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Family Focus

Prevention rather than cure

The Law Commission has just published its Report on "Matrimonial Property, Needs and Agreements".

It is recommended that the meaning of "financial needs" is clarified in Guidance so that judicial decision making is consistent.

- Further research is to be undertaken to assess whether it is possible to come up with a method to assess and calculate financial needs.
- There is recognition that not all cases go to Court and therefore Guidance on how to divide assets and income would be helpful to couples who choose to mediate, collaborate or sort things out themselves.
- The Law Commission agrees that the objective of achieving independence i.e. a Clean Break is right.
- They have also taken the step of preparing draft legislation in relation to enforceable Qualifying Nuptial Agreements that would not be subject to scrutiny by the Court provided needs are met.

The proposed requirements for Qualifying Nuptial Agreements –

- It is a Deed and includes a statement that the Parties understand that they are signing a Qualifying Nuptial Agreement that will partially remove the Court's discretion to make financial orders.
- It is signed more than 28 days before the wedding.
- Both Parties receive legal advice.
- Financial/material information is disclosed.
- There is no evidence of duress, undue influence or misrepresentation.

The Law Commission also indicated that a Pre-Nup should not be seen as the end of the process. Life events happen during a marriage and those events have consequences. Children, illness, accident, disability, lottery windfalls, success or failure of businesses are all events that affect people's needs. In order to ensure continued enforceability – any Nuptial Agreement should be reviewed in the context of those events thereby creating a Post Nuptial Agreement which can also be a Qualifying Nuptial Agreement.

Provided the Government enacts the draft Bill as law, and provided the qualifying requirements and each Party's needs are met, in the future – couples will be able to agree – both in advance and after their marriage.

- Not to share assets.
- To limit their financial claims in the event of divorce.

And the Court will not be able to interfere with this. Watch this space!

Sheridan Ball

Family Arbitration

Family Arbitration is an alternative quasi-judicial process leading to a decision that is as binding as any Court Order. Decisions are made in accordance with the law of England and Wales.

What are the advantages of Family Arbitration?

- It is quick.
- It is private.
- The Parties select their Arbitrator.
- In conjunction with the Arbitrator, the Parties agree how their arbitration process will proceed.
- The process – including disclosure – can be tailored to the issues in dispute rather than following the Court pro forma format.
- The Arbitration process can be a paper exercise without the need for any face to face hearings.
- The added expense of an arbitrator's fees has to be weighed against convenience and privacy for the Parties.
- Available for financial disputes.

Please contact Sheridan Ball MCIArb on 01482 337361 to discuss any queries concerning Family Arbitration.

Also in this issue

Enforcement of court orders

The most commonly used enforcement method in family proceedings is an Application for Committal for Contempt of Court. The following is a whistle stop tour of committal decisions during 2013.

In ***McNulty v McNulty*** *[2013] EW Misc 30 (CC)*, the Wife was granted an ex parte Freezing Order endorsed with a Penal Notice relating to approximately £70,000 worth of inheritance monies received by the Husband from his late mother's estate – this was the only significant asset in the case.

Through his solicitors the Husband had signed an Undertaking not to dispose of the inheritance for six months but he then dis-instructed his solicitors. As a litigant in person he continued to engage in the Court process and filed a Form E with disclosure but he then failed to attend the First Appointment Court hearing.

It was then discovered that the Husband had removed all but £4,000 of the inheritance and had taken steps to ensure that he could not be contacted. He sent his Wife an email in which he said he had no bank account, no address and described himself as a "*complete and utter bastard*".

Mr McNulty was given a 4 month prison sentence with the proviso that if he purged the contempt i.e. he repaid the money then this may lead to a reduced sentence.

In the case of ***Thursfield v Thursfield*** *[2013] EWCA Civ. 840*, the Husband breached a freezing order and the Wife applied to commit him to prison. The Husband failed to attend two committal hearings. At the second hearing the Judge sentenced him to 24 months imprisonment.

The Husband appealed on the basis that he considered the sentence was manifestly excessive but his appeal was dismissed. The Court considered the Husband's repeated non-attendance at Court and general contempt for the proceedings deserved this sentence.

Contrast **Thursfield** with ***Constantinides v Constantinides*** *[2013] EWHC 3688* where the Husband was committed to prison for non-payment of maintenance. The arrears were approximately £78,000 – the Husband had never made any payments under a Maintenance Order made in 2004.

The Wife had been proactive in her attempts to enforce the Order including an Attachment of Earnings Order and issuing a Statutory Demand.

At first instance the Judge found there was evidence of the Husband's wilful refusal and culpable neglect and that he was engaged in a long running and deliberate attempt to frustrate the Order. The Husband was committed to prison for six weeks.

