

AFTER HAPPILY EVER AFTER, WHO GETS THE GOLDEN EGGS?

by Advocate Victoria Myerson

Family businesses have been referred to in divorce cases as “the goose which lays the golden eggs” (*N v N (Financial Provision: Sale of Company)* [2001] 2 FLR 69) and although the court cannot directly order the sale of a company to fund a party’s settlement, such a sacrifice can be the intended and inevitable consequence of the orders made. In what circumstances will the court send the goose to market and what other challenges do company interests often attract?

INTO THE WOODS: THE MURKY REALMS OF VALUATIONS

The value of a business interest, whether as capital or simply an income stream, will be taken into account by the court when considering how to divide the assets fairly. Ascertaining the capital value of a company can be an expensive process fraught with difficulty due to the numerous different but equally subjective ways in which its value can be calculated. However where the company in question is a small family business which provides the main income stream and as such is unlikely to be sold, courts are not always willing to permit a formal valuation to be undertaken.

WOLVES IN GRANDMA’S CLOTHING

It is not unusual for other interested parties to claim an interest in the business once divorce proceedings have been issued, such as the son who declares that his father’s shares are in fact held on trust for him (*Shield v Shield* [2014] EWHC 23) or the wife who asserts that her husband is the true beneficial owner of assets which other family members claim to own (*TL v ML and Others (Ancillary Relief: Claim Against Assets of Extended Family)* [2005] EWHC 2860 (Fam)). Such issues add a further layer of complexity that requires dextrous disentanglement.

THE FAIREST SETTLEMENT OF THEM ALL

A variety of different factors are taken into account in determining the most appropriate way of dividing the assets on divorce but in the vast majority of cases the most important factor is the need of each party for accommodation and income. The aim in every case is to ensure that both parties obtain a fair settlement which provides for their needs.

In an ideal world there will be sufficient realisable capital in the matrimonial pot to provide for a clean break and immediate financial independence from each other. In reality, this is often not possible and there is persuasive (but not binding) English authority which supports the proposition that in the context of divorce proceedings, a business interest should not be sold simply to facilitate a clean break. Although there is no guarantee that a family business will be protected on divorce, the goose will only go to market where it is necessary and fair in all the circumstances of the case.

While the court cannot order the sale of the company itself, it can of course order the sale or transfer of shares. Problems can arise where third parties are also shareholders and objections are raised to the proposed transfer. However, unless liquidity is a serious problem and there is no other way to provide a settlement, an order for the sale of shares to a third party is usually a last resort.

Where husband and wife are both shareholders in the business the court will often order the transfer of shares to one party. But where neither wants to transfer their shareholding and the state of their relationship does not preclude it, it can be appropriate for them to continue to retain their shareholdings, at least for a time. This is otherwise known as "Wells sharing" following the case of *Wells v Wells* [2002] 2 FLR 97) and ensures that both parties share in the rewards (and the risks) of the company's future performance. This may be preferable to the business going off to market and can help ensure that each party receives a fair division of the risk laden and illiquid assets as well as those which are copper bottomed.

PROTECT YOUR GOOSE

Where settlement cannot be achieved by negotiation between the parties, the court will determine how the assets should be divided and the option of the parties deciding for themselves will be lost. Various forms of pre-emptive action are available however. One method is by nuptial agreement (i.e. an agreement between the husband and wife either before or after the marriage) providing for one party's shares to be sold back to the company on divorce, thereby preventing the business from being fragmented and ensuring the enjoyment of those golden eggs for many years to come.

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