



LAW OFFICES OF

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ATTORNEYS AT LAW

SEPARATION AND DIVORCE - THE BIBLE FOR BUSINESS CLIENTS



CLIENT INFORMATION LETTER #73

Q. “Help! My husband just left home last week and today he filed a motion to get a restraining order. He wants to stop me from spending any money in my business. Can a judge do that?”

A. Emergency orders are available to the court in unusual circumstances, such as to prevent waste or dissipation of assets; they are not meant to tie up a business so that it cannot operate on a day-to-day basis. The judge will not restrict the normal payment of expenses and receipt of income if there is no harm to the nonowner by the conduct of the owner. If you are continuing to operate the business just as before your separation, you have nothing to fear. If you’re about to take some unusual step, then you should immediately check with your lawyer to see if it could be interpreted as dissipation or waste of assets by the court.

Q. “What’s a TRO?”

A. A TRO, or temporary restraining order, is granted by the judge when there is an immediate danger of irreparable harm. It must be backed up with an affidavit (a sworn declaration by someone with personal knowledge) as to the facts which justify it, and often it is issued without a hearing. It must be followed up by a hearing within ten days to allow the other party his day in court. This allows him to testify and produce evidence that it should not be extended into a temporary injunction.

Q. “I don’t need to hire a CPA to evaluate my business – we already have an accountant who can easily do that.”

A. Business valuation is one of the trickiest parts of “equitable distribution,” or the division of marital property. It can easily cost \$5,000 to \$20,000, depending on the nature and complexity of the business involved. The company’s accountant (or CPA, for that matter) is just not in a position to provide the required information to the court and the opinion testimony to link that information to a fair market value. Just as you wouldn’t want a car mechanic to give the value of your roadster to the judge, you don’t want a company accountant to be the expert you call for business valuation. You’d want a CPA or economist who is skilled in establishing value for the divorce court, one who knows the valuation rules which operate there. The expert will, for example, need to give testimony – in pretrial depositions and at court – regarding such matters as good will, marital and separate components of the company, discount rates, normalized cash flow, and so on. Your divorce lawyer will be able to give you the names of several CPAs who have such experience and are recognized by the court as experts who can be believed in valuation matters.

Q. “Don’t we value a business on *book value*? Why go to all the trouble of hiring a CPA? In fact, just last month my partner and I just agreed on a value for buy-sell purposes. Surely one of these would be better than spending all that money on an expert to put a value on the business!”

A. The book value or the value in a buy-sell agreement may be relevant to proving the value of the partnership or corporation. Either one may, in fact, be the *best value* which can be put on the business entity. But neither one of them is the *only value* which is applicable. Your own trial expert - the CPA whom you hire - may very well come up with a *lower value* than that which your own buy-sell agreement states! And no valuation which we arrive at will prevent the other side from doing their own valuation if they don't agree with *our value*. So the answer is - tighten your seat belt, you might need to contend with *four valuations*, not just one or two: the buy-sell value, the book value, that placed on the business by your expert, and that placed on it by the opposing party's expert. Unfortunately, these entities are not easy to evaluate and it's not uncommon for Expert A to put a value of \$80,000 on Business X while the other expert places a value of \$250,000 on it. We have even had cases in which *our own experts* differed wildly in the valuation process. In a 1989 case involving a medical practice, for example, the other side's five experts all said "No more than \$60,000, *period!*" Our firm's expert said \$250,000. The client went out to find her own expert, thinking that her husband's medical practice *must be worth more* than \$250,000. Her new expert - who was completely ignored by the judge - put the value at \$750,000!

Q. "I don't have any extra money to pay alimony. All our profits at XYZ Inc. go back into the business so we have money for needed purchases and services."

A. This might be the way that you operate XYZ Inc., but it won't be the way that the judge looks at support, whether it's alimony or child support. The court is required to look at the funds that are reasonably available to you in XYZ Inc. when you subtract ordinary and reasonable business expenses from gross revenues. Whether you pack away all your income into retained earnings or spend it as quickly as it comes in, in the form of draws or salary, the judge will need you to account for actual income and – in the case of retained earnings – for potential income in determining a level of support to be paid.

Q. "I know what I'll do! I can make sure that we don't sell *any widgets* for the next six months. That way, there'll be no income for the judge to use in awarding alimony!"

A. Not so fast. The judge has the power to award support based on earning capacity, not actual income, when there has been a voluntary reduction of income done in bad faith. This means that, even if you don't actually earn the money, you can be ordered to pay support as if you had!

Q. "How is it that my wife can get a share of my business? I started it! All the stock certificates are in my name! She doesn't have any claim to it because she didn't create it and she's not on the title!"

A. In equitable distribution cases, that's not how it works. The rule that the courts and our legislature have created can be put quite simply: Title Doesn't Matter. Whether an asset is in the name of husband, wife or both, the court only looks at whether the asset was obtained, created or purchased during the marriage - which makes it marital property (as opposed to separate property, that which came before the marriage or is a gift or inheritance).

