decedent's heirs may have to wait for many years before they can actually take possession of or sell the homestead property. If this issue is a concern for spouses or prospective spouses, they might consider waiving their homestead rights by contract.

**Exceptions to Protection.** The homestead exemption arises when property becomes the claimant's homestead. Any lien that attaches to the property before this time is enforceable.[40] A Federal tax lien is also superior to the homestead exemption and may result in the Internal Revenue Service foreclosing upon the homestead property.[41] Section 6334(e) of the Internal Revenue Code provides some protection to taxpayers by requiring the Service to seek the approval of a judge or magistrate of a United States district court before acting on its lien.[42] Additionally, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 also places limits on the homestead exemption for certain debtors.

## Retirement Plans

Texas Property Code §42.0021 exempts from the claims of creditors a person's right to assets held in, or to receive payments (whether vested or not) from, any stock bonus, pension, profit-sharing, or similar plan, including a retirement plan for self-employed individuals any annuity or similar contract, and any individual retirement account, as well as the right of any participant or beneficiary to the assets held in any such plan or account. This protection applies only to a plan, contract, or account that qualifies under the applicable provisions of the Internal Revenue Code of 1986, as amended. Texas also exempts a person's right to assets held in, or right to receive payments (whether vested or not) from, a government or church plan or contract, so long as the plan or contract is qualified under the applicable provisions of the Employee Retirement Income Security Act of 1974.

This exemption, while extremely comprehensive, has a few limitations. First, the exemption for contributions to individual retirement accounts, other than contributions to Roth IRAs, applies only to the extent those contributions are tax-deductible. The exemptions also generally do not protect benefits once they have been distributed to the individual unless they are rolled over to another plan in a qualified, nontaxable transaction within 60 days. Finally, retirement plans are subject to claims for child support.[43]

## College Savings Plans

A person's right to the assets held in, or to receive payments or benefits from, any fund or plan established under Subchapters F and G of Chapter 54 of the Texas Education Code, or any qualified tuition program of any state that meets the requirements of Section 529 of the Internal Revenue Code of 1986, as amended, are protected from creditors under Texas Property Code §42.0022.

## Personal Property

Texas Property Code Sections 42.001 and 42.002 exempt certain personal property from garnishment, attachment, execution, or other seizure up to an aggregate value of $60,000 for a family or $30,000 for an individual. The following is a list of the personal property exempted under the statute, and reveals Texas' history as an agricultural and ranching state:

1. home furnishings, including family heirlooms;
2. provisions for consumption;
3. farming or ranching vehicles and implements;
4. tools, equipment, books, and apparatus, including boats and motor vehicles used in a trade or profession;
5. wearing apparel;
6. jewelry, not to exceed 25% of the aggregate value limitation allowed to the debtor;
7. two firearms;
8. athletic and sporting equipment, including bicycles;
9. a two-wheeled, three-wheeled, or four-wheeled motor vehicle for each member of a family or single adult who holds a driver's license or who does not hold a driver's license but who relies on another person to operate the vehicle for the benefit of the nonlicensed person;
10. 2 horses, mules, or donkeys, and a saddle and bridle for each, and forage on hand for their consumption;
11. 12 head of cattle and forage on hand for their consumption;
12. 60 head of other livestock and forage on hand for their consumption;
13. 120 fowl and forage on hand for their consumption; and
14. household pets.

Professionally prescribed health aids of a debtor or a dependent of a debtor are fully exempt from creditors' claims and are specifically excluded from the $30,000 and $60,000 dollar limitations set forth above.

In addition to the specific personal property exemptions listed above, Texas Property Code §44.003 provides that all property in the state of Texas is exempt from attachment, execution, and seizure in satisfaction of a claim of another state, or political subdivision of another state, for failure to pay that state or political subdivision's income tax on benefits received from a pension or other retirement plan. And finally, Texas Property Code §41.001 exempts burial lots from seizure for the claims of creditors.

## Income and Income Equivalents

**Wages.** Pursuant to Texas Property Code §42.001(b)(1), all current wages for personal services are exempt from garnishment, except for enforcement of court-ordered child support payments. However, this exemption applies only to protect wages from garnishment in the hands of the employer. Once the wages are paid to the debtor, they lose their exempt status.

**Unpaid Commissions.** Unpaid commissions for personal services, totaling up to 25% of the $30,000 and $60,000 aggregate limitations of exempt personal property, are also exempt under Texas Property Code §42.001(d) from seizure and are included in the aggregate total of exempt personal property.

