

AS SEEN IN **Upsize**
Minnesota



Before tying knot, how to protect your business

DIVORCE AND DEATH. Not exactly subjects that typically come to mind when you're about to tie the knot. But if you're a business owner, they are critical situations to plan for well before the big day. Why? The reality is that divorce and death happen. Today, 41 percent of marriages end in divorce, and we all face the other "d" word.

A premarital agreement can be an effective tool for protecting your hard-earned premarital wealth and particularly for a closely held business owner, for protecting your business, family and partners. Essentially, a premarital agreement can "carve out" your business from the marital estate, protecting the business from division upon divorce or from making

- [tips]**
- 1** Find an experienced attorney who drafts premarital agreements on a regular basis, and stays up-to-date with changing laws.
 - 2** A premarital agreement is a contract between two consenting adults and as such is favored by our courts.
 - 3** Unlike business contracts, however, courts will carefully scrutinize the agreements for fairness.
 - 4** Your spouse-to-be should have separate legal counsel of his or her own choosing.

your spouse an unintended partner in the event of your death.

You should consider creating a premarital agreement if any of the following apply:

- You have significant wealth.
- You own an interest in a business.
- You own unique property such as copyrights, or other intellectual property.
- You have partners and need to protect their interests, as well as think about succession planning for the business.
- You have children from a previous relationship and need to protect assets that you've earmarked for them.

Premarital agreements typically contain:

- Full disclosure of assets, liabilities and income.
- Acknowledgements that one or both parties waive certain rights in the event of death or divorce.
- Agreement of what each spouse will receive, in lieu of the rights waived.
- A writing of your intentions. For example, if you co-own a business with siblings and you intend for ownership to stay in the family, it is important that your future spouse acknowledge this intention.

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The purpose of an enforceable premarital agreement is not to leave a spouse penniless, but rather to be fair and respectful to both parties. If the individuals come to the marriage with relative financial independence, then it may be fair for the agreement to provide that each keeps his or her own property.

If the financial circumstances are disparate, however, it is still possible to carve out assets from the estate, but it is wise to

Steps to take

Steps to creating a premarital agreement include:

Plan ahead. A premarital agreement must be signed at least one day before the wedding, but I recommend discussing the idea as soon as possible, preferably three to six months beforehand. Planning ahead will help set emotions aside and allow ample time for negotiations.

Find an experienced attorney who

Procedural issues. Was full disclosure of finances made; were both parties given the opportunity for legal counsel of their own choosing; was the agreement signed at least one day before the wedding; and was the document properly witnessed and notarized.

Fairness. An agreement that is overreaching, for example, leaves one spouse with little or nothing, risks a challenge to its enforceability.

Changes in circumstances. Although an agreement may be fair at the time it was signed, if at the time of divorce or death circumstances have changed so drastically that enforcement would be unconscionable, the court may declare it unenforceable.

If a court finds all or a portion of a premarital agreement substantively unfair, then some or all of the rights waived would be reinstated. Thoughtful planning and drafting helps avoid that circumstance.

While premarital agreements are quite common today, they are a topic of conversation not easily broached. Contrary to popular perception, a good premarital agreement is not about creating an inevitable unhappy ending, but rather about planning for possible future events, with input from both spouses in an honest, forthright and respectful manner.

You worked hard to develop your business or wealth. Creating a premarital agreement simply allows you the opportunity to fairly control the terms and outcome, with an eye toward staying out of the courtroom.

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— Lisa Spencer, Henson & Efron

exchange that for other property. For example, in exchange for an ownership interest in the business, I frequently recommend that the spouse be given a "staircase" property settlement based on the number of years of marriage.

A premarital agreement can also be an important element to business succession planning. In the event of a business owner's death, it is important to have a plan for his/her ownership interest, especially if it is owned with family members or other partners.

Premarital agreements also coincide with estate and tax planning. If you have children from a prior relationship and wish to protect your estate for those children, but at the same time do not wish to leave your spouse entirely without, there are a number of options to explore.

For example, your spouse may waive the rights to take a share of your estate; in turn, you may create a trust that would provide annual income to your spouse, with the underlying assets ultimately awarded to your children, thereby also achieving an advantageous tax treatment.

drafts premarital agreements on a regular basis, and stays up-to-date with changing laws. 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. Your spouse-to-be should have separate legal counsel of his or her own choosing.

Prepare a complete and accurate financial statement. Full disclosure of finances before signing the agreement is essential, and a statement of assets, debts and income should be attached to the agreement.

Articulate your circumstances and intentions. It is important to disclose why certain assets need to be protected. For example, your business or assets may present particularly difficult valuation issues that both parties wish to avoid.

While most properly drafted premarital agreements are upheld, enforcement cannot be guaranteed, and there are situations when an agreement is found unenforceable. In Minnesota, several factors are examined to determine enforceability:

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