



*Essential Operating Agreement Provisions
for Spouse Owned Businesses
in North Carolina*

Thank you for downloading our Guide for Spouse-owned business planning. Included you will find template language for the following provisions:

- 1. Buy-Sell Agreement**
- 2. Non-Solicitation Provision**
- 3. Pre- or Post-nuptial Provision**

The first two are for inclusion in your Operating Agreement. The third should be included in a pre- or post-nuptial agreement, depending on if you are already married or not.

Thank you for downloading our Resource Guide for Spouse-Owned Businesses
ESSENTIAL OPERATING AGREEMENT PROVISIONS.
We've included template language for each of the three provisions below.

A sample buy-sell provision in an operating agreement might look like this:

Buy-Sell Procedure. The following buy-sell procedure shall apply as long as, and only where there are two (2) Members who each own fifty percent (50%) of the interest in the Company.

(a) **Notice.** Each Member shall have the right to initiate the compulsory buy-sell procedure by giving a notice to the other Member. The notice shall contain both a written offer to sell to the other member the offering Member's interest in the Company and an offer to purchase from the other Member the other Member's interest in the Company at a price and on the terms that shall be determined under the provisions of this Agreement.

(b) **Irrevocability Period.** The offer to purchase or sell shall be irrevocable for a period of one-hundred twenty (120) days during which time the non-offering Member may accept either the offer to sell or the offer to purchase.

(c) **Non-exercise of the Option.** If the non-offering Member fails to accept either the option to purchase or sell within one-hundred twenty (120) days from the written offer, then the offering Member shall have the right, within fifteen (15) days after the expiration of the one-hundred and twenty (120) day period, to purchase the interest of the non-offering Member at a price and on the terms as provided under the provisions of this Agreement. If the offering Member fails to exercise the right to buy within the time specified, the Company shall be dissolved, wound up, and liquidated.

(d) **Calculation of Purchase Price.** The purchase price shall be the fair market value of the Company as of the last day of the calendar month immediately prior to the date of the buy-sell notice divided by two (2), plus interest at the Prime rate then charged by the Company's banking depository from the valuation date through the closing date. The purchase price shall be reduced by any distributions with respect to the interest being acquired from the valuation date through the closing date. The fair market value of the Company shall be determined as follows:

(i) The Members shall attempt in good faith to agree on the fair market value of the Company. If they have been unable to agree in writing after 30 days from the exercise of one of the options to purchase granted herein, then the selling member may give notice to commence the following appraisal process to determine the fair market value of the Company.

(ii) Either Member may initiate an appraisal process to determine the fair market value of the Company by sending notice to the other Member providing the name and address of the unrelated third-party appraiser selected by the Member invoking the appraisal process. Any appraiser selected shall be qualified with respect to determining the fair market value of the company. The Member who did not invoke the appraisal process shall

have ten (10) days following notice of the selection of the first appraiser to select a second appraiser. If a second appraiser is not selected, then the fair market value shall be the value set forth in the first appraiser's report.

(iii) If a second appraiser is selected, then the two appraisers shall consult in an effort to reach an agreement as to the fair market value of the company. If the two appraisers shall agree in writing as to the fair market value within forty-five (45) days following the appointment of the second appraiser, then the agreed fair market value shall determine the purchase price.

(iv) If the two appraisers are unable to agree as to the fair market value, the two appraisers shall prepare their separate reports and submit them to the Members within sixty (60) days of the appointment of the second appraiser. If the higher estimate of fair market value exceeds the lower estimate of fair market value by 20% or less, then the fair market value of the Company shall be determined by averaging the estimates of fair market value calculated by the two appraisers.

(v) If the higher estimate of fair market value exceeds the lower estimate of fair market value by more than 20% and the Members still cannot agree as to a fair market value for the Company, then within ten days after the submission of both appraisal reports, either Member may send written notice calling for a third appraiser. If neither member sends written notice calling for a third appraiser, then the fair market value of the Company shall be determined by averaging the estimates of fair market value calculated by the two appraisers.

(vi) If either Member sends a notice calling for a third appraisal, then within thirty (30) days of the submission of both appraisal reports, the two previously selected appraisers shall select a third appraiser to determine the fair market value of the Company. The third appraiser shall not be apprised by any party of the results of the first two appraisals. Within sixty (60) days of the appointment of the third appraiser, the third appraiser shall submit his report and the fair market value of the Company shall be determined by the average of the two appraisals that are closest to each other.

Cost of Appraisal Process. The cost of the appraisal process shall be borne equally by both Members. Except that, in the event a Member calls for a third appraiser and the fair market value of the Company as determined by this process is less favorable to that Member than if the fair market value had been determined by averaging the estimates of fair market value determined by the first two appraisers, then the *entire* cost of the appraisal process, including the first two appraisals, shall be borne by the Member calling for a third appraiser.

A sample non-solicitation provision in an operating agreement might look like this:

Protective Covenants. It is the intention of the Company and its Members that no Member shall interfere with the operation of the Company, its clients, or its personnel. Therefore, both during the term of this Agreement and for a period of two (2) years following the date upon which a Member's interest in the Company is purchased, the Member agrees that he or she will not, directly or indirectly, as a consultant, owner, investor or otherwise:

- (i) solicit business from any clients of the Company.
- (ii) encourage or solicit any employee of the Company to leave the employment of the Company.
- (iii) make disparaging remarks to any person about the Company or about any shareholder or other employee of the Company.
- (iv) solicit referrals from any referral source of the Company.
- (v) take any action that would interfere with or disturb the Company's relationship with any of its clients or referral sources.



A sample provision in a postnuptial agreement might look like this:

Separate Property. Each party agrees that their respective ownership interests in the Company and any active and passive appreciation in the value of these ownership interests shall be and shall remain their separate property in the event of a separation and/or divorce and shall not be subject to any claims and rights of one party against the other for equitable distribution under North Carolina General Statutes § 50-20 et seq., as the same may be amended from time to time. In the event of a separation and/or divorce, the disposition of the parties' respective ownership interests in the Company shall be determined by the operating agreements of the Company.

Collaborative Divorce Process. Each party agrees that should either party desire to pursue separation and/or divorce then they will both retain attorneys experienced in collaborative divorce proceedings and shall enter into a Collaborative Law Agreement and use Collaborative Law Procedures, as these terms are defined by North Carolina General Statutes § 50-71, to attempt resolution in a marital settlement agreement prior to the filing of any action in court.

Collaborative divorce is a method of divorcing that encourages cooperation instead of confrontation. In this way, couples can divorce with dignity and ensure respect, integrity, and kindness in the process.

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Mark is a Board Certified Specialist in Family Law and began focusing his law practice on the collaborative divorce method over a decade ago. As a pioneer in adopting this healthier legal approach to divorce, Mark is among the most experienced collaborative divorce attorneys in the country.



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Kerry is a Board Certified Specialist in Family Law who went to law school to become an expert at helping resolve disputes peacefully. Since graduating in the top 10% of her law school class at UNC, Kerry has guided hundreds of individuals through the difficult legal and emotional process of divorce.