Best of the West CLE

October 11, 2002

Glasgow, Montana

ASSET PROTECTION PLANNING IN MONTANA

RICHARD M. BASKETT
Attorney - CPA
Baskett Law Office
Suite 234
210 North Higgins Avenue
Missoula, Montana 59802
(406) 549-1110

ASSET PROTECTION PLANNING IN MONTANA

Table of Contents

ASSET PROTECTION PLANNING IN MONTANA

by

RICHARD M. BASKETT
Attorney - CPA

1. Introduction

Litigators will want to have at least a familiarity with asset protection planning concepts. The litigator who has obtained a judgment will want to know how the game is played, and whether the other side has made any wrong moves that make assets recoverable. The litigator whose client faces potential liabilities will want to be able to provide advice on how the client should arrange affairs, or at least know to direct the client to someone who assist the client with that planning.

Asset protection planning is a significant, although an often overlooked, part of estate planning. One purpose of estate planning is to preserve the client's assets by planning dispositions so as to avoid unnecessary taxes and other expenses. The purpose of asset protection planning also is to preserve the client's assets, but often focuses more on events during the client's lifetime so that the client still has use of the assets.

Asset protection planning may be defined as planning to place assets beyond the reach of future potential creditors. Asset protection planning must not involve hiding assets, committing fraud or perjury, or engaging in fraudulent transfers. There is a distinction between asset protection planning and hiding assets. Assisting a client with transfers of property the result of which is that a hypothetical future creditor could not execute against the property in satisfaction of a judgment, is not unethical, but if there is an immediate reasonable possibility of a judgment then the attorney's assistance may be unethical. The attorney must also not advise the client to take any action that would be a violation of any applicable fraudulent transfer laws.

Any methods of asset protection that involve concealing assets, and variations of arrangements under which the transferee informally agrees to hold title to the debtor's assets only until creditors are no longer a problem are obviously fraudulent and any lawyer asked to participate in or arrange such a scheme should recognize that it may be criminal. Asset protection planning should not be based upon secret arrangements or fraudulent transfers. Assume that everything is discoverable.

Balanced against this is the requirement that a lawyer shall provide competent representation to a client.

This outline draws heavily from the excellent Tax Management portfolio on asset protection planning, Rosen, 810 T.M., Asset Protection Planning, to which the reader is referred for more detailed discussion of this topic. This outline, however, is much more geared to discussion of Montana law.

2. Titling Assets for Asset Protection

[1] Outright Gifts

An outright transfer of title to assets is one means of protecting those assets from the reach of the transferor's creditors, but then the transferor loses the income and gains from the property given, as well as the management and control of the property, and may also incur gift tax. In addition, the property then will be subject to the claims of the donee's creditors.

[2] Gifts in Trust

Similar to an outright gift, a gift to an irrevocable trust can remove the property from the reach of the transferor's creditors. Again, however, the transferor must ordinarily part with the income from and the control over the asset and the transfer may be subject to gift tax. With a properly drafted trust, the assets can be protected from the beneficiary's creditors, which is not the case with outright gifts. For an irrevocable trust to be effective in asset protection planning, almost no interest in or power over the trust may be retained by the donor.

[3] Co-Tenancies

Montana recognizes three forms of ownership by multiple persons:

> **70-1-306. Ownership by several persons -- types.** The ownership of property by several persons is either of:
> (1) joint interests;
> (2) partnership interests;
> (3) interests in common.

[a] Tenants in Common

Each tenant in common owns an undivided fractional share of property by tenancy in common, and the interest of a co-tenant is unilaterally severable and devisable. Unless specified otherwise, property owned by several persons will be presumed to be held as tenants in common.

> **70-1-314. Interest in common -- how created.** Every interest created in favor of several persons in their own right, including husband and wife, is an interest in common unless acquired by them in partnership for partnership purposes or unless declared in its creation to be a joint interest, as provided in 70-1-307.

Also, *See* Shaw in 2[3][b][i]1) below.

The creditor of a co-tenant may reach the debtor's undivided fractional interest. Consequently, where an account was held as tenants in common, the creditor of one account holder was entitled to only one-half of the total amount of funds in the account. University of Montana v. Coe, 217 Mont. 234, 704 P.2d 1029 (1985) (holding limited on other grounds by Seman v. v. Lewis, 252 Mont. 508, 830 P.2d 1294 (1992), which in turn was overruled by In re Estate of Hill, 281 Mont. 142, 931 P.2d 1320 (Mont. Feb 06, 1997)).

[b] Joint Tenancy with Right of Survivorship

[i] Creation of Joint Tenancy

1) In General

Although not stated in the statute, joint tenancy carries with it the right of survivorship. In Hennigh v. Hennigh, 131 Mont. 372, 309 P.2d 1022 (1957), the Montana Supreme Court stated that the Montana joint tenancy statute incorporated all the incidents of joint tenancy that existed under the common law, including the right of survivorship.

In Montana, joint tenancy must be expressly created.

> **70-1-307. Joint interest defined.** A joint interest is one owned by several persons in equal shares by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy or when granted or devised to executors or trustees as joint tenants.

For example, in In re Estate of Shaw, 259 Mont. 117, 855 P.2d 105, 50 St. Rep. 709 (1993), the Montana Supreme Court held that absent an express declaration that the parties were creating a joint tenancy with right of survivorship in a brand certificate or that the brand and cattle were to be owned by partnership, the son, father and mother each owned an undivided one-third interest in the brand and in the cattle as tenants in common and use of word "or" in the brand certificate, without more, did not create a joint tenancy.

Shaw overruled First Westside Nat'l Bank v. Llera, 176 Mont. 481, 482 P.2d 100 (1978), which had held that, as to personal property, not real estate, an ownership document showing title to two or more persons "and/or" had the effect of creating a joint tenancy estate with right of survivorship. Shaw also clarified that an earlier case, Marshall v. Minlschmidt, 148 Mont. 263, 419 P.2d 486 (1966), which was quite similar to Shaw in that a brand was held in the names of three persons in the form of "A or B or C" was not applicable because it had been decided on other grounds and the discussion in Marshall pertaining to joint tenancy was merely dicta.

2) Automobiles

A specific statutory exception to this general rule applies to automobiles. Joint tenancy with right of survivorship is presumed if the owners listed on the title are members of the same family:

> **61-3-202. Certificate of ownership -- issuance -- contents -- joint ownership -- inspection -- fees.** ... (3) When the names and addresses of more than one owner who are members of the same immediate family are listed on the certificate of ownership, joint ownership with right of survivorship, and not as tenants in common, is presumed.

3) Safe Deposit Boxes

Montana has a specific statute applicable to safe deposit boxes which provides that when a safe deposit box agreement grants multiple persons the right to use or occupy the safe deposit box, it will be held in joint tenancy.

> **70-1-308. Safe deposit box -- joint tenancy.** When so specified in the agreement granting for a term of time the right in two or more persons to use or occupy any safe or box, commonly referred to as a safe deposit vault or box for the safekeeping of valuables, such interest and estate created in the grantees shall be a joint tenancy in such vault or box and pass to the survivors and survivor upon the death of one or more of the joint tenants with right in such survivors and survivor to have access to and possession of such vault or box

and the contents thereof under the terms of the agreement.

In Estate of Silver, 299 Mont. 506, 512, 1 P.3d 358, 362 (2001), the Montana Supreme Court held that this statute provides for joint access to and possession of the safe deposit box and its contents; it does not provide for joint ownership of the contents of the safe deposit box. Consequently, ownership of cash in the safe deposit box did not pass to the surviving joint owner of the safe deposit box.

[ii] Severance

1) In General

At common law, joint tenancy was unilaterally severable by either tenant. A joint tenancy in real property can be severed during lifetime by a conveyance on the part of a joint tenant. In re Estate of Matye, 198 Mont. 317, 319, 645 P.2d 955, 957 (1982). Consequently, the creditor of any joint tenant can reach the undivided interest of such joint tenant. Upon the death of a co-tenant, the creditors of the estate will be able to reach the interest of the decedent in property held in tenancy in common; whether the creditors can reach the interest of the decedent in property held in joint tenancy (assuming the decedent is survived by at least one other co-tenant) is less clear. Usually they cannot, but that is not always the case. *See* 2[3][b][iv] at page 7 of this outline. For these reasons, it is important to know whether the tenancy has been severed.

2) Divorce

There had been some uncertainty under Montana case law whether a divorce effected a severance of joint tenancy between the formerly-married couple. In 1993, the Legislature adopted 72-2-814, M.C.A. which provides in subsection (2)(b) that the divorce or annulment of a marriage "severs the interests of the former spouses in property held by them at the time of the divorce or annulment as joint tenants with the right of survivorship and transforms the interests of the former spouses into tenancies in common."

Subsection (3), however, provides that "A severance under subsection (2)(b) does not affect any third-party interest in property acquired for value and in good faith reliance on an apparent title by survivorship in the survivor of the former spouses unless a writing declaring the severance has been noted, registered, filed, or recorded in records appropriate to the kind and location of the property, which records are relied upon, in the ordinary course of transactions involving such property, as evidence of ownership." No cases have yet been decided to flesh out the meaning of this subsection, but this language appears to state that a post-transaction recording could detrimentally affect a creditor's position. Due to its length, 72-2-814, M.C.A. is included in Appendix A rather than at this place in the text.

3) Homicide

Felonious and intentional killing of one co-tenant by another also severs joint tenancy. 72-2-813, M.C.A. *See* Appendix A. In Matye, a case decided prior to the adoption of 72-2-813, M.C.A., the Montana Supreme Court held that where a wife murdered her husband, a severance took place at the moment of death, resulting in a one-half interest being retained by the wife and the remaining one-half interest passing as the property of the decedent husband. In re Estate of Matye, 198 Mont. 317, 319, 645 P.2d 955, 957 (1982).

Without more, the severance of the joint tenancy would not necessarily preclude the property from passing to the killer. For example, where one spouse kills another, they might well have wills leaving everything to each other, so even though the joint tenancy was terminated and converted into a tenancy in common, the interest of the decedent would still, under the terms of the will, pass to the surviving spouse. That result is changed by statute, so that the killer does not succeed to the victim's interest; rather the killer forfeits all benefits under the decedent's estate, including an intestate share, an elective share, an omitted spouse's or child's share, a homestead allowance, exempt property, and a family allowance, and if the decedent died intestate, the decedent's intestate estate passes as if the killer disclaimed the killer's intestate share. 72-2-813(2), M.C.A.

In addition, the felonious and intentional killing of the decedent revokes any revocable (i) disposition or appointment of property made by the decedent to the killer in a governing instrument, (ii) provision in a governing instrument conferring a general or nongeneral power of appointment on the killer; and (iii) nomination of the killer in a governing instrument, nominating or appointing the killer to serve in any fiduciary or representative capacity, including a personal representative, executor, trustee, or agent. 72-2-813(3), M.C.A.

Provisions of a governing instrument are given effect as if the killer disclaimed all provisions revoked by 72-2-813, M.C.A., or, in the case of a revoked nomination in a fiduciary or representative capacity, as if the killer predeceased the decedent. 72-2-813(5), M.C.A.

4) Shares of the Tenants

Just because a joint tenancy is severed does not mean that the tenants have equal shares of the property. Absent proof, there is a presumption that the co-tenants have equal interests, but that is subject to rebuttal. In In re Estate of Garland, 279 Mont. 269, 928 P.2d 928 (1996), the Montana Supreme Court stated:

> Tenants in common presumptively own undivided equal interests in property; however, that presumption is subject to rebuttal. *See* Sack v. Tomlin (1994), 110 Nev. 204, 871 P.2d 298, 304; Lawrence v. Harvey (1980), 186 Mont. 314, 322-24, 607 P.2d 551, 557; Ivins v. Hardy (1947), 120 Mont. 35, 42, 179 P.2d 745, 748 (overruled on other grounds). Therefore, on the death of one co-tenant, the surviving co-tenant and the decedent's estate may be entitled to unequal shares in the property. The respective shares of the decedent's estate and the surviving co-tenant depend on the decedent's and the surviving tenant's individual contributions to the acquisition and maintenance of the property. *See,* e.g., Tomlin, 871 P.2d at 305. Absent proof of disparate contributions, however, the presumption that the co-tenants are entitled to undivided equal interests stands.

Distinguish this result under state law from what IRS regulations provide for estate tax purposes. Any property a decedent owns in joint tenancy with the decedent's spouse will be included in the decedent's estate at one-half the property's full value. Treas. Reg. §20.2040-1(c)(7). If the decedent owned the property in joint tenancy with someone other than the decedent's spouse, the IRS will presume that the full value of the property will be included in the decedent's estate, not just the decedent's proportional interest. Treas. Reg. §20.2040-1(a)(2). This presumption may be rebutted by evidence establishing that consideration for the property came from someone other than the decedent.

