

In Practice

Stash Your Cash Before You Tie The Knot

A Little Practical Planning Can Avoid Nightmares Later

By Nora Lockwood Toohar

Before newlyweds utter the fateful "I do," estate planning attorneys are encouraging them to stash their cash in premarital trusts.

Las Vegas estate planning lawyer Steve Oshins said he's created "hundreds" of what he calls "prenuptial avoidance trusts" for clients who don't want to share the wealth created by new business opportunities and future inheritances with their soon-to-be spouses.

While Oshins recommends that clients also have prenuptial agreements, a trust has one major advantage: You don't have to tell your fiancé about it.

"You should do both," he said. "But in some cases you don't feel comfortable discussing the prenup with your soon-to-be spouse."

Setting up a pre-marital trust isn't cheap. Oshins charges \$10,000; the cost of a prenup ranges from \$2,500 to \$10,000.

Opting Out Of Community Property

Oshins said a pre-marital trust – which he also markets as an "inheritor's trust" – is a discretionary, irrevocable trust with an independent distribution trustee. (See "Inheritor's Trust' New Trend In Estate Planning," *Lawyers Weekly USA*, Aug. 1, 2005. Search words for LWUSA Archives: inheritor and Gertner.)

It's similar to the more traditional "dynasty" trust, but the client has to be willing to talk with his parents or grandparents and actually request that they create the trust. The parents then gift the initial money – ranging from a few thousands dollars to several million dollars – to start the trust.

"If the trust is set up by the parent [at the request of the adult child], then the person getting married can be a trustee, can be the primary beneficiary and can protect all growth and income on the trust assets from

estate taxes, creditors and divorcing spouses," Oshins explained.

The trust is drafted so that the primary beneficiary – the person getting married – is the investment trustee, and has control over his own investments. The beneficiary chooses an independent party unrelated to him as the distribution trustee, who has absolute discretion over the distribution of principal and income. That's what makes the trust 100 percent asset and creditor protected.

Even if the primary beneficiary lives in a community property jurisdiction, everything that is gifted to the trust – as well as the growth and income from the trust – is owned by the trust. So, it's not community property, Oshins explained.

"This is a great way to opt out of the community property system without having to discuss it with your spouse," he said.

For example, say a young entrepreneur starts a pre-marital trust with \$1,000 gifted to the trust by someone other than himself. The trust provides for absolute discretion over income and principal distributions with an independent trustee having that discretion.

The beneficiary is a computer genius, who turns the assets into a multi-billion-dollar computer company. Twenty years later, he and his wife get divorced. Neither the assets, nor the income and assets generated from the trust are calculated in alimony or child support payments, according to Oshins.

The only exception, he said, is the possibility that a judge could treat this "discretionary trust" as a "support trust" if the trust is domiciled in a jurisdiction that follows the Uniform Trust Code.

'Belt And Suspenders' Approach

Oshins said the best scenario is to "disclose the trust in a prenuptial agreement and to specifically note that you are a beneficiary of a trust that is not part of your estate."



He added, however, "Regardless of whether you disclose it, it's protected."

Oshins said he is not aware of any case law that specifically noted whether a spouse knew or didn't know of a trust.

The trust is a good idea for entrepreneurial types, according to Oshins, because parents' seed money can be used to for new business and investment opportunities.

"I have had the parent gift \$1,000 into the trust and had the primary beneficiary form a consulting company or other non-capital intensive company and build it into millions of dollars," he said.

Estate planning attorneys must take care to draft the trust instrument as a discretionary trust, Oshins explained.

Certain creditors can pierce a support trust, whereas a discretionary trust with a non-beneficiary as the distribution trustee cannot be pierced by creditors, he said. The usual health, education, maintenance and support trust, on the other hand, could be vulnerable to some creditors, depending on the applicable state law.

Noel C. Ice, an estate planning attorney with Cantey & Hanger in Fort Worth, Texas, also suggests combining a prenuptial agreement with a trust.

"I would definitely suggest a prenuptial agreement to protect assets. Then, if I wanted to use a belt along with suspenders I

would implement that agreement through the use of a trust," he said.

For those who are skittish about prenups, he added, "The nice thing about a trust is you might be able to do the trust with your own money without going to the spouse, and without raising all those thorny issues."

Other Trust Options

Besides Oshins' pre-marital trust, there are several other kinds of trusts that can help shield a client's assets in a divorce settlement.

Wealthy families for years have created "spendthrift trusts" stipulating that the beneficiary's assets are separate from the marital estate.

And recently, more middle-class families are setting up trusts. Michael Gilfix, an estate planning and elder law attorney in Palo Alto, Calif., said he's seen an increased interest in trusts among older parents who are worried about what's going to happen to the family money if their children divorce.

"We tell people you're doing a prenup or postnup for your kids," he said.

The problem, according to Gilfix, is that even when people recognize that a prenup is a good idea, many never follow through.

"The fact is that many people – either because of romance or a failure of nerve – just don't deal with it," he said. "If you're a parent, the tax benefit is huge, and the protection from litigation is very large. When we mention the divorce issue, all the moms want to do it."

Gilfix has a trademark pending on a dynasty trust he calls a family protection trust.

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A family protection trust is treated differently from property in a divorce, and is not considered a marital asset. Gilfix noted, however, that while underlying assets that go into the trust are safe, assets and income generated from the trust could affect child support and alimony – unlike Oshins' pre-marital trust.

'Bad Feelings'

Several divorce lawyers said that although they recommend a prenup, some clients just aren't comfortable with an agreement that spells out all of the property each person owns, and specifies what will happen in the event of a breakup.

Fred A. Hicks, a family lawyer in Charlotte, N.C., recently worked with an estate planning attorney whose client was getting married and wanted to protect family assets.

"Ultimately, we decided not to do a prenuptial agreement, because our client said it's just too much of a stress on the marriage," Hicks said.

The client already had three existing family trusts, and the attorneys agreed that the trusts were an effective alternative to a prenup.

But Henry Gornbein, a divorce lawyer in Bloomfield Hills, Mich., said in general, he's skeptical about the need for a trust in most marriages.

"I think it's something estate planning lawyers are promoting," he said. "A prenup sets out what will be part of the marriage, what won't be, and in the event of a divorce or death you're handling assets in advance.

"I feel that a prenuptial agreement is more honest and straightforward," Gornbein continued. "In addition, a trust would not necessarily cover many of the issues that a prenuptial would."

And while some couples may be skittish about talking about prenuptial agreements, trusts that keep inherited money away from one spouse can also strain a couple's relationship, Gornbein pointed out.

"You really get into sensitive issues," he commented.

Gornbein said he recently worked with a young couple that is purchasing a house. The husband is a young professional and the wife comes from a wealthy family. The wife's family wanted to protect the family's wealth and insisted that the husband legally have no interest in the house.

"Sometimes that starts a marriage out with bad feelings," Gornbein said.

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