The Emotional Consequences of Asset Protection

By Jacob Stein

This year has been an emotional rollercoaster for our clients. As asset protection attorneys, we represent a great many people facing financial adversity. Our clients often come to us in a very depressed and disturbed state of mind. It is hard not to get emotionally involved in their problems.

Earlier this year I represented Richard, a retired executive in his late 60s. Richard spent his entire adult life working his way up the corporate ladder. He always worked hard and was evidently a proficient climber, as he ended his career as the chief executive officer of a Fortune 500 company.

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One of Richard's many investments was a real estate project in the Midwest. Together with several other investors, Richard signed an unlimited personal guarantee to the lender. When the bottom fell out of the real estate market and the project went south Richard found himself jointly and severally liable on the guarantee, with the projected exposure close to $10 million. It would completely wipe him out.

Richard's assets were comprised of his residence north of San Francisco, and a large brokerage account. He wanted to make certain that the lender, after they would obtain a judgment against Richard, would either be unable to reach his assets or would at least be forced to settle.

Imagine yourself in Richard's place. You have spent your entire life working day and night. You were successful and accumulated a small fortune. You have a nice lifestyle that both you and your spouse are used to. Then an unforeseen (by some) event takes place and you face a likely prospect of losing everything.

It is hard to describe the anguish that people like Richard face. I have represented over 100 people just like Richard this calendar year alone. Each story is heart-breaking and emotionally challenging.

People argue that the Richards of the world deserve what is coming to them; that anyone who invests in risky real estate projects, or invests in Florida real estate, should know better; that there is always a direct correlation between risk and return, and those high profits they were anticipating come at a price. It can be further argued that it would be immoral or unethical to protect assets at such a late stage and the attorney should turn down the engagement.

Making such arguments as a part of an abstract conversation about investing or morals is quite different from facing one of these unfortunate investors across the table and watching their lives tumble around them. Do you tell Richard that he was a fool and that he should suffer the repercussions of taking risks or do you help the man?

I choose to help, because I simply cannot turn down a human being who looks me in the eyes and asks for help. When I am able to help, I literally manage to salvage a client's life. The emotional high is addictive. When we are unsuccessful in our efforts, the emotional low is quite painful.

People like Richard have two simple options when the lender comes knocking. First option — they can choose to do nothing. This is an option preferred by those who in general prefer to do nothing; are reluctant to spend money on any sort of planning; consider it unethical to preserve assets from claims of creditors (usually with reference to other people's assets); and/or believe that planning so late in the game is a fraudulent transfer and should be avoided at all costs. The second option is to do something to protect assets. Let us explore the practical repercussions of

these two options.

If Richard chooses to do nothing, there is a very high chance that the bank will sue Richard. If they sue, there is a very high chance that the bank will get a judgment against Richard. Once they have a judgment against Richard, there is a 100 percent chance that they will take his assets.

If Richard chooses to protect his assets, the bank may challenge it as a fraudulent transfer. If they do, there is a chance that they will prevail. If so, what happens? Does Richard go to jail, face civil penalties, be subject to a caning? The only remedy for a fraudulent transfer is to recover the transferred asset, which, from a practical standpoint, is not always possible or easy.

Consequently, following our very simple decision tree, choose option one for a close to a 100 percent chance of losing all your assets, or choose option two for a much smaller chance of losing your assets. In practice, the vast majority of clients who chose to protect their assets get to keep all or the bulk of their assets. What is the downside of option two? There is none — the worst possible outcome is that the planning does not work and Richard gets the result of option one. Even the transaction cost is not a downside because the lender would have walked away with that money in any case.

Richard was a real client, and in his case we were able to shield Richard's assets and the lender settled in the mid-five figures. Of course this result is not guaranteed this result, but what is guaranteed is that if Richard picked option one, this outcome would not have been possible. As Wayne Gretzky used to say, "A hundred percent of the shots you don't take don't go in."

I know full well that we can always help clients like Richard. They walk into our office in tears, and walk out with renewed hope. They climb off the emotional rollercoaster.