

## **Pre-nuptial Agreement Clauses to Address Estate Planning**

### i. Disclosure and Documentation.

Adequate disclosure is essential for a pre-nuptial agreement to be respected. The following sample provision illustrates how this can be handled:

Husband acknowledges that he owns substantial assets that are described in his Financial Statements attached hereto as Exhibit A. Wife acknowledges that she has seen, examined and discussed with her representatives the said Financial Statements and Husband's \*TAXYEAR Federal Income Tax Returns annexed hereto as Exhibit B. Wife is aware that Husband's \*TAXYEAR tax returns have not yet been prepared, and she hereby waives her right to receive any specific information relating to Husband's \*TAXYEAR income except that he has represented to her that his taxable income in \*TAXYEAR is \*\*DESCRIBE.

### ii. Family Business Interests of Husband Wife.

Protecting a family business interest from divorce is a key objective for many pre-nuptial agreements. These protections should also be coordinated with the estate planning arrangements of all family members. The following sample clauses illustrate how this can be handled in a pre-nuptial agreement:

#### 1. Definitions.

For purposes of this provision, the following definitions shall apply:

- a. \*CORPNAME means Corporation, a \*STATENAME Corporation, with its principal place of business at \*CORPADDRESS, which operates a business \*DESCRIBE BUSINESS (the "Corporation" or "Business").
- b. \*CHILDOWNER's Present Shares" - The shares of \*CORPNAME's stock presently owned by \*CHILDOWNER, including any shares in \*CORPNAME's stock which might be issued to \*CHILDOWNER as a dividend on, in exchange for, or with respect to \*CHILDOWNER's Present Shares.
- c. \*CHILDOWNER's Future Shares" - Any shares in \*CORPNAME which \*CHILDOWNER may acquire in the future by gift or inheritance, or otherwise, including any shares in \*CORPNAME's stock which might be issued to \*CHILDOWNER as a dividend on, in exchange for, or with respect to such shares.
- d. \*CHILDOWNER'S Shares - \*CHILDOWNER's Present Shares and \*CHILDOWNER's Future Shares.
- e. "Board" means the Board of Directors of \*CORPNAME and any successor Board.

Note: If other family members are involved consider how they should be affected. If the objective is to safeguard the business for a particular family, having only some but not all sign agreements will not suffice.

- f. "Minority Shareholders" means \*CHILDOWNER and \*GRANDCHILDNAME (both of whom are children of \*CHILDOWNER) and \*OTHERFAMILYNAME and (all of whom are children of \*RELATIVENAME).

2. Representations.

\*CHILDOWNER represents to \*NEWSCOUSE as follows:

- a. \*CHILDOWNER presently is the owner of \*XNUMBER shares of common stock of \*CORPNAME. (\*CHILDOWNER's Present Shares). There are presently issued and outstanding \*NUMBER shares of common stock of \*CORPNAME, and no shares of any other class of stock. Accordingly, \*CHILDOWNER's Present Shares constitute \*% of \*CORPNAME's issued and outstanding shares. For purposes of this Agreement, various share holdings of shareholders expressed as a percentage, have been rounded to the nearest hundredth of a percent.
- b. \*CHILDOWNER and \*FORMERSPOUSE each own \*NUMBERSHARES shares of common stock in \*CORPNAME, so that their aggregate Shares represent \*PERCENT (\*%) of \*CORPNAME's issued and outstanding shares. The Minority Shareholders other than \*childowner, either individually or by way of holdings under the \*STATENAME Uniform Gifts to Minor's Act are the owners of \*PERCENT (\*%) of \*CORPNAME Shares.
- c. \*CHILDOWNER and \*PARENT each own \*NUMBER shares of common stock in \*CORPNAME, so that their aggregate Shares represent \*PERCENT (\*%) of \*CORPNAME's issued and outstanding shares. The Minority shareholders other than \*CHILDOWNER, either individually or by way of holdings under the \*STATE-NAME Uniform Gifts to Minor's Act are the owners of \*% of \*CORPNAME shares.
- d. \*CHILDOWNER's shares as well as the shares of all other \*CORPNAME shareholders are subject to a "Shareholders Agreement" dated as of \*DATE and amended \*AMENDEDDATE. Said Agreement as so amended is referred to in this Agreement as the "Shareholders' Agreement". the Shareholder's Agreement, among other things, prohibits transfers of \*CORPNAME's shares except under certain circumstances, and provides for the purchase by \*CORPNAME of \*CHILDOWNER's shares under certain circumstances. Included as one of the circumstances, is the death of \*CHILDOWNER.

