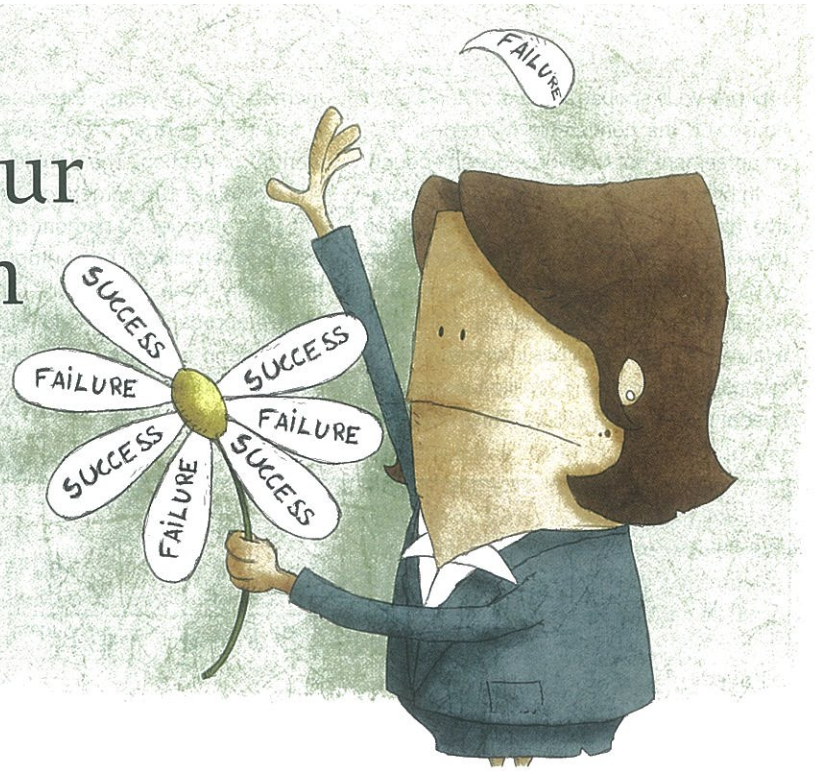
Protecting Your Business from Your Spouse



BY NINA L. KAUFMAN, Esq.

Zsa Zsa Gabor once said, "[My ex-husband] taught me housekeeping. When I divorce, I keep the house." But what if your house isn't the issue—it's your *company* ...? Can your spouse keep a piece of it?

It's an issue that affects many small business owners. U.S. divorce rates hover around 40-50 percent (American Psychological Association). Re-marriage rates exceed 50 percent (U.S. Census Department). And re-divorce rates exceed 60-70 percent (DivorceSource.com). Add in the slowly growing increase in same-sex partner rights—and the possibility of breakup needs to factor into any business owner's plans to protect her company.

Here are several situations where women business owners can make those "just in case" plans:

Before marriage

Without a pre-nuptial agreement (fondly called "prenups"), what your business earns during your marriage can, in some states, be considered "marital property" that you have to share upon divorce. The situation gets thorny, too, if your spouse works for you. This can create unspoken expectations they will get a "piece of the action" if they have helped out in the trenches.

Sherri Donovan, a New York City divorce and family lawyer (www.SherriDonovan.com) has seen women bring spouses into their business for the wrong reasons. "They are going through a difficult time, and hope this will save their marriage," she relates.

"They think, 'My spouse will finally understand me.' Or in the case of uneven earners, 'Maybe this will inspire him/her to step up to the plate.' All they are focused on is repairing the marriage. They're not looking at whether the spouse has a skill set the business needs. They haven't considered the dynamic of being partners who are equal in the bedroom, but unequal in the board room. They also haven't considered how this harms them in divorce negotiations. They're making that decision for emotional reasons, not business reasons," Donovan says.

That's why prenups are "essential if one partner already has a business prior to marriage," says divorce mediator Sabra Sasson (www.sassonlaw.net). They prevent your company from becoming collateral damage in a bitter divorce—along with the kids, and the furniture.

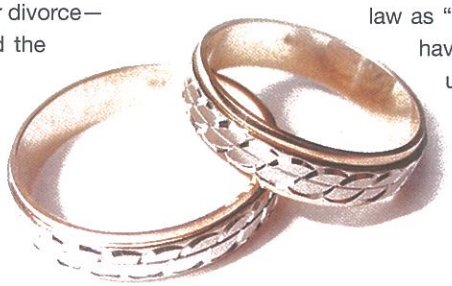
In many cases involving a business, a prenup will cover:

- The value of the company
- Who gets any increase in the company's value
- Financial support of the non-owner (or a clear statement they can support themselves)
- Whether this applies to businesses (or subsidiaries) created in the future

After getting married

You may have received an inheritance. Or gotten a nice severance package from your job. Or, simply be an unstoppable serial entrepreneur. Whatever inspired you to start a business after you got married, a "postnup" can help iron out those issues. (It can also help where you—*oops!*—forgot to have a prenup).

The big difference with postnups is that you need to provide what's known in the law as "consideration." You have to give (or give up) something to get this new deal. That could be a right to



buy out your spouse's share of the beach house. Or the convertible Mercedes. (No, an agreement not to divorce doesn't count).

In one case, Andrea Vacca, a collaborative attorney and mediator in Manhattan (www.vaccalaw.com), had a client who gave up what might have been her right to two-thirds of the marital assets. "She was a lawyer, and majority breadwinner," Vacca relates. "She earned $3 million a year; her husband earned $1million. They had been married for 15 years. Because she was a founding partner of her law firm, she wanted protection. The couple negotiated she would get 100 percent of the business; but he would get 50 percent of their other assets, even though he contributed less to the family finances overall." This collaborative approach saved tens of thousands of dollars in appraisal and legal fees, and avoided uncertainty for both.

In business together

Partners in love *and* business? Without a prenup or postnup, this gets complicated. And expensive. Particularly where "scorched earth" tactics are involved.

As Sasson points out, courts consider many factors in the "equitable distribution" of a business asset.

For example:

- ✿ When was the business formed? By whom?
- ✿ Was the business the sole source of income for the family?
- ✿ Who wants it more? How will the "loss" of the other partner-spouse impact the company's bottom line and value?
- ✿ What's the value of the business? (Note: appraisal fees can range from $2,500-$15,000, *per appraiser*)? And what valuation methods are being used?

When done well, business owners are free to play with creative possibilities for preserving the business—and their dignity. One of Donovan's clients kept the company, but allowed her spouse to set up a competing business. One of Vacca's clients kept her role in the couple's virtual business, as they didn't have to see each other all that often. "It all depends on why you divorce," says Vacca.

Discussions about prenups or postnups aren't comfortable. Like a Band-Aid®, business owners want to rip it off quickly, dispose of it, and move on. But there are a lot of factors and issues to consider. "You're not living your life in black-and-white; you're living your life," Vacca cautions. "And relationships are a living organism," concludes Donovan.

NINA KAUFMAN is an SBA-Award winning attorney and the Founder/CEO of The Legal Edge LLC, legal and business advisors to companies in the knowledge economy. She is a member of the Enterprising Women Advisory Board. For more information, visit www.BusinessExponential.com.