

# The Advisor

March 18, 2013

## Business Owners: What Happens to Your Closely-Held Shares on Divorce?

By Farah Mohamed

As an owner of a closely-held private business you likely hold *voting* shares in your corporation. These shares allow you to exercise some control over the corporation by giving you the right to vote for corporate directors and control other important corporate decisions, such as a sale of all or substantially all of the assets of the corporation.

If you own your shares personally, your shares will form part of your estate and may also form part of matrimonial property if there is a breakdown of your marriage. The practical result of this may be that your former spouse attains some control over the corporation.

But what if the corporation's bylaws, articles, or a unanimous shareholder agreement ("USA") restricts the transfer of shares to third parties? Are your shares then shielded from an equitable division of matrimonial property to your former spouse?

### What Happens to the Shares?

Pursuant to the ***Matrimonial Property Act*** (Alberta), if there is a breakdown of the marriage, property is distributed equitably between the spouses (subject to prescribed limited exceptions).

The Court has a great deal of discretion and authority in determining an equitable division of matrimonial property. For example, the Court can order you to sell your shares and distribute a portion of the net sale proceeds to your former spouse. The Court can also order you to transfer some of your shares to your former spouse.

However, where the Corporation's bylaws, articles, or a USA restricts a transfer of shares to a third party, the Courts have generally been reluctant to order a transfer of shares to a former spouse.

Therefore, a properly-drafted USA may prevent you from being ordered to relinquish some control over the corporation to your former spouse. However, if your shares form part of matrimonial property, the Court still has many other remedies at its disposal to equitably divide the shares. In past cases, the Court has:

- Ordered the shareholder spouse to make an equalization payment to the former spouse that takes into account the value of the shares; and
- Ordered the shareholder spouse to hold half of the shares in trust for the former spouse and deal with those shares the way a reasonable person would if they were considering the former spouse's best interests. The former spouse would then share in all shareholder benefits, including a payment of dividends, and distribution of corporate property on a wind-up of the corporation.

For example, in ***D.B.C. v R.M.W., 2004 ABQB 954***, a husband and wife purchased shares in a corporation understanding that the shares would appreciate significantly over time. The husband owned 39% of the voting shares in the corporation and his wife owned 1% of the voting shares. Upon a breakdown of the marriage, the parties agreed that the shares should be split equally between them. However, they disagreed over whether legal title to the relevant shares should be transferred. The Court found that transferring the shares to the wife would be contrary to the corporate articles and by-laws. Therefore, the Court ordered the husband to hold half of his shares in trust for his wife, on the following conditions:

- He was to direct the corporation to provide his wife with any money payable to her in respect of those shares;

- He was permitted to exercise the vote associated with her shares the way a reasonable person acting in his wife's best interests would; and
- He was prohibited from transferring, encumbering or otherwise dealing with the shares he held in trust for his wife without her prior approval.

There are a number of considerations to keep in mind when structuring a closely-held private corporation, just one of which is matrimonial property issues. Therefore, we recommend that you contact our [Business Law Group](#) if you wish to discuss the best way to structure your privately-held business corporation to reduce risk.

This email is sent on behalf of Field Law's Business Group. For more information on our services and contacts, please see our [webpage](#).