Article

Divorcing the In-Laws: Marital Disputes and Their Effect on Wider Family Finances

Author: Sarah Bailey-Munroe, Associate

In most cases, a marriage represents the joining of two families, rather than simply the two individuals who take vows. It is perhaps unsurprising therefore that the emotional fallout of a divorce can similarly involve the wider family, however few expect to find themselves embroiled in ensuing legal proceedings.

Disputes over the availability of family wealth in trusts or businesses are common and those who employ such structures to organise their finances have usually received advice as to their vulnerability on divorce. However, the gifting or loaning of property and cash during a marriage can often take place on an informal basis with little consideration or legal advice as to the consequences upon divorce. Such fluid family finances provide fertile ground for disputes over ownership during a divorce.

The complexity (and as such the costs) of these disputes can quickly spiral as a result of the number of transactions and parties involved. The level of acrimony can also quickly mushroom as family members take umbrage at the idea of family-funded assets being used to meet the needs of an “undeserving ex-spouse”. As might be expected, for a statute grounded in the concept of comity, the Act expressly provides that in construing its terms regard must be had to its international origin and the need to promote uniformity in its application and the observance of good faith.

Client Care

Wider family members can often be surprised to learn that the family court’s powers may extend to an asset which on its face belongs to them rather than either spouse. Conversely, upset may be caused by the realisation that property gifted or placed in a loved one’s name before divorce was on the cards, may now be treated as property owned equally by both spouses.

The unexpected nature of this realisation can create strong emotional reactions (particularly in circumstances where they feel a loved one has already been a victim within the divorce). It is important to ensure that these emotions do not overshadow the interests and wishes of their loved one and separate representation should therefore be considered as soon as a third-party claim appears likely. All parties will need to keep a firm eye on the merits of any third-party claims and their proportionality within the wider proceedings.

Chancery v Family Principles

The key difference to keep in mind when dealing with third-party claims is that they will be determined by reference to the applicable rules of commercial or property law. The notions of fairness which guide the division of assets between spouses, have no place in resolving disputes over property ownership or the enforceability of debts. As a result, cases need to be pleaded with precision as they would in the chancery division.

Whilst it may not be uncommon for a spouse’s stance to shift in relation to what is fair within substantive financial remedy proceedings, shifting narratives in third-party claims are often fatal to credibility, and as a result, to the claims themselves. How an asset came to be transferred should therefore be scrutinized with forensic detail *before* it is set out in correspondence or statements.

There may be little understanding of the legal implications of transactions which were completed without advice and careful instructions will be needed to ensure the parties’ respective intentions and contemporaneous conversations are properly understood. For example, it is all too common for parents to erroneously believe that evidence that a property was transferred for tax planning reasons will defeat a claim that the property was gifted to the couple. In reality, transferring a property to escape inheritance tax is successful precisely because the transferor’s property rights were extinguished and passed to the recipient.

Of course, property transferred as part of wealth planning may well escape equal division on divorce, by virtue of being treated as an advanced inheritance. But pursuit of a claim that the parent has retained beneficial interests will achieve little besides a heavy costs bill. Clarity as to the case being claimed is essential.

Party Status

Where the value of a third-party claim is low, a family member may prefer to accept their loss, resolving the issues within the family once the divorce is over. However, where outstanding loans or property interests are significant enough to warrant pursuit, consideration will need to be given to whether party status is necessary.

Whilst *TL v ML* makes clear that third parties should be joined at the earliest opportunity, in *Bebehani* the court confirmed that the question of joinder remains a discretionary one and there is no hard and fast rule. Given the cost implications of joinder it will be important to consider whether appropriate alternatives exist.

Family members may seek to resist joinder preferring to advance their case through evidence or even submissions as was suggested in *BY v MJ*. Personal claims relating to outstanding liabilities will often be dealt with in this way. Whilst this approach will prevent the court's findings being binding on the third parties [*Tebbutt v Haynes*], the familial relationship between debtor and creditor will usually mean that this approach can be undertaken by agreement.

However, where family members seek to defend or assert a beneficial interest in property, joinder or consolidation of a property claim will likely be necessary. A spouse pursuing a beneficial interest against a family member will almost certainly seek their joinder.

Some UK courts have developed the pragmatic approach of delaying joinder in these cases until after a Financial Dispute Resolution hearing (FDR), albeit with full pleadings and statements being directed in advance. This is a sensible option to pursue where joinder is likely unavoidable in the long run.

Conclusion

The best advice for family members seeking to protect family wealth from a divorce is (unsurprisingly) to seek advice and act before a separation is ever on the cards.

Prenuptial agreements offer the opportunity to comprehensively set out family intentions in relation to any and all financial support and therefore provide the best protection available. Where there is little appetite for this, family members with firm views as to the terms of any ad hoc financial support should ensure that they are properly recorded. Documents should be drafted setting out the terms of any transfer or loans (including repayment dates) even if only in the form of texts and emails.

Author:

Sarah Bailey-Munroe
Associate
Sarah.Bailey-Munroe@conyers.com
+1 441 298 7870