

# **A prenup or a DAPT: Which is the better choice?**

Published on December 13, 2018

If you or one of your adult children is getting married, you may be concerned about protecting your family's assets in the event of a divorce. A prenuptial agreement can be an effective tool for overriding marital property rights and keeping assets in the family. But these agreements have disadvantages. For many families, a better alternative is a domestic asset protection trust ("DAPT").

## **Why assets need protection**

The laws regarding division of property in divorce are complex and vary dramatically from state to state. In general, however, spouses retain their "separate property," which includes property they owned before marriage as well as property received by gift or inheritance during marriage.

Marital property, which is subject to division in divorce, generally includes all property acquired during marriage, regardless of how it's titled. Depending on applicable state law, marital property may even include the appreciation in value of separate property (including the other spouse's business) during marriage.

In light of these risks, it may be advisable to take additional steps to protect separate property from potential loss in the event of divorce.

## **Prenup drawbacks**

The emotional issues involved can make putting a prenup in place difficult. In addition, the requirements for an enforceable prenup make it vulnerable to attack in connection with a divorce. For example, a prenup may be unenforceable if one spouse can show that:

- The agreement was signed under duress;
- He or she didn't have independent legal counsel;
- The agreement was unconscionable when signed; or
- The other spouse didn't provide full financial disclosure.

Even if you dot all the i's and cross all the t's, there's a risk that the other spouse will challenge the agreement, which can be costly and time consuming.

## **Benefits of an asset protection trust**

A DAPT can solve many of the problems associated with a prenup. In particular, it eliminates the emotional component, because there's no need to obtain the consent of, or even inform, the future spouse. Provided the DAPT holds legal title to assets — and an independent trustee has discretionary control over distributions — it generally will be difficult for a divorcing spouse to reach those assets.

A DAPT is an irrevocable, spendthrift trust established in one of the 15 or so states that authorize them. What distinguishes DAPTs from other types of trusts is that, in addition to offering gift and estate tax benefits, they provide creditor protection even if the grantor is a discretionary beneficiary.

DAPT protection varies from state to state, so it's important to shop around. Ideally, you should look for a jurisdiction that provides grantors with the greatest degree of control over trust investments and protects trust assets from a broad range of creditors, including divorcing spouses.

To take advantage of this strategy, it's critical to transfer assets to the DAPT well before marriage. Otherwise, the transfer may be deemed fraudulent. Please contact us for additional information.

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The Law Office of Eugene Gorrin, LLC  
17 Watchung Avenue, Suite 204  
Chatham, NJ 07928  
973.701.9300  
[egorrin@gorrinlaw.com](mailto:egorrin@gorrinlaw.com)  
[www.gorrinlaw.com](http://www.gorrinlaw.com)