> **Planning Note:** Note that this presumption of 100% inclusion applies to property held by a parent in joint tenancy with children. Note also that this presumption does not apply to property held by tenancy in common. Treas. Reg. §20.2040-1(b). I recently had clients whose mother, under the advice of counsel, had given them ranch property by a deed creating a joint tenancy. Had she died with the property titled in that manner, the full value of the property would have been included in her estate, because in fact none of the consideration for the property had come from the children. We re-titled the property to tenancy in common, and when she did die shortly after that, the ranch was sold for just short of $2 Million. Because it was held in tenancy in common rather than in joint tenancy, her 25% interest in the ranch was valued at somewhat less than $500,000, and no estate tax was due. Had the ranch not been re-titled, the tax one her estate would have been roughly $560,000.

[iii] Gift Tax Consequences

The creation of a joint tenancy may be a taxable gift. The regulations distinguish between financial accounts and other assets. Creation of a joint tenancy in a bank account will not be considered a gift until such time as the money is withdrawn by the donee. Treas. Reg. §25.2511-1(h)(4). Creation of joint tenancy in land, however, will be considered a gift as of the execution and delivery of the deed. Treas. Reg. §25.2511-1(h)(5).

[iv] Creditor Claims

Joint tenancy exposes the interest of the new joint tenant to his or her creditors as well as the creditors of the original owner. However, a creditor can only reach the indebted co-tenant's fractional interest in the property, and in general if the indebted co-tenant dies before the creditor has perfected his interest in the property, the creditor will be unsuccessful in reaching this property. Note, however, the impact of 72-6-215, M.C.A., which allows the decedent's creditors to satisfy their claims from the decedent's share of nonprobate property:

> **72-6-215. Rights of creditors and others.** (1) If other assets of the estate are insufficient, a transfer resulting from a right of survivorship or POD designation under this part is not effective against the estate of a deceased party to the extent needed to pay claims against the estate and statutory allowances to the surviving spouse and children.
> (2) A surviving party or beneficiary who receives payment from an account after the death of a party is liable to account to the personal representative of the decedent for a proportionate share of the amount received to which the decedent, immediately before death, was beneficially entitled under 72-6-211, to the extent necessary to discharge the claims and allowances described in subsection (1) remaining unpaid after application of the decedent's estate. A proceeding to assert the liability may not be commenced unless the personal representative has received a written demand by the surviving spouse, a creditor, a child, or a person acting for a child of the decedent. The proceeding must be commenced within 1 year after death of the decedent.
> (3) A surviving party or beneficiary against whom a proceeding to account is brought may join as a party to the proceeding a surviving party or beneficiary of any other account of the decedent.
> (4) Sums recovered by the personal representative must be administered as part of the decedent's estate. This section does not affect the protection from claims of the personal representative or estate of a deceased party provided in 72-6-226 for a financial institution that makes payment in accordance with the terms

of the account.

The first sentence state this section applies to "a transfer resulting from a right of survivorship or POD designation under this part ..." which raises two issues: first, does this mean a right of survivorship under this part (as opposed to a right of survivorship created under common law by joint tenancy); and second, does the protection of creditors provided by this section apply to both POD and TOD accounts, or just to POD accounts?

As to the first issue, the official comments to 72-6-215, M.C.A. state that it provides a remedy to the designated classes of persons that "assures them that multiple-person accounts cannot be used to reduce the essential protection they would be entitled to if such accounts were deemed to permit a special form of specific devise." This implies that only multiple-person accounts (that is, POD accounts) are within the scope of this statute. Consequently, it appears that this section is not available to recover from regular joint tenancy property assets needed to pay claims against the estate and statutory allowances to the surviving spouse and children.

As to the second issue, the term "this part" would refer to Part 2 – Multiple Person Accounts under Title 72, chapter 6, Nonprobate Transfers on Death. Part 2 applies to accounts held at banks, savings and loans, and credit unions, 72-6-201(1), (4), M.C.A. Part 3 applies to "securities" or "security accounts"[1] registered as transfer on death ("TOD") accounts which presumably are not subject to creditors' claims. As a result, it appears creditors have less ability to reach assets held as securities or in security accounts under the Uniform TOD Security Registration Act than they would in bank accounts or other forms of multiple person accounts governed by Part 2 of the chapter on Nonprobate Transfers on Death. Until this issue is settled, cautious planning would be for the client to hold all liquid assets in a security account rather than at a bank. Note that as to TOD accounts, creditors do still have other remedies available to them:

> **72-6-309. Nontestamentary transfer on death.** ... (2) This part does not limit the rights of creditors of security owners against beneficiaries and other transferees under other laws of this state.

POD and TOD accounts are discussed further in 2[4] at page 10 of this outline.

[1] *See* 2[4][b] at page 12 of this outline for the definition of these two terms.

[c] Distinguishing Joint Tenancy from Tenancy in Common

Determining when property is held joint tenancy and when it is held as tenancy in common should be simple, but as indicated by the cases above, it has not always been. Since Shaw, it is apparent that joint tenancy will not be presumed, the intent to create it has to be clear, and words such as "or" or "and/or" inserted between the names of the tenants will create a tenancy in common, not a joint tenancy. While the tenants are alive, there may be little difference. A creditor of one could reach the tenant's interest in either event. Upon death of a co-tenant, however, if the deceased co-tenant has creditors, they would be able to reach the decedent's interest if there is a tenancy in common but not, in general, if there is a joint tenancy.

In Shaw, the Montana Supreme Court admitted that the case law was confusing, but attempted to make it more certain with the following:

> "Without attempting to reconcile all of the various cases dealing with the creation of joint tenancies that have come before this Court, we hold as follows:
>
> "1. The creation of a joint tenancy (same as joint interest) in property is by Montana statute. Sections 70-1-307 and 70-1-314, M.C.A., mandate that if parties want to create a joint tenancy (same as joint interest) in property, they must make an express declaration that they intend to create a joint tenancy or joint interest. Simply using words such as "or" or "and/or" without expressly using the words "joint tenancy", "joint tenancy with right of survivorship" or "joint interest" will not suffice to create a joint tenancy, absent a specific statute to the contrary.
>
> "2. In the event the parties do not expressly declare that the ownership interest created in the instrument of title or transfer is a joint tenancy or joint interest or a partnership interest, then a tenancy in common or an interest in common will be created."

Shaw, 259 Mont. at 126, 855 P.2d at 111.

[d] Tenancies by the Entireties

A tenancy by the entireties is a special form of joint tenancy which can only exist between a husband and wife. It is based on the common law treatment of a husband and wife as a unity and therefore a tenancy by the entireties was not unilaterally severable by the husband or the wife. Consequently, the creditor of one spouse cannot execute upon property held in this form, and so this form of ownership provides more protection from creditors than joint tenancy or tenancy in common. Montana, however, does not recognize tenancy by the entireties. 70-1-314, M.C.A.; Clark v. Clark, 143 Mont. 183, 387 P.2d 907 (1963).

An argument might be advanced that Montana has recognized tenancy by the entireties since 1993 when Montana adopted the Uniform TOD Security Registration Act, Title 72, Ch. 6, Part 3, M.C.A., which in 72-6-302, M.C.A. states as follows:

> **72-6-302. Registration in beneficiary form -- sole or joint tenancy ownership.** Only individuals whose registration of a security shows sole ownership by one individual or multiple ownership by two or more with right of survivorship, rather than as tenants in common, may obtain registration in beneficiary form. Multiple owners of a security registered in beneficiary form hold as joint tenants with right of survivorship, as tenants by the entireties, or as owners of community property held in survivorship form and not as tenants in common.

(Emphasis added).

[4] POD / TOD Accounts

[a] POD Accounts

Pay on Death ("POD") accounts may be created in Montana. A "POD designation" means the designation of:

> (a) a beneficiary in an account payable on request to one party during the party's lifetime and on the party's death to one or more beneficiaries or to one or more parties during their lifetimes and on death of all of them to one or more beneficiaries; or
> (b) a beneficiary in an account in the name of one or more parties as trustee for one or more beneficiaries if the relationship is established by the terms of the account and there is no subject of the trust other than the sums on deposit in the account, whether or not payment to the beneficiary is mentioned.

72-6-201(8), M.C.A.

During the lifetime of all parties, an account belongs to the parties in proportion to the net contribution of each to the sums on deposit unless there is clear and convincing evidence of a different intent. As between parties married to each other, in the absence of proof otherwise, the net contribution of each is presumed to be an equal amount. 72-6-211(2), M.C.A.

POD accounts can be established for any contract of deposit between a depositor and a financial institution and includes a checking account, savings account, certificate of deposit, and share account. 72-6-201(1), M.C.A. A "financial institution" is an organization authorized to do business under state or federal laws relating to financial institutions and includes a bank, trust company, savings bank, building and loan association, savings and loan company or association, and credit union. 72-6-201(4), M.C.A.

In contrast to property owned in joint tenancy, a beneficiary in an account having a POD designation has no right to sums on deposit during the lifetime of any party. 72-6-211(3), M.C.A. This feature provides asset protection for the owner of the account, since the creditors of the beneficiary cannot reach the account; the beneficiary has no interest in it. An account held in joint tenancy or tenancy in common, however, can be severed and the beneficiary's creditors can reach the beneficiary's interest. Note again, however, that a co-tenant's interest in Montana is only presumed to be an equal share of the account, but that can be rebutted by proof. *See* 2[3][b][ii]4) at page 6 of this outline.

At the death of the owner, the account passes to the beneficiary outside of probate, as it would if the property had been held in joint tenancy. But during the lifetime of the owner, the account has not been subjected to the possible claims of the beneficiary's creditors, the beneficiary has had no right to withdraw funds from the account and the owner has retained the ability to change the beneficiary designation on the account or otherwise exercise complete dominion and control over the account without requiring the consent of the beneficiary.

> **72-6-212. Rights at death.** (1) Except as otherwise provided in this part, on the death of a party, sums on deposit in a multiple-party account belong to the surviving party or parties. If two or more parties survive and one is the surviving spouse of the decedent, the amount to which the decedent, immediately before death, was beneficially entitled under 72-6-211 belongs to the surviving spouse. If two or more parties survive and none is the surviving spouse of the decedent, the amount to which the decedent, immediately before death, was beneficially entitled under 72-6-211 belongs to the surviving parties in equal shares and augments the proportion to which each survivor, immediately before the decedent's death, was beneficially entitled under 72-6-211 and the right of survivorship continues between the surviving parties.
> (2) In an account with a POD designation:
> (a) on the death of one of two or more parties, the rights in sums on deposit are

governed by subsection (1);
(b) on the death of the sole party or the last survivor of two or more parties, sums on deposit belong to the surviving beneficiary or beneficiaries. If two or more beneficiaries survive, sums on deposit belong to them in equal and undivided shares and there is no right of survivorship in the event of the death of a beneficiary thereafter. If no beneficiary survives, sums on deposit belong to the estate of the last-surviving party.
(3) Sums on deposit in a single-party account without a POD designation, or in a multiple-party account that, by the terms of the account, is without right of survivorship, are not affected by the death of a party, but the amount to which the decedent, immediately before death, was beneficially entitled under 72-6-211 is transferred as part of the decedent's estate. A POD designation in a multiple-party account without right of survivorship is ineffective. For purposes of this section, designation of an account as a tenancy in common establishes that the account is without right of survivorship.
(4) The ownership right of a surviving party or beneficiary, or of the decedent's estate, in sums on deposit is subject to requests for payment made by a party before the party's death, whether paid by the financial institution before or after death or unpaid. The surviving party or beneficiary, or the decedent's estate, is liable to the payee of an unpaid request for payment. The liability is limited to a proportionate share of the amount transferred under this section, to the extent necessary to discharge the request for payment.

[b] TOD Accounts

Transfer on Death ("TOD") accounts are created under the Uniform TOD Security Registration Act, Title 72, Ch. 6, Part 3, M.C.A. Though similar to POD accounts, they are created for "securities" and "security accounts" as defined in 72-6-301, M.C.A.:

(4) "Security" means a share, participation, or other interest in property, in a business, or in an obligation of an enterprise or other issuer and includes a certificated security, an uncertificated security, and a security account.
(5) "Security account" means:
(a) a reinvestment account associated with a security, a securities account with a broker, a cash balance in a brokerage account, cash, interest, earnings, or dividends earned or declared on a security in an account, a reinvestment account, or a brokerage account, whether or not credited to the account before the owner's death; or
(b) a cash balance or other property held for or due to the owner of a security as a replacement for or product of an account security, whether or not credited

to the account before the owner's death.

As with POD accounts, the designation of a TOD beneficiary on a registration in beneficiary form has no effect on ownership until the owner's death, and a registration of a security in beneficiary form may be canceled or changed at any time by the sole owner or all then-surviving owners without the consent of the beneficiary. 72-6-306, M.C.A. Consequently, TOD accounts insulate the account owner from the claims of a beneficiary's creditors, at least as to the securities in the account.

At the death of the owner of the account, the securities pass to the beneficiary outside of probate, as they would if they had been owned in joint tenancy. If there are multiple beneficiaries, they hold their interests as tenants in common, until the securities are divided after the death of the owner. If no beneficiary survives the death of all owners, the security belongs to the estate of the owner.

