

Marriage, divorce and the *family* business:

'Prevention is better than cure'

No one wants to contemplate, let alone experience, the breakdown and end of a relationship - be this a business relationship, living together as a couple or married. However, it is a sad fact of life that relationships do end. It is prudent to agree in the best of times what will happen in the worst of times, when communication may be much more difficult, emotions running high, and things being said and done in the heat of the moment which can have long term repercussions.

There are many steps you can take to protect yourself. This article by Consultant Lauren Greenhalgh focuses on what can be done to protect a family business (including a husband and wife or cohabitee Partnership) as much as possible, in the event of their relationship ending.

What is a *family* business?

A 'family' business is often owned and managed by family members (by blood or marriage). Family businesses might also have non-family owners and management. However, family members may often be involved in the operations of the business in some capacity and, in smaller companies at least, typically one or more family member holds a senior position in the business management structure. Family businesses often involve spouses or extended family as employees; spouses or cohabiting couples may be in Partnership with one another.

What seems a good idea in good times, and may have tax benefits when the relationship is healthy, can become problematic if the relationship breaks down.

Will an interest in a *family* business be taken into account within Divorce proceedings?

Yes. All assets of a marriage, including assets held by parties before marriage, established during marriage and even acquired after separation or divorce, are taken into consideration.

The value of 'all' assets (held in a party's sole name, or jointly with a spouse/cohabitee or a third party), including a minority interest, must be quantified and accounted for. Then it is a question of how those assets are to be divided between the parties who are divorcing to achieve a fair and reasonable outcome. If an agreement cannot be reached, then a Court will ultimately decide. The Family Court has wide reaching powers. They can order a transfer of all or part of a spouse's interest in a business to the other spouse and ultimately order the sale of a business to raise capital to meet the financial needs of the parties.

The Court considers all of the circumstances of a case and will try to protect a family business where possible, particularly where the livelihood of extended family members may be turned upside down if the foundations of the family business are rocked or where the business provides a party to the divorce with an income stream which meets one or both parties' immediate and long term financial needs. The Court may allow a spouse who set up or ran a business to continue doing so where there are other assets available to meet the other spouse's needs, and sufficient assets available to allow a fair and reasonable settlement without disruption to the business.

Difficulties arise when a husband and wife are in business together:

Is it feasible for one to continue alone following divorce?

Is there sufficient capital to release the other?

Will both have enough capital & income to meet their independent needs moving forwards?

When a family business was established before the marriage and one party brought their interest in the business into the marriage, even greater difficulties are faced. In situations such as this the extended family, or at least those family members involved with the business, are consequently drawn into the divorce issues when the business is an intrinsic part of the issues in dispute. They may want no part in the dispute; the family probably just want to continue business as usual. But suddenly the family business is the focus of a dispute and this is at the very least upsetting and potentially hugely disruptive.

Sometimes family members have to be joined as parties to court proceedings so that they have a voice in the proceedings. This will add to the distress, complexity and expense of the divorce proceedings.

How can a *family* business be protected on divorce?

To limit exposure, protect the family business or partnership at the earliest opportunity.

'Prevention is better than cure!'

For couples wishing to set up business together and who later marry, or if where is already an established family business in contemplation of marriage, it would be sensible to consider the following:

1. A Pre-Nuptial and Post-Nuptial Agreement to ring-fence a family business from divorce proceedings. Although such agreements are not definitively binding in this country at present, *provided* both parties have had the benefit of full financial disclosure, independent legal advice and are entering into the agreement freely and in good time before the wedding day (with pre-nuptial agreements) these 'contracts' are extremely influential and are more likely than not to be upheld.

2. A Partnership Agreement recording the parties' obligations and expectations in the event of a separation and/or divorce.

3. A Shareholder's Agreement and Articles of Association setting out the shareholding structure, proposed method of valuation and distribution of any majority or minority shareholding in the event of separation or divorce. For instance, a family may record that shares are to only be held by certain family members, and not their spouses, and in the event of shareholdings being sold they are bought back by the business and/or offered first to certain family members. Whilst the Court has ultimate discretion to make Orders in relation to shareholdings, the terms of a Shareholders Agreement, Articles of Association and Memorandum can be greatly persuasive.

4. A Trust to limit control and tax liability rather than transferring shares outright to family members or spouses.

The existence of a Trust will not entirely remove any interest in a business from the scrutiny of the Court but the above agreements clearly detailing intentions will be of valuable evidence of intentions if a dispute subsequently arises and is likely to hold meaningful weight.

Divorce proceedings can have a huge impact on a family business and it is advisable to take protective steps and focus on damage limitation from the outset.

This is a snapshot of the issues which will arise in these situations. It is essential that you take bespoke legal advice on your own particular issues and circumstances. No two matters are the same. Advice will differ dependent upon your particular circumstances and the issues and make up of your family business. Advice is empowering. It allows you to make informed decisions.

**This article is not a substitute for bespoke advice.
It merely flags up some issues you may want to consider.**