



With all my worldly goods I thee endow...

A Director's Guide to Divorce



Introduction

Whilst the breakdown of any marriage is sad and distressing for all parties involved, the situation becomes particularly complicated where one or both halves of the couple have business interests.

There have been a series of high-profile divorces over recent years which have led to the UK gathering a reputation as the 'divorce capital of the world' as a number of spouses have succeeded in obtaining a significant share of their partner's business fortune, despite having had no apparent direct involvement in the business.

Celebrity and high-value divorces make great news, but the media stories tend to focus on the more salacious and headline-grabbing aspects of the relationship breakdown - rather than the legal principles behind the financial settlement.

To assist company directors or partners who are contemplating separation or divorce, we have produced this straight-talking guide in 'Question & Answer' format to address the key issues that are commonly raised by our business clients.

Throughout this guide we use the term divorce for editorial simplicity, however the same principles apply in the case of the dissolution of civil partnerships.

We hope that you will find this helpful, and would welcome any comments or suggestions on issues that we might include in a future edition.

Fiona Craig
Beswicks Solicitors

Note to Journalists

You are welcome to quote from any section of this report, provided that it is attributed to 'Fiona Craig, Matrimonial Partner, Beswicks Solicitors'.

Please note that case law may have changed since this report was first published in September 2010.

To check the current situation, Fiona can be contacted on 01782 205 000 or email fiona.craig@beswicks.com.



Will getting divorced destroy my business?

For the business owner separating from their partner, one worry often dominates all others - will a divorce destroy the business? Reassuringly the answer is, “almost certainly not.” This could only happen where there is no realistic alternative to selling the business in order to achieve a fair result.

Some years ago, a reported case referred to the family business as “the goose which laid the golden egg” and indicated that “the goose may well have to go to market for sale...”.

However, the divorce courts are very reluctant indeed to interfere with successful businesses, as in many cases the business is the source of income not only for the business owner but possibly also for the children and even the former spouse.

Case notes: A realistic payment period

One case featured a family business and in its judgment the court gave priority to the survival of the company. It relied heavily on accounting evidence to conclude that the husband could arrange to release funds from the company to pay to the wife, but not by one payment. The payment was spread over two years, which the court considered to be “a realistic period to make payment so that the company is not put at risk.” The court concluded it was in nobody’s interest for the company to be sold.



What will it cost me?

What the court tries to achieve is a fair share of the assets, having regard to many factors such as age, health, dependent children and length of marriage. It also seeks to ensure a reasonable spread of those assets which are risky and those which are “copper bottomed”.

Going to court to decide how the family assets should be divided should be the last resort, as there are a number of options open to each party to try to achieve a negotiated settlement. A business owner who wishes to protect his or her business should try to achieve a sensible deal through negotiation, given the benefit of certainty in the outcome.

If the divorce court is required to intervene, then certain principles apply which differ for capital and income. In broad terms, the starting point for division of capital wealth is equality and the court will only depart from this in exceptional cases. Accepted reasons for exceptions are:

- Inherited wealth
- Pre-marital wealth
- Liquidity (copper bottomed assets v risk laden assets)
- A short marriage.

What the divorce court will not do is to discriminate between the role of breadwinner and homemaker. Arguments about the contribution of either party, financially or in kind, tend to be met with short shrift.

As for the business, the usual approach will be to offset the value against other non-business assets. This may mean giving the spouse the house or a large proportion of personal savings, or a share of a private pension. It is not an exact science.

The yardstick of equality does not apply to the division of income. In terms of income based claims, these tend to be driven by two factors. On the one hand the court will consider affordability, given an assessment of the payer’s income from all sources and an ability to pay. On the other hand, there is a generous interpretation of the spouse’s reasonable requirements, having regard to the cost of living and the standard of living enjoyed during the marriage.



Is it possible to exclude the business assets from the divorce?

It is not possible to ring fence any business assets. All assets in the marriage are ‘disclosable’ and will need to be valued as part of the settlement negotiations.

Case notes: Contempt of court

The case of Mr Young is an entertaining illustration of the difficulty a wealthy spouse can get into if he tries to hoodwink the court. Mr Young reputed to have a fortune of £400 million, spent many months trying to persuade the court that he had lost his fortune and also trying to avoid producing proper documentation to prove it.