**Unemployment Compensation.** Texas Labor Code §207.075 provides that unemployment compensation is exempt from debt collection for debts other than those incurred for necessaries furnished to the individual or the individual's spouse or dependents during the time that the individual was unemployed, as long as the benefits are not mingled with other funds.

**Workers' Compensation Benefits.** Texas Labor Code §408.201 protects Texas workers' compensation benefits from garnishment, attachment, judgment, and other actions or claims.

**Public Assistance.** Texas Human Resources Code §31.040 provides that the right to public financial assistance may not be transferred or assigned at law or in equity, and the funds are not subject to execution, levy, attachment, garnishment, or other legal process or the operation of an insolvency law.

**Medical Assistance.** All money paid or payable as medical assistance to the needy is exempt under Texas Human Resources Code §32.036 from execution, levy, attachment, garnishment, any other legal process, and the operation of any insolvency law.

**Law Enforcement Officers' and Fire Fighters' Survivors Benefits.** Texas Government Code §615.005 exempts law enforcement officers' and fire fighters' survivors benefits from execution, levy, attachment, garnishment, or any other legal process, and from the operation of any insolvency law.

## Life Insurance and Annuities

Texas Insurance Code Sections 1108.001 through 1108.052 provide complete creditor protection for life insurance and annuity products in Texas. Under Section 1108.051, both proceeds to be paid to a beneficiary and cash surrender value to be provided to an insured under an insurance policy, annuity contract, or benefit plan, are fully exempt from garnishment, attachment, execution, or other seizure. Furthermore, these benefits are protected both before and after the benefits are provided. These exemptions are unaffected by a reservation by the insured in the policy of the power to change the beneficiary, or the designation in the policy of the insured or the insured's estate as a contingent beneficiary. The only exception to this protection are claims for child support liens or levies under Chapter 157 of the Family Code.

## Marital Property

Marital property planning for Texas spouses can also provide an opportunity to achieve asset protection as long as the fraudulent transfer rules are not violated in the process. When a creditor of either one spouse or both spouses makes a claim against marital property, the characterization of the property as separate or community determines which assets the creditor can reach. Further, the type of liability (tort or contract) and when it was incurred (before or during marriage) also affects a particular creditor's rights. These rules are explained below.

**Separate Property.** In general, a spouse's separate property is not subject to the liabilities of his or her spouse.[44] For example, a doctor can protect her separate property and the couple's community property from the claims of her patients by converting this property to her husband's separate property. The only time that a creditor of one spouse can reach the separate property of another spouse is to fulfill a contract for "necessaries."[45] This rule comes from Texas Family Code §25.01, which imposes a duty on each spouse to support the other spouse. One caveat with regard to converting assets to one spouse's separate property is that inequity can result upon divorce because a court cannot award one spouse's separate property to the other in a divorce proceeding.[46]

**Community Property.** The liability rules concerning community property are more complicated than those relating to separate property. A spouse's "sole management" community property is exempt from the liabilities incurred by her spouse before marriage and the contractual liabilities (other than for necessaries) incurred by her spouse during marriage.[47] With regard to the debtor spouse, his sole management community property, and all of the spouses' "joint management" community property, is subject to all of his debts, whether incurred before or during marriage.[48] Additionally, a tort creditor may reach all of the spouses' community property (whether sole management or joint management) if the event giving rise to the liability occurred during marriage.[49]

**Premarital Agreements.** Prospective spouses may sign a premarital agreement detailing each spouse's personal and property rights during and upon dissolution of marriage.[50] The terms with respect to which the parties can agree are almost limitless, provided that the agreement does not violate public policy or a criminal statute, or limit a child's right to support from a parent.[51] A premarital agreement may be deemed invalid if a party was coerced into signing the agreement, or if the agreement was unconscionable when signed.[52] Notwithstanding, an unconscionable agreement is enforceable if, before signing the agreement, the party seeking to invalidate the agreement was either (i) given adequate disclosure of the other party's assets and obligations (or voluntarily waived his right to disclosure in writing), or (ii) despite not being given adequate disclosure, he or she had adequate knowledge of the other party's assets and obligations.[53]

**Post-Marital Agreements.**

—*Converting Community Property to Separate Property.* Spouses may convert their community property to the separate property of one or both spouses. A separate-property conversion agreement is subject to challenge by a spouse for coercion and unconscionability in the same manner as described above for premarital agreements.[54] A conversion agreement is also void with respect to a preexisting creditor whose rights are diminished as a result of the agreement.[55]

