

Business owners – preparing your case

There are few things worse for a business than the owner getting divorced.

The business itself comes under intense scrutiny – how much is it worth, how much income can it produce, should it be producing more? The business may be valued, and that process in itself involves some high stakes, since the outcome will be highly influential in court.

Other people may have different ideas about your business that conflict with your own plans. It is often the case that judges will look at liquidity within a business and the possibility of that being paid out to meet housing or other claims. This can be particularly trying if that liquidity was going to be the “seed-corn” for future business development.

This is a very highly specialised area of law. More than any other, it is important to get the right legal advice.

Early on, you and your solicitor must get a firm grip on this aspect of your case. That way, you stand a better chance of directing the way the case goes, rather than merely reacting to what the court is asking, or what your spouse is demanding.

Explain how your business works

Your business will be different to any other. It will help everybody involved in the case to have a clear understanding of what it is and how it works.

The process of financial disclosure demands very specific information to be supplied. The Form E asks for the last two years' accounts and your projected income.

However, it is better to “flesh out” the basic information so that the court can understand your take on the business. After all, you know more about the business than anybody else.

Here are some lines of inquiry for you to think about:

- Who set the business up and when – is it something you created and, if so, with whom?
- If your spouse has made a contribution, perhaps in the early days, then say so. Usually this will be exaggerated or over-emphasised by your spouse, and it will put it more into context if you have stated it plainly – neither exaggerating it, nor understating it.
- Who else is involved in your business? Courts have a radically different approach if the business is owned by one person – who is getting divorced – as against by a lot of business partners. A court, for example, will have a different approach to liquidity, if taking money out of the business would damage other people's livelihoods.
- What is the position about selling shares? The memorandum and articles of association may place limitations on selling shares to third parties rather than to the founding members of the business.
- What are the main financial benefits you draw from the business? It makes a difference as to whether the business is capital heavy and income light (perhaps a farming business) as against capital light and income heavy (perhaps a consultancy business). The courts might approach matters differently if there are assets that could be sold without damaging the business. Alternatively, the courts may think more in terms of maintenance orders if it is a professional practice, or some other form of income-producing business with little underlying capital.
- Do a SWOT analysis – in other words describe the strengths of the business, the weaknesses of the business, the opportunities that you have as a business, and the threats that face your business. It helps the court to know what the underlying market conditions are, though it is unwise

to exaggerate the problems too much. The courts will naturally expect the blackest picture to be painted and will pay less attention if the threats are more apparent than real.

What are your plans for the business?

The courts are always keen to know why a business is structured in the way it is and what plans the couple had for it during the marriage. This can be very influential.

The court may not wish to disrupt the plans that you had for the business merely because the owner is divorcing. It helps therefore to share with the court what your plans are and what you are trying to achieve.

- Is yours a “develop to sell” business? Some businesses develop particular products – perhaps software – which are developed with a view to taking to the market as soon as possible. The approach of the court may be to make orders so that such developments can be tracked, so your spouse can come back and share the profits of sale later on.
- Do you intend to sell your business when you retire? Again, you may have a longer term view before selling the business. No doubt the purchasers of the business will want you to stay in it for a while, so the divorce settlement may be structured around that. Alternatively, it may be too long to wait, or it may be unfair to allow an ex-spouse to benefit from many years of post-divorce business development.
- Is the business going to be passed to the next generation? Again, if this is agreed – that the business can be passed on to your children in due course – then a very different approach may be adopted both by the courts and by your spouse.

Litigate or collaborate?

Court battles about businesses can be massively expensive as well as debilitating in terms of time and effort.

Much depends upon whether a compromise can be reached and whether you are both sufficiently flexible about the outcome. If you are defending your business from any intrusion – so you are not prepared to share the capital or other benefits – then there may be no alternative to going through the courts.

But if you are prepared to sit round a table and think about all options, and do so openly and flexibly, then court proceedings may be avoided.

We have set out in the section called [approaches](#) how collaborative law works. For businesses, this can be particularly helpful in avoiding a head to head collision and massive legal fall-out.