He made headlines when it was reported that he had been admitted to hospital under the Mental Health Act and, according to his counsel, “the fact that it is an NHS hospital shows that it is a genuine breakdown”! Ultimately he found himself in contempt of court and facing a great deal of trouble with the judge who made final orders, the breach of which could lead to imprisonment.

Our business has been built up over several generations - will this be taken into account?

Yes - the courts will look primarily at the ‘fruits of the marriage’. This involves assessing the value added to the business since the marriage, taking account of the history and goodwill within the business before the marriage. Pre-marital wealth is a good reason to depart from the principle of equality.

A similar approach is taken with inherited assets, as you can ask the court to treat them as materially different to those assets which were built up through the joint endeavours of the marriage.



Will my divorce have an impact on fellow directors?

It would be grossly unfair to fellow directors, shareholders or partners if a business had to be wound up in order to fund a divorce settlement. So the court will do its utmost to achieve a fair settlement without killing or even wounding the 'golden goose'.

The court will look at any shareholder agreement or partnership agreement. This will be taken at face value - unless it appears to be a sham, having been amended recently to transfer assets away from the divorcing shareholder or partner. Any movement of assets in the years immediately prior to separation may be presumed to be an attempt to defeat the other person's claim and can be set aside.

Unfortunately, we often come across businesses without a valid shareholder agreement and this can result in additional problems - our commercial team can advise you if this is the case in your business.

I am the only shareholder, does this change things?

Theoretically a limited company is separate and distinct from the individual shareholder and it is the shareholder who is getting divorced, not the company.

The court will not use this legal nicety as a means of allowing the shareholder to hide behind the business if it is clear that the company is really the shareholder's alter ego. In real terms, if the shareholder has access to and controls all the assets of the business, then the court is likely to take these into account and treat them as assets of the marriage.



My spouse has had no involvement in the business whatsoever - why should they benefit now?

The courts will not discriminate between the role of breadwinner and homemaker. Arguments about the contribution of either party tend to be met with short shrift.

Case notes: An exceptional contribution

The case of Cowan v Cowan was the first case which indicated that the court could depart from the premise of 'an equal division of assets' in a case where one spouse had made an exceptional contribution to the accumulation of family wealth.

Mr Cowan's particular contribution arose because he had identified and exploited the possibilities of technology which facilitated the production of extra strong polythene. Hence the case is recognised by family lawyers as the "bin bag case". In Mr Cowan's case, he was able to persuade the court that his contribution was so exceptional (the term used was "stellar") as to justify a significant departure from an equal division of the assets.

Subsequently many entrepreneurs have tried to persuade the courts that they have made "stellar" contributions, however very few have succeeded.

Case notes: Seed of Genius

Media entrepreneur Sir Martin Sorrell did succeed in persuading the court that he possessed the "seed of genius" which made the difference between being a successful businessman and an exceptionally talented individual. In that case, the court commented that it was not easy to define what constituted a "stellar" contribution but: "rather like the elephant it is not difficult to spot when you come across it". The court was satisfied that it had spotted the elephant in Sir Martin's case and awarded him significantly more than 50% of the available assets.

Case notes: Recognising the support of the home maker

More recently John Charman tried to persuade the Court of Appeal that he had single-handedly built up the family fortune in excess of £131 million. However the Court did not agree and, recognising the support provided by the wife during the long marriage, awarded Mrs Charman £48 million. This was the largest contested ancillary relief award made in England, although well under 50% of the total assets.



My spouse works for the company, but is not an active director, what are the implications?

Often a director's spouse will be on the payroll, even as a director or shareholder, but without having any active involvement in the business.

It is important that you are not in too much of a hurry to dismiss them. As an employee of the company, they are protected by employment legislation and an unfair dismissal could land your business in front of a costly employment tribunal.

Further if they are a shareholder you might inadvertently trigger a shareholder dispute which will only add to your difficulties and could lead to significant problems for your business.

Removing their independent income will mean that you then have to pay them this same money as spousal maintenance out of your own taxed income. It can be significantly more tax-efficient to pay them a salary and hope that they might choose to move jobs in the future.

My spouse and I are equal partners in our business, how do we proceed?

In some rare circumstances, we have seen couples who have managed to maintain an amicable working relationship and the business has remained intact.