> **72-6-307. Ownership on death of owner.** On the death of a sole owner or the last to die of all multiple owners, ownership of securities registered in beneficiary form passes to the beneficiary or beneficiaries who survive all owners. On proof of the death of all owners and compliance with any applicable requirements of the registering entity, a security registered in beneficiary form may be reregistered in the name of the beneficiary or beneficiaries who survived the death of all owners. Until division of the security after the death of all owners, multiple beneficiaries surviving the death of all owners hold their interests as tenants in common. If no beneficiary survives the death of all owners, the security belongs to the estate of the deceased sole owner or the estate of the last to die of all multiple owners.

[c] Creditor Claims

TOD accounts appear to provide greater protection against the claims of the account owner's creditors than do POD accounts. *See* 2[3][b][iv] at page 7 of this outline.

[5] Community Property

Montana has adopted the Uniform Disposition of Community Property Rights at Death Act. Title 72, Ch. 9, Part 1, M.C.A. Under this Act, only one-half of any community property is owned by a deceased spouse, and therefor subject to the claims of the deceased spouse's creditors. 72-9-107, M.C.A.

> **72-9-107. Disposition upon death.** Upon death of a married person, one-half of the property to which this part applies is the property of the surviving spouse

> and is not subject to testamentary disposition by the decedent or distribution under the Uniform Probate Code. One-half of that property is the property of the decedent and is subject to testamentary disposition or distribution under the Uniform Probate Code. With respect to property to which this part applies, the one-half of the property which is the property of the decedent is not subject to the surviving spouse's right to elect against the will.

Community property includes not only property acquired while living in a community property state, but property that is traceable to community property.

> **72-9-102. Application.** This part applies to the disposition at death of the following property acquired by a married person:
> (1) (a) all personal property, wherever situated, that was acquired as or became and remained community property under the laws of another jurisdiction; and
> (b) all or the proportionate part of that property acquired with the rents, issues, or income of, the proceeds from, or in exchange for that community property; or
> (c) property traceable to that community property; or
> (2) all or the proportionate part of any real property situated in this state that was acquired with the rents, issues, or income of, the proceeds from, or in exchange for property acquired as or which became and remained community property under the laws of another jurisdiction, or property traceable to that community property.

Curiously, the Act states that it does not affect the rights of creditors.

> **72-9-114. Creditor's rights.** This part does not affect rights of creditors with respect to property to which this part applies.

The application of this provision may need to be fleshed out by the courts. Consider the example of a married couple who acquired a house while living in California. That house was always titled in the husband's name. The couple moved to Montana and used the proceeds of the California house sale to acquire another house here, again titled in the husband's name. But for the application of the Uniform Disposition of Community Property Rights at Death Act, only the husband has any apparent interest in the house. It is clear under the Act, however, that the house is community property, with ownership split between the husband and wife. The husband has no power to devise more than his one-half interest in the house at the time of his death, and presumably creditors of his estate are entitled to satisfy their claims only out of his one-half interest. Or does 72-9-114, M.C.A. change that result?

3. Limited Partnerships

[1] Asset Protection Features

The Revised Uniform Limited Partnership Act of 1976 ("RULPA"), which has been widely adopted, provides two principal means of asset protection. First, it provides protection to the limited partners similar to the protection generally available to corporate shareholders, namely, a limited partner's personal exposure for the debts of the partnership is generally limited to his investment in the partnership. Second, the RULPA provides for a charging order, which limits the remedies available to the creditor.

Under a charging order, partnership assets are protected from the judgment creditors of both the limited and the general partners. This is an especially attractive feature of family limited partnerships.

[2] Charging Orders

[a] Statutory Basis

Montana has adopted the 1976 version of RULPA[2] The Montana charging order provision, which is similar but not identical to the RULPA charging order provision, is found in 35-12-1103, M.C.A., which reads as follows:

> **35-12-1103. Rights of creditors.** On due application to a court of competent jurisdiction by any judgment creditor of a partner, the court may charge the partnership interest of the partner with payment of the unsatisfied amount of the judgment debt, with interest thereon. To the extent so charged, the judgment creditor has only the rights of an assignee of the partnership interest. This chapter does not deprive any partner of the benefit of any exemption laws applicable to his partnership interest.

Note that the second sentence provides, "the judgment creditor has only the rights of an assignee of the partnership interest." The effect of that is found in 35-12-1102,

[2]Montana and 10 other states have adopted the 1976 version of RULPA; forty states and the District of Columbia have adopted RULPA (1976) with the 1985 Amendments. *See* www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-ulpa.asp. A new revision of RULPA was adopted by the National Conference of Commissioners on Uniform State Laws in August 2001 but apparently has yet to be adopted by any state.

M.C.A., which provides that an assignment of a partnership interest does not entitle the assignee to become or to exercise any rights of a partner. The assignment only entitles the assignee to receive any distributions to which the assignor would be entitled.

> **35-12-1102. Assignment of partnership interest.** Except as otherwise provided in the partnership agreement, a partnership interest is assignable in whole or in part. An assignment of a partnership interest does not dissolve a limited partnership or entitle the assignee to become a partner or to exercise any of the rights thereof. An assignment only entitles the assignee to receive, to the extent assigned, any distributions to which the assignor would be entitled. Except as otherwise provided in the partnership agreement, a partner ceases to be a partner upon assignment of all his partnership interest.

[b] Drafting Considerations

This potential delay in being able to execute against a judgment is the feature that makes limited partnership interests unattractive to creditors. Note, however, that this result can be changed by the partnership agreement. For greater asset protection, the partnership agreement should preclude an assignee from becoming a substitute partner without consent of all the other partners. In addition, it may be appropriate to draft the partnership agreement to have different requirements for voluntary as opposed to involuntary assignments.

With asset protection in mind, the partnership agreement might be drafted so as to leave the timing of distributions to the General Partner. Likewise, a provision might be included providing that the only time a withdrawing partner is entitled to receive the value of his or her capital account is upon the dissolution of the partnership.

4. Limited Liability Companies

Limited liability companies (LLC's) are available in all states and the District of Columbia, but the enabling statutes are diverse. Many, including Montana, contain a charging order section identical to that found in the RULPA. The Montana provision, 35-8-705, M.C.A., provides:

> **35-8-705. Rights of judgment creditor.** (1) On application to a court of competent jurisdiction by any judgment creditor of a member, the court may charge the distributional interest of the member with payment of the unsatisfied amount of judgment, with interest. To the extent charged, the judgment creditor has only the rights of an assignee of the distributional interest. This

chapter does not deprive a member of the benefit of any exemption laws applicable to a distributional interest.
(2) The court may appoint a receiver of the share of the distributions due or to become due to a judgment debtor and make all other orders, directions, accounts, and inquiries that the judgment debtor may have made or that the circumstances require to give effect to the charging order.
(3) A charging order constitutes a lien on the judgment debtor's distributional interest. The court may order a foreclosure of a lien on a distributional interest subject to the charging order at any time. A purchaser of the distributional interest at a foreclosure sale has the rights of a transferee.
(4) At any time before foreclosure, a distributional interest that is charged may be redeemed:
(a) by the judgment debtor;
(b) by one or more of the other members with property other than the company's; or
(c) with the company's property if permitted by the operating agreement.
(5) This section provides the exclusive remedy by which a judgment creditor of a member or a transferee may satisfy a judgment out of the judgment debtor's distributional interest in a limited liability company.

As with a limited partnership, a member's interest in the LLC is personal property, not an interest in specific company assets.

35-8-701. Ownership of limited liability company property. (1) Property transferred to or otherwise acquired by a limited liability company becomes property of the limited liability company. <u>A member has no interest in specific limited liability company property</u>.
(2) Property may be acquired, held, and conveyed in the name of the limited liability company. Any estate in real property may be acquired in the name of the limited liability company, and title to any estate acquired must vest in the limited liability company rather than in the members individually.

35-8-703. Nature of distributional interest. (1) A member is not a co-owner of, and does not have a transferable interest in, property of a limited liability company.
(2) A member's distributional interest in a limited liability company is personal property and, subject to the provisions of 35-8-707, may be transferred in whole or in part.
(3) An operating agreement may provide that a member's distributional interest may be evidenced by a certificate of the interest issued by the limited liability company and, subject to the provisions of 35-8-707, may also provide for the

transfer of any interest represented by the certificate.

The assignee of a membership interest will not become a member without the unanimous consent of all other members. The assignee of an LLC interest who does not become a member is only entitled to receive the share of profits and income to which the assignor would have been entitled, and has no right to participate in the management of the LLC.

35-8-707. Transfer of distributional interest -- rights of transferee. (1) A transfer of a member's distributional interest does not entitle the transferee to become a member or to exercise any rights of a member. A transfer entitles the transferee to receive, to the extent transferred, only the distributions to which the transferor would be entitled.
(2) A transferee of a distributional interest may become a member of a limited liability company if and to the extent that the transferor gives the transferee the right in accordance with authority described in writing in the operating agreement or if all other members consent.
(3) A transferee who has become a member, to the extent transferred, has the rights and powers, and is subject to the restrictions and liabilities, of a member under the operating agreement of a limited liability company and the provisions of this chapter. A transferee who becomes a member also is liable for the transferor member's obligations to make contributions under 35-8-502 and for obligations under 35-8-605 to return unlawful distributions, but the transferee is not obligated for the transferor member's liabilities unknown to the transferee at the time that the transferee becomes a member.
(4) Whether or not a transferee of a distributional interest becomes a member under subsection (2), the transferor is not released from liability to the limited liability company under the operating agreement or the provisions of this chapter.
(5) A transferee who does not become a member is not entitled to participate in the management or conduct of the limited liability company's business, may not require access to information concerning the company's transactions, and may not inspect or copy any of the company's records.
(6) A transferee who does not become a member is entitled to:
(a) receive, in accordance with the transfer, distributions to which the transferor would otherwise be entitled;
(b) receive, upon dissolution and winding up of the limited liability company's business:
(i) in accordance with the transfer, the net amount otherwise distributable to the transferor; and
(ii) a statement of account only from the date of the latest statement of account

agreed to by all the members; and
(c) seek under 35-8-902(2) a judicial determination that it is equitable to dissolve and wind up the company's business.
(7) A limited liability company does not have to give effect to a transfer until it has notice of the transfer.

In contrast to limited partnerships, no LLC member is liable for the debts of the LLC. This feature makes LLC's more attractive than limited partnerships for asset protection planning, but there also is less case law on LLC's than limited partnerships.

5. Trusts

[1] Trust Provisions Designed for Asset Protection

[a] Discretionary Distribution Provision

A trust may contain a distribution provision allowing the trustee discretion to distribute trust income, principal or both, as the Trustee deems appropriate. The trust may also contain a distribution provision limited by a broadly defined standard.

A discretionary distribution provision limits the beneficiary's interest in the trust; the beneficiary has an interest only to the extent the trustee decides to make a distribution. With such a provision, a creditor of a beneficiary cannot reach the underlying trust assets, or compel the trustee to pay out income or principal. This provides a significant asset protection benefit.

The Montana law on such discretionary distributions is found at 72-33-304, M.C.A.:

> **72-33-304. Transferee or creditor cannot compel trustee to exercise discretion -- liability of trustee for payment to or for beneficiary.** (1) If the trust instrument provides that the trustee shall pay to or for the benefit of a beneficiary so much of the income or principal or both as the trustee in the trustee's discretion sees fit to pay, a transferee or creditor of the beneficiary may not compel the trustee to pay any amount that may be paid only in the exercise of the trustee's discretion.
> (2) If the trustee has knowledge of the transfer of the beneficiary's interest or has been served with process by a judgment creditor seeking to reach the beneficiary's interest, and the trustee pays to or for the benefit of the beneficiary any part of the income or principal that may be paid only in the exercise of the trustee's discretion, the trustee is liable to the transferee or creditor to the

> extent that the payment to or for the benefit of the beneficiary impairs the right of the transferee or creditor. This subsection does not apply if the beneficiary's interest in the trust is subject to a restraint on transfer that is valid under 72-33-301 or 72-33-302.
> (3) This section applies regardless of whether the trust instrument provides a standard for the exercise of the trustee's discretion.
> (4) Nothing in this section limits any right the beneficiary may have to compel the trustee to pay to or for the benefit of the beneficiary all or part of the income or principal.

The Official Comments to 72-33-304 M.C.A. state that it provides broader asset protection than is generally available.

> Drawn from California Probate Code Ann. (1987) section 15303. Subsections (1) and (2) of this section are in turn drawn from section 155 of the Restatement (Second) of Trusts (1957), and provide that a judgment creditor cannot compel the trustee of a discretionary trust to pay any part of the discretionary trust income or principal, although a judgment creditor may be able to reach any payment the trustee does decide to make.
>
> Unlike section 155 of the Restatement, this section applies whether or not the trustee's discretion is subject to a standard. See section 27(3) [subsection (3) of this section]. The Restatement provision applies only where the trustee has "uncontrolled discretion." Accordingly, under section 27 [this section], even though the beneficiary of the trust could compel the trustee to make payment pursuant to the standard set out in the trust instrument, the transferee or creditor has no similar right to compel the payment.
>
> Subsection (4) of section 27 [subsection (4) of this section] makes clear that the section does not affect or limit any right the beneficiary (as distinguished from a transferee or creditor of the beneficiary) may have to compel payment.

