

The ABCs of Trusts

When representing a client, it is imperative to understand the full scope of their marital estate, as well as their, and their spouse's, potential non-marital estate. This can require the divorce lawyer to have an understanding of various other areas of law, one of which has to do with estate planning. This applies to the client's current estate plan, which will likely need to be changed after the divorce, as well as any estate plan that they are a beneficiary of.

This article is intended to be a very general overview and introduction to a very popular trust concept, the "ABC" Trust arrangement. Understanding the "how" and "why" of this arrangement will allow you to better understand the marital and non-marital estates, and enable you to gain additional insight as to your future life goals for after the divorce. Obviously, any individual who has a desire to modify an existing estate plan or establish a new one should consult with an attorney who specializes in this area of the law.

Many people understand the basics of estate planning (it allows the deceased individual – also known as the decedent – to control the disposition of their property at death). But when you go beyond basic estate planning, it often involves the use of trusts. Simply put, a trust is an instrument that allows one person, a trustee, to hold legal title to assets who will manage those assets for the benefit of others, the beneficiary(ies), and possibly himself/herself as well.

The use of trusts in estate planning enables the individual to have a wider variety of options, as well as other benefits. Trusts allow for someone to manage assets for the benefit of others, as not everyone is capable of

handling large amounts of money or other assets. Trusts can provide creditor protection (to a certain extent) for the beneficiaries, allow the preservation of assets beyond the next generation (with certain limits), and in some cases can avoid the probate process required with wills. Perhaps one of the greatest benefits of a trust though is to minimize tax liability and preserve more assets for future generations.



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“Trusts can provide creditor protection for the beneficiaries, allow the preservation of assets beyond the next generation and in some cases can avoid the probate process required with wills.”

Trust Arrangement. Like it sounds, the ABC Trust Arrangement uses three Trusts:

A Trust – A General Power of Appointment Trust

This is an irrevocable trust, which gives the beneficiary the right to receive income distributions from the trust assets, as well as

The Estate Tax

As the IRS explains, there “is a tax on your right to transfer property at your death,” known as the Estate Tax, or as some call it, the Death Tax. The current federal estate tax rate is 40%, but there is an estate tax credit, which will allow most people to transfer their property at death, without paying any estate taxes. (Some states also levy an estate tax – including Illinois, who reinstated their estate tax in 2011). The estate tax credit allows estates with less than \$5,340,000 in 2014 (indexed for inflation) to transfer tax free.

Only the amount of the estate that exceeds \$5,340,000 would be subject to the Estate/Death tax. There is also an unlimited exemption for transferring assets to a spouse.

The ABC Trust Arrangement

In order to maximize these benefits, individuals will often employ a series of Trusts, known as an ABC

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Schiller DuCanto & Fleck LLP Welcomes Two Partners



Judge Joseph Waldeck (left) brings nearly 20 years of experience from the bench, previously serving as an Associate Judge in the 19th Circuit in Lake County. During his judicial career, he focused on juvenile, domestic abuse and family law matters. Brian Schroeder (right) is a skilled appellate lawyer who brings more than 20 years of experience in appellate law, having argued cases before the United States Court of Appeals for the Seventh Circuit, the Illinois Supreme Court, and all five Districts of the Illinois Appellate Court.

Seven Estate Planning Benefits of Premarital Agreements

Unfortunately divorce is a fact of life in our society that cannot be ignored. Despite this fact, few of us plan for what will happen after marriage, including what happens when faced with the misfortune of divorce. At the same time many of us, without thinking twice, create an estate plan to pass our property at death. You can and should plan for what happens after marriage in the same way you plan for death. A well-planned premarital(1) agreement, despite its public stigma, can provide several estate planning benefits both for a successful marriage and a failed marriage. The following are seven estate planning benefit premarital agreements provide:

1. Safeguards Assets. Assets acquired during a marriage are presumed to be marital property, irrespective of how title is held. Similarly, assets put into some form of joint ownership during the marriage can be converted from non-marital property to marital property. A premarital agreement can avoid these consequences by creating rules as to what happens with property owned by either party. This can include safeguarding property acquired individually or jointly, determining the allocation of property upon divorce, defining what happens with estate planning transfers of premarital property into joint ownership, and the like.

