

How far can a judge dictate the sharing of assets when a company is involved?

NICHOLAS FAIRBANK AND EMMA SPRUCE, BARRISTERS, 4 PAPER BUILDINGS, 10/11/2020

SHARE  

 Add to favourites  Send Feedback

Determining what is a 'fair' distribution of a couple's property can be a complicated business. The court, in very broad terms, will seek to achieve equality between the parties with respect to the matrimonial property i.e. those assets acquired or built up during the marriage, unless there is good reason to depart from equality, for example one party requiring more of those assets to meet their future needs.

Property for the purposes of financial remedy proceedings includes land, shares in public or private companies, partnership assets, business stock, choses in action (e.g. cheques), money, jewellery, chattels – and so on. In simple terms nothing of value which is within the control of either party should be excluded. Nor are the court's powers under the Matrimonial Causes Act 1973 restricted to circumstances where the parties' assets are held in the parties' own names.

Courts are particularly careful when companies are involved. Judges have the power to order the sale of a company or transfer it into one spouse's sole name. Where there is a family company which has both an attributable capital value as well as a sustainable income from which the parties benefit, a sale of that company will often be the least attractive option because it is most likely that the parties will continue to need to derive an income from the company in the future.

A 'straightforward' option in this scenario might be for the court to make an order that will 'off-set' one party's interest in the company – for example if the Wife is to retain the company in her name, the Husband may derive a larger proportion other parts of the matrimonial pot.

This might be thought of as one spouse 'buying out' the other. For this to be achievable, the parties should co-operate with obtaining a fair and realistic valuation of the company. If they do not co-operate, the court will order whatever valuation is required.

'Wrapped up' assets

Complications are inevitable when a spouse wishes to claim against an asset which appears to be in the hands of a third party, including companies.

When it comes to trusts – even those that are held overseas -the determination of this type of dispute is completely different from the usual discretionary exercise and is approached on the same legal basis as if it were being determined in the Chancery Court.

There will be a two-stage approach to determining such an application: first, to determine whether trust assets are resources in which a spouse has any present or potential interest.

Second – if they do have such an interest – what (if any) legitimate expectation they have of having those resources available to them (and to what extent) in the foreseeable future.

As for assets held by companies, a person and a company in which that person holds shares are separate legal entities. The court can make orders in respect of the shares in that company but far less readily, if at all, in respect of underlying assets owned by the company.

There are very limited exceptions to this rule, the main one being that a party and not the company is in fact the true beneficial owner of the underlying asset itself.

Even then, proving such ownership can be difficult and expensive, involving not just the parties but the relevant company itself and any court order eventually made will have to be very carefully worded.

Being practical

Divorce can be a very expensive business, especially without the right advice. It is therefore vital to take advice when considering options for divorce. It may also be prudent to take advice before marriage, perhaps specifically seeking advice on the value of entering into a pre-nuptial agreement. There is rarely a 'quick fix' to a divorce, parties can look to reduce the hassle, cost and delay of protracted proceedings by taking the following steps:

- (1) Take legal advice early;
- (2) Co-operate with providing your spouse and the court with a clear picture of your financial landscape; and
- (3) Consider alternatives to formal court proceedings which offer a myriad of benefits such as mediation, arbitration or a 'One Couple One Lawyer' approach such as the service provided by 'The Divorce Surgery'.