[b] Spendthrift Provision

A spendthrift provision, providing a restraint on the voluntary or involuntary alienation of a beneficiary's interest in a trust, may provide a significant asset protection benefit for the trust beneficiary. The Montana spendthrift statutes are as follows:

> **72-33-301. Restraint on transfer of income.** Except as provided in 72-33-305 [relating to transfers in trust where the trustor is beneficiary], if the trust instrument provides that a beneficiary's interest is not subject to voluntary or involuntary transfer, the beneficiary's interest in income under the trust may

not be transferred and is not subject to enforcement of a money judgment until paid to the beneficiary.

72-33-302. Restraint on transfer of principal. (1) Except as provided in 72-33-305 and subsection (2) of this section, if the trust instrument provides that a beneficiary's interest in principal is not subject to voluntary or involuntary transfer, the beneficiary's interest in principal may not be transferred and is not subject to enforcement of a money judgment until paid to the beneficiary.
(2) After an amount of principal has become due and payable to the beneficiary under the trust instrument, upon petition to the court by a judgment creditor, the court may make an order directing the trustee to satisfy the money judgment out of that principal amount. The court in its discretion may issue an order directing the trustee to satisfy all or part of the judgment out of that principal amount.

72-33-303. Trust for support. Except as provided in 72-33-305, if the trust instrument provides that the trustee shall pay income or principal or both for the education or support of a beneficiary, the beneficiary's interest in income or principal or both under the trust may not be transferred and is not subject to the enforcement of a money judgment until paid to the beneficiary.

These spendthrift provisions are based on the California Probate Code, but have certain important differences, which make them more useful for asset protection planning. 72-33-301, M.C.A. permits the trustor to restrain transfers of the beneficiary's interest in income. However, the corresponding California section is subject to exceptions for claims for child and spousal support, claims for reimbursement of public support, the right of general creditors to reach maximum of one-fourth of payments due beneficiary, and income in excess of the amount needed for education and support. None of these exceptions are applicable in Montana. *See* Official Comments to 72-33-301, M.C.A. In addition, Montana law, prior to 1989, limited the effectiveness of spendthrift trusts of real property to that which was necessary for the education and support of the beneficiary. 72-24-210, M.C.A. (1987). That exception no longer applies. 72-33-303, M.C.A. does not include the limiting qualification "to the extent the income or principal or both is necessary for the education or support of the beneficiary" which is found in the corresponding California section. *See* Official Comments to 72-33-303, M.C.A.

Spendthrift trusts have been upheld in Montana. Lundgren v. Hoglund, 219 Mont. 295, 711 P.2d 809 (1985), although no cases have been decided under the above-referenced spendthrift statutes since they were enacted in 1989.

[c] Flight Provision

A flight provision (sometimes referred to as a "fleeing clause") allows the trustee to change the situs of trust administration, governing law, and to transfer trust assets to effect such changes.

A flight provision may be included in a foreign trust to address civil unrest, an unfavorable change in the law or political climate of the situs jurisdiction, or other situations. This can be an important asset protection tool in the face of an oncoming creditor's challenge against the trust.

[d] Trust Protector Provision

A trust protector (or, in some cases, a committee of trust protectors) is not a trustee, but has specified powers over the trust. Powers granted to the trust protector should be drafted in the negative, that is, as veto powers.

For example, a trust protector provision that required both the trustee's and the protector's signatures for a transfer would in effect provide a direct veto power over the transfer of funds, securities, and other assets. The appointment of a non-U.S. trust protector may cause the trust to be classified as a foreign trust under the control test. Prop. Reg. Section 301.7701-7(d)(1)(ii).

[e] Other Protective Provisions

[i] Extension Provision

An extension provision grants the trustees the discretion to extend the term of the trust. If the trust were about to terminate at a time when a beneficiary was having credit problems, this could be used to postpone distribution of the trust until a time better for the beneficiary.

[ii] Principal and Income Allocation Provision

The trustee has discretion under a principal and allocation provision to allocate receipts and disbursements between principal and income. To the extent it did not constitute an abuse of discretion, the trustee could, under such a provision, allocate receipts to trust principal, so that less or no income would be left to be distributed.

[iii] Revision of Beneficial Interests

Under a revision of beneficial interests provision, the trustee has discretion to revise the beneficial interests of a beneficiary, or even exclude someone as a beneficiary, and to add others as beneficiaries. This provision is probably easier to defend against claims of abuse of trustee discretion than is a principal and income allocation provision.

[2] Trusts in Common Law Property Jurisdictions

[a] Asset Protection Features

[i] Domestic Trusts

The extent to which a domestic trust provides asset protection depends upon two factors:

- the relationship to the trust of the person for whom asset protection is sought, and
- the nature and extent of that person's interest in and/or controls over the trust.

1) Revocable Trusts

A trust which is revocable by the settlor will be subject to claims of the settlor's creditors, even if the settlor is not a beneficiary of the trust.

> **72-36-301. Creditor's rights against revocable trust during trustor's lifetime.** If the trustor retains the power to revoke the trust in whole or in part, the trust property is subject to the claims of creditors of the trustor to the extent of the power of revocation during the lifetime of the trustor.

Even though a revocable trust is not subject to probate, the settlor's creditors can reach the trust assets.

> **72-36-302. Creditor's rights against revocable trust after trustor's death.** Upon the death of a trustor who had retained the power to revoke the trust in whole or in part, the property that was subject to the power of revocation at the time of the trustor's death is subject to the claims of creditors of the decedent trustor's estate and to the expenses of administration of the estate to the extent that the decedent trustor's estate is inadequate to satisfy those claims and expenses.

Even if the settlor can revoke the trust, a trust could be used for asset protection planning as to beneficiaries other than the settlor. For example, if the trust provides discretion in the trustee as to when and whether to make distributions of income, principal or both and has a beneficiary other than the settlor, a creditor of the beneficiary would have to wait for a distribution to receive the distribution of trust income or principal. If such a trust has multiple beneficiaries other than the settlor, the trustee could simply make distributions to the beneficiary or beneficiaries other than the one plagued with credit problems. This would be a form of discretionary distribution trust provision referred to in 5[1][a] at page 19 of this outline.

2) Irrevocable Trusts

The extent of asset protection available through a domestic irrevocable trust depends upon the nature and extent of the other interests the settlor has retained in the trust. Any individual interest might not open the trust assets to the claims of creditors, but a combination of interests might. And certain trust provisions that will protect trust assets if the beneficiary is not the settlor do not if the beneficiary is the settlor, as a matter of public policy.

For public policy reasons, a properly drafted spendthrift provision, which generally insulates trust assets from the creditors of a nonsettlor beneficiary, will not be effective in protecting trust assets from the creditors of a settlor-beneficiary. In addition, the creditors of the settlor-beneficiary will be able to reach that amount of trust income, principal or both which the trustee, in the maximum exercise of its discretion in favor of the settlor-beneficiary, could pay or apply for the benefit of the settlor-beneficiary under the terms of the trust. The applicable Montana statute is found at 72-33-305, M.C.A., which provides as follows:

> **72-33-305. Where trustor is beneficiary.** (1) If the trustor is a beneficiary of a trust created by the trustor and the trustor's interest is subject to a provision restraining the voluntary or involuntary transfer of the trustor's interest, the restraint is invalid against transferees or creditors of the trustor. The invalidity of the restraint on transfer does not affect the validity of the trust.
> (2) If the trustor is the beneficiary of a trust created by the trustor and the trust instrument provides that the trustee shall pay income or principal or both for the education or support of the beneficiary or gives the trustee the discretion to determine the amount of income or principal or both to be paid to or for the benefit of the trustor, a transferee or creditor of the trustor may reach the maximum amount that the trustee could pay to or for the benefit of the trustor under the trust instrument, not exceeding the amount of the trustor's proportionate contribution to the trust.

This does not mean that irrevocable trusts cannot be used for asset protection planning for the settlor. The settlor's creditors can only reach what is available to the settlor, so, for example, if the settlor of an irrevocable trust retains only a life estate, with the remainder to pass to other beneficiaries, such as the settlor's children, the creditors are entitled to reach only the income interest retained by the settlor. That would still allow the remainder interest to pass to the settlor's children (or other beneficiaries).

The trust assets can also be protected from the creditors of a beneficiary. Consider the situation where a trust provides an income interest to the settlor's spouse or child with a remainder over to the settlor or the settlor's other children. The creditors of the spouse or child would only be entitled to reach the income interest, and upon the death of the spouse or child, the trust principal would pass to the other beneficiaries designated by the trust.

3) Alaskan Trusts.

The Alaska Trust Act (AS Section 34.40.110), provides even greater protection for settlors. Under this Act, the trust may provide that the interest of a trust beneficiary may not be either voluntarily or involuntarily transferred before payment or delivery of the interest to the beneficiary.

The Act also provides that a claim cannot be satisfied out of a beneficiary's interest in the trust by a creditor existing when the trust is created, a person who subsequently becomes a creditor, or another person. That protection is not available, however, (1) if the transfer was intended to hinder, delay, or defraud creditors or other persons specified under the Alaska the fraudulent conveyance statute; (2) to the extent the trust requires income or principal distributions to the settlor; (3) if at the time of the transfer, the settlor is in default of child support payments by at least 30 days; or (4) to the extent the settlor may revoke or terminate the trust without the consent of a person who has a substantial adverse beneficial interest in the trust.

Note that under exception (2) above, the settlor could be the beneficiary and obtain the credit protection features of the Alaska trust as long as the trust did not *require* distributions of income or principal to the settlor; discretionary distributions are allowable. This protection is available even if the settlor is the only person to whom the trustee may distribute principal, income, or both.

The settlor may also retain the right, where the trust has beneficiaries in addition to or other than settlor, to veto distributions to other beneficiaries of the trust. Creditor protection is available even if the settlor retains the right to control who receives the trust property upon the settlor's death. If the settlor retains these veto and appointment powers, gifts to the trust are not completed and therefore are not subject to gift tax, but then the corpus of the trust would also be includable in the settlor's taxable estate.

Under exception (4) above, it should be noted that the settlor's power to "revoke or terminate" the trust does not include a power to veto a distribution from the trust, a testamentary special power of appointment or similar power, or the right to receive a distribution of income, corpus, or both in the discretion of a person, including a trustee, other than the settlor. If the settlor retains any combination of the above powers and interests, the settlor's creditors cannot reach the trust assets (assuming creditor protection is not lost under the other provisions). Thus, the transferred property may be protected from the claims of the settlor's creditors even though the settlor retains a power that renders the transfer incomplete for federal gift and estate tax purposes.

The Alaska statute requires that some part of the assets must be held in Alaska and that an Alaskan permanent resident, bank or trust company must serve as a trustee and have certain duties including maintaining books and records of the trust and preparing or arranging for the preparation of the trust's income tax return. In addition, part of the administration of the trust must occur in Alaska.

[ii] Offshore Trusts

1) Definition

An "offshore trust" is one that has at least one trustee who is resident outside of the United States (and its territories and possessions), and that is construed, interpreted, administered, and otherwise subject to the laws of a foreign country (usually, but not necessarily, the same country where the non-U.S. trustee is resident). The terms "offshore trust" and "foreign trust" are synonymous.

2) Discussion

As noted above, the extent to which domestic trusts are effective for asset protection depends upon the relationship to the trust of the person for whom protection is sought (that is, settlor-beneficiary or nonsettlor-beneficiary), and the nature and extent of that person's interest in or controls over the trust. Those factors are not so significant with a properly drafted and situated foreign asset protection trust ("APT").

A certain amount of protection is achieved simply because the trust is foreign. A creditor's attorney often will not be familiar with the laws and procedures in the foreign country where the trust is located. In addition, the trust laws of some foreign jurisdictions are more protective than domestic trust laws.

3) Selecting the Jurisdiction

Factors to consider in selecting the jurisdiction for the APT, as set forth in Rosen, 810 T.M., Asset Protection Planning, are:

a) Legal System

Trusts are recognized in jurisdictions with legal systems based on English common law. A system based upon the civil law does not usually contain a trust concept.

Examples of common-law based jurisdictions with favorable trust legislation in place include: The Bahamas, Belize, Cayman Islands, Cook Islands, Cyprus, Gibraltar, Isle of Man, and the Turks and Caicos Islands.

b) Favorable Trust Protection and Tax Laws

(1) Statute of Elizabeth

The selected jurisdiction should have in place legislation establishing a set of rules specifically addressing international trusts and selected issues. Any such set of rules, or related set of rules should address the applicability of the Statute of Elizabeth, which, since its enactment in 1571, has served as the basis for the fraudulent transfer laws of many common law jurisdictions. The Statute contains no limitation period, and its judicial interpretations by the English courts have been favorable to creditors, often finding an intent to defraud. Even creditors who came into existence as creditors following a transfer could attack a transaction, making it virtually impossible for any significant asset protection planning to be undertaken.