He appealed and his appeal was allowed. The Committal Order was discharged because the Appeal Judge was not sure if the Husband had the means to pay. The Judge said, "*It is one thing when the Court is deciding whether or not to make a Maintenance Order, or the level of that Maintenance Order, to take into account current or likely earning capacity but it is a very different matter to imprison a person for not maximising his earning capacity*".

Sheridan Ball

Divorce – the corporate view

The corporate team at Rollits is often asked to advise in divorce cases. All areas of corporate law (except perhaps work on flotations – although even a flotation was relevant in a recently-reported divorce case) arise in divorces, including:

1. Corporate governance
Being in a difficult personal position does not lessen the duties of good faith, etc that a director owes to his company.

2. Employment law
An estranged spouse employed in the family business has employment rights like anyone else. Acting hastily to sack him/her might result in an employment tribunal claim.

3. Removal of spouses as a director
It is possible for a controlling shareholder to remove his/her spouse from the position of director. The procedure is prescribed by company law and is quite involved. It is worth bearing in mind that removal as a director can prejudice the availability of entrepreneurs' relief (ER) from capital gains tax (CGT) if the spouse owns shares in the family company. If his/her shares are sold as part of the divorce settlement the extra CGT paid as a result of ER not being available might not be in anyone's interest.

4. Share sales
If a spouse owns shares in a family company then these can be sold as part of the divorce arrangements. This could involve the family company purchasing its own shares from the estranged spouse: a so-called share buyback. Share buybacks must follow a procedure set out in company law and should never be undertaken without professional legal advice. The spouse selling his/her shares at a gain might not pay CGT on the share

The disclosure disaster of Young & Young

On 30 January 2014 the Court finally dealt with the long running case of *Young v Young*. It was described by the Judge "*as complicated a financial remedies case as has been dealt with before these courts*" – so what went wrong?

Mr & Mrs Young were married for 17 years and separated in 2006. By the time their case came before the Court there had been 6 years of litigation. The central issue in the case was the level of Mr Young's wealth. He accepted early on that any assets should be shared equally but claimed to be insolvent, owing over £28 million. Mrs Young claimed that her former husband was worth "*many hundreds of millions*" or at one stage "*a few billion at least*".

Mr Young, relying upon bankruptcy proceedings brought by the Inland Revenue, alleged that in 2006 his business empire had 'imploded' and had left him virtually penniless. He then declined to participate in the financial proceedings and failed to give even the most basic disclosure to support his assertion that he had nothing. Mrs Young decided to chase the money.

Mrs Young instructed her team of advisors, including leading counsel, financial advisers and forensic accountants to undertake a full examination of her husband's financial position. At the conclusion of the 20 day final hearing Mrs Young was only able to establish Mr Young's financial position as it was in 2006: she was unable to trace the money after that.

Mr Young was unwilling to account for how his wealth had dissipated. He could have produced a paper trail showing how his debt had mounted up and how his wealth had been lost but he refused to do so. He failed to comply with a variety of court orders for disclosure and when Mrs Young enforced those orders in the course of the proceedings Mr Young was given and served a 6 month term of imprisonment for contempt of court. But he still failed to comply with his disclosure obligations.

Mrs Young filed 65 separate applications to secure orders for disclosure against third party sources like the Bank and the Inland Revenue and companies that Mr Young had previously traded with. Her forensic team were able to reconstruct what had been happening with Mr Young's business but only up to 2006. Due to Mr Young's conduct and Mrs Young's inability to establish his financial position after 2006 the Court drew adverse inferences against him and concluded that he was hiding from the Court wealth that he had had back in 2006. The judge assessed his 2006 wealth at £45 million and ordered Mrs Young is to receive £20 million by way of a lump sum payment.

The Judge was highly critical of both Mr & Mrs Young. Mrs Young had made so many applications against her husband in the course of proceedings that the Judge noted any more would have been an abuse of process. Mr Young's complete refusal to provide disclosure was so great that ultimately he was ordered to pay part of Mrs Young's which totalled £6.4m. Mrs Young is now left with the problem of attempting to enforce her lump sum order as she

cannot point to where the money is. Whether Mr Young has hidden his wealth or not he will never be able to enjoy it knowing that Mrs Young will be monitoring his every move. I suspect we have not heard the end of their story.

The Rollits family team can guide clients through the difficulties of the disclosure process so that you can avoid being the next Mr and Mrs Young.

Karen Myles

sale because of the spouse exemption. That is only available if the couple were living together in the tax year (6 April to 5 April the following year) in which the transfer of the asset takes place. The earlier in the tax year one separates, the more time one has to transfer assets free of CGT.

5. Demergers
These involve splitting assets or businesses held in a single company into two companies. For example, a company whose shares are held by the wife might own two hotels. If might be equitable for each spouse to own a hotel each. That can be achieved efficiently by using favourable tax reliefs that exist to facilitate demergers. Rollits is able to advise on ways to plan around the stamp taxes pitfalls frequently encountered in demergers.

