FORENSIC accounting update

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Pre-nuptial agreements in the news

There has been increasing interest in pre-nuptial agreements in recent years as it is believed that they may reduce the emotional and financial costs of divorce. This article considers the financial aspects of such agreements.

Pre-nuptial agreements are not automatically enforceable in England and Wales. However, in a landmark ruling in *Radmacher -v- Granatino* in 2010 the Supreme Court held that courts should give effect to a pre-nuptial agreement that is freely entered into by each party with a full appreciation of its implications, unless in the circumstances prevailing it would not be fair to hold the parties to their agreement. The Supreme Court said that the fairness of upholding any particular agreement would be considered by courts on a case by case basis and that it would be natural to infer in future that parties who entered into such an agreement, to which English law was likely to be applied, intended that effect should be given to it.

As an initial step towards an agreement, the parties are likely to need to decide upon the extent to which assets, liabilities, income and expenses are to be attributed to them as individuals as opposed to being regarded as common to them, whether relating to the period before or after the date of marriage. It follows that there must be full disclosure by both parties.

Assets and liabilities

A pre-nuptial agreement may define all property owned by the parties individually at the time of the agreement as "separate property" and may provide that each of the parties shall retain all rights and obligations in that property, including any claims against it and future appreciation in its value. The other extreme is a complete pooling of all property, but the couple may negotiate a "third way" in which, for example, specific assets may be "separate property" but any appreciation in their value may be divided between the parties in a specified way in any divorce settlement. It may also be important to clarify the extent to which mortgages or other liabilities attach to specific assets.

It may be necessary to obtain valuations of any assets to be pooled. While this is often straightforward, the valuation of interests in privately held businesses may require specialist expertise. In such cases, the parties should agree at the outset what needs to be valued so that the accountants engaged to carry out any valuations have clear parameters within which to work. In the event of a divorce, expert input may be needed to value businesses.

Pension rights may need to be addressed given that they will often be a significant category of asset and that there may be a large disparity between the values of the rights held by the two parties. It will generally be necessary to incorporate a pre-nuptial agreement into estate planning and to consider the agreement's interaction with any wills made by the marrying couple.

Income and expenses

In considering the parties' sources of income, benefits in kind such as cars and medical insurance may need to be taken into account. A pre-nuptial agreement may also define the support a spouse would require as compensation for contributing to the financial lifestyle of the marriage, e.g. a wife may support her husband through business school so that he may enhance his future earnings. An agreement made by a wealthy couple may specify an annual or monthly limit to personal expenses to be met from the pooled resources and/or may set out the extent to which one party's expenses will be met by the other following a divorce.

Conclusions

Awareness of pre-nuptial agreements has been enhanced by the publicity generated by "big money" divorce cases. Couples contemplating such agreements need to focus on exactly what they want from them and on what in financial terms they as individuals are bringing to the party. Given the need for full financial disclosure, expert accountancy advice can help to establish the extent of the financial resources and obligations of the couple.

To obtain further details of our activities or to benefit from the firm's experience and expertise, please contact George Sim or Rakesh Kapila.

Please note that this newsletter has been written for the general interest of readers and is intended for guidance only. It is therefore essential to take specific professional advice before taking any action.

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