Consequently, a favorable jurisdiction is one which has enacted legislation repealing the Statute. Often such a repealing statute will provide specific fraudulent transfer rules, including a limitations period, and may require the creditor to satisfy a specific standard of proof in order to establish that a particular transfer was fraudulent.

An extensive and specific fraudulent transfer statutes of the offshore jurisdictions is found in the Cook Islands, which requires the complaining creditor to prove the fraudulent transfer "beyond a reasonable doubt." and the case must be brought in the Cook Islands. The statute also provides that a transfer to the trust cannot be fraudulent as to a creditor whose cause of action accrues after the transfer to the trust.

(2) Comity

The jurisdiction being considered for the situs of an APT should not give comity to judgments of other jurisdictions. In such a jurisdiction, an order of a U.S. court will not be recognized as long as the foreign trustee of the APT is resident in a jurisdiction which does not grant comity to U.S. judgments.

(3) Effect of Retained Interests, Powers, and Self-Settled Spendthrift Provisions

The APT jurisdiction should preferably have laws that override the common law rules which preclude effective asset protection for the settlor-beneficiary of spendthrift, wholly discretionary, and certain other retained-interest trusts.

(4) Taxation and Exchange Controls

The selected jurisdiction should exempt the APT, its assets, and its income from any type of taxation, and from any exchange controls (in those jurisdictions which have such taxes and/or controls).

(5) Other Factors

Other important factors would include the economic environment, the stability of the political and social system, compatible language, availability and quality of professional services, and availability and quality of electronic communication facilities.

4) Selecting the Offshore Trustee

Trust companies with experience in administering APT's, and particularly those that have successfully participated in litigation concerning an APT, are desirable.

The number of APT's (and their asset value) under the potential trustee's administration and the financial strength of the trust company are relevant inquiries.

If the trust company has no U.S. branch operation, it will be more difficult for a U.S. court to exert pressure on the offshore trustee through an order directed to the U.S. branch.

[b] Tax Consequences

[i] Domestic Trusts

The tax consequence of domestic trusts is beyond the scope of this outline. In general, revocable trusts will have no particular tax advantages, since for income tax purposes all the income will be taxed to the settlor and upon the settlor's death, all the assets will be included in the settlor's taxable estate. Properly drafted irrevocable may be used to make gifts that remove property from the settlor's taxable estate and thereafter shift the income and related income tax to either the trust or the beneficiaries of the trust.

[ii] Offshore Trusts

1) Classification Issues

An offshore trust may be treated as a U.S. person for U.S. tax purposes. The Code defines a foreign trust as a trust which is not a U.S. person. IRC §7701(a)(31)(B). A trust is a U.S. person if (i) a court within the United States is able to exercise primary supervision over the administration of the trust, and (ii) one or more United States persons have the authority to control all substantial decisions of the trust. IRC §7701(a)(30)(E).

These definitions of foreign and domestic trusts were added by the Small Business Job Protection Act of 1996 , effective for taxable years beginning after 1996, unless the trustee irrevocably elects to apply the definition to tax years ending after August 20, 1996, the date of enactment.

Before these changes, a foreign trust was defined as a trust the income of which, from sources without the United States which was not effectively connected with the conduct of a trade or business within the United States, was not includible in gross income. IRC §7701(a)(31), before amendment by the Small Business Job Protection Act of 1996. The old definition used a "facts and circumstances" test, turning on the nationality of the trustees; place of organization; place of administration; location of assets; citizenship of settlor; and citizenship of beneficiaries, among other factors.

If the APT is to hold S corporation stock and avoid U.S. withholding tax, it must qualify as a U.S. trust, since an S corporation may not have a nonresident alien as a shareholder. IRC §§1361(b)(1)(C).

2) U.S. Income Tax Consequences

In addition, the Taxpayer Relief Act of 1997 repealed the excise tax under IRC §§1491, 1492, and 1494, effective August 5, 1997. In its place, new §684 requires the recognition of gain upon a transfer of appreciated property by a U.S. person to a foreign trust. The recognized gain is equal to the excess of the fair market value of the property transferred over the transferor's adjusted basis. IRC §684(a). This recognition of gain rule does not apply to a transfer to a trust by a United States person to the extent that any person is treated as the owner of such trust under section 671. IRC §684(b). A domestic trust that becomes a foreign trust is treated as having transferred all its assets to the foreign trust. IRC §684(c).

In the normal course, the gain recognition rule will not be triggered by creation of an APT because, in general, a United States person who directly or indirectly transfers property to a foreign trust is treated as the owner if there is a United States beneficiary of any portion of the trust. IRC §679(a). Consequently, in most instances, an APT created by a U.S. person will be a grantor trust by virtue of the application of Section 679 (if not as a result of the application of one or more of the other sections of Subpart E, the grantor trust rules).

An APT is normally established with the settlor, and often the settlor's spouse, as income and/or principal beneficiaries, and the settlor often retains other powers resulting in grantor trust status under IRC §674 (Power to Control Beneficial Enjoyment). APT's often have provisions that may result in grantor trust status under one or more of the following Code provisions: §673 (Reversionary Interests), if the grantor has a reversionary interest the value of which exceeds 5% of the trust assets at the inception of the trust; §674 (Power to Control Beneficial Enjoyment) if any person may add beneficiaries to the trust (other than after-born or after-adopted children); §677 (Income for Benefit of the Grantor) if the trustee has the discretion (or is required) to distribute trust income to the settlor or the settlor's spouse.

If the APT is not classified as a grantor trust, the trust will be taxed under Subchapter J of the Internal Revenue Code.

3) U.S. Estate and Gift Tax Consequences

An APT is usually structured so that transfers to it will be incomplete gifts for gift tax purposes.

A gift is incomplete if the donor reserves the power to revest the beneficial title to the property in himself. A gift is also incomplete if and to the extent that a reserved power gives the donor the power to name new beneficiaries or to change the interests of the beneficiaries as between themselves unless the power is a fiduciary power limited by a fixed or ascertainable standard. Treas. Reg. §25.2511-2(c). Therefore, an APT provision reserving such an inter vivos or testamentary special power of appointment (or both) to the settlor will result in transfers to the trust being incomplete gifts.

Of course, distributions to persons other than the settlor during the settlor's lifetime will be completed gifts.

Since the transfers to the APT will be incomplete gifts, the value of the APT will be included in the settlor's gross estate. IRC §2033. Thus, tax planning language to take advantage of the unified credit, the marital deduction, and similar matters should be included in the APT.

4) Withholding Tax

If the asset protection trust is a foreign trust, its U.S. source interest, dividends, rents, and other "fixed or determinable annual or periodical gains, profits, and income" will ordinarily be subject to a 30% withholding tax. IRC §§871(a), 1441(a). The 30% withholding rate is often reduced by tax treaty. Most asset protection jurisdictions do not have income tax treaties with the United States, and a trust situated in any those jurisdictions will be subject to the 30% rate.

[3] Trusts For Settlors Owning Community Property

The basis of property included in a decedent's estate is adjusted to its fair market value as of the date of the decedent's death (or alternate valuation date, if elected for estate tax purposes). IRC §1014. The basis of all community property included in a decedent's estate is adjusted, even though only the decedent's one-half interest is included in his or her estate. IRC §1014(b)(6). It is important, therefore, not to terminate the community property character of assets transferred to the APT. If the situs jurisdiction of the APT does not recognize the community nature of the property, then on the first spouse's death, the surviving spouse may not be entitled to a stepped-up basis on his or her share of the community trust assets.

According to Howard D. Rosen in his Portfolio written for Tax Management, Rosen, 810 T.M., Asset Protection Planning, only two offshore jurisdictions have enacted legislation directed at the preservation of the double step-up for community property, the Cook Islands and Nevis, and he suggests that, in selecting a jurisdiction within which to settle an APT, for those settlors who reside in community property states, or who otherwise own community property, the Cook Islands may be the only jurisdiction in which the community property nature of the property may be preserved to qualify for the double basis adjustment at the first spouse's death.

6. Fraudulent Transfers

[1] General Fraudulent Transfer Laws

Fraudulent transfer law in the United States has evolved from the Statute of Elizabeth, and is currently found in Section 548 of the Bankruptcy Code, 11 USC 548, and in the fraudulent transfer statutes of the states. The Uniform Fraudulent Transfer Act ("UFTA"), completed by the Uniform Law Commissioners in 1984, revises the Uniform Fraudulent Conveyance Act of 1918, and has been adopted by 40 states, including Montana.

See http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-ufta.asp.

[a] Definition

The Montana fraudulent transfer statutes are found at 31-2-333 and -334, M.C.A.:

> **31-2-333. Transfers fraudulent as to present and future creditors.** (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
> (a) with actual intent to hinder, delay, or defraud any creditor of the debtor; or
> (b) without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor:
> (i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
> (ii) intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.
> (2) In determining actual intent under subsection (1)(a), consideration may be given, among other factors, to whether:
> (a) the transfer or obligation was to an insider;
> (b) the debtor retained possession or control of the property transferred after the transfer;
> (c) the transfer or obligation was disclosed or concealed;
> (d) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
> (e) the transfer was of substantially all the debtor's assets;
> (f) the debtor absconded;
> (g) the debtor removed or concealed assets;

(h) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
(i) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
(j) the transfer occurred shortly before or shortly after a substantial debt was incurred; or
(k) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

31-2-334. Transfers fraudulent as to present creditors. (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.
(2) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

Note that the transfer is fraudulent either if the debtor had actual intent to hinder or defraud his or her creditors or, regardless of the debtor's intent, if it is made without receiving a reasonably equivalent value in exchange, and the debtor was engaged or about to engage in a business or a transaction for which the debtor's remaining assets were unreasonably small in relation to the business or transaction, or the debtor intended to incur, or should have reasonably known he or she would incur, debts beyond his or her ability to pay them as they became due. Similar provisions are contained in the Bankruptcy Code. 11 USC Section 548.

[b] The Transfer

The fraudulent transfer rules do not apply unless there has been a "transfer" of "an asset or an interest in an asset," and an "asset" does not include:
(a) property to the extent it is encumbered by a valid lien;
(b) property to the extent it is generally exempt under nonbankruptcy law; or
(c) an interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only one tenant. 31-2-328, M.C.A.

[c] Creditors Protected

31-2-333(1), M.C.A. protects a creditor whose "claim arose before or after the transfer was made." A literal interpretation of this clause might lead one to conclude that a transfer which satisfies the intent or equivalent value criteria of the statute, could be attacked by any creditor, regardless of how long after the transfer the creditor's claim arose. However, that is not how the courts have interpreted such statutes. *See* Casagrande v. Donahue, 178 Mont. 479, 585 P.2d 1286 (1978), a case decided under the old Uniform Fraudulent Conveyance Act, which held that joint bank accounts created more than 11 years before a decedent's death did not place the decedent's property beyond the reach of his creditors, it was his death that put the accounts out of their reach, and therefore the fraudulent conveyance statute was inapplicable.

[d] Determination of Intent -- Badges of Fraud

Under 31-2-333(1)(a), M.C.A., a transfer is fraudulent if the debtor made the transfer with the actual intent to hinder, delay, or defraud the creditor. The determination of the debtor's actual intent is made by considering the surrounding facts and circumstances.

31-2-333(1)(b) lists these factors, often referred to as "badges of fraud," used in determining actual intent for purposes of (1)(a):

> (2) In determining actual intent under subsection (1)(a), consideration may be given, among other factors, to whether:
> (a) the transfer or obligation was to an insider;
> (b) the debtor retained possession or control of the property transferred after the transfer;
> (c) the transfer or obligation was disclosed or concealed;
> (d) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
> (e) the transfer was of substantially all the debtor's assets;
> (f) the debtor absconded;
> (g) the debtor removed or concealed assets;
> (h) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
> (i) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
> (j) the transfer occurred shortly before or shortly after a substantial debt was

incurred; or

(k) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

The debtor's solvency before and after the transfer is one of the most important badges. Typically, a transfer will not be held to have been fraudulent absent proof of actual intent, if, following the transfer, the debtor retained sufficient nonexempt assets to satisfy the claims of his creditors.

[e] Remedies of the Creditor

If a transfer is found to have been fraudulent, the creditor remedies available are set forth at 31-2-339, M.C.A.:

> **31-2-339. Remedies of creditors.** (1) In an action for relief against a transfer or obligation under this part, a creditor, subject to the limitations in 31-2-340, may obtain:
> (a) avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;
> (b) an attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with the procedure prescribed by Title 27, chapter 18; or
> (c) subject to applicable principles of equity and in accordance with applicable rules of civil procedure:
> (i) an injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;
> (ii) appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or
> (iii) any other relief the circumstances may require.
> (2) If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds.

[2] Fraud on the RTC or FDIC

Under 18 USC §1032, it is a crime to:

(a) knowingly conceal or endeavor to conceal an asset or property from the Federal Deposit Insurance Corporation, acting as conservator or receiver or in the Corporation's corporate capacity with respect to any asset acquired or liability assumed by the Corporation under section 11, 12, or 13, of the Federal Deposit Insurance Act, the Resolution Trust Corporation, any conservator appointed by the

> Comptroller of the Currency or the Director of the Office of Thrift Supervision, or the National Credit Union Administration Board, acting as conservator or liquidating agent;
> (b) corruptly impede or endeavor to impede the functions of such Corporation, Board, or conservators; or
> (c) corruptly place or endeavor to place an asset or property beyond the reach of such Corporation, Board, or conservator.

