

**Seeking Appointment of a
Business Receiver in Divorce:
If the Shoe Fits, This May Be
Your Best Legal Strategy**

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Seeking the Appointment of a Business
Receiver in Divorce

Couples choose to marry for many different reasons, including love, companionship, and a shared desire to raise a family - business considerations generally don't factor into the decision. Yet, when a marriage dissolves and the couple starts the divorce process, they will face critical business issues. For example, when the divorcing couple own a business together or when they jointly hold a minority interest in a private company, they face the difficult task of deciding how to

fairly divide the business or how to split their shared ownership interest in the business.

If the couple is having serious conflicts during the divorce over how to divide their assets, both parties have the option to request the family court to appoint a receiver. The receiver is an independent professional the court appoints to take control of certain property. As discussed below, however, the appointment of a receiver is considered an extraordinary remedy. Therefore, a party who attempts to persuade a court to appoint a court-appointed receiver should consider: (i) whether the circumstances are suitable for the appointment, (ii) the specific relief desired, and (iii) the consequences that may result from seeking appointment for a receiver.

Circumstances Warranting Appointment
of A Receiver

Texas law authorizes the appointment of a receiver when the movant can demonstrate that the property at issue is in danger of being lost, removed, or materially injured. This situation may arise in a divorce when just one of the spouses is actively involved in the business. The involved spouse may be wrongfully taking assets of the business, e.g., directing the business to pay personal expenses. This is one situation where the appointment of a receiver is appropriate.

CRITICAL DISTINCTION: Under applicable law, Texas family judges have more discretion to appoint a receiver in a divorce proceeding than they would in a civil lawsuit in state court. The Texas

Family Code authorizes family court judges to appoint a receiver even if there is no allegation of impropriety. Such authority is based on the general rule of property division – the just and right division of the marital estate. While the Family Code does not open the floodgates to the appointment of receivers in all or even most divorce proceedings, the Code's provisions make clear that receivers have a different role to play than they do in a civil cases.

Examples of Receiver Appointments

If the couple's business constitutes a substantial asset of the marital estate, the appointment of a receiver may be appropriate to ensure a just division of this asset. This is particularly true where just one of the spouses is controlling this asset. In this situation, the receiver would be authorized by the court to sell the business and split the net sales proceeds between the couple.

Where the business interest owned by the couple is especially difficult to value, may be another situation warranting appointment of a receiver. One common method of valuing a business is using a discounted cash flow analysis. This requires projecting future financial performance which is usually based on historical financial information. If the company at issue is a start-up, it will not have historical financial data to permit a discounted cash flows analysis to be completed. One of the spouses may want to seek appointment of a receiver to realize the value of the business based on an arms-length transaction that would be conducted

by an independent party.

A third situation arises when one spouse owns all (or most) of the interest in the business and the other spouse has an interest only as a community property interest. The owner spouse's strategy in the divorce may be to divide this asset by conveying a minority interest to the other spouse in the final decree. This would leave the spouse who holds only a community interest holding an illiquid and unmarketable minority stake in a private company with no ability to monetize his/her ownership interest. Once again, a receiver may be appointed to conduct a sale of the business so that a just and fair division of the asset is achieved between the parties.

Specific Receivership Relief

When moving to appoint a receiver, the movant should not rely on the court or opposing party to nominate the receiver. Instead, the movant should identify potential receivers who are independent, with no pre-existing relationship with either party, and who are familiar with the business and industry.

In addition to identifying specific people to nominate as the receiver, the moving party should specify the scope of the receiver's duties. Receivers are usually appointed on a temporary basis and are not a long-term solution for managing a business. Therefore, the specific relief requested should be goal oriented. Examples include: (i) recovering certain property, (ii) temporarily managing the business until new directors can be elected or (iii) selling the business.

Business Risks of Appointing A Receiver

The divorcing couple may be adversarial in their divorce proceeding, but they should be united in their desire to preserve and maximize the value of the business in which they each have an interest. Simply put, it is not in either spouse's financial interest to engage in actions that diminish or destroy the value of assets in their marital estate. Any party seeking appointment of a receiver must be cognizant of the potential adverse consequences of appointing a receiver over the business.

To mitigate these concerns, parties should consider seeking to have their pleadings regarding receivers filed under seal to avoid publication to third parties. If the appointment of the receiver will be made public, the party seeking appointment of the receiver must be careful about what is said in its pleadings to minimize adverse impacts on business relationships.

Timing is another strategic consideration. While a party may seek appointment of a receiver at any time after the divorce proceeding is filed, the moving party should consider how the timing of the request may impact the business. For example, if the business is in the midst of negotiating an important business transaction that should enhance the value of the company, it may be advisable to wait until the deal has been completed before seeking appointment of a receiver. On the other hand, if one spouse has a legitimate basis to believe that the other spouse has used and will use business

assets improperly to the detriment of the business, the concerned spouse may want to promptly seek appointment of a receiver shortly after the divorce action is filed.

Finally, as a strategic concern, when a party has a legally valid basis to seek appointment of a receiver, the request for this appointment may spur settlement negotiations. The Owner of a business, who is concerned that he or she may lose control over the business to a receiver may be more willing to consider reasonable business solutions to effect a Business Divorce.

Conclusion

When couples end their marriage, they are also conducting a Business Divorce of assets in their marital estate. In this context, it may be a wise legal strategy to seek appointment of a receiver in the divorce when the facts and law authorize a party to seek this relief. The appointment of a receiver is an extraordinary remedy that is not frequently granted by courts, but in the right set of circumstances, this remedy may be the best, if not the only, avenue to secure a just, fair division of assets.

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- 1 See Texas Civil Practice and Remedies Code § 64.001(a),(b).
 - 2 See Texas Family Code § 7.001; *Young v. Young*, 765 S.W.2d 440, 444 (Tex. App.-Dallas 1988, no writ). But see *Readhimer v. Readhimer*, 728 S.W.2d 872, 873 (Tex. App.-Houston [1st Dist.] 1987, no writ).
 - 3 See *Amason v. Harrigan*, 288 S.W. 566 (Tex. Civ. App. San Antonio 1926).