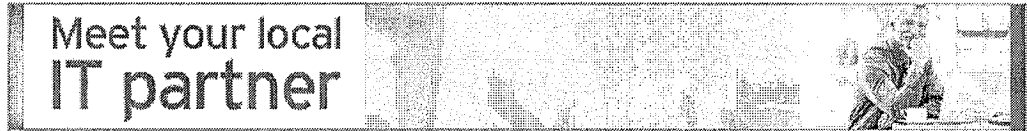


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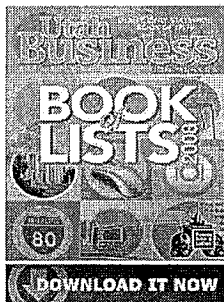
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Before You Say "I Do"

Keeping Your Business and Marriage Separate
by Emily B. Smoak

20 November 2009—

"But, where is the love?" This is the question I was asked by an entrepreneur client in response to my suggestion that he consider a prenuptial agreement before getting married. Certainly, it is a question worth asking. How you answer that question depends upon your perspective. If your answer is "I love you darling, but I want to protect my business just in case," there are a few things you can do to reduce your risk of your business becoming (in whole, or in part) a marital asset.

What is Marital Property?

In Utah, "marital property" is defined (in general) as all assets that are acquired during the marriage. If you start a business during the marriage using funds generated during the marriage, the business is marital property. If you own a business before you are married, and operate your business during your marriage, all income, retirement and investment accounts, distributions, monies and equity earned from the business during the course of your marriage is likely to be deemed marital property by a court. Also, if you own a business before you get married, then sell your old business after you marry and start a new business, your new business is (at least partially) marital property.

Prenuptial or Postnuptial Agreements

A prenuptial or postnuptial agreement is a valid, enforceable contract in which your spouse can release any claims that he or she may have to your business interests now, or in the future. Both parties should review the agreement with their own individual attorney. The agreement should not be presented to your spouse on the day of your wedding. It should be reviewed at some appropriate time well before the bride walks down the aisle.

Make sure you have a witness and notary present when signing the documents. The notary will require both parties to declare under oath that all assets of both parties have been declared as part of the agreement, that both parties are of sound mind, are not under duress (or threat), and that both are operating with the advice of an attorney. Make sure to keep a copy of this agreement among your other important papers.

If your business attorney adds language to your shareholder or operating agreements, note that it is not necessarily binding. While you may think that this added language will protect your business from your marital estate, it is only binding when your spouse is a party to the written agreements or contracts.

All in the Family

If your spouse works with you in your business, you risk a valid claim by your spouse that he or she should be entitled to a fair portion of the equity generated by the business during the marriage. If you want to be very careful, do not arrange for your spouse to work in your business in any capacity whatsoever. Divorce lawyers often find spouses working together, in one capacity or another, especially in multi-generational family businesses.

The area of law involving these kinds of family businesses and how their value can become, in whole or in part, a marital asset is an unpredictable hornet's nest. The main suggestion is to not involve your spouse in contribution (financially or otherwise) to your business if you want to keep the value of your business out of your marital estate.

What About Bank Accounts?

Keep your business accounts separate from personal accounts and do not give your spouse access to your business accounts. If you want monies from your business to become a marital asset, the best thing you can do is put the money into a jointly held bank account, or even better, a jointly held piece of real estate.

The law presumes that monies held in a joint account or properties held in joint names are marital assets. If you commingle your income with monies generated from your business, some of which is used for personal expenses and some of which is funneled back into your business for operating expenses, you risk a claim by your spouse that your business is, at least in part, a marital asset to be divided.

An Exception to the Rule

There is one caveat to these suggestions. There is no formula that will ensure your business is protected from your marital estate. Divorces in Utah are decided, above all else, in Courts of Equity. That is, the judge has very broad discretion to make orders that the court deems to be equitable, including giving your spouse monies or interest in your business, no matter what precautions you have taken.

It's certain that if you and your spouse cannot work out the terms of your divorce yourselves (with or without the

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help of attorneys), a judge will. And if the judge makes orders that he or she thinks are equitable, neither you nor your spouse, will likely be entirely happy with the result.

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