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TAX & ESTATE PLANNING ALERT

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I cannot be married in the church with a prenuptial agreement... what do I do?

A funny thing happens on the road to marital bliss. I love you becomes "I love you, but. . . do you mind signing this. . . this protects both of us. . . my parents think it would be a good idea. . ." etc.

You may be single and contemplating a first marriage with overbearing parents, or divorced and thinking about jumping back in the marriage game.

If contemplating marriage, one set of facts causes concerns: having certain religious leanings and wanting to protect your valuable business and property interests, but also be married in accordance with a particular religion. Entering into a prenuptial agreement may not be allowed as a precursor to marriage, and could jeopardize your ability to be married in the "eyes" of your religion. If you are religious, is there another alternative to a prenuptial agreement that would suffice? Is this alternative available in every state? What about a postnuptial agreement?

Navigating religious doctrine in premarital planning

Where religious affiliations intersect with premarital planning, additional creativity may be necessary. For example, in Catholicism (the author is Catholic), Catholics have a specific set of laws (Canon Law) that its clergymen, known as priests, must consult with in order to determine whether a couple can be married in the church. With few exceptions, a priest cannot marry someone who has undertaken prenuptial planning.

Canon Law is the code of ecclesiastical laws governing the Catholic

Church. Several Canons are applicable to marriage, importantly Cannon 1102 Section 1 whereby a marriage subject to a condition about the future (i.e., signing a prenuptial agreement) cannot be contracted validly. In other words, while in the legal sense two people can be validly married by anyone holding a notary in some states, and a marriage is valid with or without a prenuptial agreement, to be valid in the Catholic Church, a marriage cannot be preceded by a contract such as a prenuptial agreement.

What can you do?

While there may be some exceptions, generally when contemplating marriage you will not want to transfer assets to another person, even for a short period of time, just to be married in the religious sense. For example, a transfer subject to an escrow arrangement isn't going to sound enticing. Similarly, you are not going to want to enter into a transaction resembling a sale with a buyback provision. You will not want to, as a business owner, part with control of your asset for a short period of time: what if a regulatory issue took place or during the interim ownership period a tort or other claim occurred? For insurance purposes, transfers where you would part with control or ownership contemplating to resume ownership following the marriage are problematic: what company would insure such business for even a short period of time? An additional concern would be what if the religion found out about any of the aforementioned planning immediately following the marriage? Might steps be taken to void the marriage (in the religious sense) thereby causing embarrassment and shame?

Utilizing domestic asset protection trusts for marital and legal protection

At least one estate planning technique is suitable if you are contemplating marriage, and validly would like to be married in compliance with a particular religion. You could create a domestic asset protection trust whereby the trust would be created/settled by you AND you could be a beneficiary of the trust, remaining eligible to receive distributions of income or principal from the trust. A domestic asset protection trust is a "self-settled" trust. A domestic asset protection trust must be executed and administered in conformity with an applicable state domestic asset protection trust statute. Otherwise, self-settled trusts will be fair game for creditors and spouses, even in states with domestic asset protection trust legislation. Ohio law allows domestic asset protection trusts called "legacy trusts". Pennsylvania and Florida do not.

Enacted into law in 2013, the Ohio legacy trust act allows a person to establish a "self-settled" trust, have the assets held in the trust protected from the claims of "unknown future creditors," and still remain a discretionary beneficiary of the trust. This differs from most states' laws, where if a person transfers assets to a trust for his or her own benefit, the

transfer could be ignored by both present and future creditors.

For example, pursuant to Fla. Stat. § 736.0505, Florida does not afford the same creditor protection to "self-settled" asset protection trusts (revocable and irrevocable trusts created by a settlor where the settlor retains a beneficial interest in the trust) as states such as Ohio.

There are a few important steps that should be taken if you are considering transferring your primary assets to one or more domestic asset protection trusts. For example, if you have an important business asset that you want placed outside of the reach of a future spousal creditor, you would want to separate such asset in trust from other just as lucrative assets: the business should be separate from one or more lucrative investment accounts or rental properties. An umbrella structure, a trust owning multiple LLCs which in turn own single assets, could be appropriate under certain circumstances.

For federal gift tax purposes, you should retain such dominion and control (within the meaning of Treasury Regulations §25.2511-2) over the assets transferred to this trust as to render the gift incomplete (such as by retention of an inter vivos and a testamentary special power of appointment over the trust assets). Thus, you would make a transfer while retaining control over the trust so as to avoid using up your unified credit amount.

Using an Ohio legacy trust as an example, you would appoint a qualifying trustee located in Ohio. This importantly strengthens the creditor protection purpose of the trust by allowing an independent fiduciary control over the assets.

You would remain a discretionary beneficiary over the trust assets. This allows you to still have access in the event money is needed from the trust. If the trust is created to run your business, any distributions or dividends would be caught by the trust and then could later be distributed to you.

In order to continue running a business owned by the trust, you would setup the business' operating documents to remain as president or manager of the business. You would essentially remain the key person in your business, the difference is that instead of your business paying you directly, your business pays the trust, and you can request a distribution from the trust.

Furthermore, in order for the domestic asset protection trust to truly work for premarital planning purposes, you would need to fund it with all assets desired to be protected prior to the date of legal marriage.

Exploring postnuptial agreements as a marital planning alternative

Additionally, most states, Florida, Ohio, and Pennsylvania included, allow

the creation of a post-nuptial agreement. A postnuptial agreement is similar to a prenuptial agreement in that it identifies which assets are to remain outside of the marriage and what assets are considered marital property of both spouses. A postnuptial agreement is signed after marriage begins. There are no term requirements for a postnuptial agreement, and it can be entered into shortly after marriage or many years after marriage. Although state law differs on the amount of information that spouses must share with one another in order to enter into a valid postnuptial agreement, generally these are a valid alternative to you if you are desiring a religious ceremony but unable to come to terms with a domestic asset protection trust. The risk is of course that your future spouse may not desire to enter into one following the legal marriage ceremony.

For more information please contact Michael Sneeringer or any member of Porter Wright's Tax, Estate Planning and Personal Wealth Practice Group.