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Beyond the Prenup

Families Increasingly Turn To Trusts to Protect Assets, Inheritances From Ex-Spouses

By RACHEL EMMA SILVERMAN

WEALTHY FAMILIES and individuals are increasingly looking beyond prenuptial agreements to shield property from future divorce claims.

The main goal is to make sure inheritances, and other assets accumulated before marriage, are kept separate from marital property, which a judge can divvy up if a couple divorces.

Protecting wealth from the financial ravages of divorce has long been a key concern of families, who often enlist lawyers to draft a detailed prenup spelling out what's his and hers before the wedding invitations are sent out.

But wealth managers are increasingly trying other strategies—especially the creative use of trusts, which can be effective in sheltering assets a spouse has earned before the marriage or will inherit. Using multiple, premarital asset-protection techniques, including trusts and prenups, can also be helpful if one of the strategies falls through. And since divorce judges have wide discretion in carving up property, that's always a danger.

Legal advisers say parents of prospective brides and grooms often show the most interest in premarital trusts, because they don't want to see family wealth dissipate because of divorce. Families have also grown more comfortable in recent years with using trusts for tax planning and asset-protection purposes. Also, a growing number of states have loosened their trust laws to allow trusts to last longer and be better shielded from creditors.

A chief attraction of premarital trusts, lawyers say, is the fact that they can be set up without the future spouse's knowledge. Many wealthy individuals choose to forgo a prenup altogether, for fear that it will dim the ardor of romance—and for them a premarital trust is a good alternative, says Mario Mata, a lawyer with Cantey & Hanger in Dallas. He says the majority of prenups he drafts for clients are never even signed. "They never take it out of the envelope," he says. "They didn't have the guts."

Premarital asset-protection tactics can be as simple as scrupulously maintaining separate bank and securities accounts. They can also be

Buying Protection

Advisers are increasingly recommending alternatives to prenuptial agreements to protect assets in case of divorce.

Trusts can help shield premarital assets or inheritances from spouses.

Unlike a prenup, creating premarital trusts can be done without the future spouse's consent.

Premarital trusts may be less effective in shielding wealth acquired during marriage.

The safest strategy is to use both trusts and prenups.

mind-numbingly complex, such as combining offshore family limited partnerships, which are popular estate-planning tools for family businesses, with offshore asset-protection trusts, located in places with special laws that make it tough for U.S. creditors to reach trust assets.

The cost of setting up these more-complicated offshore plans ranges from about \$45,000 to \$125,000, says Chicago lawyer Thomas J. Handler, who says he has set up such structures for a growing number of his wealthy clients. On top of that are administration and accounting fees that can run several thousand dollars annually, and asset-management fees of about 1% on the assets placed in trust.

A domestic trust can cost less—typically about \$5,000 to \$10,000 in attorney's fees, depending on the complexity of the arrangement, plus annual fees. The cost of a prenup varies widely, depending on the type of assets involved and the extent of negotiations. A simple agreement starts at about \$1,000, but prenups involving complicated family businesses and multiple resi-

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lents can end up costing tens of thousands of dollars in lawyers' and appraisers' fees.

Of course, no strategy to protect property from divorce is bulletproof. Divorce and trust laws vary markedly by state, a particular problem as families move or maintain different residences. What's more, family court judges often have wide latitude in dividing up marital property. For instance, one spouse's trust holdings could influence a judge to award more support or a greater share of assets to the other spouse. In some cases, a judge also could tap trust assets for alimony payments.

Belts and Suspenders' Approach

The safest bet, say advisers, is to combine asset-protection structures with prenuptial agreements—what lawyers call the "belts and suspenders" approach. While trusts may shield premarital assets or money that comes from a spouse's parents or grandparents, they may be less effective in divvying up property earned or acquired during marriage. Prenups, in turn, spell out exactly how assets, especially what's obtained after marriage, should be divided in case of divorce or death.

They also have the advantage of promoting open discussion among couples about finances. But prenups might not hold up in court if drafted improperly or if the couple's circumstances change greatly after being signed.

Premarital planning tactics vary depending on whether the assets in question were generated by the bride or groom or their parents. If it's the parents that are wealthy, advisers recommend that they leave gifts or inheritances to their children in trust, rather than outright. In general, inherited property and gifts, even those received during marriage, are considered out of the marital estate, but income and appreciation may not always be.

When parents transfer family wealth into trusts, that property is segregated into its own bucket, clearly outlining what's inherited or given and what's not. By contrast, says New York lawyer Arlene Dubin, a gift or inheritance deposited into a bank account runs the risk of being subject to division at divorce, if it's commingled with marital assets such as a joint tax refund or even a paycheck.

Steven Oshins, a Las Vegas trust lawyer, recommends that clients' parents set up discretionary trusts for the

bride's or groom's benefit. In such trusts, an independent trustee has the power to decide when any distributions are made, rather than having the trust automatically disburse assets when children reach certain ages. Because the trust, rather than the heir, legally holds the inheritance, the windfall can be hard for divorcing spouses to reach.

"As long as the trust is fully discretionary, the spouse cannot access it," says Mr. Oshins. Parents can even set up these trusts after their children are married.

Foreign Asset-Protection Trusts

If the bride or groom has earned significant wealth before marriage, some advisers suggest the use of domestic or foreign-asset-protection trusts. These trusts, which are irrevocable, are set up and funded by the spouse, rather than a third party, such as parents or grandparents. If set up properly—before marriage is safest—the trust could be kept out of the marital estate.

Most asset-protection trusts are located offshore, in locales like the Cook Islands and Nevis, which have laws that protect trusts from U.S. creditor claims. But now several states, such as

Alaska, Delaware, Rhode Island, Nevada, Utah and, as of this year, South Dakota, permit these trusts for both residents and nonresidents.

Still, these domestic asset-protection trusts are controversial, because they're still largely untested in court, especially if the beneficiary lives in a state that doesn't allow them. This year's federal bankruptcy law also makes these trusts less viable as a way to shield assets from creditors in bankruptcy situations.

In all, it's safest to set up an asset-protection trust before the trip down the altar. After the vows, squirreling away joint property without the other spouse's consent might be considered a fraudulent transfer. In divorce litigation, spouses often hire forensic accountants and other detectives to hunt down the other party's hidden assets.

"Planning when people are already married that has the effect of dividing assets without the other spouse's consent is immoral, illegal, wrong and malpractice," says Jay D. Adkisson, a lawyer and author of a recent book on asset protection. Yet many people show up for asset-protection advice when it's too late and they are already in the midst of a divorce.