

Overview of the Assets your LLC Can Shelter

Your limited liability company can own any asset that you can title to a limited partnership. In practice, we prefer the limited liability company to title more dangerous (liability-producing) assets since LLC managers will be fully protected personally from the LLC debts, while the limited partnership's general partner would have personal liability. We use the limited partnership to title and protect safe assets. The limited partnership has been battle-tested for nearly a century, whereas the limited liability company is newer and has not been as extensively tested. But a limited liability company is desirable to own:

- Second homes and vacation homes
- Commercial real estate
- Cars, boats, planes, etc.
- Equipment and other physical assets
- Operating businesses

We sometimes have a single-member limited liability company own a primary residence. We will particularly use the LLC to avoid an attachment of a home by a judgment creditor. You may ask that if both the limited liability company and the family limited partnership can equally protect such a variety of assets, why not title your home to a family limited partnership or multi-member limited liability company to gain the same charging order protection? You can only preserve your family residence tax benefits by titling your home to a single member limited liability company.

As a single individual, you have a \$250,000 capital gains tax exclusion on profits when you sell your home. If a family limited partnership owns your house for more than three out of five years, you lose your tax benefit. You could transfer your home to a family limited partnership for no more than three years and then retransfer the home to your own name for at least two years, but this is impractical.

An alternative is to have a single-member limited liability company own your home. If you are married, one spouse (usually the less liability-prone spouse) would be that single-member. Since the IRS disregards single-member limited liability companies for tax purposes, the home should, at least for capital gains purposes, be treated as if the home were owned in the name of the individual member. You cannot achieve this tax strategy with a limited partnership, which by definition requires at least two owners and therefore cannot be a disregarded entity. Review this strategy with your tax advisor.

It is possible to achieve this same tax strategy with a limited partnership, if you use either a grantor trust or an LLC as one partner, and the trust grantor or LLC owner as the second partner. Because a trust may not provide limited liability as a general partner, it makes sense to instead use an LLC. It's pointless to use a limited partnership instead of an LLC, if you need to use an LLC with the limited partnership to achieve our goals anyway. It's much easier to simply use an LLC and a grantor trust.

When an LLC is to hold your personal residence, you must be aware of the home loan's due-on-sale clause. We are frequently asked by clients about this clause (standard in most mortgages), which requires the mortgage lender to consent to any transfer of the property (to a limited liability company or otherwise). Lenders routinely consent to such transfers, unless the lender sold the mortgage to Fannie Mae, the borrower is in default on the mortgage or you are paying lower than prevailing interest rates.

We have had cases where a lender refused to consent to the transfer, but we nevertheless transferred the property to a limited liability company to sidestep a real estate attachment or creditor seizure. Not once did we have a lender actually foreclose because of the transfer. Further, there are cases that have upheld the right of an owner to transfer property to an LLC or FLP that is owned by the same party, even without the consent of the mortgage holder.

Nonetheless, if it appears that a due-on-sale clause may cause problems; federal law allows us to transfer the property to a living trust (which may be irrevocable) without triggering the clause. Although a trust usually provides little or no asset protection (particularly if you continue to enjoy use of the property), we can encumber the property with additional liens which act as a debt shield against subsequent creditor claims. We use a trust for privacy and estate planning. We use a debt shield for asset protection. And we can build a solid program that your lender is happy with. Our overriding strategy is to segregate as many of your assets as possible into separate limited liability companies. For instance, if you own ten apartment houses, you would title each in a separate limited liability company. Or we would use a Series LLC. Your ten limited liability companies, or cells in the Series, may be owned by one family limited partnership. Your limited partnership may be owned by your living trust. You can then bequeath your estate without probate while at the same time maximizing the protection for your respective entities. With layering, you accomplish different financial objectives. The LLC is usually an essential component to this layering process.