Q. "What I meant was, I started it *before we were married*. I thought that made it my own property!"

A. Yes, that makes at least part of it separate property. Your lawyer and the CPA will need to do some work, however, in tracing the portion of the present value which is attributable to separate funds or assets coming into the business before the marriage. In a notable case several years ago, the owner of the Charlotte Motor Speedway lost the right to claim any part of his pre-marriage assets as his *separate property* since he couldn't trace them out of his current holdings; he'd commingled the funds and assets and the CPA couldn't follow the trail backwards to prove what was his separate property.

Q. "I don't have any personal expenses for transportation and meals. I write it all off for business."

A. This could be a problem. The judge will want to see income and expense figures to determine such issues as spousal support and business value. Reasonable and ordinary business expenses do not include *all your mileage* charged against the business, or all meals taken as business expenses. The other side's expert - and your own expert, as well - should remove the personal component of these business write-offs and add it back into your income.

Q. "I don't think that my wife should get more than half of the value of this business. Can the judge award her more?"

A. There is a statutory presumption of an equal division, that is, the law says that the usual or assumed split is 50-50. However, the judge can apply numerous factors to result in an "equitable" split, that is, one which is other than equal. The factors are many - such as the tax consequences of a division, the incomes and expenses of the parties, the health of the parties, the length of the marriage and the contributions of your spouse to the acquisition of the business. Any of these, standing alone, can tip the scales to create an unequal division.

Q. "I don't have the money needed to buy out my husband's interest in my business. The cash just isn't there! How will I be able to settle my case?"

A. The term is "distributive award." It's a cash payment over time, usually six years as the maximum, which allows one party to pay the other in what appears to be a

lopsided property division in which one side has most of the assets locked up in a valuable business which cannot be sold off or liquidated.

Q. “Our settlement just gave my wife some rental properties that we owned. Doesn’t that mean that the judge will reverse the order granting alimony to my wife?”

A. Maybe. The court, if requested, must revisit a property division when the issue of alimony or child support is involved and the support recipient has received income-producing property that wasn’t there at the time of the initial support award.

Q. “I caught my wife committing adultery. Surely that’s enough for the judge to allow me to keep my own business!”

A. Marital fault is not a relevant factor in the equation of an equitable distribution case. If she committed adultery before the date of separation, that might be useful in an alimony case, but the only fault that equitable distribution cases recognize is “economic fault,” that is, a party’s wrongful conduct to damage, dissipate, waste or destroy marital property.

Q. “Will I have to provide my husband and his lawyers with information about my business?”

A. Yes – lots of it! The process is called “discovery,” and it involves written questions (interrogatories), document requests and possibly a visit to the site of the property or business under Rule 34. Either side can demand, as well, to hear oral testimony about business matters under oath (called a “deposition”). The other side can demand that you designate someone who is particularly skilled in the giving of answers in certain areas, such as financial operations.

Q. “I don’t want my entire case exposed in a courtroom before a bunch of strangers. We have trade secrets, compensation data and proprietary information that need not be made public. How can we avoid a messy, public trial?”

A. In family law cases, the parties can agree (but the court cannot mandate) the use of arbitration. This means that the case is contested in a conference room, not a courtroom. The parties’ attorneys will select the arbitrator, usually a skilled family law attorney, and the parties are responsible for paying the fees charged by the arbitrator, either 50-50 or in such other ration as agreed upon. The parties’ attorneys will sit down with the arbitrator and set up the dates and times for arbitration and the rules to be applied.

Q. “Can’t we try to settle the case before litigation?”

A. Yes – you should. The rules of court here in Wake County require that all equitable distribution cases must proceed to mediation before they can be calendared

for trial. A skilled mediator – who is often an attorney specializing in family law – can often broker a compromise between the parties which will keep the case out of court and will cost a lot less than a contested trial.

Q. “Can’t I get a pre-nup to avoid this mess?”

A. Yes - if you’re not already married! An antenuptial agreement, also called a “pre-nup,” will allow you to specify what is marital, what is separate, and what happens if one of you dies or if the two of you go through a divorce. You can also make provisions for alimony - or a waiver of alimony - in a pre-nup.

Q. “How do I find a lawyer who can help me through this mess?”

A. A good family law attorney is your best bet – one who works in this field most (or all) of the time. There are more than 100 lawyers in North Carolina who are recognized as “board-certified” in family law; they have had to meet the high standards (an initial examination, recommendations from other lawyers, annual continued education and re-certification every five years) of the North Carolina State Bar’s Board of Legal Specialization. The listing of all such lawyers, arranged by county, is found at www.nclawspecialists.org. You can also choose a North Carolina lawyer who has been selected as a Fellow of the American Academy of Matrimonial Lawyers, a small and select group of distinguished lawyers in the area of family law; there are only about thirty such family law leaders in the state. The website listing all Fellows in the state is www.nc-aaml.com. There are photographs, profiles and samples of professional writings there as well.



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