

## How Can I Help Preserve My Assets from the Claims of Creditors During My Lifetime and at My Death?

This article will focus on the common estate planning concern that many owners have about preserving their assets from the claims of creditors and the litigation process. One of the most frequent questions that we frequently hear from our clients is, “Can I transfer my assets to my spouse to avoid creditors?” Since each owner’s situation is different depending on your overall Exit Objectives, there isn’t a one-size-fits-all answer. However, we will provide you some guidelines in this article for elements to consider when working with your Exit Planning Professional to accomplish this important estate planning goal.

Most owners are deeply concerned about the litigation crisis in our society. They are anxious about spending a lifetime building up assets only to have one lawsuit take away everything. For that reason, they want to transfer assets from their names to others — usually their spouses, or sometimes to trusts for their children. Then, if they are sued, they reason, they will be “judgment proof” — that is, there will be no assets to seize.

The difficulty with this approach is that creditors, not debtors, make the laws in this country. There is a law in many states known as the Fraudulent Conveyance Act. It provides that if a person transfers property to another with the intent to delay, hinder, or defraud a current or future creditor, then that transfer is void and the assets so transferred are attachable as part of the debtor’s estate.

If a transfer is made to a close family member, it is generally presumed that the conveyance was fraudulent. That means that you — the transferor — have the burden of proving that the transfer to your spouse or children was not fraudulent. If litigation has already been threatened or started, any transfer to a family member for less than fair and adequate consideration can be suspicious; it may well be attacked as fraudulent.

If a transfer to a family member is to be made, then it must be made long before litigation is ever threatened.



**Michael Wildeveld, CEPA, M&AMI,  
CM&AP, CM&AA, CBI, CBB**  
[michaelw@veldma.com](mailto:michaelw@veldma.com)

**Veld Mergers & Acquisitions**  
[www.veldma.com](http://www.veldma.com)  
1 Park Plaza, 600  
Irvine, CA 92614  
[310-652-8066](tel:310-652-8066)

And there must be a reason that can be established — other than creditor avoidance. If you can demonstrate that the transfer is part of your estate and income tax planning, then you may have established an acceptable reason.

Estate planning goals are often accomplished by equalizing estates between spouses. Since you, as the owner of the business, normally have the bulk of the estate, it often makes sense to transfer assets to your spouse for estate tax purposes. The transferred assets are, at least arguably, out of your estate for creditor purposes. You also may want to consider keeping the assets most prone to creating liability risk — such as your business — in your estate and transferring, again for estate planning reasons, non-risky assets to the non-business active spouse. Additionally, you may want to consider transferring assets to fund a child's or grandchild's trust for college education purposes. In any case, you should meet with an Exit Planning Professional to create a plan based on your unique objectives and business situation.

If you have any questions about creating an estate plan that preserves your assets prior to your business exit, please contact us and consult your tax and legal advisors to discuss your particular situation and determine the best strategy for you. Along with your team of advisors, we can help guide you through the process of creating an estate plan that not only helps meet your estate planning goals, but also supports your overall Exit Plan.

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