Working Hard for the Money: Matrimonial Property Issues for the Self-Employed

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Business Issues in Family Law Matters

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WORKING HARD FOR YOUR MONEY:
MATRIMONIAL PROPERTY ISSUES FOR THE SELF-EMPLOYED

In Alberta we have observed significant changes in our provincial economy over the past 5 years and with these economic changes, where Albertans are working and earning money to support themselves has also shifted. Across the province we are seeing the start of a movement where individuals are moving away from working in traditional employee/employer workplaces and towards opportunities that allow them to start or grow their own businesses and work for themselves.

Today, nearly one is six workers in Alberta is self-employed. And as a province, Albertans are leading the charge across the country with the highest average growth rate in self-employed individuals[1].

INTRODUCTION

As family law practitioners it is becoming increasingly common to meet with clients where one or both spouses are working for themselves. Whether they are self-employed running a business out of the matrimonial home or running a larger corporation with extensive assets and employees there are issues that immediately come to mind concerning the parties' income(s), support and property division. From clients the most common property related questions that will be heard during an initial consultation are:

1. What is the business worth, if anything?
2. How do we determine who is keeping the business?

This paper seeks to explore the practical steps and important considerations that family law lawyers must be aware of when advising clients with corporate or business interests in matrimonial property division matters.

BUSINESSES AS PROPERTY

The starting point is that all businesses, regardless of their corporate structure, are 'property' and subject to a 'just and equitable' division under Section 7 of the *Matrimonial Property Act*.

[1] Government of Alberta, Ministry of Labor, *2016 Alberta Self Employment Profile* (Government of Alberta, published August 2017)

There are three types of organizational structures commonly utilized from which a business operates:

1. Sole proprietorship;
2. Partnership; or
3. Incorporated business.

Sole Proprietorships

Sole proprietorships are the most simple and most basic business structure in Canada. To start a sole proprietorship there are no forms, regulations, or paperwork – most often an individual simply starts conducting their business not even realizing that they are operating as a sole proprietorship. Legally, the business and the owner/operator are one and the same. The business has no separate legal identity from the owner. From a matrimonial property division perspective the debts and assets of the business are the debts and assets of the owner/operator.

Partnerships

Partnerships can be formed in Alberta under the *Partnership Act,* RSA 2000, c. P-3. A partnership is not a separate legal entity from its individual partners. Each partner is entitled to equally share in the profits of the business and its losses. 'Limited partnerships' are distinctly different from partnerships in general. In a limited partnership there are two classes of partners: (1) general partner(s) who are personally liable for all the debts of the business; and (2) limited partners whose liability is limited to the amounts they have contributed.

Incorporated Businesses

Businesses can be incorporated under the *Canada Business Corporations Act*, RSC 1985, c C-44 or in Alberta, under the *Business Corporations Act*, RSA 2000, c B-9. In the most basic sense, an incorporated business is a legal identity separate from that of its shareholders. Shareholders are not responsible for the debts or liabilities of the company, except to the extent that they have potentially given personal guarantees to lenders on behalf of the company. Shareholders realize profits from the business in the form of dividends.

Throughout this paper the term 'business' will be used in the general sense of the word to refer to any company whose corporate structure may be a sole proprietorship, partnership, or corporation.

Initial Property Division Considerations for Businesses

In family law, businesses are property subject to matrimonial property division. A business which is owned by a separating couple may also be the means by which income is generated for one or both spouses. Thus the valuation and division of corporate assets is not only relevant from a property standpoint, but also in the context of calculating child and spousal support. There is some overlap between these two considerations and our Court of Appeal has determined that these two considerations are not mutually incompatible.[2]

At the time a couple separates a business may be thriving, in equilibrium, or failing. The relative success of a business, and the viability of a business as a "going concern", affects the way in which a business may be distributed as matrimonial property. Likewise, the nature of the business may be such that there are few, if any, assets to distribute and the primary value of the business is the ability of same to generate income for one or both spouses.

If the business is thriving it may be important to divide property such that the business can be preserved as a going concern and a vehicle capable of generating income for one or more members of the family.

If the business is failing and the prospects grim, it may make more sense to liquidate the business and distribute the assets of the business to the spouses.

Where to Start – Gathering Disclosure

A family lawyer requires information in order to evaluate how best to address how a business can be valued and divided as set out above. The five most obvious methods to begin to acquire that information are by:

1. Filing a Notice to Disclose (Form FL-17) which requires a spouse with 1% or more interest in a business to produce:
    - the financial statements of the corporation and its subsidiaries;
    - a statement showing a breakdown of all salaries, wages, management fees or other payments or benefits paid to, or on behalf of, persons or corporations with whom the corporation, and every related corporation, does not deal at arm's length; and

[2] *Ravoy v. Ravoy,* 2002 ABCA 6 at paragraph 14