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This article about prenuptial agreements, including an interview with Art Kewin, was published in Profit magazine and on the web at Canadian Business On Line in November 2006.

For more information about retirement and estate planning in blended families call Art.

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[Why you need a prenup](#)

Susanne Ruder

From the November 2006 issue of PROFIT magazine

Helen Wilket has been through the mill. Long hours and hard work at the helm of a series of computer-services firms over the past two decades have translated into big business success but have taken their toll on her personal life in the form of two failed marriages. But it could have been worse. Without a prenup, the 46-year-old entrepreneur might have also lost her business. Now, she has remarried for a third time — but not before shielding her assets. "You work hard for your money," says Wilket (whose name we've changed to protect her privacy). "If you trust the person, great. But unless you're 100% certain that you can see the future, then there's nothing wrong with taking precautions."

Indeed, the statistics suggest you should prepare for the worst: 38% of Canadian marriages end in divorce within 30 years, with the majority of splits coming by Year 3. For entrepreneurs, who are emotionally and financially tied to the companies they build, divorce can hit especially hard. Unless you have a prenuptial agreement or marriage contract (signed post-marriage) that dictates how you will divide your assets in the event of divorce, you risk such landmines as expensive public trials, damaged relations with lenders and investors or, worse, a hostile ex calling the shots as a company shareholder. Far from being a "test" of love or a plan to fail, prenups should be as much a part of doing business as selling a product.

While demand for prenups is rising, fewer than 10% of people getting married actually sign one, says Michael Cochrane, a partner with the Toronto-based law firm of Ricketts Harris LLP, and author of *For Better or For Worse: The Canadian Guide to Marriage Contracts and Cohabitation Agreements*. That's because few couples want to discuss the potential of a breakup. But, he says, "Businesspeople, more than anyone need to be proactive."

Marriage contracts and prenups offer swift, private and less costly resolutions to breakups by helping to avoid litigation. A typical three-day divorce trial can easily cost thousands of dollars, and when a business is involved, the process can take weeks, says Vancouver-based lawyer and financial planner Art Kewin, principle of Integrated Financial and Legal Solutions. Trials risk publicly exposing a company's client lists and financial records, says Kewin, "and the values of illiquid, closely held companies and professional practices are often destroyed in the battle." Plus, unsettled divorces distract business owners from running their companies effectively.

"[A divorce] can cause bankers to call in loans. It can also restrict a company's access to cash to take on a new project," adds Kewin. "A prenup will ease the minds of lenders and investors."

Wilket dodged that bullet, thanks to a marriage contract with her second husband. Just as her marriage was breaking down, her firm was on the hunt for growth capital. "The last thing I wanted to do was go to our potential investors and say, 'By the way, you have a new partner — it's my ex-husband'," she says. "It would have cast a type of uncertainty that would have destroyed our financing." Since then, Wilket has drafted two other contracts: a cohabitation agreement and subsequent prenup with her third husband. She says she was up front and honest with both her husbands about her need for an agreement and, as a result, there was no discord or disagreements.

Wilket's experience underscores why business partners, investors and heirs should investigate marriage contracts, too. "If you don't have an agreement in place, and something happens to any of our marriages, then it could totally disrupt the business," says Wilket. "You start getting people involved who have no interest in helping [the business], but have every interest in extracting their own pound of flesh out of it."

Useful clauses might stipulate that company shares can't be seized or transferred, or that your stock becomes non-voting and must be offered for sale to the company at a specified price in the event of a divorce, suggests Richard Wise managing partner of Wise Blackman LLP, a Montreal-based business valuator and forensic accountancy.

Be sure to define "value" (i.e., fair market value, value to owner or liquidation value) and a valuation date (i.e., separation date versus divorce date). Says Wise: "You want to make sure that whomever interprets the agreement is going to have a very clear understanding of your intentions."