If any of the client's obligations are owed to a bank which has been taken over by the RTC, extra care must be taken not to make any transfers that violate this statute.

[3] Bankruptcy

It is useful to have a basic understanding of what federal bankruptcy laws treat as property of the bankruptcy estate, 11 USC Section 541, the Bankruptcy Code fraudulent conveyance rules, 11 USC Section 548, the rule which permits the debtor (in some states) to choose between using his or her state's exemptions or the federal exemptions, 11 USC Section 522(b), the meaning of "insolvency" under the Bankruptcy Code, 11 USC Section 101(32), and, importantly, the circumstances under which a bankruptcy discharge will be denied, 11 USC Section 727(a).

No action should be taken which could result in a denial of the bankruptcy discharge.

> Section 727(a) of the Bankruptcy Code provides, in relevant part:
> (a) the court shall grant the debtor a discharge, unless -- * * *
> (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed --
> (A) property of the debtor, within one year before the date of the filing of the petition; . . . .

Conversions of nonexempt assets into exempt assets can result in denial of discharge, if fraudulent intent is found in connection with the conversion.

[4] Money Laundering Control Act

The Money Laundering Control Act, 18 USC §§1956, 1957, makes it unlawful to move funds into or out of the United States or to conduct or attempt to conduct a financial transaction with the intent to promote the carrying on of a "specified unlawful activity," or, to move such funds, or to conduct or attempt to conduct a financial transaction, having been informed by a law enforcement officer that such funds represent the proceeds of some form of unlawful activity, and knowing that such movement was designed to conceal or disguise the nature, location, source, ownership, or the control of the proceeds of a specified unlawful activity, or to avoid State or Federal reporting requirements.

In addition to the severe criminal sanctions provided the Money Laundering Control Act, authorizes the imposition of civil penalties. 18 USC §1956(b).

Section 1957 of the Control Act also makes it unlawful to knowingly engage in a "monetary transaction" involving proceeds in excess of $10,000 derived from a specified unlawful activity.

[5] Internal Revenue Code §7212

IRC §7212 makes it a felony to "corruptly . . . obstruct{s} or impede{s}, or endeavor{s} to obstruct or impede, the due administration of this title {the Internal Revenue Code} . . . ."

7. Exemption Planning

[1] Homestead Exemption

In general, a homestead is exempt from execution or forced sale.

> **70-32-201. Homestead exempt from execution generally.** The homestead is exempt from execution or forced sale, except as in this chapter provided.

There are exceptions, however:

> **70-32-202. Execution allowed under certain judgments.** The homestead is subject to execution or forced sale in satisfaction of judgments obtained:
> (1) on debts secured by construction or vendors' liens upon the premises;
> (2) on debts secured by mortgages on the premises, executed and acknowledged by the husband and wife or by an unmarried claimant; or
> (3) on debts secured by mortgages on the premises, executed and recorded before the declaration of homestead was filed for record.

The homestead consists of the claimant's dwelling and appurtenances:

> **70-32-101. Of what homestead consists.** The homestead consists of the dwelling house or mobile home, and all appurtenances, in which the claimant resides and the land, if any, on which the same is situated, selected as provided in this chapter.

The homestead exemption protects no more than $100,000 of equity in the homestead:

> **70-32-104. Limitation on value.** (1) A homestead may not exceed $100,000 in value. In a proceeding instituted to determine the value of the homestead, the assessed value of the land with included appurtenances, if any, and of the dwelling house as it appears on the last-completed assessment roll preceding the institution of the proceeding is prima facie evidence of the value of the property claimed as a homestead.
> (2) If a claimant who is an owner of an undivided interest in real property claims a homestead exemption, the claimant is limited to an exemption amount proportional to the claimant's undivided interest.

The homestead exemption must be claimed in a declaration:

> **70-32-106. Contents of declaration.** The declaration of homestead must contain a statement that the person making it is residing on the premises and claims them as a homestead and a description of the premises.

The declaration must be recorded:

> **70-32-107. Declaration to be recorded.** The declaration must be recorded in the office of the county clerk of the county in which the land is situated.

[2] Life Estates

If the homestead exemption does not adequately protect the client's interest, the client might consider a "split purchase" of a life estate in real property to be used as a personal residence acquired by the life tenant simultaneously with a remainder interest being acquired by other persons, each party providing fair and adequate consideration, or the life tenant providing all of the consideration, and gifting the remainder. This allows some protection due to the limited interests held by each of the parties. Presumably, a creditor will not find significant value in a life estate in a personal residence.

For gift and estate tax purposes, the split purchase transaction may be subject to IRC

§2702, and could possibly result in adverse gift tax consequences, unless it is structured to constitute a personal residence trust. Treas. Reg. §25.2702-5(a).

[3] Wage Exemptions

The Federal Consumer Credit Protection Act provides a limitation on the amount of the disposable earnings of an individual which may be garnished. 15 USC §1671. In general, the maximum part of the aggregate disposable earnings of an individual for any workweek which is subjected to garnishment may not exceed (1) 25% of his disposable earnings for that week, or (2) the amount by which his disposable earnings for that week exceed thirty times the Federal minimum hourly wage prescribed by section 206(a)(1) of title 29 in effect at the time the earnings are payable, whichever is less. 15 USC §1673(a). Exceptions on the limitations are provided for support orders, bankruptcy orders, and state federal taxes. 15 USC §1673(b).

The Montana statute incorporating these limitations is found at 25-13-614, M.C.A., which is reproduced in its entirety in Exhibit B of this outline.

There is some question whether federal limitation applies only to wages resulting from an employer-employee relationship. Consequently, it may be appropriate for the client to incorporate and adopt an appropriate employment agreement in order to create an employer-employee relationship.

[4] Qualified Retirement Plans and IRAs

[a] Qualified Plans

ERISA requires, in order for a plan to be qualified, that it contain a provision that benefits under the plan can not be assigned or alienated. 29 USC §1056(d)(1). The United States Supreme Court, however, had to decide whether this meant that the assets of a participant's plan were exempt assets in a bankruptcy. The issue was created by the Bankruptcy Code provision that, "A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title." 11 USC §541(c)(2). In Patterson v. Shumate, 112 S.Ct. 2242 (1992), the US Supreme Court held that a debtor's interest in an ERISA qualified retirement plan was exempt from bankruptcy distribution.

The bankrupt individual whose plan assets were at issue argued that the plan's spendthrift provision required by ERISA was a restriction on transfer enforceable under applicable nonbankruptcy law, and, as such, his plan interest should be excluded from the bankruptcy estate. The creditor argued that the Bankruptcy Code reference to "non-bankruptcy law" should be interpreted to mean only such provisions as were enforceable under state law, and not federal law such as ERISA.

In a unanimous decision, the U.S. Supreme Court held that "applicable non-bankruptcy law" is not limited to state law, and includes any relevant non-bankruptcy law, including federal law such as ERISA. 112 S.Ct. at 2246.

In In re Witwer, 148 B.R. 930 (C.D. Cal. 1992), however, the court held that a sole owner of a corporation was not an employee, and therefore could not be an ERISA qualified plan participant, although the court did hold that the debtor's plan interest was exempt under California law.

[b] Individual Retirement Accounts

Individual Retirement Accounts ("IRAs") are not ERISA plans and, therefore, are not covered by the Patterson case. Montana does, however, have a statute exempting IRA accounts to some extent:

> **25-13-608. Property exempt without limitation -- exceptions.** (1) A judgment debtor is entitled to exemption from execution of the following:
> ...
> (e) except as provided in subsection (2), individual retirement accounts, as defined in 26 U.S.C. 408(a), to the extent of deductible contributions made before the suit resulting in judgment was filed and the earnings on those contributions, and Roth individual retirement accounts, as defined in 26 U.S.C. 408A, to the extent of qualified contributions made before the suit resulting in judgment was filed and the earnings on those contributions;
> ....
> (2) Veterans' and social security legislation benefits based upon remuneration for employment, disability benefits, and assets of individual retirement accounts are not exempt from execution if the debt for which execution is levied is for:
> (a) child support; or
> (b) maintenance to be paid to a spouse or former spouse.

Consider amounts rolled over into an IRA from a qualified plan. Are those "deductible contributions" of the character contemplated by 25-13-608(1)(e)? Until this issue is settled, the cautious approach would be not to roll over any amounts from a qualified plan to an IRA.

[5] Life Insurance

[a] Statutory Exemptions

Montana exempts life insurance proceeds from execution:

> **33-15-511. Exemption from execution of life insurance proceeds.** (1) If a policy of insurance, whether heretofore or hereafter issued, is effected by any person on his own life or on another life in favor of a person other than himself or, except in cases of transfer with intent to defraud creditors, if a policy of life insurance is assigned or in any way made payable to any such person, the lawful beneficiary or assignee thereof, other than the insured or the person so effecting such insurance or executors or administrators of such insured or the person so effecting such insurance, shall be entitled to its proceeds and avails against the creditors and representatives of the insured and of the person effecting the same, whether or not the right to change the beneficiary is reserved or permitted and whether or not the policy is made payable to the person whose life is insured if the beneficiary or assignee shall predecease such person; except that, subject to the statute of limitations, the amount of any premiums for such insurance paid with intent to defraud creditors with interest thereon shall enure to their benefit from the proceeds of the policy, but the insurer issuing the policy shall be discharged of all liability thereof by payment of its proceeds in accordance with its terms, unless before such payment the insurer shall have received written notice at its home office, by or in behalf of a creditor, of a claim to recover for transfer made or premiums paid with intent to defraud creditors, with specifications of the amount so claimed.
> (2) For the purposes of subsection (1) above, a policy shall also be deemed to be payable to a person other than the insured if and to the extent that a facility-of-payment clause or similar clause in the policy permits the insurer to discharge its obligation after the death of the individual insured by paying the death benefits to a person as permitted by such clause.
>
> **33-15-512. Exemption from execution of proceeds of group life -- exception.** (1) A policy of group life insurance or the proceeds thereof payable to the individual insured or to the beneficiary thereunder shall not be liable, either before or after payment, to be applied by any legal or equitable process to pay any debt or liability of such insured individual or his beneficiary or of any other person having a right under the policy. The proceeds thereof, when not made payable to a named beneficiary or to a third person pursuant to a facility-of-payment clause, shall not constitute a part of the estate of the individual insured for the payment of his debts.
> (2) This section shall not apply to group life insurance issued pursuant to parts 10, 11, and 12 of chapter 20 to a creditor covering his debtors, to the extent that such proceeds are applied to payment of the obligation for the purpose of

which the insurance was so issued.

[b] Irrevocable Life Insurance Trusts

An irrevocable life insurance trust would also remove the insurance from the reach of the insured's creditors, but would have the added benefit of allowing the settlor to direct, through the trust agreement, what should happen with the insurance proceeds.

[6] Annuity Contracts

Montana exempts from execution the proceeds of annuity contracts:

> **33-15-514. Exemption from execution of proceeds of annuity contracts -- assignability of rights.** (1) The benefits, rights, privileges, and options which under any annuity contract heretofore or hereafter issued are due or prospectively due the annuitant shall not be subject to execution, nor shall the annuitant be compelled to exercise any such rights, powers, or options, nor shall creditors be allowed to interfere with or terminate the contract, except:
> (a) as to amounts paid for or as premium on any such annuity with intent to defraud creditors, with interest thereon, and of which the creditor has given the insurer written notice at its home office prior to the making of the payments to the annuitant out of which the creditor seeks to recover. Any such notice shall specify the amount claimed or such facts as will enable the insurer to ascertain such amount and shall set forth such facts as will enable the insurer to ascertain the annuity contract, the annuitant, and the payments sought to be avoided on the ground of fraud.
> (b) the total exemption of benefits presently due and payable to any annuitant periodically or at stated times under all annuity contracts under which he is an annuitant shall not at any time exceed $250 per month for the length of time represented by such installments and that such periodic payments in excess of $350 per month shall be subject to garnishee execution;
> (c) if the total benefits presently due and payable to any annuitant under all annuity contracts under which he is an annuitant shall at any time exceed payment at the rate of $350 per month, then the court may order such annuitant to pay to a judgment creditor or apply on the judgment, in installments, such portion of such excess benefits as to the court may appear just and proper, after due regard for the reasonable requirements of the judgment debtor and his family, if dependent upon him, as well as any payments required to be made by the annuitant to other creditors under prior court orders.
> (2) If the contract so provides, the benefits, rights, privileges, or options accruing under such contract to a beneficiary or assignee shall not be

transferable or subject to commutation, and if the benefits are payable periodically or at stated times, the same exemptions contained herein for the annuitant shall apply with respect to such beneficiary or assignee.
(3) An annuity contract within the meaning of this section shall be any obligation to pay certain sums at stated times during life or lives or for a specified term or terms, issued for a valuable consideration, regardless of whether or not such sums are payable to one or more persons, jointly or otherwise, but does not include payments under life insurance contracts at stated times during life or lives or for a specified term or terms.