—*Converting Separate Property to Community Property.* Spouses can also convert the separate property of one or both spouses to community property.[56] The conversion agreement should be signed by both spouses, identify the property being converted, and specify that the property is being converted to community property.[57] In addition, the agreement must contain specific disclosure language in Texas Family Code § 4.205(b).[58] Failure to include the disclosure statement is grounds for invalidating the agreement.[59] Further, the agreement may, but is not required to, address the spouses' management rights in the converted property. In default, the provisions of Section 4.204 of the Texas Family Code will determine the management rights.[60] Notwithstanding all of the above benefits, a conversion of separate property to community property will not affect the rights of a preexisting creditor regarding such property.[61]

## Spendthrift Trusts

Under Texas law, a declaration in a trust instrument that the interest of a beneficiary shall be held subject to a "spendthrift trust" is sufficient to restrain voluntary or involuntary alienation of the interest by a beneficiary.[62] This protection has a few exceptions. First, a spendthrift provision will not protect a settlor's beneficial interest in the trust from the claims of his creditors.[63] Second, a court may order the trustees of a spendthrift trust to make disbursements to fulfill a beneficiary's child-support obligations to the extent of mandatory distributions required under the trust document.[64] Or, if trust distributions are discretionary rather than mandatory, the court may order child-support payments from the income of the trust, but not from the principal.[65]

## Limited Partnerships and Limited Liability Companies

Texas law also provides some narrow protections for an individual's limited partnership interest in a Texas limited partnership (LP) and membership interest in a Texas limited liability company (LLC). In general, a limited partnership interest in a Texas LP is not subject to seizure by the partner's creditors, but the Texas statute suggests ambiguities that could leave room for creditors to argue otherwise. As for a member's interest in a Texas LLC, it will likely be subject to foreclosure by a creditor.

*Asset protection in the context of LP and LLC interests has its own unique set of issues. Please refer to the articles included in your seminar materials, "A Charging Order is the Exclusive Remedy Against a Partnership Interest: Fact or Fiction?" by Elizabeth M. Schurig and Amy P. Jetel, and "The Alarming Potential for Foreclosure and Dissolution by and LLC Member's Personal Creditors" by Elizabeth M. Schurig and Amy P. Jetel.*

## <u>Conclusion</u>

In summary, Texas law affords many opportunities for estate planners to help their clients strategically position their assets in a way that is asset protective. And given the time-tested nature of the protective vehicles discussed in this article, it is clear that estate planning, by its very nature, is asset-protection planning.

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1 13 Eliz c5 (1570).
2 *See*, *e.g.*, 18 USC §1014.
3 *Nichols v. Eaton,* 91 U.S. 716, 725-726 (1875).
4 UFTA §4(a)(1).
5 *Id*.
6 UFTA §4(b)(1)-(11).
7 *Id.*
8 UFTA §4(a)(2).
9 UFTA §5(a).
10 UFTA §2.
11 UFTA §5(b).
12 UFTA §1(7)(i).

13 CCH Bankruptcy Reform Act Briefing: Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, p. 1 (April 21, 2005) < http://www.cch.com/bankruptcy/Bankruptcy_04-21.pdf>.

14 These materials are taken, in part, from Duncan E. Osborne and Elizabeth M. Schurig, *Asset Protection: Domestic and International Law and Tactics* (West, 1995, updated quarterly). This resource also provides an exhaustive list and discussion of the protections provided by the fifty states and Washington, D.C.

15 Tex. Prop. Code Ann. §§ 41.001, 41.008 (Vernon 2000 and Supp. 2006).

16 *NCNB Texas Nat. Bank v. Carpenter*, 849 S.W.2d. 875 (Tex. App. – Fort Worth 1993, no writ).

17 Tex. Prop. Code Ann. § 41.002(a) (Vernon 2000).

18 Tex. Prop. Code Ann. § 41.005(c) (Vernon 2000).

19 Tex. Prop. Code Ann. § 41.002(b)(1) (Vernon 2000).

20 Tex. Prop. Code Ann. § 41.002(b)(2) (Vernon 2000).

21 *Id*.

22 Tex. Prop. Code Ann. § 41.005(c) (Vernon 2000).

23 Tex. Prop. Code Ann. § 41.002; *Wilcox v. Marriott*, 103 S.W.3d 469 (Tex. App. – San Antonio 2003, pet. denied); *Johnson v. First S. Props., Inc*. 687 S.W.2d 399 (Tex. App. – Houston [14th Dist.] 1985, writ ref'd n.r.e.); *Von Hutchins v. Pope*, 351 S.W. 2d 642 (Tex. Civ. App. – Houston 1961, writ ref'd n.r.e.).

