Family business: property disputes resolution

Larisa Kudryavtseva*, Daria Fedorova, and Anna Chubatova
Kuban State Agrarian University, 13/1 Kalinin Street, Krasnodar, Russian Federation

Abstract. Within the framework of this article, the problem of dividing a family business by spouses when being in divorce is considered. The paper presents possible options for dividing a family business based on judicial practice. The work covers some features of divorce if a spouse has a share in a limited liability company. The authors also note some distinctive features of the distribution of jointly acquired property, if one of the spouses has the status of an individual entrepreneur. And some nuances are also considered in the division of property in the event of the liquidation of a peasant (farm) economy. Court decisions on these issues are analyzed and reflected in the study.

1 Introduction

The legislation establishes that after marriage, the property that the spouses obtain is called jointly acquired. The division of property is carried out following article 38 of the Family Code of the Russian Federation (hereinafter referred to as the RF FC). In addition, clause 5 regulates a reservation about things that are not allowed to be divided according to the family law [1].

In other words, if a marriage contract or a specific agreement on the division of property was not concluded between the spouses, then, as a rule, each of the parties claims half of the property that was acquired when being in marriage. Half of the family business should also be included here.

However, as the practice often shows, the spouse who ran the family business does not always express a desire to share the result of his "brainchild" with a former spouse who did not take part in it. If we talk about spouses who are business partners, then personal interests are always affected when dividing property, which does not always have a good effect on the family business.

The norms of the family law contain provisions that restrict spouses in relation to each other in terms of disposing of joint property. There are legal nuances whose presence characterizes the legal regime of joint ownership. So, for example, Article 35 of the RF FC establishes that the disposal of property that is jointly owned is possible only with the consent of both spouses. The situation is the same with the transaction being made, as a result of which it may be declared invalid. In other words, when resolving the dispute, one must prove that one of the spouses was aware of the disagreement of the other.

It is worth emphasizing that the division of common property occurs after the dissolution of the marriage; such situation may also arise in other cases [2].

At the same time, the division of property is possible both in the way of compensation payment of market value. Thus, the spouses can choose two ways to solve the problem: through agreements, which is the most favorable, or through the courts, which is the most costly and difficult.

One must mention the fact that some successful people who have been in business for a long time anticipate the possibility of further problems that may arise. Therefore, even at the stage of marriage, they enter into a marriage contract to avoid various litigations and adverse consequences. On the one hand, the spouse who conducts entrepreneurial activities secures one’s business and leaves no chance for the other spouse to object. If you look from a different angle, according to the statistics, such marriages soon collapse for various reasons. In justification of this, one can say that the society of our country is skeptical and extremely categorical about the marriage contract. Although abroad, the marriage contract is widely used in various countries, because it simplifies the procedure for dividing property, which saves time [3].

As a rule, divorce is a rather complicated and time-consuming process for each of the parties. If the former spouses have their businesses and invest their funds, then divorce can be even more difficult. The decision to divide business assets when being divorced with the ex-wife is an issue that is still the subject of serious disputes between lawyers. As is the case with the usual division of marital property, the procedure for dividing a business is complex and has many nuances.

The Russian legislation governing family disputes does not include specific rules governing the relationship between spouses when dividing a business. According to the current rules, to settle these relations, the general rules, established when dividing the property of the spouses after divorce, are applied.

The legal norms governing relations concerning the division of spouses' business in the Russian Federation have general provisions based on the norms of the family law, family relations and property relations of spouses, including civil law norms on determining the legal status of commercial entities [4].

*Corresponding author: larisa-k75@mail.ru

© The Authors, published by EDP Sciences. This is an open access article distributed under the terms of the Creative Commons Attribution License 4.0 (https://creativecommons.org/licenses/by/4.0/).
2 Results and Discussion

What is the section for the joint business of the spouses? First of all, it is a complex of property and property assets of one or both spouses. But it can also be a share in the authorized capital of an LLC, certain shares of a joint-stock company with the right to receive dividends [5, 6].

A difficult procedure is used for dividing a business, which includes property complexes. An investment complex is a commercial enterprise that includes property and land plots, equipment, as well as rights of claim and debts. The property of the spouses acquired during the marriage is the common property of the spouses. However, the property of a commercial organization does not become common property, even if one of the spouses is its sole owner. To divide the property complex, it is necessary to assess the market value of the company. In this case, the share of the company’s participation, and not the property of the company, is subject to division. Many of the spouses mistakenly believe that being divorced they will be able to receive the property of this company, but this is not so. A legal entity is a separate economic entity with the right of ownership [7, 8].

Husbands and wives who have acquired shares of an enterprise during the marriage will also be subject to a 50/50 split. There are also many problems associated with an offshore company at present. Our legal framework requires the formal legal ownership of a spouse in such companies, but most often these companies are registered in more than one of the two spouses. According to the emerging disputes about the direct ownership of capital by one of the spouses in foreign law firms owned by a third party, the court sees that the issue of indirect ownership is a legally significant circumstance and must be confirmed by evidence that meets the requirements of relevance or admissibility. According to this fact, the Supreme Court of the Russian Federation points directly to the legal consequences.