More often, one partner will seek to buy-out the other one or occasionally the couple decide to sell the business outright and start afresh.

In these instances, our corporate finance team works closely with the matrimonial team to obtain the best sale value for the divorcing couple.

What will happen to my pension, which is substantial compared to that of my spouse?

Pensions are also a disclosable asset and can be shared in divorce proceedings. In long marriages, they will normally be treated as a joint asset. On the positive side, sharing the pension is one way of achieving a 'clean break' settlement.

Sharing of pensions can be very complex, except where the parties have purchased a SIPP which owns the business premises. It is quite simple to share this sort of pension and this arrangement does not have a damaging effect on the company.



How long will I have to keep paying maintenance?

You will need to pay until your partner remarries, dies or the court discharges the maintenance order obligation.

Most entrepreneurs would prefer to achieve a clean break. This is beneficial financially for the paying party and emotionally on both sides.

Unless you can negotiate a clean break agreement, then the court can order you to pay spousal maintenance. This will typically be where there has been a longer marriage and a significant discrepancy in income has arisen.

The partner receiving maintenance is generally unable to work and achieve the same level of income because they lack experience and capacity, usually due to childcare commitments.

A clean break agreement would enable you to end any spousal maintenance payments at the time of the divorce or at a later pre-determined time, such as if you are unable to work or when your pension kicks in.

To achieve the clean break, you would usually need to hand over a greater share of the capital at the outset, so this will be influenced by your views on the future prospects of the business.

How long is a 'long' marriage?

The length of a marriage is a critical factor in determining the settlement.

In a childless marriage of less than five years, the spouse cannot expect a huge share of their partners assets.

There is no definition, but any marriage of more than ten years carries significant financial obligations



Once agreed, is this arrangement set in stone?

Generally the arrangement for the capital sum is fixed but this is not the case for maintenance payments.

It is very difficult to set aside an agreement, except if your spouse discovers that you have been hiding assets then the agreement could be overturned and they would seek to renegotiate it based upon the facts.

Spousal maintenance can always be re-negotiated depending on a change of circumstances, up or down. This highlights the benefits of a clean break. Should your business become significantly more profitable in the future then your spouse could attempt to re-negotiate improved payments.

Case notes: A fall in capital value

Under the original capital settlement, Mr Myerson agreed to pay his wife 43% of the marital assets, partly in instalments of cash, whilst he kept all the shares in his company.

However when the value of his shareholding plummeted during the recession, a year after getting divorced, Mr Myerson tried to claim that his previously agreed divorce settlement was unfair.

The court ruled that variations in capital values or share portfolios are not enough to overturn a capital settlement, although Mr Myerson can seek to vary the instalments.



What steps can I take to protect the business assets?

Business owners often expect their lawyer to suggest ways to conceal business assets and may already have moved assets to make the business look less profitable than it is.

In most cases such steps are futile. Even the most complicated paper (or paperless) trail can be followed if the spouse's lawyer is tenacious enough.

The legal position is clear. In divorce proceedings both parties must make full and frank disclosure of their financial circumstances. The duty is far reaching. It is not enough to answer whatever questions are asked in the hope that some assets will be overlooked. You are expected to voluntarily disclose every asset you own or control, not just personal assets but also all business and even trust interests and assets overseas as well as the UK.

Case notes: Charman v Charman

The case of Charman v Charman, mentioned earlier, also demonstrates the futility of trying to hide behind trusts or complex commercial arrangements designed to conceal the true extent of your wealth.

A trust set up for the benefit of Mr Charman was treated as if it was an asset in his sole name, and his argument that it was "dynastic" was given short shrift.

The court took the pragmatic approach and decided that the key consideration was that the assets in the trust were available to Mr Charman on demand and therefore it made no material difference that they were not in his sole name.



I suspect my spouse has been opening my post or reading emails

Whilst opening personal mail is not lawful and would be frowned on by the courts, realistically there is little you can do.

Inevitably when parties have shared a home, there may be sensitive documents lying around and freely available to the other spouse. In such cases it is legitimate for spouses to see and copy such documents, but law obliges them to tell you that this has happened.

Case notes: Breach of privacy

The celebrity chef Marco Pierre White, recently accused his wife of a breach of privacy because she had copied some documents for use in the divorce proceedings. However the case was thrown out of court on the basis that it is common practice among divorcing spouses and their lawyers to obtain confidential information, although documents must not be obtained “impermissibly”.

