

FAMILY BUSINESS

All You Need Is *Love*

And A **BUSINESS ASSETS** Prenuptial Agreement



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To a young couple engaged, their marriage will be a relationship of love and trust. With age and experience we learn that marriage is also very much an economic arrangement involving the immediate and, often, the extended families of the couple. We also learn that many marriages are not stable and end in divorce, and that any marriage can end with an unexpected early death. As much as you may like your child's fiancé, you are probably a little nervous about what may happen if your child owns an interest in your business and your child's marriage doesn't work out or your child dies.

As a business owner, it is natural for you to be concerned about who else owns an interest in your company. Whether your children own an interest in your business, or you plan to give or leave your business to your children, you certainly do not want a hostile stranger as an owner, and you may not want anyone other than immediate family to be an owner.

If you mention your concerns to your lawyer, your lawyer may suggest that the couple enter into an antenuptial agreement. Mention an antenuptial agreement to your child, and your child may suggest that you are asking them to sign an antenuptial agreement.

Your child's concern is not without basis. Antenuptial agreements (also known as prenuptial agreements) have traditionally been used in the context of second marriages later in life, when one or both parties may have children from a prior marriage. They can be an effective means of protecting the potential inheritance of children from a prior marriage against claims that could be made by a parent's new spouse. But it takes some life experience and perspective to understand the need for, and to be comfortable with, the broad form of agreement used under such circumstances.

Instead of the usual broad form of antenuptial agreement generally used for second marriages, for a first marriage we often recommend a much narrower form of agreement, which we refer to as a "business assets antenuptial agreement." The acronym for this device probably will reflect your child's initial reaction to the concept, but read on.

There is a distinction between a normal, broad form antenuptial agreement and the more limited device we employ. To understand that difference, it may help to understand what an antenuptial agreement is and the extent to which it is enforceable.

What is an antenuptial agreement? It is merely a written contract entered into by

two people before they marry in which they determine the scope of the property rights each will have in the property of the other. Usually the agreement will contemplate two situations: death and divorce. Without the agreement, a surviving spouse's rights will be determined by law, and divorced spouse's rights will be determined both by law and by the discretion of a judge. In a divorce, the judge has broad discretion when applying the law to the circumstances of a marriage.

Normally, an antenuptial agreement will deal with all of the property and rights to property of both parties. It will be enforced by the courts if (a) it is "fair and reasonable" when it is entered into, and (b) it is not "unconscionable" at the time a party attempts to enforce it. For an agreement to be considered fair and reasonable when it is entered into, the courts have imposed two main requirements. First, both parties must be represented by independent counsel. Second, each party must make a full and accurate disclosure to the other of his or her assets

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and income. One major consideration that both parties and their families must bear in mind is that the agreement does not prevent either party from giving more to the other than the agreement or the law would otherwise require. The agreement, if enforceable, merely controls how much either party can get from the other without the written consent of the other.

A business assets antenuptial agreement must meet all of the requirements for enforceability of any antenuptial agreement. The difference is that the only assets that the parties seek to protect are family business assets. Other assets are dealt with on death or divorce as if there were no agreement in place. When we draft these agreements, we are careful to cover not just present business assets of a party, but also to cover business assets that the party may later receive by gift or inheritance, and business assets that may grow out of any present business operations by the family. If the husband or wife starts a new, unrelated business or inherits or is given other assets not related to the family business, the agreement does not deal with those assets and they will pass by law and judicial discretion upon divorce, or by law at death absent a will or trust provision to the contrary.

In order to comply with the full disclosure requirement, we ask our clients to sup-

ply not only the value of a family business interest that a child may already own, but also to supply a reasonable (not over- or understated) estimate of the present value of the family business interests that the child would be likely to receive through gift or inheritance. There is a risk with the business assets antenuptial agreement, as with any antenuptial agreement, that a court will refuse to enforce it when a couple divorces or one of them dies, but it is a very small risk. Where disclosure has been as full as possible and where both parties were represented by counsel with respect to the agreement, the Massachusetts courts will honor a broad form antenuptial agreement as long as it is not unconscionable – typically, meaning that enforcing the agreement would cause one of the parties to become destitute and at risk of becoming dependent on the taxpayers for support. A court should have even less trouble honoring an agreement that is narrowly tailored to protect only family business interests, whether currently owned or expected to be received in the future. If your child is already married, it may not be too late to take steps to address concerns you may have about your child's spouse and your family business. Massachusetts recently recognized the validity of postnuptial agreements under certain circumstances. The requirements for creating a valid postnuptial agreement are

similar to those for an antenuptial agreement – there must be full financial disclosure and separate legal representation before the agreement is signed; but there is a higher standard that must be met when it comes time for the postnuptial agreement to be enforced – namely, the court must find the postnuptial agreement to be “fair and reasonable” under the circumstances as they then exist. This higher standard means that a postnuptial agreement may be more vulnerable to attack than an antenuptial agreement when the time arrives to ask a court to enforce it. However, a postnuptial agreement limited to protecting family business interests, like a narrowly tailored antenuptial agreement, should raise fewer issues for a reviewing court than would a broad form agreement. We have found that it is far easier to persuade a young couple that they are not betraying the trust inherent in their relationship if they act merely to protect the family business. If you are nervous about what your child's marriage may mean to the health and survival of your family business, you should seriously consider the use of a business assets antenuptial or postnuptial agreement. ■

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