

REVIEW OF LEGAL RESOURCES



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ASSET PROTECTION PLANNING GUIDE, SECOND EDITION

by Barry S. Engel (Chicago, IL: CCH Inc., 2005) [CCH Inc., 4025 W. Peterson Ave., Chicago, IL 60646-6045; (800) 248-3248; <http://tax.cchgroup.com>]; 691 pp.; \$110, plus \$12.95 shipping; discounts available for multiple copy purchases.

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It is believed that foreign asset protection planning is wrought with unacceptable dangers, including the threat of contempt and, for attorneys, disbarment. The *Asset Protection Planning Guide* (“*Asset Protection*”) should put those fears to rest. The book is well-written and thorough. Denver attorney Barry S. Engel painstakingly explores the legal and ethical ways to fashion an asset protection plan that will survive attack from the most aggressive of creditors.

Any asset protection plan must begin with an in-depth analysis of the law of fraudulent transfers, which includes the Uniform Fraudulent Conveyance Act, the Uniform Transfer Act, and the Bankruptcy Code. Extensive examples and cases are cited in the book. Included are discussions of the “badges of fraud,” such as undercapitalization, insolvency, and situations where the debtor incurs debt beyond the ability to pay. The primary issue is whether the debtor has transferred assets with the “intent to hinder, delay or defraud.” To avoid the possibility of having the plan set aside, Engel explains that the settler of a trust should set up the trust at a time when there are no pending or reasonably foreseeable claims.

The Engel “Ladder of Asset Protection Planning Tools” begins with gifting strategies and ends with expatriation. Near the top of the ladder is the foreign estate planning trust. The primary advantage of a properly drafted foreign trust is the likelihood that the creditor will have to litigate (or perhaps re-litigate) his claim in a foreign jurisdiction. Engel analyzes the fifteen most favorable foreign jurisdictions and compares them with each other and with the eight most favorable locations in the United States. In Engel’s estimation, overall, the best location for a foreign trust is Nevis, followed by Cook Islands, St. Vincent, and the Grenadines. Engel posits that the best domestic location is the state of Utah.

Asset Protection discusses in substantial detail the issue of contempt. Generally, if a settler of a trust fails to comply with a court order to repatriate trust assets or refuses to provide court-ordered documents, the result will be jail-time. The defense most often used is “impossibility of performance.” This defense, however, does not work when the impossibility is self-created by the settler. The author discusses the leading contempt cases and concludes that careful asset protection planning can avoid the imposition of contempt sanctions.

One case that is widely cited in the media is *FTC v. Affordable Media, LLC* [179 F.3d 1228 (9th Cir. 1999)], commonly referred to as the “Anderson case.” Engle notes that, in this case, the Anderson trust had a fatal flaw. The trust had a provision allowing the trustee to refuse to repatriate the trust assets in the case of “duress,” and the person who had the power to determine if “duress” existed was Anderson himself. Other cases analyzed by Engel include *In Re Lawrence* [238 BR 498 (Bankr.S.D.Fla. 1999)] (the debtor transferred assets days after a \$20 million arbitration award); and *U.S. v. Bilzerian* [926 F.2d 1285 (2d Cir. 1991)] (the settler refused to provide documents to the court that were under his control).

Asset Protection also analyzes the impact of the war against terrorism on the creation of foreign trusts. The USA PATRIOT Act authorizes the President to impose sanctions for financial institutions that refuse to reveal records, including the seizure of monies. However, the forfeiture power authorized by the USA PATRIOT Act is limited to banks that have affiliates in the United States. Because Switzerland does not have an American affiliate bank, it remains a relatively safe haven. For these reasons, Engel concludes that the impact of the USA PATRIOT Act on asset protection planning is “relatively minimal.”

A substantial part of this book explores the ethical ramifications of creating foreign trusts, and discusses some of the related pitfalls that could threaten an attorney’s livelihood. Chapter 16 is entitled “Ethical, Civil and Criminal Considerations for the Asset Protection Planner.” One example of attorney liability occurred when the attorney advised the client to set up a foreign trust and the settler (in this case a physician) used funds financed by a Medicare fraud. “Willful blindness” can lead to violations of various federal statutes, including the Money Laundering Control Act. Other cases cited in the book conclude that the passage of “tainted” funds through an attorney’s trust account can lead to criminal liability. Another area of exposure for an attorney may occur as a result of the failure to use IRS Form 8300, the “Report of Cash Payments over \$10,000 Received in a Trade or Business.”

Other topics discussed in *Asset Protection* include expatriation, insurance, annuities, family limited partnerships, hybrid companies, civil foundations, and the protection of retirement benefits. This book is a gold mine of information for attorneys who work either in the asset protection area or are thinking about entering this field of law.