2. Protects Future Income. Depending on the financial circumstances of each spouse at the time of divorce, one spouse may be at risk of having a maintenance/alimony obligation to the other spouse. In a premarital agreement you can predetermine whether or not a party is entitled to maintenance and to what extent each party is responsible for the payment of maintenance. Predetermining responsibility/entitlement to maintenance at the outset of the marriage can reduce litigation costs for a divorce by defining the future income stream each party can expect.

3. Insulates Property from Debt. If one spouse enters into the marriage with large debts or contingent liabilities (such as a personal guarantee) creditors may be able to turn to marital or jointly held property to satisfy these debts. A premarital agreement can limit liability for these debts, such as through a waiver of property rights except in the event of death, divorce, or such other terms as may be the case. This can serve to preserve the property of the non-debt holding spouse, as well as the property of the marriage.

4. Provides for Death and Children (2) of a Prior Marriage. Under Illinois law, a spouse has certain inheritance rights. These rights may work to limit the

amount of an inheritance a child from a prior relationship receives, or what happens to a deceased spouse's estate, despite what the express terms of a will provide. Through a premarital agreement spouses can waive their respective inheritance rights, as well as make provisions for what happens in the event of death. This allows a party to ensure that children from a prior relationship inherit their share of property upon death, as well as to address what the other spouse is entitled to in the event of death.

5. Preserves a Business Interest. A business owner entering into a marriage may want to preserve his/her ownership interest in a business. Without a premarital agreement in place it is possible that the non-owning spouse could end up owning an interest in the business, acquiring voting rights, or otherwise receiving rights that interfere with the operations of the business. A properly crafted premarital agreement can preserve the business interest as the separate property of the business owner in the event of divorce or death.

6. Sets the Rules of Engagement. Without a premarital agreement the divorce process will proceed through the court system, which can be costly. With a premarital agreement you can change the process to some degree. Such changes may include an agreement to arbitrate the divorce to keep all proceedings private (an important benefit given the fact that divorce proceedings are a matter of public record); private mediation on all issues before proceeding to court which can result in substantially reduced litigation costs if agreements are reached; voluntary disclosure of information before proceeding to court; and the like. These changes can reduce litigation costs, maintain privacy, and preserve each spouse's respective estate.

7. Governs the Marital Relationship. A premarital agreement, not unlike a partnership agreement, can also address a number of items that come up in the day-to-day relationship of a married couple. This can include items such as: how tax returns are filed (joint, separate, etc.), how and by whom household bills are paid, how banking is handled (joint accounts, separate accounts, where are pay checks deposited, etc.), how credit card charges are handled, agreements to set aside money for a specific purpose, and similar items. These items can have the effect of governing the relationship, preserving an estate, and complimenting other estate plans that are already in place.

As set forth above, a premarital agreement can be a great



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estate planning tool that allows a couple to define their future financial responsibilities and rights regardless of what the future may hold. A properly drafted premarital agreement can further serve to reduce litigation costs associated with a divorce by defining the couple's wishes up front, as well as to reduce the costs of litigation associated with a will contest over inheritance issues. While no one comes into a marriage with the intent of getting a divorce, divorce unfortunately happens with regularity. As a result, you need to plan for your marriage both the good and the bad. Start planning today and consult an attorney who can prepare a premarital agreement to define your future.

(1) The terms "prenuptial", "antenuptial" and "premarital" are synonymous. These agreements all involve an agreement entered prior to the marriage meant to control obligations and entitlements in the event of certain future events (i.e. divorce, death, disability, etc.). Effective January 1, 1990 Illinois adopted the Illinois Uniform Premarital Agreement Act (750 ILCS 10) to govern these types of agreements. Therefore for purposes of this article the term "premarital" is used.

(2) In Illinois, provisions of a premarital agreement in a divorce situation that provides for or is intended to control issues involving children (custody, parenting time, support, etc.) are void and against public policy. These provisions will not be enforced.

The ABCs of Trusts *(Continued from cover)*

the right to "appoint" where the assets of the trust will be distributed on their death. By making the beneficiary your spouse, and making it a "general" power, as opposed to a "limited" power, of appointment, you are able to qualify for the unlimited marital deduction, and avoid any estate taxes. The assets of the trust will be included in the surviving spouse's estate, but may qualify under that spouse's estate tax credit thus reducing their potential tax liability.

