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Family law news: Good reason to depart from equality of division?

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In the case of Charman v Charman the Court of Appeal held that the sharing principle applies to all the available assets on divorce, but to the extent that assets are non-matrimonial, there may be good reason to depart from equality. In the recent case of J v J, Charles J has attempted to shed light on what constitutes a 'good reason' and to what extent it will justify a departure from 50:50 division of the assets.

Mr J and Mrs J married in 1996 when Mr J was 44 and Mrs J was almost 30. It was a second marriage for both of them: Mr J had two adult children from his first marriage and Mrs J had a daughter, aged 2. They separated in January 2006.

The assets in the case totalled approximately £27m. The majority of this wealth derived from the sale of Mr J's company, from which he received approximately £24m. Mr J had set up the company, which dealt in the management and supply of gas, in 1986. He worked in the company for 10 years prior to the marriage and sold it in May 2007, 16 months after the parties' separation.

In attempted settlement of the divorce proceedings Mr J offered Mrs J 50% of the net increase in the value of the company between the date of the marriage and the date of separation, approximately £3.7m. Mrs J sought a lump sum of £10m, which constituted 40% of the total assets.

The main argument focused on the extent to which Mr J could rely on the existence of the company prior to the marriage and the increase in its value between the parties' separation and the company's sale to justify a departure from equality in his favour.

Post-separation assets

Charles J found that the husband had been the driving force behind the company. It was his 'brain child' and its success was attributable to his early working life, the knowledge and experience he had gained during this period and the continuation of his hard work over the years before, during and after the marriage. Mrs J had made no direct contribution to the building up of the company or the value of the available assets. Her contribution was purely domestic.

The Judge distinguished between post-separation earnings (which are attributable to the earning capacity acquired and developed during the marriage) and post separation increases in the capital value of assets. The latter may be referable to passive economic growth (which does not justify a departure from equality) or to the effort, skill or work of a party to the marriage.

Charles J reiterated the well established principle that assets are to be valued at the date of the hearing, and not at the date of separation. If the available assets decrease in value during this period, the award will, in all but exceptional cases, be based on what is available at the time of the hearing. The Judge emphasised that this approach has become all the more important in the current economic climate.

The corollary to this is that if the assets increase in value between the date of separation and the hearing, the award should be assessed by reference to the post separation growth in the capital value of the assets. However, such an increase in value might justify a departure from equality, particularly where this is necessary to achieve a fair result.

As always, timing is important. Just as the relevance of a pre-marital asset will diminish the longer the marriage, an asset built up during the marriage may become distanced from the marriage the greater the period between separation and the final court hearing.

Pre-acquired/gifted assets

The existence of pre-acquired or gifted assets may justify a substantial departure from equality. Charles J held that this could extend to a 100%:0% division of such assets in the appropriate case. (Departure from equality will only be relevant after both parties' needs have been met and after any award in respect of compensation for relationship generated disadvantage has been made.)

So far so good. Charles J emphasised that the assessment of the appropriate award in each case is fact – sensitive and should be effected on a principled and not an arbitrary basis. In his view, 60% of the value of Mr J's company should be attributed to his pre-marital endeavours. The remaining 40% was therefore attributable to the marriage and should be shared equally. Mrs J received 20% of the value of the company (plus 50% of the assets referable to the marriage), a total award of £5.78m.

The case is useful in that the Judge emphasised that the choices made by spouses before separation about the way they conduct their married life is relevant on divorce and can have an effect on asset distribution.

Many cases that we deal with involve significant pre-acquired or inherited wealth, and although this particular case is fact specific, it represents a welcome attempt by the High Court to clarify circumstances in which a spouse will be able to justify a substantial departure from equal division of assets on divorce.

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