- e. \*CHILDHOLDER's shares are also the subject matter of an agreement dated as of \*AGREEMENTDATE between all of the Shareholders of \*CORPNAME, including \*CHILDDOWNER, \*FORMERSPOUSE, and \*CORPNAME. That agreement is referred to as the "Shareholder Agreement". Among other things, the Shareholder Agreement provides for the following:
  - i. Restriction of transferability of all of \*CORPNAME's stock owned by a Minority Shareholders, including \*CHILDDOWNER's; and
  - ii. Acquisition of all of the shares of \*CORPNAME, its nominee, or other shareholders of \*CORPNAME, under certain circumstances, which circumstances include the death of a Minority Shareholder.
- f. By virtue of the provisions of the Minority Shareholder Agreement, CHILDDOWNER's shares are not transferable except under certain limited circumstances, and are transferable only to \*PERMISSIBLEENTITY, its nominee or other shareholders of \*CORPNAME. In the event of \*CHILD OWNER's death, or the occurrence of certain other events, \*CHILDDOWNER or his estate, must transfer \*CHILDDOWNER's Shares in accordance with the Shareholders" Agreement and/or the Minority Shareholder Agreement.
- g. By reason of the fact that \*CORPNAME is a closely held corporation, all of whose shares are owned by \*PARENT, \*PARENT, and the Minority Shareholders, no market exists to establish their value. the shareholders' Agreement does not establish a value of any of \*CORPNAME's shares including CHILDDOWNER's except in the event of a sale of shares, triggered by the death of either \*PARENT or \*PARENT. The value of \*CHILDDOWNER's Present Shares, in the event of the death of \*PARENT in accordance with the Shareholders' Agreement is approximately \*DOLLARS. The Minority Shareholder Agreement does not independently establish the value of \*CHILDDOWNER's Shares, It does establish a value of (CHILDDOWNER's Shares which is related to the value of such shares in accordance with the Shareholders' Agreement.
- h. The Board has determined that it would be detrimental to the best interests of \*CORPNAME if spouses of Minority Shareholders had the right to inquire into \*CORPNAME's books and records in the event of matrimonial litigation. the Board has also determined that it would be detrimental to the best interests of \*CORPNAME if the spouses of any Minority Shareholders have the opportunity to acquire any interest in the shares of \*CORPNAME's stock owned by a Minority Shareholder by way

of equitable distribution in the event of matrimonial litigation or otherwise.

- i. As a result of the determination of the Board referred to in Paragraph G of this Section, the Board as required that, as a condition to a Minority Shareholder being permitted to retain his \*CORPNAME shares upon marriage, that the prospective spouse of the minority Shareholder enter into an agreement containing the terms of this Agreement, prior to his/her marriage to the Minority Shareholder.

3. Agreements by \*NEWSPOUSE.

- a. In the event of any matrimonial litigation involving the parties, \*NEWSPOUSE waives any right which she might otherwise have to inquire into the financial affairs and business affairs of \*CORPNAME. This waiver shall be contingent upon receipt of evidence that at the date of commencement of any marital litigation, a binding shareholders' agreement is in full force and effect between \*CORPNAME and all of its shareholders covering the disposition and value of shares held by a minority shareholder.
- b. In the event of any matrimonial litigation between the parties, \*NEWSPOUSE waives any right which she otherwise might assert to seek distribution to her of any of \*CHILDOWNER'S Shares, but such waiver shall in no way affect \*NEWSPOUSE's rights to see equitable distribution of the value of \*CHILDOWNER's shares.
- c. In the event that \*CHILDOWNER or CHILDOWNER's Estate (in the event of his death) becomes obligated to transfer \*CHILDOWNER's Shares, in accordance with the Shareholders' Agreement or the Minority Shareholder Agreement, as either may presently exist, or as the same may subsequently be amended, \*NEWSPOUSE agrees that she will not interfere with, or seek to enjoin in any manner, performance by \*CHILDOWNER or his estate of their respective obligations under either the Shareholders' Agreement or Minority Shareholder Agreement. the provisions of this Article will be effective notwithstanding any rights which \*NEWSPOUSE may have to \*CHILDOWNER's estate, in the event of his death, by way of Will, intestacy, surviving spouse elective share, or otherwise. \*CHILDOWNER agrees that any such rights will not be asserted by her so as to seek an interest in or with respect to \*CHILDOWNER's Shares. \*NEWSPOUSE does not relinquish any such rights with respect to any proceeds to which \*CHILDOWNER's estate will become entitled as the purchase

price of \*CHILDOWNER's Shares, in accordance with the Shareholders' Agreement or Minority Shareholder Agreement.

iii. Pre-Marital, Gift and Other Immune Property, and Certain Other Property.

It is common for a pre-nuptial arrangement to identify and provide that gift and inherited property shall remain separate. Obviously, the preferable approach is to segregate all such assets in trusts and through other mechanisms to demonstrate their immune nature. The following clause is illustrative:

Each party shall, during his or her lifetime, keep and retain sole ownership, interest, title, enjoyment, control and power of disposal of all their respective properties of any kind or nature whatsoever, including any increase or decrease in the value of said property, now owned or hereafter acquired by either party in his or her separate name or in the name of an entity in which that party has an interest, whether said property shall be now owned or acquired subsequent to the execution of this Agreement, free and clear of any interest, right or claim of the other party regardless of whether there has been a contribution, financial or otherwise, made toward the acquisition of any particular asset by the other party.