B Trust – A Bypass Trust - A Bypass Trust is intended to have assets that "bypass" your spouse in order to maximize the decedent's estate tax credit. While the property transferred to the Bypass Trust is technically subject to the federal estate tax, the tax credit eliminates any actual liability. So in 2014, you would transfer a total of \$5,340,000 to the B Trust. The surviving spouse can still receive income generated from the trust assets, as well as have a trustee invade principal for the surviving spouse's health, education, maintenance or support. However, when the surviving spouse passes away, the remaining trust assets are not included in part of their estate and thus, not taxable.

C Trust – A Qualified Terminable Interest Property (or QTIP) Trust - A QTIP Trust allows the decedent to provide for the surviving spouse during their lifetime, by requiring that the surviving spouse receives all income generated during the surviving spouse's life, distributed at least annually, but still be able to control where the trust assets will go upon the death of the surviving spouse. The right of the decedent to control the ultimate distribution of assets is the key distinction between the General Power of Appointment Trust and a QTIP Trust. While the assets of this trust will be included in the surviving spouse's estate, the surviving spouse (really their executor) can require that the trust pay the estate tax associated with the assets of the trust.

Each Trust is intended to serve a slightly different purpose, but when combined, they allow the decedent to accomplish several goals, including maximizing the estate tax credit, avoiding any estate taxes upon death, providing for their surviving spouse through distributions provided for by each trust, and allowing the individual to ultimately determine the distribution of his/her assets (with B and C Trusts) after his/her spouse dies.

Of course there are even more options and intricacies when dealing with trusts and estate planning, and individuals may use only one of the aforementioned trusts to meet their needs, the ABC Trust Arrangement is worth considering in order to accomplish several goals, particularly with higher net worth estates.

Understanding Child Support Trusts (a/k/a 503(g) Trusts)

What happens if you have a parent who fails or refuses to pay child support? Or an ex-spouse with substance abuse issues who cannot be trusted to hold funds intended to be used for child support? The answer may lie in the imposition of a child support trust under Section 503(g) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/503(g)).

Section 503(g) provides that a trust may be created “if necessary to protect and promote the best interests of the children.”⁽¹⁾ Necessity is found through evidence of inability or unwillingness to pay on the part of the payor party. See *In re Marriage of Pickholtz*, 178 Ill. App. 3d 512 (2nd Dist. 1988). Further, the creation of these trusts is “inappropriate in the absence of evidence showing some need to protect the interests of the children.” *Atkinson v. Atkinson*, 87 Ill. 2d 74 (1981). 503(g) trusts can be imposed as part of a final divorce decree and also in post-divorce situations where the payor parent fails or refuses to pay child support. See *In re Marriage of Steffen*, 253 Ill. App. 3d 966 (4th Dist. 1993).

The concept of “children’s best interests” is fairly broad and the courts have upheld the creation of these trusts in a variety of circumstances.

For example, 503(g) trusts have been permitted when one parent is incarcerated⁽²⁾; if both parents are unemployed at the time of the entry of Judgment for Dissolution of Marriage⁽³⁾; and when a parent is unable to make timely child support payments and has overall disdain for higher education⁽⁴⁾.

Child support trusts have historically been used for minor children’s “support, maintenance, education, physical and mental health, and general welfare.” 750 ILCS 5/503(g). They can be set up to make child support payments on a monthly basis, as well as to pay additional child-related expenses such as uninsured medical costs, extracurricular activities, and education expenses. However, the relevant provisions of the child support statute apply (750 ILCS 5/505). In addition, the trusts can be established for the payment of college expenses in accordance with Section 513 (750 ILCS 5/513). See *In re Marriage of Harsy*, 193 Ill. App. 3d 415

(5th Dist. 1990) (upheld creation of trust for the children’s future educational needs even though the children were very young and there was no evidence that they would attend college in the future).

These trusts can be funded from marital assets or assets from one parent’s separately held, or non-marital, estate. See *In re Marriage of Andrew*, 258 Ill. App. 3d 924 (5th Dist. 1993) (upholding trial court’s imposition of a 503(g) trust from the sale proceeds of the parties’ marital residence when both parties were unemployed) and *In re Marriage of Steffan*, 253 Ill. App. 3d 966 (4th Dist. 1993) (creating a trust using the father’s non-marital assets).

