

Business valuation in divorce poses more complex issues for SMSFs

By Keeli Cambourne, Deputy Editor, SMSF Adviser and Matthew Burgess, Director, View Legal

Divorce has many complex issues for SMSFs but one of those is becoming even more complicated, according to a leading legal specialist.

Matthew Burgess, director of View Legal, said there are many nuances involved in family law and one that is becoming more prevalent is the percentage split of assets and the valuation principles which apply.

“Where a business owned and operated by a couple forms part of the assets to be divided under a property settlement, there are a range of potential issues that can arise,” he said.

Mr Burgess said the case of *Ledarn & Ledarn* [2013] FamCA 858 provides an interesting insight into the types of concepts that the family court will consider.

The case involved a business of which the wife was the general manager and the husband was the original designer of the core product. Both parties wanted sole control of the business as part of the matrimonial settlement, and the wife ultimately succeeded.

Some of the key aspects of the decision included the following:

1. Although there was an independent valuation suggesting the business was worth \$8 million, the wife had argued that it was worth ‘\$10 million’ to her.
2. While generally, the value attributed to a business will be that which an arm’s length purchaser will pay, the family court can instead accept a value that one of the parties to the relationship subscribes to it.
3. The court also considered the evidence that seemed to suggest that the wife had a much better understanding of the nuances of the business and how it would best operate in allowing her to take full control.
4. The wife’s request that there be a 5-year non-compete restraint imposed on the husband was however rejected on the basis that given she had significant business acumen, in addition to all of the assets of the business, the prospects of the husband successfully commencing a competing offering were at best remote.

“There is a risk in family splits on zeroing in on what assets will be included in a technical sense and the percentage calculations that are applied to these,” Mr Burgess said.

“I think in the family law context there is a lot of subjectivity involved, which is particularly evident in the *Ledarn* case in which both partners had a fair amount of impact on how the business will perform.

“The question is how the marriage breakdown will impact on the future earnings of the business and how do we look into that and see what will happen when one partner exits the business.

“If we assume the business is a going concern, and there will be no change of personnel, and then use a standard formula for valuation, it doesn’t take into account the impact on the business created by the individuals.”

Mr Burgess said there is more complexity involved in family breakdown with more wealth being held inside structures.

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"I actually think the iteration in family relationship now is that women have a much greater role in creating family wealth so businesses are now a true joint venture between husband and wife and women have been radically improving the performance of business and they need to be financially compensated for that."

