

Family Law Factsheets

Divorce and your business

The courts in England and Wales used to leave family businesses out of the equation when totting up the assets of failed marriages - but no longer. Now they will try to keep the business in the family if it generates enough income - in the shape of salary and dividends - to keep two households in reasonable comfort. But if it doesn't - or if for some reason that arrangement is unacceptable to the parties - the business will be included amongst the assets to be divided between them.

Equal shares

In a series of cases the courts have ruled that, where one partner in a marriage is involved in building up a business, and the other in creating and maintaining a home, the home-maker's support may be equivalent or nearly equivalent in value to the creation of the business.

Even where the judges are not prepared to go that far, they are likely to value the home-maker's efforts much more highly than his (or, more likely, her) partner will do. And in that case, even if the home-maker has had no involvement with the business at all, the net result of a divorce may be to force its sale.

There are circumstances in which this is more likely:

- where the marriage has been a long one. On average, divorce in England and Wales now takes place after 11 years of matrimony, so anything over that would be considered long. However, home-makers of less than five years' standing have been given big shares of the joint assets when other factors (see below) have been involved;
- where the home-maker has sacrificed his or her own career, to support the business-builder;
- where there are children, or other family responsibilities, which have fallen on the home-maker;
- where one or both of the parties to the marriage has suffered severe illness, redundancy, bankruptcy or other catastrophic event(s) in which they relied particularly heavily on the support of their partner.

There are also circumstances in which it is less likely:

- where the business has little value - either because it produces little income now and little prospect of income in the future; or because the income it produces or promises is entirely dependent on the determination, skill or genius of the business-builder, and has no value without his (or her) involvement;
- where the marriage has been of short duration, and there has been no significant change in the circumstances of either party during its course; or
- in certain circumstances, where both parties have freely agreed beforehand on the disposition of the assets in the event of a break-up - ie where there is a pre-nuptial agreement.

Pre-nuptials have no legal standing in England and Wales, but the courts are likely to take them into account providing:

- both parties freely entered into them;
- each party received independent legal advice;
- both parties were honest and open about their assets;
- there is a reliable record of what those assets were;
- the agreement was 'fair';
- the marriage has been of relatively short duration; and
- there have been no unforeseen changes in circumstances since.

This obviously leaves scope for considerable argument (what, for instance, is 'fair', and 'fair' in what circumstances?), so even if

TOLLERS • BUSINESS LEGAL • TOLLERS • PRIVATE CLIENT

www.tollers.co.uk

This document was created on 06 May 2010

While great care is taken when compiling these materials, no responsibility is accepted for their content or accuracy. They are for general guidelines only and action should not be taken without obtaining specific advice.

both parties have agreed to a pre-nuptial, recourse to the courts should be avoided if at all possible. However, if there are circumstances in which it cannot be avoided, it will pay to be prepared.

Getting it right

Establish the value of the assets being brought into the marriage.

- Where they are substantial, get them professionally valued.
- If you are an employer, that includes your business.
- If you are a one-man band and expect to stay that way, don't bother. What you gain on the roundabout you would lose on the swings.

You will have to accept that any valuation becomes progressively less relevant, the longer the marriage continues. But it might be useful if it rapidly becomes evident that this marriage is a very bad move.

While you are arranging this valuation, try to reach agreement on how the business will be valued thereafter.

- This is particularly important if your potential spouse is a shareholder or senior employee of the business.
- But agreement will remove a source of argument, whatever your spouse does.

Whether or not you have reached such an agreement, be honest with your spouse thereafter about the value of the business.

- Do not exaggerate it - for example, in an attempt to be reassuring.
- If the marriage subsequently fails, your spouse will see the 'real' value as evidence of your duplicitous attempts to short-change.

Try to build up assets outside the business during the course of the marriage.

- If the worst comes to the worst, they can be sold to release capital, rather than selling the business.

Consider holding a substantial part of the business's assets in cash or other realisable forms.

- If necessary they can be released to fund payment of a capital sum to the spouse.
- This is a tax-efficient way of creating such a fund.
- But if it ever has to be used, there could be significant tax liabilities.
- And its use might impact on the activities of the business, and would reduce its value.

Seek advice.

- There are other, though less straightforward, alternatives.

Getting it wrong

Any attempt to lie about your assets could be very expensive, not only in terms of your wealth, but also in terms of your reputation.

- The courts are experienced in spotting such attempts at deception, and take a hard line on them.
- One Yorkshire businessman was jailed for 18 months for serial deceptions.
- Your solicitor, as an officer of the court, could not be party to such a deception.