How to protect your business in case of a divorce? According to experts [9–11], there is a great uncertainty and incompleteness in the legislation of the Russian Federation and judicial practice. Russia is taking steps to resolve this issue. Now the most optimal way to protect spouses and business partners is to exclude the use of the common joint property of spouses in the course of economic activity.

In addition, in the event of a divorce, a special role is assigned to the organizational legal form of a legal entity when dividing a family business. Due to the existence of various entities, it seems particularly difficult to divide the legal entity itself during the divorce process.

Civil legislation provides for such legal forms of a legal entity that are often encountered in the conduct of a family business, such as a peasant (farm) economy, individual entrepreneurship, a limited liability company, a joint-stock company, etc. [12]

Based on the examples given, it seems that the simplest way out of the situation with the division of a family business is in the form of a limited liability company, which will be discussed in the framework of a scientific article below. The real ability to compensate for the prescribed part from the division of common property of the specified legal form is easier when obtaining from the division of a limited liability company, unlike the others, as practice shows [13–15].

Let us consider this opinion in more detail. To begin with, it should be mentioned that all the relations relevant to a limited liability company (hereinafter referred to as the company) are regulated by Federal Law No. 14-FZ “On Limited Liability Companies” [2] and later by the Charter of the organization. Let us consider a situation where both spouses are the founders of a society when they have not reached a compromise. After all, we can consider the sections of the shares of a legal entity. In this case, there are several ways to resolve this legal dispute. Firstly, it is possible to sell one’s share to another spouse. Secondly, on the contrary, it is possible to redeem it. And, thirdly, the most extreme way is completely selling the family business and sharing the income from its proceeds.

The situation looks more complicated when only one of the spouses is a member or founder of the company. It is worth noting that there are legal difficulties on this topic, since, having considered some decisions of the courts, the authors have concluded that in judicial practice there is no uniform approach to resolving such disputes. As a rule, the share of the founder-spouse is supposed to be divided. However, the practice shows that in this case, it is also necessary to take into account the opinions of other members of society. Studies of court rulings have shown that the most common practice is to divide the share in the authorized capital in kind, and only then its implementation and monetary compensation are the best solution. Indeed, it is much more expedient and profitable for the spouse who was not a member of the society to insist on the monetary compensation; one cannot but agree with this since one will not be able to enter into business affairs as a new partner.

As for the peculiarities of the division of such form of a legal entity as a peasant (farm) economy, it is regulated by Federal Law No. 74 “On a peasant (farm) economy”, if the spouses are in it during a divorce [3].

In case of a divorce, in the event of the termination of the activities of a peasant (farm) economy, it is possible to divide property on the basis of Federal Law No. 74 as follows: division of shares on the basis of the land code; other property is sold during sales. In the event of the termination of the activity of a peasant (farm) economy, one of the spouses remains among its participants; the monetary compensation in case of a divorce is the other spouse’s responsibility.

Let us consider a situation where one of the spouses, registered as an individual entrepreneur, invests family funds in the business.

It is worth noting that when one of the spouses acts as an individual entrepreneur, the property that is involved in doing business is their joint property for them. Of course, the business itself belongs to the spouse, on whom the status of an individual entrepreneur is registered according to the documentation.

The legislation establishes that the status of an individual entrepreneur includes the right of a registrant to carry out a certain type of entrepreneurial activity. And in the process of its implementation, the entrepreneur can use any property that belongs to one. That is, the acquired property for the entrepreneurial activity will belong to a person having the status of an individual entrepreneur. It follows from this that the division of property is subject to division in the same manner as the division of any other property belonging to common property.
However, in practice, problematic situations often arise that are associated with indivisible items acquired for exploitation in the course of entrepreneurial activity. The parties of this category of disputes often argue that it is impossible to use one or another item for its intended purpose in cases of its separation. To resolve such disputes, the court often resorts to such method as collecting compensation, which, in the opinion of the authors, is a very reasonable solution of such situations. At the same time, the monetary compensation is measured at half the cost of the entire property assigned to an individual entrepreneur.

Summing up, I would like to note the following. The divorce proceedings, like family disputes, can seriously affect a family business. In addition, all the disputes related to the undivided jointly acquired property are individual, as court practice shows; so it seems almost impossible to find a uniform approach to resolving such disputes in court if the spouses have not reached an agreement. However, there are still ways to neutralize or at least minimize the overall negative consequences, for example, through the conclusion of a marriage contract or agreement on the division of the property.

In the process of the research, it is worthwhile to compare the Russian legislation on property relations of spouses with the foreign legislation experience.