In practical terms, it is sensible to use a separate correspondence address and keep it secret as soon as you foresee a problem. Remember to change the password on your computer!



I have been thinking about selling the business, what impact would this have?

Selling the business is a long term strategic decision that will rest on many factors aside from your divorce, including finding the right buyer at the right price.

However, it is likely to be more advantageous if you can postpone the sale until after the divorce. Once you have sold up and the money is in the bank, dividing this sum will be a relatively clear cut exercise.

Prior to sale, the value of the business is likely to be more conservative as trading cannot be guaranteed and market factors are taken into account.

The stress of getting divorced is also likely to have an impact on your personal involvement in the business and it may be advisable to sort out your marriage first before tackling another major transaction.

Should I spend, spend, spend?

The courts will look at your conduct and if it appears that you have frittered away your assets then this will be taken into account.

Similarly if you push the business into debt, then the court will look back at your trading information to decide whether it is a bona fide business decision.



Our marriage has been in trouble for a while and I have already sheltered a number of assets, which my spouse is not aware of.

The business owner who tries to conceal assets risks a lot. Your spouse will almost certainly know more about your business than you imagine. Your family's lifestyle will offer clues. Then there is the paper and electronic record. All businesses have accounts in some form. The divorce courts can order production of these and any other relevant documents. In extreme cases they can also compel other people to produce documents.

A failure to make full and frank disclosure has two potential consequences. Firstly the court can impose costs penalties. Secondly the court may conclude that the business owner has still more, as yet, undisclosed assets.

Is it possible to put assets into trust for my children and prevent my spouse having access?

Unless you have discussed this previously and agreed this investment strategy with your spouse then it is likely to be seen as an attempt to put the assets out of reach.

Are overseas assets taken into account?

Overseas assets are indeed taken into account when valuing assets, but any order made that involves the transfer of overseas assets can be difficult to enforce due to different jurisdictions. There are also complications at the point of valuation due to exchange rate fluctuations and the tax regime in each country will need to be taken into account.

Case notes: Alter ego's and sham companies

Paulin v Paulin demonstrates that the court is sceptical about arrangements involving "sham" company and off-shore arrangements. In this case the husband tried to argue that the sale proceeds of the matrimonial home, which was owned by his company, could not be distributed to him and Mrs Paulin because the company had a judgment against it, in favour of a company registered in the Isle of Man. However forensic accounting investigation showed that the Isle of Man company was itself the "alter ego" of Mr Paulin and so his argument fell on stony ground.



We do have a pre-nuptial agreement, but I have heard that these are not worth the paper they are written on.

A pre-nuptial agreement will be viewed by the courts as an important indication as to what was in your minds when you married and is likely to influence their decision. The more detailed the agreement is, the more weight the court will place on it and if it is properly set out, it is more likely to be held binding.

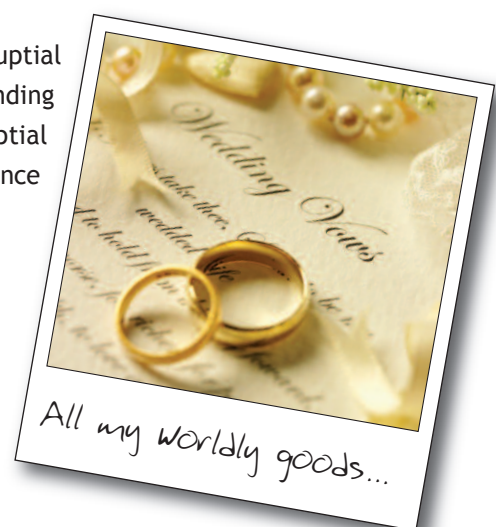
Before entering into the agreement, you will have had to disclose your assets fully, and have each taken independent legal advice. You need to set out, not only that you both wanted to enter into the agreement, but why; for example protecting an inheritance or business interests or to cover the future needs of adult children. It is important that every foreseen eventuality was covered; otherwise it is very easy to set the agreement aside and for one party to ask the court to disregard it.

