



Practical Planning and Drafting of Wyoming LLCs & DAPTs

By: Cecil Smith, JD & Carol Gonnella, JD



The state of Wyoming has done it again! In 1977, Wyoming was the **first state** to enact an LLC statute. Now all states have them. Effective July 1, 2010, Wyoming has become the **first state** to give creditor protection to Single Member LLCs. This new Wyoming law gives protection to single member LLCs in a way that no other state law presently provides.

In the new provisions of the Wyoming statute regarding creditor rights (W.S. 17-15-503), the Wyoming legislature nailed down the definition of “exclusive remedy” by amending the statute to reiterate that the Charging Order is the exclusive remedy, and for the first time for any state, **to make this remedy applicable to a sole member LLC.** The statute now states:

“[The Charging Order] is the exclusive remedy by which a person seeking to enforce a judgment against a judgment debtor, including any judgment debtor who may be the sole member, dissociated member or transferee, may, in the capacity of the judgment creditor, satisfy the judgment from the judgment debtor’s transferable interest or from the assets of the limited liability company.”

In addition, these new statutory provisions further nail down the lid on the casket of creditor rights by defining specifically the limits the judge has in ordering the Charging Order. The statute affirmatively directs that the judgment creditor has no other rights, legal or equitable, other than the Charging Order, by stating:

“Other remedies, including foreclosure on the judgment debtor’s limited liability interest and a court order for directions, accounts and inquiries that the judgment debtor might have made are not available to the judgment creditor attempting to satisfy a judgment out of the judgment debtor’s interest in the limited liability company and may not be ordered by the court.” (emphasis added)

Asset protection is the new currency of estate planning attorneys ... meaning it will be a profit center for us. With the amount exempt from estate taxes uncertain, fewer and fewer clients are concerned about estate taxes. However, all of our clients are concerned about protecting what they have from lawsuits, divorce proceedings, creditors and predators. And, if your clients tell you they are not concerned about asset protection planning, you, as their attorney, should be concerned for them. At least, it is something that must be addressed in your conferences with them.

We introduce asset protection issues to our clients by helping them identify the assets they own that are already protected by some state or federal law, such as IRAs (in some states), life insurance and annuities (in some states). We then identify the assets that are not protected and are thus subject to seizure. We then ask our clients if they could survive comfortably with the assets that are already protected. Most of our clients shake their heads “NO”. That opens the door for us to make our presentation about the Wyoming LLC.

If our clients like the LLC as an asset protection strategy (and most do), we point out that a weakness of any LLC is that if a creditor obtains a Charging Order, the income stream from the LLC will not be protected. However, since no one can force the manager of an LLC to make distributions, this is great leverage for the LLC owner who has a judgment against him. The LLC may freeze the income inside the LLC and there is nothing for the creditor to take. On the other hand, the LLC owner is likewise unable to get to the income. Wyoming is one of only 12 states to enact laws allowing Domestic Asset Protection Trusts. Thus, with a DAPT as the owner of the LLC units, the LLC’s income is distributed to the DAPT instead of to the judgment creditor who has obtained a charging order. The income stream from the LLC is now protected. The Trustee of the DAPT has discretion to distribute trust assets to or for the benefit of the beneficiaries of the DAPT, and your client

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and his family may be one of those beneficiaries.

Although this article spotlights Wyoming LLCs and Domestic Asset Protection Trusts, these concepts would apply to LLCs and DAPTs formed in several other states as well. The strength of an LLC for purposes of asset protection and discounting to save estate and gift tax comes from three sources:

1. Forming the LLC in a state like Wyoming that has very strict statutes regarding withdrawal by members, dissolution of the LLC, and rigid creditor protection statutes.
2. Using a state-of-the-art Operating Agreement that has been designed to address all of the asset protection and discounting cases.
3. Treating the LLC as a real business. We must advise our clients not to treat the LLC checking account as a personal cash register.

About the Authors:

Cecil Smith is a former IRS Estate Tax Attorney. Carol is a former Prosecuting Attorney. Both limit their practice to estate planning, asset protection planning, business planning and the post-mortem settlement of trusts and estates. Cecil has offices in Memphis & Nashville, TN and in Oxford, MS. Carol has offices in Jackson & Cody, WY. Cecil & Carol have been teaching and writing together for more than a dozen years. Cecil & Carol have coauthored the Wyoming LLC Manual, and along with Bob Keebler have coauthored the BIG IRA BOOK. Both books are on display at their booth at the symposium. They are known for their colorful and graphic-rich flowcharts that illustrate the estate and asset protection planning strategies they teach.