In some countries, the spouses can choose the option to which their property relations will be subject. They have the right to change the regime of marital property.

In countries where Russia has a matrimonial property regime, spouses can completely exclude each other by choosing to separate or establish a limited community of property regimes. They can also combine separate and community properties for different types of their property. To avoid a divorce in the countries with a legal separation regime, a spouse will need to decide to share one’s ownership of some type of property or income from it.

Now let us look at the foreign law in more detail. In Holland, marital property between spouses contains both property and debts. From the moment the marriage contract is signed, it is the joint property of the spouses. The marital property is complete: it covers all the money as well as the future belongings of the spouse. In general, it is a shared obligation to pay off all debts of the spouses.

The German system of matrimonial property, according to the German Civil Code of 1886, can be changed by the spouses in the case of a marriage contract.

The Italian Constitution guarantees the inviolability of human rights. Article 29 of the Constitution states that “the family established by marriage is the family. Marriage is based on the moral equality of the spouses to ensure the unity of the interests of the family. According to Article 159, Section 1 of the Italian Civil Code, in Italy there is a legal property regime of the family, based on the common property of the spouses. Italy also has norms that provide for the conclusion of a marriage contract.

The legislation in France is also very similar to that in Russia. In the French law, the property relations of spouses, if they have not concluded a prenuptial agreement, are regulated by the legal order: this is the regime of joint ownership of property within the marriage.

Marriage property is the property acquired during the marriage on a gratuitous basis. It is all the property purchased with profits or wages or other income.

In about half of France, there is a common presumption of marital property and therefore any property acquired is considered common unless it is proven that one of them owns it. In this case, the funds that are kept in a bank account of the spouses of one spouse are considered common property.

The personal property of each spouse includes the following: the property each spouse owns at the time of marriage; the property the spouses receive during the marriage without compensation, that is, by inheritance or gift.

The funds of the spouse are received from the sale and exchange of the personally owned property. This category should include property that is personal by default: for example, personal hygiene products or money received in compensation for damage personally by the spouse.

In contrast to the Russian law, the laws of developed Western countries have long recognized the expediency of concluding a marriage contract. In many countries, marriage has its peculiarities, but the main goal of the marriage contract is to enable the spouses to determine the fate of their property independently. They can fall back on the legal regime of property, which automatically begins to operate from the time of the marriage.

A marriage contract is very common in Western Europe, the United States, and Canada. It became known due to strong feminist movements and the struggle of the "weaker half of humanity" for their rights and equality of men and women in marriage. The wealthiest people mostly enter into marriage contracts: politicians, businesspersons, and show business stars.

At the end of the study, it is necessary to compare the content and conditions of the marriage contract in Russia and foreign countries, as well as to highlight some differences. In Russia, the marriage contract can be concluded before marriage, but it comes into force only after the marriage, while in Europe and the United States, marriage is already at the stage of entry.

According to the laws of Russia, based on the Constitution of the Russian Federation and the rules of law on notaries in Russia, there is secrecy in the marriage contract. In some countries, on the contrary, there is free access for interested persons to the content of the marriage contract. The adoption of this law is necessary to protect the rights of creditors by spouses; it becomes necessary in the field of entrepreneurship.

Under the Russian law, the marriage contract does not regulate the property relations of the spouses. With the help of a marriage contract, spouses can not regulate their non-property rights and obligations between them and with regard to children. This contract does not regulate the relationship between the spouses, the intimate life of the spouses, communication with the children after divorce, etc.

3 Conclusion

Abroad, the agreement between the spouses necessarily regulates other rights and obligations of the spouses. Foreign marriage contracts are a kind of protection for spouses from all possible problems, including property, children, and alimony obligations.

In Russia, there is an opportunity to change the marriage contract at the request of the spouses. According to experts,
in Europe and the United States, all changes are possible only after marriage, and afterward only by court decision.

This procedure can be carried out in different countries in different ways. The laws of France, Italy, and Germany regulate the order and conditions of the marriage contract. The slightest deviation threaten to violate the marriage contract. The contract itself is drawn up by professional lawyers; in some countries, it is the authority of the notary. In all the cases, the written form is mandatory. They obtain a certificate of the prenuptial agreement from a notary and present it after the marriage.

In the Anglo-Saxon law, there are no special requirements for the marriage contract procedure. You only need to fill out all the necessary documents and sign the contract in the presence of witnesses, which corresponds to the procedure for the conclusion of the usual civil-law contract.

In this area, it is very important to study foreign experience and compare it with domestic, as well as in others. It is also possible to adopt some positive points in the regulation of certain situations. It is possible to avoid mistakes made earlier in the development of the legislation of other countries. The experience of foreign countries allows you to try to close the gaps in your legislation and improve the already existing norms to prevent mishaps. They are especially important in the matters concerning the contractual regime of the property of spouses, because for Russia the marriage contract is a novelty in contrast to other countries where it is already many years in the force.

References