

How a 'Start-Up' might 'End-Up' Upon Divorce in England

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The last thing an entrepreneur has is time!

Therefore, if an issue as personally and emotionally exhausting as family breakdown should arise the potential for it to cause a harmful distraction from work needs to be managed carefully.

Part I of this article explains the sorts of scenarios where entrepreneurs may require assistance from a family lawyer and how a business asset is treated in England upon divorce; and

Part II explains how a family lawyer can use their entrepreneur clients' skills to help them resolve family law issues efficiently.

Although the terms 'marriage' and 'spouses' are used in this article these terms apply equally to civil partnerships and civil partners (whether same sex or heterosexual) as the legal rights of civil partners in England are akin to those of married couples. Cohabitants rights in England are very different and are not dealt with here.

Part I

When do Entrepreneurs need a Family Lawyer?

Whenever there is any issue which impacts your personal relationship. This might include:

- Before you marry
- Before you start a business or company
- If you are considering inviting a spouse or partner to join you in your business
- If you are considering relocating abroad
- If you are experiencing difficulties with your relationship or marriage

Division of assets upon divorce in England

Many people believe the business or company assets, particularly if the business begun before they met their spouses and their spouses do not work in the business, are excluded from the division of assets upon divorce. Under English family law, this is not so. (The treatment of such assets can be different in other countries).

Often a business or company is the sole or primary generator of a family's income and assets acquired during the marriage. Under English law businesses represent a marital asset just like any home, investment or other asset acquired during the marriage.

How would a business be valued?

Therefore, upon divorce whenever one or both spouses are shareholders or owners of a business, the assets of that entity must be valued and considered along with all other assets each spouse holds or has a beneficial interest in, anywhere in the world. All their assets are initially valued as at the date of the resolution of their finances.

If the business is in the process of being sold, the sale value can be applied. If not, an independent valuer is usually instructed jointly by both spouses to provide a valuation report which the parties rely upon to determine the value of their shares, equity, and the underlying assets in the business. Valuers also commonly consider the potential income which can be generated from the company. The joint valuer is selected by both spouses and the letter of instruction to the valuer is also agreed between the parties (or determined by a third party if these aspects cannot be agreed).

The valuer might ask very far-reaching questions about the company. It is not uncommon in English financial proceedings pursuant to a divorce for the disclosure to be extensive e.g., to include board minutes of meetings or queries about why particular decisions were taken at a particular time.

Whilst there is scope to question certain assumptions made by a jointly instructed independent expert, an independent valuation is usually the value a court in England would use to determine the value of the business for divorce purposes.

Would the whole business be shared with a spouse?

Once the value of all assets of a marriage have been determined, consideration will be given to when those assets were introduced to the marriage and whether any were gifted, inherited, or acquired before the spouses either cohabited or separated. The remaining assets constitute the marital assets available for division upon divorce.

After a long marriage (usually around 10 years) or if the couple have children, the starting point for division of assets will be a 50:50 split of the marital assets plus child maintenance. If this division produces enough money to meet both spouses' capital and income needs this will establish a 'clean break' between the parties.

However, if 50% of the marital assets is insufficient to meet the weaker financial spouse's needs, non-marital assets can be transferred or paid to the weaker financial spouse. Spousal maintenance can also be payable to them. If spousal maintenance is payable, the potential for the variation of spousal maintenance remains. So, there would be no 'clean break' in this case until all financial obligations to the financially weaker spouse end and or they are financially independent of the paying party.

For shorter marriages, or where there are no children, the financial rights of the weaker financial party may be less burdensome.

Would the business have to be sold?

It is usual for the business owner to want to retain their interest in their business and if that business also represents the main generator of income, no court wants to 'kill the goose that lays the golden egg'.

Once the quantum of assets needed to settle the matter is determined and, provided there are other capital resources available (including perhaps potential borrowings) it is usually possible to structure a deal to avoid shares or equity being sold or transferred to the other spouse. This approach known as 'offsetting' would mean the non-shareholder or owner would receive a greater share of the more liquid assets of the marriage but no longer have an interest in the business itself.

Owing to the fact business assets represent a greater risk than liquid assets, a discount of the 'offsetting' capital payment to the other spouse can often be negotiated. However, in England the scope for any reduction for liquidity will still depend upon the financial needs of the financially weaker spouse being met.

Sometimes, where there are insufficient other assets to 'offset' the value of the shares or equity owed to the weaker financial spouse, it might be necessary for some shares or equity to be realised or transferred to the other spouse. However, each family's situation and approach will be unique to their individual circumstances. The timing associated with those actions are also often open for negotiation (subject to the financial needs of the financially weaker spouse).

The timing of divorce is rarely predictable. The potential or perceived risks to a business' structure and its future arising from a major shareholder or owner's divorce can be considerable. If the business is undergoing due diligence for additional investment or for a potential sale, news of a divorce can prove to be of real concern to investors or buyers.

When spouses consider how to structure any financial settlement on divorce, the cooperation of fellow directors, partners or shareholders also need to be considered and managed carefully. It might be impossible to transfer or sell the shares to a spouse as issues like this can be unpalatable if the spousal relationship is acrimonious.

What if a spouse has a connection to another country?