As these trusts are created for the purpose of child support, they will terminate upon a child’s emancipation, or his or her completion of a post-high school education if a parent is obligated to contribute to same. Absent an agreement of the parties to the contrary, upon termination of the trust, any remaining trust funds are to be distributed to the parent who funded the trust. *In re Marriage of Harsy*, 193 Ill. App. 3d 415 (5th Dist. 1990) (holding that income and principal of trusts a father was required to establish for his children’s future educational expenses could not be disbursed to children upon termination of the trusts, but instead had to be returned to the father). Neither Illinois statutes nor case law

provide much guidance on the construction of these trusts, but case law indicates that the general rules of Illinois trust law also apply to 503(g) trusts. Special consideration should be given to who is named as trustee; this person should be neutral and impartial and there should be language in the trust regarding the resignation or removal of the trustee. See *In re Marriage of Vucic*, 216 Ill. App. 3d 692 (2nd Dist. 1991) (striking down trust provisions appointing ex-wife as trustee over husband’s 503(g) trust). A child support trust should also include provisions requiring an accounting by the trustee for the use of the funds. And, if created by agreement of the parties, the trust should specify the distribution of the funds in the event the payor parent dies before termination of the trust or exhaustion of the trust funds. Overall, the trust terms should be as specific as possible to avoid problems down the road.

When children’s best interests are at risk,

do not overlook the benefit of creating a 503(g) child support trust to ensure the children’s continued support during and after divorce proceedings.

(1) 750 ILCS 5/503(g). The statute also permits the court to consider the payor party’s conviction of certain specified criminal offenses in making a determination as to the best interests of the children.

(2) *In re Marriage of Vucic*, 216 Ill. App. 3d 692 (2nd Dist. 1991) (striking down trust provisions, appointing ex-wife as trustee over husband’s 503(g) trust).

(3) *In re Marriage of Andrew*, 258 Ill. App. 3d 924 (5th Dist. 1993).

(4) See *In re Marriage of Harsy*, 193 Ill. App. 3d 415 (5th Dist. 1990).



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Gregory C. Maksimuk Named ABF Fellow



Gregory was nominated, and accepted the nomination, to become a fellow of the American Bar Foundation which is limited to less than one percent of lawyers admitted to practice in each jurisdiction of the United States. Selection as a Fellow of the American Bar Foundation is a recognition of a lawyer whose career has demonstrated extraordinary leadership in the profession, service to society and commitment to the ideals and objections of the American Bar Association.

IN THE NEWS

Anita M. Ventrelli was interviewed by Chicago Lawyer Magazine for the article titled "The diversity discussion" for the July 2014 issue.

Jay P. Dahlin was interviewed on Fox 32 regarding Tips for Dad's Who Are Spending Father's Day Alone.

Kimberly A. Cook was interviewed by the Chicago Daily Law Bulletin regarding her childhood in Panama and her decision to become a family law attorney.

Brian A. Schroeder was interviewed by The Chicago Tribune, The Daily Mail, WGN, WTAX News Radio, NBC 5 Chicago, CNN New Day and Al Jazeera America regarding his case involving frozen embryos and when the man and woman who created the embryos disagree about using them to have children.

Evan D. Whitfield was the Emcee at YWCA Lake County's 36th Annual Women of Achievement Awards Dinner on May 10, 2014.

Gregory C. Maksimuk was sworn in as Vice-President of the Kane County Bar Association.

Meighan A. Harmon was appointed to the Board of the Lilac Tree, a resource that provides education, support and guidance to women in the divorce process.

Jay P. Dahlin presented Litigating International Custody Disputes at the IICLE Family Law Litigation Strategy on May 22, 2014.

Schiller DuCanto & Fleck LLP was named Global Law Experts Matrimonial Law Firm of the Year in Illinois – 2014.

Andrea K. Muchin was appointed to the Women's Board of the Jewish United Fund.

Eric R. Pfanenstiel became a member of the Next Gen Board for the DuPage Children's Museum.

Gregory C. Maksimuk, Thomas F. Villanti and Evan D. Whitfield were all named Top 40 Trial Lawyer Under 40 by The National Trial Lawyers.

Schiller DuCanto & Fleck LLP has a new monthly column in the Chicago Daily Law Bulletin titled "Modern Family."



The materials contained in this Newsletter are intended for general informational purposes only and not to be construed as legal advice or opinion.

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