

Prenuptial Agreements

A Primer For The Business Owner

by Jane Schweitzer

You started the business. You grew the business. The last thing you want to do is divide the business.

A business owner entering a marriage may conclude that the business won't become part of the marital estate because it was owned before the marriage. Maybe. Maybe not. What if your spouse provides services for the business or marital funds are used to run or expand the business or to pay off business debt? Under these circumstances the business just might become marital property, thereby making it subject to division by the court. How can you protect your business? A prenuptial agreement can protect it from becoming just another asset to be divided by the judge.

What is it?

A prenuptial agreement is a contract entered into by the bride and groom before marriage. It provides for a waiver of certain marital interests, for the distribution of property acquired during the marriage and/or for the sequestration of property brought into the marriage. Because about half of all marriages end in divorce, it is reasonable to plan for such a contingency. A well-crafted prenuptial agreement can prevent some of the expenses of a dissolution and keep your business intact.

Prenuptial agreements may deal with the issues of spousal support (maintenance) during and after the dissolution proceeding, the sequestration of property brought into the marriage, the division of property acquired during the marriage, and even the payment of attorneys fees and court costs incurred during the dissolution. Prenuptial agreements may also deal with issues relating to the rights of a surviving spouse to the estate of the deceased spouse. The spouse's right to take a percentage of the deceased spouse's estate regardless of what his or her will says, the right to exempt property, the right to receive an allowance from the estate and the right to the homestead allowance can all be waived in a prenuptial agreement.

"unconscionable." An unconscionable agreement elicits a gasp from the bench: "An agreement is unconscionable when the inequality is so strong, gross, and manifest that it must be impossible to state it to one with common sense without producing an exclamation at the inequality of it." The agreement is evaluated for fairness as of the date of the execution, not as of the date of the dissolution.

Full disclosure

Don't expect a prenuptial agreement to be enforced if you haven't been forthcoming as to the extent and value of your holdings. A complete, accurate financial statement should be attached to the prenuptial agreement. In some situations, an appraisal of the subject property should be attached to the agreement.

Timing

The timing of the presentation of the prenuptial agreement can be crucial to its enforcement. A prenuptial agreement first presented shortly before the wedding is bound to raise judicial eyebrows. While agreements first presented in close to wedding dates have been enforced, a judge may frown on timing that does not allow for full consideration of the agreement.

Representation

The husband and wife should have separate counsel. Both parties should understand their rights with and without the prenuptial agreement. The agreement should include a clear statement regarding the involvement of counsel and the understanding of the parties as to the effect of the agreement.

Consideration and fairness

The concept of "consideration" (the benefit received by a spouse who relinquishes some marital rights) is not clearly stated in the law as it relates to prenuptial agreements. Some courts have set aside prenuptial agreements that left one spouse with only nominal property, while other courts have let such agreements stand.

What's mine and what's yours?

When a husband and wife get divorced, the court is charged with the responsibility of determining what is in the marital estate and with equitably dividing it. While there is the presumption that everything the husband and wife acquire during the marriage is part of the marital estate, some property by law is not, such as property one spouse inherited during the marriage, property owned before the marriage and the increase in value of property owned by a spouse before the marriage. The law also excludes from the marital estate any property "excluded by a valid written agreement of the parties"—the prenuptial agreement. If it's not in the marital estate, the court can't divide it.

What does it take to make it stick?

A prenuptial agreement is supposed to take some of the bite out of a dissolution proceeding since some of the most contentious issues have already been resolved by the agreement. But a prenuptial agreement that seems acceptable at the time it is signed may not seem so at the time of a dissolution and can be challenged.

A prenuptial agreement needs to be entered into "freely, fairly, knowingly, understandingly, and in good faith with full disclosure" to prevent it from being tossed aside by the court. The court will also consider whether the agreement is

The key elements of an enforceable prenuptial agreement are that at the time of the signing of the agreement, the parties knew their rights without the agreement and knew what they were giving up by signing it.

Protection of your business

Your prenuptial agreement should be drafted by a counsel who has a full understanding of your business holdings. You must make a complete disclosure of your assets within the agreement. Your soon-to-be spouse should be represented by separate counsel and given enough time to fully review and understand the proposed agreement, and the agreement should recite that understanding. A draconian agreement that leaves your spouse with nothing in the event of a dissolution may be held to be unconscionable and thus not be enforced.

A prenuptial agreement can protect your business from being just another asset in your marital estate that is subject to being divided by the court. Who knows? Yours might just be in the 50% of marriages that don't end in divorce. But just to be on the safe side, get a prenup anyway.

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