

Protecting the Family Businesses From Marital Breakdown

While nobody likes to think about the consequences of a failed marriage before walking down the aisle, the risks faced by shareholders in a family business can be high. After all, without the proper protection mechanisms in place, a divorcing spouse could be entitled to half their partner's shares in the family business or half the monetary value.

Through a combination of corporate and family law, family business owners can take legal steps that will keep the shares in the company and prevent any of the value leaving if a marriage in the family breaks down. The first step is to ensure appropriate provisions are included in the family business shareholders' agreement. The shareholders' agreement can contain provisions preventing a shareholder from selling shares outside the family. This clause could be important if one of the owners needs to generate funds to settle a divorce claim.

The second step is to have a prenuptial agreement. Some family businesses make having a prenuptial agreement which protects the value of the business shares from a claim by a divorcing spouse conditional to owning the shares in the first place.

Requiring shareholders to sign a prenuptial agreement with their future spouse can be a sensitive issue, but when handled appropriately, the marital contract can be executed fairly and without hurt feelings. Having the clause in place in the shareholders agreement well ahead of a potential marriage in the family is helpful. This will avoid anyone marrying into the family feeling like this new rule has been put in place just for them. Nobody likes surprises, so having an established rule in place will also help the shareholder discuss the requirement with a potential spouse even before an engagement and wedding are planned.

Shareholders in a family business may not be formally married but are nonetheless in an "adult interdependent relationship". In Alberta, couples are considered to be in such a relationship if they have lived together for three years or have a child together and cohabit. This definition replaces what we used to call a "common-law" relationship. An adult interdependent partner does not have legislated claims to property but can make a claim against family assets, including the shares of a family business by way of what is called an action for unjust enrichment. Essentially, this is a claim by the spouse for compensation for contributions made to the accumulation of assets or value during the relationship and it can include a claim for the increase in value to shares of a family business. Similar to a prenuptial agreement, cohabiting partners can enter into a cohabitation agreement which would govern the distribution of their assets in the event they separate.

There are several important requirements to keep in mind to ensure a prenuptial or cohabitation agreement is valid and upheld. These include:

- Each party has independent legal representation

- Each party makes full and accurate disclosures
- The agreement is not signed under duress
- The agreement is signed well before the marriage date

To discuss this in more detail, contact one of our lawyers in our Family Solutions group.

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