



Family Wealth Institute

“Honey, I love you, but my parents have told me that I have to have a prenuptial!”

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It's the best of times...it's the scariest of times...your son or daughter is about to get married. Among the many thoughts likely to go through your mind will be “*I hope this marriage works*”. Your concern is founded in both observable and documented reality. Divorce in this country is a serious problem. Nationally, nearly 40% of marriages end in divorce. In some regions, the rate exceeds 50%.

Beyond the emotional damage caused to the parties, children, and extended family, stress and family dynamics, there can be significant financial costs. Affluent parents spend considerable time and effort planning and shifting their wealth to their children. These parents have at least three key goals

- They want to provide for their children and future generations;
- They are anxious to minimize the transfer taxes and other costs; and
- **They don't want to see their wealth diverted in the event of divorce.**

So begins one of the most traumatic aspects of the engagement ...the talk about a premarital agreement. Known by many names – “nuptial agreements”, “ante nuptial agreements”, “spousal property agreements” – the document is intended to cover a wide- range of goals.

The first and most obvious is to identify, differentiate and protect the separate property of each spouse, in the event of divorce. In many cases, the premarital agreement will define the rights and expectations of a surviving spouse, in the event of the death of the other spouse. The agreement can also define the rights and obligations of each party with respect to spousal support (alimony), retirement assets, payment of income taxes, payment of joint expenses during marriage, spousal interests in earnings and any appreciation in value in the separate property of the other spouse. Many agreements contain a sunset provision that mandate a different treatment should the marriage last for a minimum number of years.

Complicated and intimidating, the process of negotiating the terms of the agreement and reviewing provisions seem to emphasize the risk of marriage and doubts about its permanency. The marriage often starts on a note of distrust and discord.



Besides the dynamics of the process, these agreements are not as foolproof and safe as may be thought. Every agreement can, with the consent of the parties, be changed after the marriage. Ever see the George Clooney and Catherine Zeta-Jones movie “Intolerable Cruelty”? Parents, who pressured their kids in the first place, may never know.

A local court can disregard provisions in an agreement that it deems unfair, or imposed under duress, or which are overreaching. Language which is ambiguous can be clarified as the court thinks appropriate. If the financial information provided to each other was not reasonably disclosed, the agreement can be disregarded.

For these and other reasons, many parents and grandparents go a different route with their children or grandchildren. *You may find this technique less stressful on everyone, and a far better solution to the primary goal of protecting assets from the reach of a disgruntled former spouse.*

The strategy is pretty simple and fits in well with most estate plans. During your lifetime, you form an irrevocable trust for the benefit of your child (or grandchild, if that’s appropriate). If you have more than one child, you would create a separate trust for each. If your child is a mature adult, he or she can be appointed as trustee. If your child is not yet ready for the responsibilities of managing this wealth, either because of age or experience, then you would need to appoint another party to serve as trustee.

Here’s an example of how a trust like this could be designed. Let’s assume you have a son about to get married. Your son is 30 years old, mature and responsible. You like your daughter-in-law or prospective daughter-in-law, but the risk of divorce is unacceptable to you. The trust might look like this

1. The trust will be designed to receive lifetime gifts from you as well as bequests at the time of your deaths. It will also be utilized to acquire investment assets from you which your son may purchase during your lifetime.
2. The trustee of this trust during your lifetime will be your son.
3. Your son can enjoy the income earned each year, and such amounts of principal as he may need for his health or support, provided he does not have the personal resources to handle those expenses. Be careful about too much flexibility. Marital and financial pressures might cause your son to exercise these powers too liberally. We often have a special trustee or “trust protector” appointed to make decisions on the need to withdraw principal.
4. Typically, upon the primary beneficiary’s death (your son, in this case), the income would continue for the lifetime of his wife. It’s what he would have likely wanted. Upon her death, the assets will be held for the benefit of his children. It’s best to follow the



distribution plan that your son may have already established for his children in his own will or personal trust, and he should have the power to modify this plan, for the benefit of his children, siblings, nieces or nephews, or charity. He should have the power to remove or appoint a spouse to receive income after he's gone. Again, this is about his family needs.

In short

1. Your son will have control over the assets you gift and sell to him for his entire lifetime;
2. His personal creditors cannot reach these assets nor will any of the assets be taxed in his estate at the time of his death or the death of the surviving spouse;
3. He enjoys all the income for his lifetime and any principal needed to provide for his health or support;
4. The trust can continue for the lifetime of his wife, and then be available to the children, and he'll have the power to revise the distribution plan at any time.

Your assets are protected for your family; your child has continuing power and enjoyment over those assets, creditors and ex-spouses can't reach these assets, and the emotional stress in explaining, defending, and retaining the prenuptial agreement is avoided or reduced substantially. Even in those 50-60% of the cases in which there is no risk or possibility of divorce, the reduction of estate taxes, protection against business and other creditors, and the avoidance of probate on these assets make this strategy attractive and easy to talk about.

There may be still some good reasons to have such an agreement, but the real thorn in the relationship – *I love you, but we might get divorced one day*– is avoided.

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To contact the authors, please call the toll free number at 866-833-1112.

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