Each of the parties shall have the absolute and unrestricted right to retain or dispose of such property, the proceeds from the sale thereof. This right shall include the right to dispose of any income or other usufruct therefrom, and any increments, accretions, increases or decreases in value at any time of any assets, whether due to market conditions, or the services, skills or efforts of either party, or a combination of market conditions, the services, skills or efforts of either party ("Increase").

Such property and Increase shall be free from any claim or claims that may be made by the other in the event of death, incapacity, divorce, annulment, separation or rights incidental to the dissolution of the marriage in any jurisdiction including, but not limited to, rights under community property laws, equitable distribution or otherwise or rights of inheritance created by marriage with the same effect as if no marriage had been consummated between them.

iv. Enhanced Value or Change in Form of Pre-Marital Property.

Even if the parties provide that specified assets are immune from equitable distribution, what of the appreciation in those assets? The following clause is illustrative:

The separate assets of Husband and Wife, as set forth in Exhibits A and C, whether real, personal and/or mixed, and any incremental value thereof, accrued subsequent to the execution of this Agreement or to the marriage of the parties or assets traceable to those assets set forth in Exhibits A and C, shall remain free from any and all claims of the other, notwithstanding any appreciation in value, change in form, increase in equity or payments made in reduction of obligations or payments toward maintenance, repairs, taxes or joint efforts of the parties that have enhanced the value of premarital assets, whether such changes were due to market conditions or the services, skills or efforts of either party, or a combination of market conditions, the services, skills or efforts of either party.

v. Inheritances, Transfers or Gifts from Third Parties.

Any property acquired by either party prior to or during the contemplated marriage, by way of gift, inheritance or intra-family, or other transfer from a third party, shall be deemed the separate property of the party acquiring same. This shall include, but not be limited to, any Increase.

vi. Gift Tax Returns.

Even if specified assets, such as gifts received, are immune, issues can arise. If one spouse is wealthier than the other, perhaps both should join in splitting annual gifts to obtain tax benefit for the family unit as a whole. What consequences might this have? Might it create a claim by the spouse joining in the election? The following clauses illustrate how these and related matters might be addressed in a pre-nuptial agreement:

If the parties file a gift tax return and elect gift splitting on such return, the execution of such return shall be binding upon the signing spouse as to the acknowledgement and acceptance of any resulting change in title of the property covered by such gift tax return, regardless of how such property shall otherwise be characterized under this Agreement.

The parties acknowledge that each may include the other as a Crummey power beneficiary in various trusts, and that each may request the other to consent to gift split on a gift tax return in order to increase the availability of annual gift tax exclusion. In no event shall the execution or acknowledgement of a Crummey power notice or the execution of a gift tax return agreeing to split gifts, create any gift tax or other liability for the spouse so cooperating. Further, in the absence of other documentary proof to the contrary, no inference shall be made from the mere execution of a Crummey demand notice or the consent to gift split, beyond the accommodation of the donor party, unless documentary proof otherwise exists.

Any such gifts shall be subject to the Gift Presumption.

vii. Estate Planning and Related Matters.

Estate planning issues must be addressed in any pre-nuptial agreement for it to be complete. The following clauses illustrate some of the points to consider:

Each Party hereby agrees to refrain from any action or proceeding which may tend to void or nullify to any extent, or in any particular, the terms of any Last Will and Testament of the other Party, or of any inter-vivos or testamentary trust, or testamentary substitute, created by the other Party which does not violate the terms of this Agreement. Each Party agrees not to contest or oppose the administration of any inter-vivos or testamentary trust, or the probate of any Last Will and Testament executed by the other Party, unless same violates the terms of this Agreement, or unless there is a misrepresentation under this Agreement.

The naming by one party of the other party as a fiduciary under any estate planning document shall not confer on that other party any rights beyond serving in such capacity.

viii. Inter-Party/Inter-Spousal Gifts.

What of gifts from one spouse to the other? It is common to provide that a gift becomes the property of the donee spouse. This might not always be appropriate. The following clauses are illustrative:

Any gift or other gratuitous transfer between the parties prior to or during the contemplated marriage shall become, following the consummation of such gift, the separate property of the donee party, unless given to a joint or other co-ownership account or title in which even the general laws of property shall apply in determining ownership of such assets.

Such property of the donee, shall remain the separate property of the donee. Such separate donee property shall include, but not be limited to, any property into which such gift property is converted, and any Increase.

FLPs and LLCs are commonly used to hold investment and other assets, including separate assets. It may be advantageous for the couple to gift or sell a percentage of such assets, or even of a real estate property, to secure lack of marketability discounts for estate and gift tax purposes, provide general creditor protection by creating another owner whose consent to a transfer may be required, etc. The pursuit of these valid non-matrimonial planning objectives should not be used in the event of a later divorce to challenge a greater portion of the property so given. Consider the following clause:

In the event either party gifts the other party, or sells for fair value or otherwise to the other party, an interest in a business or entity which otherwise was almost entirely comprised of separate property, such gift or sale, or participation in management by the donee or purchasing spouse, shall not taint the character of the non-gift or non-sold interests as other than separate property ("Gift Presumption").