



Written By:
Dustin I. Nichols
Partner



Heather Kocer
Attorney

California's Little Known Gold Nugget for Retirement Preservation – The Private Retirement Trust

Exemption planning is a safe and effective protection solution for wealth preservation and is fundamental to estate planning. With exemption planning, you can properly prepare for the next financial disaster, regardless of whether it is self-inflicted or just bad luck. The first step to protecting yourself, your family, and your legacy must begin with California's exemption planning toolbox, which contains creditor exemptions, including one very little known, yet robust exemption to protect an individual's private retirement assets. Most of California's creditor exemptions are minimal and will only prevent you from becoming penniless. In contrast, the private retirement plan exemption provided at Cal. Code Civ. Proc., § 704.115(b), is unprecedented in that it allows you to gradually fund your retirement, while preserving and exempting (i.e. "protect") such select retirement assets from the reach of creditors. Thus, even if you are destined for personal hardships or misadventures in business, you will have retirement assets at your disposal to maintain your lifestyle during the critical ages of life when working hard and replenishing your income is no longer an option. In fact, well-established case precedent provides that: "[t]he very purpose of the exemption is to permit a judgment debtor to place funds beyond the reach of creditors [...]", and the statute is to "be construed, so far as practicable, to the benefit of the judgment debtor." (*Schwartzman v. Wilshinsky* (1996) 50 Cal.App.4th 619, 629 & 630, *internal citations omitted*).

Specifically, Cal. Code Civ. Proc., § 704.115(b) states that: "[a]ll amounts held, controlled, or in process of distribution by a private retirement plan, for the payment of benefits as an annuity, pension, retirement allowance, disability payment, or death benefit from a private retirement plan are exempt." This potent statutory exemption protection allows California residents to recharacterize their *exposed* personal assets to *exempt* private retirement assets. Once recharacterized, the private retirement plan shields the assets held in the Private Retirement Trust ("PRT") from creditors if the private retirement plan is/was principally or primarily *designed* and *used* for retirement purposes (with the exception of IRS, family, spousal and child support obligations). Since no one wants to go from living the highlife to being a public charge, especially in their retirement years, the need for a private retirement plan is a no-brainer.

The private retirement plan and corresponding PRT are flexible and powerful exemption planning tools, but as with all trust and entity planning, such is only as good as the individuals appointed within the PRT instrument, the retirement appraisal/analytics supporting the legitimacy of the "plan," and the integrity of the "trust," as well as the administrative support. Thus, the establishment a private retirement plan and PRT is not a simple task. It requires sophisticated exemption planning by an experienced attorney familiar with the statute and underlying case precedent in order to make certain that the retirement plan is principally *designed* and *used* for retirement purposes.

The key ingredients to ensuring a retirement plan will survive the "principally *designed* and *used* for retirement purposes" test and withstand scrutiny from the courts if challenged by creditors include, at a minimum: proper and supportable retirement analytics, a retirement plan that is sponsored by an employer company (which company can be wholly owned by the

beneficiary of the plan), a PRT to hold the retirement assets that is preferably controlled by an independent trustee or custodian, an independent plan administrator to ensure the proper management and yearly maintenance of the plan, as well as a skillful and proficient PRT integrated team to implement the plan.

Proper structure, funding, and administration of the private retirement plan and corresponding PRT requires extensive coordination by the PRT integrated team, which includes the PRT Retirement Planner, the PRT Nestor, the PRT Trustee, the PRT Pylortes, and the PRT Administrator. Each team member is responsible for performing the duties of their particular office, as well as constantly collaborating with the other team members on year-to-year exemption analyses to ensure your PRT is *properly* funded annually so that your retirement goals are realized. This requires effectuating a thorough and sufficiently documented fact-driven analysis, which will frequently change as your age, income, asset exemptions amounts, etc., changes throughout your lifetime.

Exemption planning using a private retirement plan and PRT is an effective protection strategy. However, it is important to understand that retirement assets in a private retirement plan will only benefit from the exemption protection provided by Cal. Code Civ. Proc., § 704.115(b) if the private retirement plan is properly designed, funded, used, and annually administered to maintain compliance with applicable laws.