

## Key Conversations

# Premarital Planning with Asset Protection Trusts

Wealth preservation—preserving and protecting hard-earned assets from loss to future creditors and ex-spouses—is one of the top financial planning goals of high net worth individuals. Since “love may not be all you need,” many individuals planning to get married have considered a prenuptial agreement (“prenup”) to protect assets in the event the marriage fails.

A prenup is a contract between the parties that divides assets in the event of a divorce. Why does the issue of a prenup come up so often prior to marriage? The answer is simple. Statistics show that 40% to 50% of first marriages end in divorce. And the chance of divorce occurring in subsequent marriages is even greater—60% of second marriages and 73% of third marriages.

Individuals who have accumulated assets prior to the marriage want to protect them from distribution to an ex-spouse in the event of a future divorce. This is particularly important to individuals who own interests in a family business. Most families would prefer to avoid involvement or ownership of family business interests by a family member’s ex-spouse.

While many people turn to a prenup to address these types of issues, there is a real concern that a prenup will not achieve its objectives. But there is an alternative to a prenup that eliminates the unpleasant, troublesome prenup requirements and is an effective way to protect assets in the event of a future divorce—an Asset Protection Trust.

## The downside to prenups

Properly executed prenups are enforceable in every state. Although the laws of each state differ, there are some general requirements that must be met in order for the prenup to be upheld by a court if contested by a disgruntled ex-spouse. They are:

- It must be free of fraud, undue influence and duress.
- The parties should have separate legal counsel, which might be very expensive.
- The prenup should be signed before the wedding invitations are mailed. If it is signed too close to the wedding, it may be unenforceable.
- Each party must make full financial disclosure of all assets owned at the time. This, in itself, could preclude a prenup for those who do not want to share the extent of their wealth.

Parents and siblings may insist on a prenup, particularly when the individual owns stock in a family business, for fear that the stock may be distributed to the ex-spouse. There are also personal reasons why many prenups are not executed

## Key Takeaways



Many individuals planning to get married consider a prenuptial agreement (“prenup”) to protect assets in the event the marriage fails. But there is a real concern that a prenup will not achieve its objectives.



There is an alternative to a prenup that eliminates the unpleasant, troublesome prenup requirements and is an effective way to protect assets in the event of a future divorce—an Asset Protection Trust.



A Delaware Asset Protection Trust can be used by an individual to transfer a portion of his or her assets to the trust prior to taking the marriage vows, while retaining sufficient assets to live on and fulfill obligations.

by both parties. They are clearly unromantic and question the intent of the parties to commit to the marriage. The process of drafting the prenup can cause friction and, in some cases, even terminate the marriage plans.

## The alternative: An Asset Protection Trust

A properly structured Asset Protection Trust (“APT”) is an alternative to the troublesome prenup. An APT is a self-settled spendthrift trust. It is a trust created by an individual (“grantor”) prior to the marriage for his or her own benefit, permitting the grantor to receive distributions from the trust. Others, such as the children of the grantor, may also be beneficiaries of the trust.

Until distributions are made to the grantor or other beneficiaries, the trust assets should be protected from ex-spouses as well as other future creditors. The APT can also be used in combination with a prenup as a “belt and suspenders” approach. In that case, however, the APT must be disclosed to the future spouse.

## The Delaware Asset Protection Trust

Only 14 states have enacted laws which permit APTs, including Delaware, Nevada, South Dakota and Alaska. Ohio also recently passed a statute that permits APTs. Delaware APTs have been used for the last 15 years and are the most popular among wealthy individuals and their advisors. In fact, Delaware law has served as a model for the APT law of other states.

Delaware has a long history of favorable personal trust law and offers increased flexibility and confidentiality. In contrast to many states, in Delaware, there is no public record of the trust. Most states require the trustee to give trust information to the beneficiaries of the trust. But a grantor who names children from a prior marriage as beneficiaries may not want them (and consequently an ex-spouse who may have custody of minor children) to have information about the trust. When privacy is a concern, the grantor of a Delaware trust may restrict such information for a period of time. For example, the grantor can direct the trustee to give no information to beneficiaries until the grantor’s death.

Delaware also has a refined directed trust statute, which permits the grantor to control investments as the Investment Advisor. This is a vital benefit for the business owner who transfers closely-held business interests to the trust. The grantor can also give other individuals, called Distribution Advisors and Trust Protectors, the power to control distributions from the trust and hold other powers, such as the power to amend the trust.

When used as an alternative to a prenup, the grantor can transfer a portion of his or her assets to the trust prior to taking the marriage vows, while retaining sufficient assets to live on and fulfill obligations. The grantor has the ability to receive distributions from the trust, such as all of the net income as well as the principal at the discretion of the trustee or the Distribution Advisor. The trust assets should be protected from future creditors, and, in the event that the marriage ends in divorce, the assets are not subject to a division of property incident to a divorce. The grantor does not have to live in Delaware to create a Delaware trust.

## Summary

When a prenup is impractical, undesirable or potentially unenforceable, an APT is an alternative solution to address the issue of a possible future divorce. An APT created under the law of a state like Delaware is an option to a prenup if created prior to the wedding. There is no legal requirement to disclose the creation of the trust, to ask a future spouse to sign it or to disclose financial assets. It also allows an individual to avoid the unpleasant and unromantic discussion about a prenup. Those who are planning marriage should consult their advisors about premarital planning with an APT.

For more information about Delaware Trusts, please contact **Anne Marie Levin, J.D., LL.M., National Fiduciary Advice Leader, Key National Trust Company of Delaware,®** at 302-574-4700 or [anne\\_m\\_levin@keybank.com](mailto:anne_m_levin@keybank.com).

## Key Private Bank



Investment products are:

NOT FDIC INSURED • NOT BANK GUARANTEED • MAY LOSE VALUE • NOT A DEPOSIT • NOT INSURED BY ANY FEDERAL OR STATE GOVERNMENT AGENCY

Information provided is for illustration purposes only and is not intended as individual tax advice. Key National Trust Company of Delaware® does not give legal advice. Since laws are always subject to interpretation and possible changes, Key National Trust Company of Delaware strongly recommends that you seek the counsel of an attorney and/or other qualified tax advisor as to the specific legal and tax consequences of all planning concepts as they apply to the facts of your particular situation.