If either spouse has a connection to another country (by residence, domicile, or nationality, including dual citizenship), it would be advisable before any discussions take place with a spouse - or anyone else - to consult a family lawyer who is a specialist in international matters. This is because it has to be ascertained if an option exists to start the divorce (and any related financial claims) in another country (where the treatment of assets might be more beneficial to a particular spouse). It can be vitally important which spouse issues proceedings first in time in the other relevant country. Sadly, it is therefore best to secure your favoured jurisdiction so far as possible first, before informing the other spouse.

What else can be done to help safeguard business interests?

The various agreements and charters listed below may be very useful tools for seeking to 'ring fence' or otherwise manage how business assets are dealt with in the event of divorce. Whilst they are not legally binding in England, they can hold significant weight provided they are entered into freely, with full knowledge/disclosure of all relevant issues and with independent legal advice. It shows intent which is an important factor. Further these agreements and charters are also likely to be upheld if the weaker financial spouse's financial needs (both capital and income) can be met without the 'ring fenced' assets.

They might also be binding in other countries (where applicable).

- Pre-marital agreements
- Post-marital agreements
- Family Charters
- Shareholders agreements

Part II

How family lawyers can use an entrepreneur's skills to help resolve family law matters

A good family lawyer will adapt their approach to cases based on their client's needs and preferences. For entrepreneurs, their time is precious. Therefore, in considering how best to approach cases involving entrepreneurs it is helpful to consider some of the following skill sets:

Delegation

In other aspects of entrepreneur's working lives delegation and use of specialists is encouraged and often necessary to facilitate the space, creativity and adaptability required of an entrepreneur. Family lawyers are excellent negotiators and can be that specialist to deal with family law matters.

Tactics

Having worked with many entrepreneurs with the breakdown of their personal relationships (whether they are running

established public companies, family businesses or start-ups,) it is hugely important to adopt a strategic, well-structured, and focused approach to their family law issues from the start of the retainer. Where there are also children issues to resolve, the tactics of the financial and children matters also need to be integrated.

Communication

Concise, instructive, and punctual communication is usually favoured by entrepreneurs and so emails from family lawyers containing succinct requests and analysis of any law are usually favoured.

Management

The concept and deployment of a carefully managed 'To Do List' is important. Even family lawyers manage their days in this way.

Decision-making

In the main, entrepreneurs instinctively make decisions quickly. Although this quality can be a considerable attribute in the corporate world, it is not the way to determine issues relating to the breakdown of a marriage. Hasty decisions will generally be impulsive and can lead to making an offer that is too generous and beyond what a court considers appropriate.

Commercialism

Entrepreneur's business skills lend themselves to understanding the importance of proactive and preventative measures.

In family law, these could include pre-marital or post-marital agreements, shareholders' agreements, or family charters. Such agreements can determine how a company's shares or partnership's equity are to be distributed in the event of personal separation or divorce. These agreements can also be particularly helpful if an entrepreneur is about to marry or if spouses/romantic partners are about to set up businesses together or are planning to work together in an existing business. Whilst these are not legally binding agreements, they are contracts and can help manage expectations as well as provide a relevant insight of the intention of the spouses/romantic partners in the event of a relationship breakdown.

Problem-solving

If a former spouse is in agreement, disputes can always be determined outside the court process, by engaging in alternative dispute resolution 'ADR' (mediation, arbitration) by early neutral evaluation, or in the form of a roundtable meeting often led by a solicitor. A good specialist family lawyer will discuss these options at the start of the process. All couples are different so for some it will work very well indeed, for others it will not, but at least the options are there for a couple to consider. Everything does not always have to be decided by a court of law.

Timing

When advising an entrepreneur, it is also important to understand the current performance stage and expectations of the business over the coming years. Such knowledge is crucial to the advice given by a family lawyer.

Cost Benefit Analysis

Entrepreneurs are often adept at weighing up benefits of a settlement. A balance must be struck between the costs of continuing to litigate and the time, energy and emotional cost to themselves and the families if going into the court arena.

Use of Technology

On-boarding programs like Settify (an interactive tool, tailored to only ask questions relevant to your situation) which iFLG helped develop and introduce to England, can also save time when collating the information necessary to provide initial advice. This reduces the time required at an initial meeting. The use of a remote meetings should be considered as it will save considerable time and cost.

International Considerations

Just as taxes can be variable depending where specific business processes are performed, in family law personal connections to other countries can be hugely important in assessing whether England is the only or best country in which to commence divorce and financial proceedings. Early assessment of the facts is therefore crucial (and without any prior notice to your spouse). If you have international connections either through nationality or residence, a specialist international family lawyer should be instructed very early in any separation (even possibly if the relationship is under strain). Gathering information is crucial in situations like this. Plan ahead or rue the day when the letter from a lawyer appointed by your spouse arrives.

Use of other Professional Advisers

Just as specialists are commonly introduced to solve specific problems in a business, tax advisers, accountants and company law specialists are often needed in cases involving significant company or partnership assets. Organisations like Beacon Gainer can provide 'plug and go' services linking you quickly to various trusted relevant advisers to save you time doing so.

Well-being

Increasingly entrepreneurs are appreciating the added value to their companies and business of the well-being of their staff and colleagues. Although the division of assets upon divorce could be considered as largely a commercial exercise, the human cost of divorce and its impact on family life can be huge. Personal wellbeing must therefore always be foremost in the mind of the divorcing or separating couple.

Lucy has been a member of Beacon Gainer for 6 years. This article is written to accompany her podcast with Beacon Gainer called 'Grit, Grace and Good Humour: Entrepreneurship' which can be heard from 11 March 2021.

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