

## Know-How

### ► MANAGING GROWTH

# Protecting Your Assets

What you need to know about premarital agreements



BY Lisa T. Spencer

**S**uccession planning is an important consideration for most, if not all, business owners. If you (or a business partner) are considering marriage in the future, then you should consider a premarital agreement (a.k.a., prenuptial or antenuptial agreement) as an integral part of your business's succession plan. Premarital agreements can protect individual wealth in a number of circumstances, but in particular, can protect your business from an unintended division or making your spouse an unintended partner.

You should consider creating a premarital agreement if: You own a business that has significant value; you own a business with partners and need to protect their interests; you have built up or inherited significant wealth; you have children from a previous relationship and need to protect assets that you intend to give to them; or you have an ownership interest in unique property such as patents, copyrights, or other intellectual property that pose potentially difficult valuation issues.

When the words, prenuptial, antenuptial or premarital are mentioned, many people envision a stereotypical, one-sided agreement. Contrary to that perception, however, an enforceable premarital agreement is not grossly one-sided, but is fair and respectful of both parties, taking into consideration what each of them brings to the marriage and what each party may give up as a result of the marriage (e.g., a career). If the individuals come to the marriage with relative financial independence, then

it may be fair for the agreement to provide that each keeps their own separate property. If the financial circumstances are vastly unequal, however, it is still possible to designate the business or other assets as separate property, but it is wise to exchange that separate property for other property.

**If you are thinking about a premarital agreement, then you should consider the following steps:**

**1. Plan well in advance.** A premarital agreement must be signed, witnessed and notarized at least one day before the wedding. Planning at least three to six months ahead will avoid discussing the agreement during the last minute wedding flurry and allows ample time for negotiation.

**2. Consult an attorney.** An attorney who drafts premarital agreements on a regular basis, and stays



up-to-date with ever-changing law, is a wise investment. A premarital agreement is a contract between two consenting adults and as such is favored by our courts. Unlike business contracts, however, courts will carefully scrutinize the agreements for fairness.

Legal counsel is important to help you think through all the issues. Your spouse-to-be should have separate legal counsel of his or her own choosing.

### **3. Make full, written disclosure.**

Full disclosure of your finances before signing the agreement is essential, and a statement of assets, debts and income for both parties should be attached to the agreement.

**4. Agree on terms.** Premarital agreements contain waivers of certain rights that would otherwise be bestowed on the parties by law in the event of death or divorce. The parties must agree on what they will each receive in lieu of those waived rights.

### **5. Express your circumstances and intentions.**

You should disclose why certain assets need to be protected. For example, you may not generate significant taxable income, but do have significant cash flow, or perhaps your business or assets may present particularly difficult valuation issues that you wish to avoid.

While premarital agreements are not uncommon, they are a topic not easily broached. A good premarital agreement, however, is not about planning an unhappy ending, but instead, is about respectful and forthright planning for your future together. **MB**

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Lisa T. Spencer, an attorney with Henson & Efron P.A., practices in the area of family law representing clients in cases involving business valuation, executive compensation valuation, intellectual property, and premarital agreements. She can be reached at [lspencer@hensonefron.com](mailto:lspencer@hensonefron.com) or 612-252-2875.