

## **Is a prenup part of your business risk management strategy?**

Managing risk is an essential part of any business operation and while personal relationships do not often appear high on a business risk register, an acrimonious divorce has the power to devastate a small business.

While few anticipate or want to believe their own marriage will break down, sadly recent statistics show that over a third of all marriages end in divorce. It is not uncommon for directors of a family business to insist that members of the next generation enter into a prenup before they get married, in order to protect the business assets from the effects of a divorce.

It is sensible for all entrepreneurs to consider a prenuptial agreement if they are thinking of getting married or entering a civil partnership just in case the relationship does not last. This provides important protection for any assets which have been built up prior to the marriage, and any contributions to the business that are made at the time of marriage.

## **What impact can divorce have on my business?**

It will be necessary to agree a financial settlement as part of a divorce, with the wealthier spouse often having to provide for the other person. This may involve paying a significant lump sum, for example to purchase a property, or ongoing maintenance. Either situation can put a strain on a business if this is the sole source of income or if capital is tied up in assets rather than cash.

Alongside the financial concerns, a divorce can have an impact on fellow partners or shareholders, family members and employees who rely on the business. Sometimes a couple may work together, or one may be an employee of the other; each scenario bringing its own complications. Divorce can be a stressful experience for anyone, but when it is tied to your livelihood there is no doubt that the stress is magnified.

## **How is a business considered within the financial settlement?**

A business is an asset which, like any other, will be taken into account during the calculation of the financial settlement. Your business will need to be valued, usually by an independent accountant. This will involve disclosing your business accounts and assets both to the independent valuer and to your former spouse.

Once a valuation has been placed on your business then it will be considered as part of the overall matrimonial pot, which needs to be fairly shared.

Fortunately, the courts recognise the importance of enabling a business to keep trading, and they tend to be keen to allow businesses to continue as a going concern. This then means that you may need to trade off an interest in another asset, such as a pension or the matrimonial home, in order to keep your business intact.

### **How can a prenup protect business owners?**

A prenuptial agreement allows you to set out in advance how your business assets should be treated in the event of a divorce. It may be that you wish for the entire asset to be outside of the matrimonial pot, or that you specify a certain interest which would be due to your spouse should you divorce in the future. We can advise you on what is a realistic division of your business depending on your circumstances and what other assets are held.

If your new spouse will also be joining the family business as an employee, then the prenup can specify how they would be compensated for their work. If they receive a market wage, then it is unlikely they could claim any higher interest in your business on this basis. If on the other hand your spouse is an integral part of the business and shares in profits, then reasonable provision will need to be made for them financially to allow them to readjust to their new lifestyle outside of the business.

A prenup can also cover how a business would be valued in a divorce; what if any percentage interest your spouse would receive on divorce; and how that should be calculated. For example, you may want this to cover only growth during the period of the marriage and not prior to marriage or after separation.

### **What type of business assets can be covered?**

A prenup can cover a range of business assets, such as cash in the bank, property, land, machinery, equipment, vehicles, intellectual property, stock, artwork and furniture.

You can choose to be specific about these assets or if the business has a separate legal entity, such as a company or LLP, then you may choose simply to refer to the business assets generally.

Any income stream that you receive from your business will need to be given careful consideration when considering your prenup. If your income will be used to fund the family lifestyle, then reasonable provision will need to be made for your spouse in the event of a divorce. Failure to do so could risk the agreement being found invalid.

### **How can I obtain a binding prenup?**

In England and Wales, a prenup is not yet legally binding, but since 2010 our courts have shown that they are highly likely to enforce the terms of a prenup provided certain conditions are met. These conditions are to ensure fairness and include:

- you and your spouse must obtain independent legal advice on your rights and the implications of the proposed prenuptial agreement;
- you both must make a full disclosure of all assets and liabilities held;
- the prenup should allow for future family changes, such as what will happen if/when children arrive; and
- neither of you must have been unduly pressurised into signing.

Bearing in mind the above, it is also important to factor in the timing of any agreement. It should be a well thought out agreement that both spouses have had adequate time to consider. An agreement in the run up to a wedding day, with all the emotion at that time, is more likely to fail in court as one or other spouse was under undue pressure. Seeking early expert advice is the smart option to minimise your business risk.

Our key contacts at DMP for further advice and assistance on prenuptial agreements are Stephanie Alderwick and Tony Roe:

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