Even with a clause that says business assets are yours and yours alone, uncompensated input from your ex in terms of time, money or effort exposes you to an "unjust enrichment claim" for a portion of company assets, says Cochrane. To avoid this, be sure to pay them fairly for their contribution.

Marriage contracts usually address division of personal as well as business assets, such as investment portfolios, property and matrimonial home(s). You can specify which province's laws you'll abide by for assets left unnamed in your contract. **Provincial legislation is largely the same, with a few notable exceptions, including whether pre-wedding assets and inheritances are subject to division (no in Ontario, yes in B.C.), and what valuation date applies (date of separation in Ontario, versus date of separation, divorce and/or trial in B.C.).**

You might also want to consider "sunset" clauses that retire some or all provisions after children are born or after certain anniversaries, suggests Kewin, plus a dispute resolution mechanism for any disagreements.

Marriage contracts are recognized by all Canadian courts, unless there's just cause for overturning one, such as a failure to disclose all your assets or a deal signed under duress. In the case of a prenup, give yourself time to think it through and ensure it can stand up to legal scrutiny by drafting it well before your wedding. "Six months is a very comfortable time to start getting down to brass tacks," Kewin says. "The more complicated the circumstances, the more lead time you need."

And avoid absolutes. "Some people try to make sure that everything they'll ever have, make or dream about is theirs and theirs alone," says Cochrane. "Those are the ones that the judges are really tempted to throw out."

Draft a marriage contract or cohabitation agreement with a matrimonial lawyer or, in Quebec, a notary. Also helpful are an accountant, business valuator, financial planner and tax-planning expert. You can expect to spend upwards of \$3,500 for a contract involving business interests, says Kewin, adding that it's easy for high-net-worth individuals to spend more than \$25,000 on an agreement. That's "peanuts" compared to a contested divorce, he says. Besides: "A poorly drawn, poorly conceived prenup can often create more problems than it solves."

Wilket paid \$5,500 for her cohabitation agreement and another \$15,000 for her current prenup, which includes an in-depth verification of her assets by an accountant to boost credibility. She likens it to a homeowner's insurance policy: "If the house burns down, I'll get a million dollars. But who really wants to collect?"

A marriage contract not only shields your business, it can help spark a frank and healthy discussion about money. "It can enhance communication, provide clarity about expectations, and can actually create a solid financial foundation to this new relationship," says Kewin. "The prenup is just taking a business-like approach to an economic partnership. And that discussion can actually be done with love and respect."

*The following letter about **false assumptions** was published in Advisor's Edge, January 2003*

Re: Coupling Up, Jennifer McLaughlin, November 2002, p.18.

Congratulations for addressing some important client co-habiting issues relevant to financial advisors. Property division, spousal support and estate planning issues are particularly thorny financial and legal issues for cohabiting couples. My experience as a lawyer in over 2000 matrimonial cases and my Divorce and New Partnership financial planning practice addresses these issues frequently.

Ms. McLaughlin's article noted that property law is provincial jurisdiction. It is EXTREMELY IMPORTANT that advisors and their clients be aware of this when considering national media articles. For example, the time periods for spousal support entitlements vary from province to province, and in BC there is no specific cohabiting time that triggers property entitlements. The six month period noted in the article is a common misconception in BC.

The key piece of information financial advisors need is this: The issue of whether or not a cohabitation agreement is advisable is a strategic issue. Cohabitation agreements are not tactical instruments for general application.

Experienced matrimonial lawyers in BC would not generally say “I urge my clients to enter into a cohabitation agreement” as the Ontario lawyer is quoted, given recent BC Court of Appeal and Supreme Court of Canada decisions.

Older Canadians and their intended beneficiaries are particularly vulnerable to adopting generic information. The consequences of cohabiting, together with the personal and financial cost to redress, if possible, the unintended financial and estate distribution consequences, are typically beyond their common experience.

Once again, thank you for bringing this important issue to advisor’s attention.

Sincerely,

D. Art Kewin, M.A., LL.B., CFP, CDFA