[7] Disability Insurance

Montana also exempts from execution the proceeds of disability insurance:

> **33-15-513. Exemption from execution of proceeds of disability insurance.** The proceeds or avails of all contracts of disability insurance and of provisions providing benefits on account of the insured's disability which are supplemental to life insurance or annuity contracts heretofore or hereafter effected shall be exempt from all liability for any debt of the insured and from any debt of the beneficiary existing at the time the proceeds are made available for his use.

[8] Miscellaneous Exemptions

Montana has multiple exemption statutes. Several of them are included in Appendix B.

APPENDICES

Appendix A — Statutes Severing Joint Tenancies

Appendix B — Miscellaneous Execution Exemption Provisions

Appendix A

Statutes Severing Joint Tenancies

72-2-813. Effect of homicide on intestate succession, wills, trusts, joint assets, life insurance, and beneficiary designations. (1) For purposes of this section, the following definitions apply:
(a) “Disposition or appointment of property” includes a transfer of an item of property or any other benefit to a beneficiary designated in a governing instrument.
(b) “Governing instrument” means a governing instrument executed by the decedent.
(c) “Revocable”, with respect to a disposition, appointment, provision, or nomination, means one under which the decedent, at the time of or immediately before death, was alone empowered, by law or under the governing instrument, to cancel the designation in favor of the killer, whether or not the decedent was then empowered to designate the decedent in place of the decedent’s killer and whether or not the decedent then had capacity to exercise the power.
(2) An individual who feloniously and intentionally kills the decedent forfeits all benefits under this chapter with respect to the decedent’s estate, including an intestate share, an elective share, an omitted spouse’s or child’s share, a homestead allowance, exempt property, and a family allowance. If the decedent died intestate, the decedent’s intestate estate passes as if the killer disclaimed the killer’s intestate share.
(3) The felonious and intentional killing of the decedent:
(a) revokes any revocable:
(i) disposition or appointment of property made by the decedent to the killer in a governing instrument;
(ii) provision in a governing instrument conferring a general or nongeneral power of appointment on the killer; and
(iii) nomination of the killer in a governing instrument, nominating or appointing the killer to serve in any fiduciary or representative capacity, including a personal representative, executor, trustee, or agent; and
(b) severs the interests of the decedent and killer in property held by them at the time of the killing as joint tenants with the right of survivorship and transforms the interests of the decedent and killer into tenancies in common.
(4) A severance under subsection (3)(b) does not affect any third-party interest in property acquired for value and in good faith reliance on an apparent title by survivorship in the killer unless a writing declaring the severance has been noted, registered, filed, or recorded in records appropriate to the kind and location of the property, which records are relied upon, in the ordinary course of transactions involving such property, as evidence of ownership.
(5) Provisions of a governing instrument are given effect as if the killer disclaimed all provisions revoked by this section or, in the case of a revoked nomination in a

fiduciary or representative capacity, as if the killer predeceased the decedent.
(6) A wrongful acquisition of property or interest by a killer not covered by this section must be treated in accordance with the principle that a killer cannot profit from the killer's wrong.
(7) After all right to appeal has been exhausted, a judgment of conviction establishing criminal accountability for the felonious and intentional killing of the decedent conclusively establishes the convicted individual as the decedent's killer for purposes of this section. In the absence of a conviction, the court, upon the petition of an interested person, shall determine whether, under the preponderance of evidence standard, the individual would be found criminally accountable for the felonious and intentional killing of the decedent. If the court determines that under that standard the individual would be found criminally accountable for the felonious and intentional killing of the decedent, the determination conclusively establishes that individual as the decedent's killer for purposes of this section.
(8) (a) A payor or other third party is not liable for having made a payment or transferred an item of property or any other benefit to a beneficiary designated in a governing instrument affected by an intentional and felonious killing, or for having taken any other action in good faith reliance on the validity of the governing instrument, upon request and satisfactory proof of the decedent's death, before the payor or other third party received written notice of a claimed forfeiture or revocation under this section. A payor or other third party does not have a duty or obligation to make any determination as to whether the decedent was a victim of a homicide or to seek any evidence with respect to a homicide even if the circumstances of the decedent's death are suspicious or questionable as to the beneficiary's participation in a homicide. A payor or other third party is only liable for actions taken 2 or more business days after the actual receipt by the payor or other third party of written notice. The payor or other third party may be liable for actions taken pursuant to the governing instrument only if the form of the service is that described in subsection (8)(b).
(b) The written notice must indicate the name of the decedent, the name of the person asserting an interest, the nature of the payment or item of property or other benefit, and a statement that a claim of forfeiture or revocation is being made under this section. Written notice of a claimed forfeiture or revocation under subsection (8)(a) must be mailed to the payor's or other third party's main office or home by certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action. Notice to a sales representative of the payor or other third party does not constitute notice to the payor or other third party. Upon receipt of written notice of a claimed forfeiture or revocation under this section, a payor or other third party may pay any amount owed or transfer or deposit any item of property held by it to or with the court having jurisdiction of the probate proceedings relating to the decedent's estate or, if no proceedings have been

commenced, to or with the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. In addition to the actions available under this section, the payor or other third party may take any action authorized by law or the governing instrument. If probate proceedings have not been commenced, the payor or other third party shall file with the court a copy of the written notice received by the payor or other third party, with the payment of funds or transfer or deposit of property. The court may not charge a filing fee to the payor or other third party for the payment to the court of amounts owed or transferred to or deposited with the court or any item of property. The court shall hold the funds or item of property and, upon its determination under this section, shall order disbursement in accordance with the determination. A filing fee, if any, may be charged upon disbursement either to the recipient or against the funds or property on deposit with the court, in the discretion of the court. Payments, transfers, or deposits made to or with the court discharge the payor or other third party from all claims for the value of amounts paid to or items of property transferred to or deposited with the court.

(9) (a) A bona fide purchaser who purchases property or who receives a payment or other item of property in partial or full satisfaction of a legally enforceable obligation is neither obligated under this section to return the payment, item of property, or benefit nor liable under this section for the amount of the payment or the value of the item of property or benefit. However, a person who, not for value, receives a payment, item of property, or other benefit to which the person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who is entitled to it under this section.

(b) If this section or any part of this section is preempted by federal law, other than the federal Employee Retirement Income Security Act of 1974, as amended, with respect to a payment, an item of property, or any other benefit covered by this section, a person who, not for value, receives the payment, item of property, or other benefit to which the person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who would have been entitled to it were this section or part of this section not preempted.

(10) For the purposes of this section, a felonious and intentional killing includes a deliberate homicide as defined in 45-5-102 and a mitigated deliberate homicide as defined in 45-5-103.

72-2-814. Revocation of probate and nonprobate transfers by divorce -- no revocation by other changes of circumstances. (1) As used in this section, the following definitions apply:

(a) "Disposition or appointment of property" includes a transfer of an item of

property or any other benefit to a beneficiary designated in a governing instrument.
(b) “Divorce or annulment” means any divorce, annulment, or dissolution or declaration of invalidity of a marriage that would exclude the spouse as a surviving spouse within the meaning of 72-2-812. A decree of separation that does not terminate the status of husband and wife is not a divorce for purposes of this section.
(c) “Divorced individual” includes an individual whose marriage has been annulled.
(d) “Governing instrument” means a governing instrument executed by the divorced individual before the divorce or annulment of the individual’s marriage to the individual’s former spouse.
(e) “Relative of the divorced individual’s former spouse” means an individual who is related to the divorced individual’s former spouse by blood, adoption, or affinity and who, after the divorce or annulment, is not related to the divorced individual by blood, adoption, or affinity.
(f) “Revocable”, with respect to a disposition, appointment, provision, or nomination, means one under which the divorced individual, at the time of the divorce or annulment, was alone empowered, by law or under the governing instrument, to cancel the designation in favor of the individual’s former spouse or former spouse’s relative, whether or not the divorced individual was then empowered to designate the divorced individual in place of the individual’s former spouse or in place of the former spouse’s relative and whether or not the divorced individual then had the capacity to exercise the power.
(2) Except as to a retirement system established in Title 19 or as provided by the express terms of a governing instrument, a court order, or a contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce, or annulment, the divorce or annulment of a marriage:
(a) revokes any revocable:
(i) disposition or appointment of property made by a divorced individual to the individual’s former spouse in a governing instrument and any disposition or appointment created by law or in a governing instrument to a relative of the divorced individual’s former spouse;
(ii) provision in a governing instrument conferring a general or nongeneral power of appointment on the divorced individual’s former spouse or on a relative of the divorced individual’s former spouse; and
(iii) nomination in a governing instrument that nominates a divorced individual’s former spouse or a relative of the divorced individual’s former spouse to serve in any fiduciary or representative capacity, including a personal representative, executor, trustee, conservator, agent, or guardian; and
(b) severs the interests of the former spouses in property held by them at the time of the divorce or annulment as joint tenants with the right of survivorship and transforms the interests of the former spouses into tenancies in common.
(3) A severance under subsection (2)(b) does not affect any third-party interest in

property acquired for value and in good faith reliance on an apparent title by survivorship in the survivor of the former spouses unless a writing declaring the severance has been noted, registered, filed, or recorded in records appropriate to the kind and location of the property, which records are relied upon, in the ordinary course of transactions involving such property, as evidence of ownership.
(4) Provisions of a governing instrument are given effect as if the former spouse and relatives of the former spouse disclaimed all provisions revoked by this section or, in the case of a revoked nomination in a fiduciary or representative capacity, as if the former spouse and relatives of the former spouse died immediately before the divorce or annulment.
(5) Provisions revoked solely by this section are revived by the divorced individual's remarriage to the former spouse or by a nullification of the divorce or annulment.
(6) No change of circumstances other than as described in this section and in 72-2-813 effects a revocation.
(7) (a) A payor or other third party is not liable for having made a payment or transferred an item of property or any other benefit to a beneficiary designated in a governing instrument affected by a divorce, annulment, or remarriage, or for having taken any other action in good faith reliance on the validity of the governing instrument, before the payor or other third party received written notice of the divorce, annulment, or remarriage. A payor or other third party does not have a duty or obligation to inquire as to the continued marital relationship between the decedent and a beneficiary or to seek any evidence with respect to a marital relationship. A payor or other third party is only liable for actions taken 2 or more business days after the actual receipt by the payor or other third party of written notice. The payor or other third party may be liable for actions taken pursuant to the governing instrument only if the form of service is that described in subsection (7)(b).
(b) The written notice must indicate the name of the decedent, the name of the person asserting an interest, the nature of the payment or item of property or other benefit, and a statement that a dissolution, annulment, or remarriage of the decedent and the designated beneficiary occurred. Written notice of the divorce, annulment, or remarriage under subsection (7)(a) must be mailed to the payor's or other third party's main office or home by certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action. Upon receipt of written notice of the divorce, annulment, or remarriage, a payor or other third party may pay any amount owed or transfer or deposit any item of property held by it to or with the court having jurisdiction of the probate proceedings relating to the decedent's estate or, if no proceedings have been commenced, to or with the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. In addition to the actions available under this section, the payor or other third party may take any action authorized by law or the governing instrument. If probate proceedings have not been

commenced, the payor or other third party shall file with the court a copy of the written notice received by the payor or other third party, with the payment of funds or transfer or deposit of property. The court may not charge a filing fee to the payor or other third party for the payment to the court of amounts owed or transferred to or deposited with the court or any item of property. The court shall hold the funds or item of property and, upon its determination under this section, shall order disbursement or transfer in accordance with the determination. A filing fee, if any, may, in the discretion of the court, be charged upon disbursement either to the recipient or against the funds or property on deposit with the court. Payments, transfers, or deposits made to or with the court discharge the payor or other third party from all claims for the value of amounts paid to or items of property transferred to or deposited with the court.

(8) (a) A bona fide purchaser who purchases property from a former spouse, relative of a former spouse, or any other person or who receives from a former spouse, relative of a former spouse, or any other person a payment or other item of property in partial or full satisfaction of a legally enforceable obligation is neither obligated under this section to return the payment, item of property, or benefit nor liable under this section for the amount of the payment or the value of the item of property or benefit. However, a former spouse, relative of a former spouse, or other person who, not for value, received a payment, item of property, or other benefit to which that person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who is entitled to it under this section.

(b) If this section or any part of this section is preempted by federal law, other than the federal Employee Retirement Income Security Act of 1974, as amended, with respect to a payment, an item of property, or any other benefit covered by this section, a former spouse, relative of the former spouse, or any other person who, not for value, received a payment, item of property, or other benefit to which that person is not entitled under this section is obligated to return that payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who would have been entitled to it were this section or part of this section not preempted.

