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The Plan Ingredients

For a Private Retirement Trust ("PRT") to be valid and effective, its Retirement Plan Agreement ("Plan") must possess certain attributes and ingredients. Assets in a Plan are exempt from creditors under CCP § 704.115(b) only if the Plan is principally designed and used for retirement purposes. The key ingredients to ensuring a Plan will survive this test and withstand scrutiny from the courts if challenged by creditors include, at a minimum:

- a Retirement Plan that must be sponsored by an employer company;
- a Private Retirement Trust to hold the retirement assets;
- proper and supportable retirement analytics (i.e., "Retirement Appraisal");
- an independent custodian (i.e., PRT Trustee); and
- annual administration and maintenance.

The creation of a Plan begins with enlisting the Participant's employer company, which company can be wholly owned by the Participant, to sponsor the Retirement Plan Agreement. The sponsoring company must then structure an agreement that sets forth policies and procedures regarding eligibility and participation in the Plan, how and what contributions can be made to the Plan, recharacterization of assets, how and when distributions can be made to the Participant, protocol and procedures concerning Plan loans, as well as administrative matters. It is critical to the survival of the Plan, that these policies and procedures are designed in conformity with case precedent that provides guidance on which Plan particulars are acceptable and which will negate the validity of the retirement purpose. For example, in the case of In re Bloom ((9th Cir. 1988) 839 F.2d 1376, 1379), the first circumstance the court considered in determining whether the loans taken by the Participant destroyed the retirement purpose of the Plan was whether the Participant "followed the procedures set out in the Trust Agreement for obtaining loans".

The next step is to form the PRT, which is the vehicle that will hold the retirement assets. Technically the Participant can serve as the PRT Trustee, but an independent custodian is preferable and safer since courts can invalidate Plans if the Participant exercises substantially all control "over contributions, management, administration, and use of funds." (Schwartzman v. Wilshinsky (1996) 50 Cal.App.4th 619, 629.) This issue is predictably contested by creditors since acting as your own PRT Trustee can be perceived as diluting the retirement purpose of the Plan and the retirement purpose is paramount if the Plan is challenged. Like the Plan, the PRT also details policies and procedures for the administration of the retirement assets such as funding, which is essential to the design of the Plan.

For proper funding and to make certain the Plan is designed for retirement purposes, the primary intent in creating the Plan must be for retirement purposes. Although "[a] plan used in part to shield assets is still exempt if it was designed and used primarily for retirement purposes" (In re Rucker (9th Cir. 2009) 570 F.3d 1155, 1160, internal citation omitted), it is best if retirement plans are designed exclusively for retirement purposes since a secondary intent can easily be construed as the primary intent resulting in the loss of the exemption. To properly establish a Plan that is designed exclusively for retirement purposes, the Plan must be customized for each Participant based on that Participant's Retirement Appraisal, which involves an extensive analysis of the Participant's net worth, life expectancy, the types of assets held, adjustments for inflation, the Participant's future earning capacity as well their lifestyle and projected retirement age. The resulting calculations prove-up the Participant's retirement need and provide a roadmap for the appropriate annual funding that would be required to fulfill that need.

Finally, the PRT must receive annual maintenance to make sure the Plan is being followed and nothing slips through the cracks. Part of this maintenance should include revisiting the Retirement Appraisal to ensure the client is maximizing their retirement benefit considering the client's net worth and income circumstances may change annually, which could result in overfunding or the Client losing out on an increased exemption potential that may exist. This maintenance is handled by the Plan Administrator, who tracks Plan activity including contributions, distributions, and transactions with the PRT such as loans and promissory notes. The Plan Administrator also generates financial statements, annual statements, benefit statements, and reports all information to the PRT Trustee and the Participant. The support services provided by the Plan Administrator are crucial to assisting the PRT Trustee with verifying all activities comply with the Plan's policies and procedures.

In summary, a Private Retirement Plan and Private Retirement Trust are complex and comprehensive devices that, if properly designed and used with all of the appropriate ingredients, protect a Participant's retirement assets by recharacterizing such assets as exempt under CCP § 704.115(b).

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