Case notes: Pre-nuptial agreements

In the case of Crossley v Crossley, both had been married several times before, and their marriage was short and childless. When Mrs Crossley, described as a 'serial divorcee' tried to make a financial claim after their separation Mr Crossley attempted to get her claim struck out, relying on a pre-nuptial agreement which they had both signed, without duress, before they married. The court's view was that there was no reason why the agreement should be set aside - both parties had clearly understood exactly what they were signing up to at the time.

In Radmacher v Radmacher, the husband who was the financially weaker party, argued that he had not fully understood the extent of his wife's fortune at the time they married. He then claimed that he needed financial support from his wife, despite agreeing before the marriage that he would have no claim against her. In this case the court's view was that both parties had signed the pre-nuptial agreement "with their eyes open" and it would not be right to ignore the agreement completely given that the husband was a man of commerce and aware of the effect of the contract.

By taking a collaborative approach to drawing up a pre-nuptial agreement you can greatly improve its chance of withstanding a challenge. If you are considering entering a pre-nuptial agreement, then it is important to talk about this well in advance and to take legal advice.



I understand that the media now has free access to the divorce courts, how can we protect our privacy?

In actual fact, unless you are a well known celebrity, then you are unlikely to be of great interest to the media. However, you can make an application to the court for the press to be excluded if there are commercial sensitivities that will be aired. The court will decide on the balance of public interests.

What not to do when getting divorced...

You may think that you have a brilliant idea for concealing your assets, but unfortunately divorce lawyers are likely to have seen it before - and we all compare notes!

Classic mistakes include:

- Taking valuable pictures off the walls
- Admitting yourself to hospital with amnesia
- Physically hiding your assets
- Giving the jewellery away
- Persuading co-directors not to pay bonuses for the next six months
- Paying a bonus to a third party
- Putting a huge sum into your pension
- Making large uncharacteristic charitable donations
- Taking up gambling
- Removing a laptop or memory stick
- Hacking into a computer
- Diverting your spouses post
- Advising your spouse not to waste money on consulting a solicitor - guaranteed to set our alarm bells ringing!



How can Beswicks help?

Breaking up is hard and you need a solicitor who will fight for your best interests, in terms of your family, property and business.

Our experienced solicitors provide support and guidance, explaining the procedures and your options throughout the legal process.

Not all relationship breakdowns need to be acrimonious and we offer the option of collaborative law where the couple and team of lawyers work together to find a solution which is acceptable to both parties. Throughout the case the partners commit to negotiating constructively, avoiding inflammatory language and, most importantly, putting the interests of the children first and ensuring the continued success of the business.

The Beswicks team has particular expertise in advising business owners and high net worth individuals who will be concerned to protect their assets and business interests during a relationship breakdown.

We work closely with a number of pension experts, actuaries, accountants and other professionals to secure the best outcome for you.





Fiona is a highly regarded family lawyer who has specialised in divorce and relationship breakdown for over 15 years. She worked in Cheshire before joining Beswicks in 2002 and now is the partner leading on matrimonial issues. Recognised for her abilities in handling cases involving significant financial assets and for her resolute approach she has acted for many high net worth individuals in business, the sports world and the public sector.

Fiona has significant experience of negotiating financial settlements, including:

- pension earmarking and sharing
- safeguarding assets
- collaborative negotiations
- working with experts in valuing businesses, pensions and other assets
- analysing tax issues.

Within legal circles Fiona is described as a persuasive and effective advocate, well-prepared and knowledgeable, who strives to achieve fair and reasonable settlements. Responsive and reliable, her clients value her approachable and sympathetic style and practical, non-legalistic approach.

As one of the first accredited specialists with Resolution (formerly the Solicitors Family Law Association), she has helped lead the introduction of Collaborative Family Law in North Staffordshire.

Her specialisms include:

- ancillary relief - financial settlements in high value complex cases; pension and property settlements
- divorce and dissolution
- separation agreements
- pre-nuptial agreements
- living together agreements
- civil partnerships
- cohabitation disputes
- Official Solicitor appointments
- residence and contact disputes.

Fiona has been a member of Resolution - First for Family Law for over ten years and is active at both local and national level. She is a Resolution accredited specialist in Advocacy - Financial and Advocacy - Children.

In collaborative law Fiona represents her local Staffordshire practice group within Resolution nationally, and is a member of the International Academy of Collaborative Practitioners.

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