

Steve Leimberg's Asset Protection Planning Email Newsletter - Archive Message #196

Date: 22-Mar-12

From: Steve Leimberg's Asset Protection Planning Newsletter

Subject: [Steve Oshins on Weddell v. H2O, Inc: Nevada Supreme Court Affirms Creditor Protection Benefits of Nevada LLCs](#)

“Prohibiting the creditor from exercising the debtor’s management rights reflects the principle that LLC members should be able to choose those members with whom they associate. Thus, the historical rationale for charging order protection was to protect the other members of an LLC where one member has a personal creditor problem.

However, as asset protection planning has evolved and the competition among the states to have the most protective asset protection laws has intensified, the asset protection planners now have the ability to use charging order protected entities to protect their clients’ assets from potential creditors. This tool is so easy, yet it is extremely underused by estate planners who at a minimum should be integrating this form of asset protection planning into their repertoire.”

We close this week with **Steve Oshins’** observations on the “hot off the press” case of Weddell vs. H2O, Inc., an opinion issued by the Supreme Court of Nevada on March 1, 2012. As Steve points out in his commentary, this case illustrates the creditor protection benefits of using a Nevada LLC.

Steven J. Oshins, Esq., AEP (Distinguished) is a member of the **Law Offices of Oshins & Associates, LLC** in Las Vegas, Nevada. Steve is a nationally known attorney who is listed in The Best Lawyers in America® and has been named one of the Top 100 Attorneys in Worth magazine. He was inducted into the NAEPC Estate Planning Hall of Fame® in 2011. He has written some of Nevada's most important estate planning and creditor protection laws, including the law making the charging order the exclusive remedy of a judgment creditor of a Nevada LLC and LP (in 2001, 2003 and 2011), the law changing the Nevada rule against perpetuities to 365 years (in 2005) and the law making Nevada the first and only state to allow a Restricted LLC and a Restricted LP creating larger valuation discounts than any other state allows (in 2009). He is also the author of the Annual Domestic Asset Protection Rankings at http://www.oshins.com/images/DAPT_Rankings.pdf. Steve can be reached at 702-341-6000, x2 or at soshins@oshins.com. His law firm's web site is <http://www.oshins.com>.

Here is Steve's commentary:

FACTS:

Between 2000 and 2007, Michael B. Stewart and Rolland P. Weddell entered into a business relationship concerning a number of different projects, ranging from garlic farming to geothermal energy. Several disputes arose between the two parties, ultimately leading to the collapse of their business relationship. Upon the relationship's demise, Weddell filed a complaint asserting numerous claims against Stewart. Stewart also filed a complaint and asserted numerous counterclaims. After a four-day bench trial, the district court found in Stewart's favor on all counts. Weddell appealed the decision.

Stewart and Weddell both owned percentages of Granite Investment Group, LLC ("Granite") and High Rock Holding, LLC ("High Rock"). In October 2008, in an unrelated matter, the district court granted an application by a creditor to charge Weddell's membership interest in Granite and High Rock, among other Weddell entities, for over \$6 million. Pursuant to NRS 86.401.2, the charging order issued by the court entitled the creditor to any and all disbursements and distributions, including interest, and all other rights of an assignee of the membership interest.

Creditor's Rights under Charging Order

The primary issue in the case was whether the judgment creditor receives any rights to participate in the management of a Nevada LLC upon receiving a charging order over the debtor's membership interest. The district court had ruled that the charging order against Weddell's membership interests in Granite not only gave the judgment creditor Weddell's economic rights over the membership interest, but also his managerial rights.

The collection rights and remedies against a member's interest in a Nevada limited liability company are governed by NRS 86.401. This provision recognizes the charging order as a remedy by which a judgment creditor of a member can seek satisfaction by petitioning a court to charge the member's interest with the amount of the judgment. A charging order directs the LLC to make distributions to the creditor that it would have made to the member. As a result, a charging order affects only the debtor's membership interest and does not permit a creditor to reach the LLC assets.

Consequently, the judgment creditor does not step into the shoes of the member. The judgment creditor only receives the rights of an assignee of the member's interest. A judgment creditor, or assignee, is only entitled to the judgment debtor's share of the profit and distributions, takes no interest in the LLC's assets, and is not entitled to participate in the management or administration of the business.

After the entry of a charging order, the debtor member no longer has the right to future LLC distributions to the extent of the charging order, but retains all other rights that the debtor had before the execution of the charging order, including managerial interests. The Supreme Court of Nevada reversed the district court's judgment relating to the scope of the charging order against Weddell's membership interests. The Supreme Court ruled that the charging order only divested Weddell of his economic opportunity to obtain profits and distributions from Granite, not his managerial rights.

COMMENT:

It is no surprise that the Supreme Court of Nevada reversed the district court on the issue of the extent of the rights the holder of a charging order has with respect to the LLC. This decision is in line with decisions in other charging order cases.

This case was decided under the Nevada charging order laws that were modified in the 2003 legislative session and did not include the substantial enhancements made in the 2011 legislative session. See [Steve Leimberg's Asset Protection Planning Email Newsletter - Archive Message #180](#). The 2003 version of Nevada's charging order laws specifically made the charging order the exclusive remedy of a judgment creditor. However, there were no provisions disallowing the judge from issuing an equitable remedy to find a way around the exclusive remedy language.

For example, the judge could have used one of a number of potential equitable remedies, including the constructive trust theory, the resulting trust theory, the alter ego theory or the reverse veil-piercing theory as a way around the statutory provisions. Maybe none of these potential theories were raised by the attorney for the holder of the charging order or maybe the judge determined that it wasn't appropriate to go beyond the charging order remedy.

The 2011 legislative changes to Nevada's charging order laws specifically

disallow the issuance of any equitable remedies. Therefore, in future litigation, members of Nevada LLCs will be even more protected than the degree of protection provided by pre-2011 laws.

Planning Opportunities

Prohibiting the creditor from exercising the debtor's management rights reflects the principle that LLC members should be able to choose those members with whom they associate. Thus, the historical rationale for charging order protection was to protect the other members of an LLC where one member has a personal creditor problem.

As asset protection planning has evolved and the competition among the states to have the most protective asset protection laws has intensified, the asset protection planners now have the ability to use charging order protected entities to protect their clients' assets from potential creditors. This tool is so easy, yet it is extremely underused by estate planners who at a minimum should be integrating this form of asset protection planning into their repertoire.

By itself, a charging order protected entity almost always causes a creditor to settle a dispute for less than the amount that the creditor would be able to reach if the charging order protected entity did not exist. This is why there are relatively few published charging order cases in comparison to the endless number of litigation cases filed each year. So, at a bare minimum, an LLC (or LP) should be used for almost every client who has sufficient at-risk assets to substantiate the cost of forming and maintaining an LLC (or LP).

Taking this a step further, when the charging order protected entity is combined with an asset protection trust, the odds are even more stacked against a potential creditor from the creditor's perspective. Thus, there are even fewer published cases involving asset protection trusts. The more roadblocks the planner can include, the more frustrated a potential creditor will get and the better the negotiation will tilt in favour of our debtor clients.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Steve Oshins

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CITES:

Weddell v. H2O, Inc., 128 Nev.Adv.Op. #9 (Nev., Mar. 1, 2012); NRS 86.401

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