24 *McFarlane v. First Nat'l Bank*, 97 S.W.2d 754 (Tex. Civ. App. – Amarillo 1980, writ ref'd).

25 Tex. Prop. Code Ann. § 41.005(c) (Vernon 2000).

26 Tex. Prop. Code Ann. § 41.005(e) (Vernon 2000).

27 *Estate of Montague v. Nation Loan Investors, L.P*., 70 S.W.3d 242 (Tex. App. – San Antonio 2001, pet. denied) (abandonment requires that the claimant intend to, and actually does, stop using the homestead as his homestead); *Hollifield v. Hilton*, 515 S.W.2d 717 (Tex. Civ. App. – Fort Worth 1974, writ refused n.r.e.) (conveyance terminates homestead); *Brown v. Loan*, 7 S.W. 2d 189 (Tex. Civ. App. – Austin 1928, no writ) (acquisition of another homestead); Tex. Prob. Code Ann. §§ 270-271 (Vernon 2003) (claimant's death); *Duran v. Henderson*, 71 S.W.3d 833 (Tex. App. – Texarkana 2002, pet. denied).

28 Tex. Prop. Code Ann. § 41.003 (Vernon 2000).

29 Tex. Prop. Code Ann. § 41.004 (Vernon 2000).

30 Tex. Const. art. XVI, § 50; Tex. Prop. Code Ann. § 41.001 (Vernon Supp. 2006).

31 *Kemper v. Freeman*, 254 S.W.2d 837 (Tex. Civ. App. – Fort Worth 1953, no writ).

32 Tex. Fam. Code Ann. § 5.001 (Vernon 1998).

33 *Kunkel v. Kunkel*, 515 S.W.2d 941 (Tex. Civ. App. – Amarillo 1974, writ ref'd n.r.e.)

34 Tex. Fam. Code Ann. § 5.001 (Vernon 1998).

35 Tex. Prob. Code Ann. § 283 (Vernon 2003).

36 Tex. Prob. Code Ann. § 284 (Vernon 2003).

37 *Id*.

38 Tex. Prob. Code Ann. § 285 (Vernon 2003).

39 *Id.*

40 *First Realty Bank & Trust v. Youngkin*, 568 S.W. 2d 428 (Tex. Civ. App. – Eastland 1978, no writ).

41 *See United States v. Rodgers*, 461 U.S. 677 (1983).

42 Internal Revenue Code ("IRC") §6334(e) (2004).

43 Tex. Prop. Code Ann. §42.005

44 Tex. Fam. Code Ann. § 3.202(a) (Vernon 1998).

45 *Daggett v. Neiman Marcus Co.,* 348 S.W.2d 796 (Tx. Civ. App.—Houston [1st Dist.], 1961).

46 *Cameron v. Cameron*, 641 S.W.2d 210 (Tex. 1982).

47 *See* Tex. Fam. Code Ann. § 3.202(b) (Vernon 1998).

48 Tex. Fam. Code Ann. § 3.202(c) (Vernon 1998).

49 Tex. Fam. Code Ann. § 3.202(d) (Vernon 1998).

50 *See* Tex. Fam. Code Ann. §§ 4.001 – 4.010 (Vernon 1998).

51 Tex. Fam. Code Ann. § 4.003 (Vernon 1998).

52 Tex. Fam. Code Ann. § 4.006(a)(1), (2) (Vernon 1998).

53 Tex. Fam. Code Ann. § 4.006(a)(2) (Vernon 1998).

54 Tex. Fam. Code Ann. § 4.105 (Vernon 1998).

55 Tex. Fam. Code Ann. § 4.106 (Vernon 1998).

56 Tex. Fam. Code Ann. § 4.202 (Vernon Supp. 2006).

57 Tex. Fam. Code Ann. § 4.203 (Vernon Supp. 2006).

58 Tex. Fam. Code Ann. § 4.205 (Vernon Supp. 2006).

59 Tex. Fam. Code Ann. § 4.205(a)(2) (Vernon Supp. 2006). It should be noted that coercion is another ground upon which such agreements may be challenged. *See* Tex. Fam. Code Ann. § 4.205(a)(1) (Vernon Supp. 2006).

60 Tex. Fam. Code Ann. § 4.204 (Vernon Supp. 2006).

61 Tex. Fam. Code Ann. § 4.206. (Vernon Supp. 2006)

[62] Tex. Prop. Code Ann.§112.035
[63] Tex. Prop. Code Ann.§112.035(c).
[64] Tex. Fam. Code Ann. §154.005(a).
[65] Tex. Fam. Code Ann. §154.005(b).