Appendix B

Miscellaneous Execution Exemption Provisions

31-2-106. Exempt property -- bankruptcy proceeding. An individual may not exempt from the property of the estate in any bankruptcy proceeding the property specified in 11 U.S.C. 522(d). An individual may exempt from the property of the estate in any bankruptcy proceeding:
(1) that property exempt from execution of judgment as provided in 19-2-1004, 19-18-612, 19-19-504, 19-20-706, 19-21-212, Title 25, chapter 13, part 6, 33-7-522, 33-15-512 through 33-15-514, 39-51-3105, 39-71-743, 39-73-110, 53-2-607, 53-9-129, Title 70, chapter 32, and 80-2-245;
(2) the individual's right to receive unemployment compensation and unemployment benefits; and
(3) the individual's right to receive benefits from or interest in a private or governmental retirement, pension, stock bonus, profit-sharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, excluding that portion of contributions made by the individual within 1 year before the filing of the petition in bankruptcy which exceeds 15% of the individual's gross income for that 1-year period, unless:
(a) the plan or contract was established by or under the auspices of an insider that employed the individual at the time the individual's rights under the plan or contract arose;
(b) the benefit is paid on account of age or length of service; and
(c) the plan or contract does not qualify under section 401(a), 403(a), 403(b), 408, or 409 of the Internal Revenue Code of 1954 (26 U.S.C. 401(a), 403(b), 408, or 409).

19-2-1004. Exemption from taxes and legal process. Except as provided in 19-2-907 and 19-2-909, the right of a person to any benefit or payment from a retirement system or plan and the money in the system or plan's pension trust fund is not:
(1) subject to execution, garnishment, attachment, or any other process;
(2) subject to state, county, or municipal taxes except for:
(a) a benefit or annuity received in excess of $3,600 or adjusted by an amount determined pursuant to 15-30-111(2)(c)(ii); or
(b) a refund of a member's regular contributions picked up by an employer after June 30, 1985, as provided in 19-3-315, 19-5-402, 19-6-402, 19-7-403, 19-8-502, 19-9-710, or 19-13-601; or
(3) assignable except as specifically provided in this chapter.

19-18-612. Protection of benefits from legal process and taxation -- non-assignability. (1) Except for execution or withholding for the payment of child

support or for the payment of spousal support for a spouse or former spouse who is the custodial parent of the child, payments made or to be made under this chapter are not subject to judgments, garnishment, execution, or other legal process. A person entitled to a pension may not assign the right, and the association and trustees may not recognize any assignment or pay over any sum assigned.
(2) The first $3,600 or the amount determined pursuant to 15-30-111(2)(c)(ii) of benefits received under this part is exempt from state, county, and municipal taxation.

19-19-504. Protection of benefits from legal process and taxation. (1) Except for execution or withholding for the payment of child support or for the payment of spousal support for a spouse or former spouse who is the custodial parent of the child, the benefits provided for in this part are not subject to execution, garnishment, attachment, or the operation of bankruptcy, insolvency, or other process of law and are unassignable except as specifically provided in 19-19-505.
(2) The first $3,600 or the amount determined pursuant to 15-30-111(2)(c)(ii) of benefits received under this part is exempt from state, county, and municipal taxation.

19-20-706. Exemption from taxation and legal process. Except as provided in 19-20-305 and 19-20-306, the retirement allowances or any other benefits accrued or accruing to any person under the provisions of the retirement system and the accumulated contributions and cash and securities in the various funds of the retirement system are:
(1) exempted from any state, county, or municipal tax of the state of Montana except for:
(a) a retirement allowance received in excess of $3,600 or adjusted by an amount determined pursuant to 15-30-111(2)(c)(ii); or
(b) a withdrawal paid under 19-20-603 of a member's contributions picked up by an employer after June 30, 1985, as provided in 19-20-602;
(2) not subject to execution, garnishment, attachment by trustee process or otherwise, in law or equity, or any other process; and
(3) unassignable except as specifically provided in this chapter.

19-21-212. Exemption from taxation, legal process, and assessments. Except for execution or withholding for the payment of child support or for the payment of spousal support for a spouse or former spouse who is the custodial parent of the child, contracts, benefits, and contributions under the optional retirement program and the earnings on the contributions are:
(1) except for a retirement allowance received in excess of $3,600 or adjusted by an amount determined pursuant to 15-30-111(2)(c)(ii), exempt from any state, county,

or municipal tax;
(2) not subject to execution, garnishment, attachment, or other process;
(3) not covered or assessable by an insurance guaranty association; and
(4) unassignable except as specifically provided in the contracts.

25-13-601. Waiver of exemptions in unsecured note unenforceable. Any waiver of statutory exemption from execution in an unsecured promissory note shall be unenforceable.

25-13-607. Claim enforceable against exempt property. Notwithstanding any other provision of this part, a creditor may levy against exempt property to enforce a claim for:
(1) the purchase price of the property; or
(2) a loan made for the express purpose of enabling the judgment debtor to purchase the property and used for that purpose.

25-13-608. Property exempt without limitation -- exceptions. (1) A judgment debtor is entitled to exemption from execution of the following:
(a) professionally prescribed health aids for the judgment debtor or a dependent of the judgment debtor;
(b) benefits the judgment debtor has received or is entitled to receive under federal social security or local public assistance legislation, except as provided in subsection (2);
(c) veterans' benefits, except as provided in subsection (2);
(d) disability or illness benefits, except as provided in subsection (2);
(e) except as provided in subsection (2), individual retirement accounts, as defined in 26 U.S.C. 408(a), to the extent of deductible contributions made before the suit resulting in judgment was filed and the earnings on those contributions, and Roth individual retirement accounts, as defined in 26 U.S.C. 408A, to the extent of qualified contributions made before the suit resulting in judgment was filed and the earnings on those contributions;
(f) benefits paid or payable for medical, surgical, or hospital care to the extent they are used or will be used to pay for the care;
(g) maintenance and child support; and
(h) a burial plot for the judgment debtor and the debtor's family.
(2) Veterans' and social security legislation benefits based upon remuneration for employment, disability benefits, and assets of individual retirement accounts are not exempt from execution if the debt for which execution is levied is for:
(a) child support; or
(b) maintenance to be paid to a spouse or former spouse.

25-13-613. Property necessary to carry out governmental functions. (1) In addition to the property mentioned in 25-13-609(1), there shall be exempt to all judgment debtors the following property:
(a) all fire engines, hooks, and ladders, with the cart, trucks, and carriages, hose, buckets, implements, and apparatus thereto appertaining, and all furniture and uniforms of any fire company or department organized under any laws of this state;
(b) all arms, uniforms, and accouterments required by law to be kept by any person and one gun to be selected by the debtor;
(c) all courthouses, jails, public offices, and buildings, lots, grounds, and personal property, the fixtures, furniture, books, papers, and appurtenances belonging and pertaining to the courthouse, jail, and public offices belonging to any county of this state; and
(d) all cemeteries, public squares, parks, and places, public buildings, town halls, public markets, buildings for the use of fire departments and military organizations, and the lots and grounds thereto belonging and appertaining owned or held by any town or incorporated city or dedicated by such city or town to health, ornament, or public use or for the use of any fire or military company organized under the laws of the state.
(2) No article, however, or species of property mentioned in this section is exempt from execution issued upon a judgment recovered for its price or upon a judgment of foreclosure of a mortgage lien thereon, and no person not a bona fide resident of this state shall have the benefit of these exemptions.

25-13-614. Earnings of judgment debtor. (1) Earnings of a judgment debtor that are not subject to garnishment as provided in this section are exempt.
(2) Except as provided in subsections (3) and (4), the maximum part of the aggregate disposable earnings of a judgment debtor for any workweek that is subjected to garnishment may not exceed the lesser of:
(a) the amount by which his disposable earnings for the week exceed 30 times the federal minimum hourly wage in effect at the time the earnings are payable; or
(b) 25% of his disposable earnings for that week.
(3) The restrictions of subsection (2) do not apply in the case of an order or judgment for the maintenance or support of any person, issued by a court of competent jurisdiction or pursuant to an administrative procedure that is established by state law, affords substantial due process, and is subject to judicial review.
(4) (a) The maximum part of the aggregate disposable earnings of a judgment debtor for any workweek that is subject to garnishment to enforce an order described in subsection (3) may not exceed:
(i) 50% of the judgment debtor's disposable earnings for that week if he is supporting his spouse or dependent child (other than a spouse or child for whom the order is issued); or

(ii) 60% of the judgment debtor's disposable earnings for that week if he is not supporting a spouse or dependent child described in subsection (4)(a)(i).
(b) However, the amount stated in subsection (4)(a)(i) may be 55% and the amount stated in subsection (4)(a)(ii) may be 65% if such earnings are being garnished to enforce an order for maintenance or support for a period prior to the 12-week period that ends with the beginning of such workweek.
(5) For the purposes of this section, the definitions of earnings, disposable earnings, and garnishment are as set forth in 15 U.S.C. 1672.

25-13-615. Homestead. The homestead of a judgment debtor exempt from execution is provided for in Title 70, chapter 32

25-13-609. Personal property exempt subject to value limitations. A judgment debtor is entitled to exemption from execution of the following:
(1) the judgment debtor's interest, not to exceed $4,500 in aggregate value, to the extent of a value not exceeding $600 in any item of property, in household furnishings and goods, appliances, jewelry, wearing apparel, books, firearms and other sporting goods, animals, feed, crops, and musical instruments;
(2) the judgment debtor's interest, not to exceed $2,500 in value, in one motor vehicle;
(3) the judgment debtor's interest, not to exceed $3,000 in aggregate value, in any implements, professional books, and tools, of the trade of the judgment debtor or a dependent of the judgment debtor; and
(4) the judgment debtor's interest, not to exceed $4,000 in value, in any unmatured life insurance contracts owned by the judgment debtor.

33-7-522. Benefits not attachable. Money or other benefits, charity, relief, or aid to be paid, provided, or rendered by a society is not liable to attachment, garnishment, or other process and may not be seized, taken, appropriated, or applied by any legal or equitable process or operation of law to pay any debt or liability of a member, a beneficiary, or any other person who may have a right to the benefit, either before or after payment by the society.

39-51-3105. Assignment, pledge, or encumbrance of right to benefits void -- benefits exempt from levy, execution, attachment, or other remedy for collection of debt -- exception. Any assignment, pledge, or encumbrance of any right to benefits that are or may become due or payable under this chapter is void, and the rights to benefits are exempt from levy, execution, attachment, or any other remedy provided for the collection of debt. Benefits received by an individual, as long as they are not mingled with other funds of the recipient, are exempt from any remedy for the collection of all debts except as provided in 39-51-2207, 39-51-2208, 39-51-3106, 39-51-3107, and 39-51-3206. Any waiver of an exemption provided for in this section is void.

39-71-743. Assignment or attachment of payments. (1) Payments under this chapter may not be assignable, subject to attachment or garnishment, or held liable in any way for debts, except:
(a) as provided in 71-3-1118;
(b) a portion of any lump-sum award or periodic payment to pay a monetary obligation for current or past-due child support, subject to the limitations in subsection (2), whenever the support obligation is established by order of a court of competent jurisdiction or by order rendered in an administrative process authorized by state law; or
(c) as provided in 53-2-612 or 53-2-613 for medical benefits paid pursuant to chapter 71 or 72 of this title.
(2) Payments under this chapter are subject to assignment, attachment, or garnishment for child support as follows:
(a) for any periodic payment, an amount up to the percentage amount established in the guidelines promulgated by the department of public health and human services pursuant to 40-5-209; or
(b) for any lump-sum award, an amount up to that portion of the award that is approved for payment on the basis of a past-due child support obligation.
(3) After determination that the claim is covered under the Workers' Compensation Act or Occupational Disease Act of Montana, the liability for payment of the claim is the responsibility of the appropriate workers' compensation insurer. Except as provided in 39-71-704(7), a fee or charge is not payable by the injured worker for treatment of injuries sustained if liability is accepted by the insurer.

39-73-110. Assistance not assignable or subject to legal process. Except as otherwise provided in this chapter, assistance granted under this chapter is not transferable or assignable, at law or in equity, and none of the money paid or payable under this chapter is subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

53-2-607. Assistance not assignable or subject to legal process. Except as otherwise provided in this title, assistance granted under this title is not transferable or assignable at law or in equity and none of the money paid or payable under this title is subject to execution, levy, attachment, garnishment, or other legal process or to the operation of any bankruptcy or insolvency law.

53-9-129. Award not subject to execution, attachment, garnishment, or assignment -- exception. (1) An award is not subject to execution, attachment,

garnishment, or other process.
(2) An assignment or agreement to assign a right to compensation in the future is unenforceable except:
(a) an assignment of a right to compensation for work loss to secure payment of maintenance or child support; or
(b) an assignment of a right to compensation to the extent that the benefits are for the cost of products, services, or accommodations necessitated by the injury or death on which the claim is based and are provided or to be provided by the assignee.

80-2-245. Benefits exempt from execution. All money or benefits received from hail insurance are exempt from execution, are not liable to attachment, and may not be seized, taken, or appropriated by any local process to pay any debt or liability of the insured unless the amount is assigned and then for no more than the amount of the claim intended to be secured by the assignment, with lawful interest.