

Marital Assets & Business

By K. Dean Kantaras and Dennis Németh

Most businesses begin small with one or two friends as founding shareholders or members becoming the owners. Many entrepreneurs begin by working for someone else to gain experience and then move out on their own, starting a business which, over time, expands and grows. Various successes soon follow, allowing the owners to grow in their personal lives.

But what happens when one or both of their personal lives breaks down? Owners end up in a divorce and learn a court is going to decide whether their business interest may be treated as a marital asset. The question is, are their business interests really protected as separate and apart from the marriage, especially if they founded the business prior to becoming married and starting a family?

The short answer, the lawyer's answer, is, well, maybe. Many businesses are working on a shoestring budget when founded, and thus the owners are seeking ways to save money. The result is that many simplify the process of establishing the business entity and decide it is easier and less expensive in the moment, to utilize a document preparation service, online or traditional brick-and-mortar, which charge nominal fees, usually less than \$500, plus filing costs with the state regulatory and registration departments. Some believe they are savvy enough to file on their own with those departments and save the additional costs.

Unfortunately, they realize too late that the cost saving measures upfront result in substantial risk of expense, and potentially loss of business interests in the future. As business attorneys, and family and marital attorneys attest, the proper formation of a business is far more than filing "articles" with the state. As a general principle in Florida, "marital assets" are defined as assets and liabilities acquired or incurred during the parties' marriage. Further, a non-marital asset, such as a business founded before the parties were married, can become marital if it is not maintained as a wholly separate entity and assets or funds are mixed between the business and the spouses.



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So, what can business owners do to reduce the risk of their business being determined to be marital assets, versus simply having a marital component, or alternately, how do they protect their interests from being impacted by their co-owners' divorces? First, they should have attorneys involved from the start of the formation of the business. A knowledgeable business attorney can help them prepare the proper documents for formation of the business, which will help ensure that the business is properly structured, and can set up record keeping systems that support the business' separate identity. The attorney will walk them through the requirements of Florida statutes governing the various types of business entities from foundation through operations.

Second, they must operate the business as a truly separate entity. This means the avoidance of blending personal or marital funds or other assets with business accounts. An easy safeguard is to maintain a separate account for all funds earned or received prior to the marriage of the owner, and keeping those funds segregated from any

funds earned or shared during the marriage. After marriage, they should ensure that all business income flows through business accounts, not personal, and the business should maintain an operating account with sufficient funds to allow them to continue operations without financial contributions from their personal or marital accounts.

Any funding issues should be resolved with business loans and not personal loans and promptly paid back. The owners should explore bank financing, ideally without personal guarantees when possible. Again, the goal is for them to avoid mingling personal or marital accounts and assets with the business and to have the business repay its own expenses and debts. In small, closely held businesses, the risk can extend to the owners utilizing business credit cards for personal and family expenses.

Finally, as one or both co-owners of a business approach the formation of the business, and, most importantly, prior to marriage, they will benefit from speaking with a marital and family law attorney about protective planning such as prenuptial or postnuptial agreements. These are valuable vehicles for protecting their separate assets from claims by current or future spouses in the event of a divorce. A properly drafted prenuptial, or postnuptial, agreement will allow them to define certain assets, such as their business, as a separate, non-marital, asset and establish agreed expectations in advance. Prenuptial and postnuptial agreements are treated and interpreted as contracts negotiated at arm's length by the spouses and are enforceable as such. ❖

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