6. The "corporate veil"
Many a party has found it frustrating that assets are not held directly by their spouse, in particular that they are within a company. Shares in a family company might be the most valuable asset held by either spouse. The value of those shares derives from the assets held by the company. Family Courts have until recently sought to "look through" the corporate structure in order to bring about an equitable sharing of assets held (directly and indirectly) by the divorcing couple. A recent Supreme Court case, which binds all Courts, says that is no longer acceptable. It is only in very particular circumstances that the Court can pierce the corporate veil and directly order a company to transfer assets to a party to divorce proceedings.

Divorce cases can lead to complex corporate transactions. Those who advise in this area should not be afraid to bring all their experience and creativity to bear.

Nasim Sharf

Prest v Petrodel

What is the position when a Husband and Wife separate and the majority or all the assets are held in company structures?

The Family Courts ability to attack a spouse who holds their wealth in company structures comes from the Matrimonial Causes Act 1973 and the overriding objective of the Family Courts is to achieve fairness.

A transfer of shares is a common way to satisfy matrimonial claims but it will often be impractical or undesirable for an ex-spouse to be a shareholder. If liquidity is not an issue a lump sum payment to the other spouse will be used so the business can continue without any interference or fear of future minority shareholder litigation.

If a spouse is legally or beneficially entitled to an asset it can be transferred by a property adjustment order. But what happens if the asset is a company asset? Can the "corporate veil" be pierced using such an order?

Historically, the Family Courts have pursued a practice in relation to company assets in an attempt to achieve fairness, by allowing assets to be subject to Property Adjustment Orders, in cases where one spouse has control of a company – when the Husbands control is so complete that it can be said he is the company's alter ego.

It wasn't until 2013 that the competing views of the Family Courts on the one hand looking to achieve fairness and the Commercial Courts on the other hand wanting to uphold the principle that a Company must be treated as a separate legal entity were tested in the case of *Prest v Petrodel Resources Limited*.

The first Judge awarded Mrs Prest a lump sum of £17.5 million and as almost all the wealth was held in a series of companies also decided how the lump sum should be discharged. He concentrated on the Petrodel group of companies which owned several London properties including the matrimonial home and ordered those properties to be transferred to Mrs Prest as Mr Prest was the 'effective owner'.

This decision was overturned in the Court of Appeal which stated that the Family Court had no jurisdiction to make such Orders. Yes, the Husband did control the Companies but it was the Companies and not the Husband that owned the Properties. Also, despite Mr Prest acting dishonesty in the family proceedings – refusing to provide proper disclosure and comply with Court orders – he did not act improperly in respect of the Companies and the corporate veil could not be pierced this way.

Mrs Prest appealed and won even though the Supreme Court agreed with the company arguments on many points. The Family Court should not be allowed to order the transfer of property by one party to the other if the property was not theirs to transfer.

What the Supreme Court also looked at however was the historical pattern of the acquisition of the properties and established that the beneficial ownership was still the husbands despite him not being the legal owner. The Supreme Court considered that the Companies held the properties on trust for Mr Prest and therefore they could be transferred to Mrs Prest.

Whether assets which are legally vested in a company are in fact still beneficially owned by its controller is always highly fact specific. The Court must find evidence to indicate the intention of the transferor and the source of the monies for purchase will also be important. In finding intention the Courts can, where appropriate, draw adverse inferences against the parties either in respect of their failure to give or call evidence or by their failure to make proper disclosure within the proceedings. Mr Prest's failure to engage and provide proper disclosure cost him dearly.

How does this affect us on a day to day basis?

- Spouses may become more inclined to make allegations that properties vested in a Company are beneficially owned by the other spouse.
- More Companies may become parties to matrimonial litigation.
- Shareholders, lenders, insolvency practitioners and auditors may have to look more rigorously at Corporate Property portfolios to establish whether there are competing claims from a spouse.
- The need for a proper paper trail and full disclosure will be vital in order not to be at the mercy of the Court in its readiness to apply presumptions about ownership.

More than ever consideration of the matrimonial situation in Corporate transactions should be encouraged.

Alison Benson

Information

If you have any queries on any issues raised in this newsletter, or any family matters in general please contact Sheridan Ball on 01482 337361.

This newsletter is for the use of clients and will be supplied to others on request. It is for general guidance only. It provides useful information in a concise form. Action should not be taken without obtaining specific advice. We hope you have found this newsletter useful.

If, however, you do not wish to receive further mailings from us, please write to Pat Coyle, Rollits, Wilberforce Court, High Street, Hull, HU1 1YJ.

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Hull Office
Wilberforce Court, High Street,
Hull HU1 1YJ
Tel +44 (0)1482 323239

York Office
Rowntree Wharf, Navigation Road,
York YO1 9WE
Tel +44 (0)1904 625790

www.rollits.com