Divorce in the family business:

Unfolding the legal problems by learning from practice

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Abstract

Purpose – Our purpose is to explore the case of divorce in family business from a legal perspective.
Design/methodology/approach – We rely on legal analysis and interviews with estate distribution executors to discuss problems with the legal rules and how they are practiced.
Findings – Our findings show that the law is ill fitted to the situation where there is a family business included in the division of marital property. In divorce, family law dictates the division of marital property and the family business is reduced to an asset to be divided like any other. Critical issues are identified and elaborated.
Research limitations/implications – Divorce and other disruptions to the family system should be considered in family business research among other threats to the business. The legal perspective on divorce in the family business offered here primarily concerns ownership issues. The impact of divorce on management is equally in need of exploration, which is our suggestion for further studies.
Practical implications – Our paper illuminates in which ways the business is hampered from divorcing owners and discuss critical issues with applying family law in a family business context.
Social implications –Policymakers should establish rules in which shares in an unlisted business are by default assigned to separate property until something else is contracted.
Originality/value – New light is shed on the practical problems of interpreting family law in a family business context advancing our understanding of family aspects in family business research.
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Family Business, Ownership, Family dynamics, Divorce, Division of marital property, Family law
Paper Type
Research paper

Introduction

The key feature distinguishing family firms from other businesses is the intertwining relationship between a family and the business that it owns (Sharma, 2004). This feature leads to both financial and non-financial goals that are intended to sustain both a profitable business *and* family harmony (Sharma, 2004). Nonetheless, the importance of the family system for the business is often neglected (Zachary, 2011). Many business owners have strong emotional attachments to their businesses (Zellweger & Astrachan, 2008), and the manner in which an owner values the nonfinancial aspects of his or her ownership stake and identifies with the firm is described as 'psychological ownership' (Pierce, Kostova & Dirks, 2001). This attachment plays a crucial part in understanding business family issues and is increasingly considered in family business studies.

However, when the owners of a family firm divorce, family law dictates the division of marital property and the family business is reduced to an asset to be divided like any other. In this situation, problems arise when otherwise successfully integrated family and business systems must be separated. Our purpose is to explore the special case of divorce in a family business from a legal perspective with respect to how it affects the business. We contribute to the literature by identifying problems with divorce law and its interpretation in the context of a family business, and we describe legal documents that may be prepared in anticipation of divorce. Furthermore, we suggest a policy solution that acknowledges the interests of both the firm and the business stakeholders. In this regard, we rely on both legal analysis and interviews with estate distribution executors to identify the problems that arise when the law governing the division of marital property is interpreted in practice. Importantly, we concentrate on cases in which one spouse owns shares in a family-owned business. Furthermore, we focus on Swedish law. The legal details may of course vary according to national (or state) legislation, and certain major variations are accounted for in this study.
The remainder of this paper is structured as follows. The next section discusses the complexities inherent at the intersection of divorce and family business. Then, the process of dividing marital property in accordance with the Swedish legal system is discussed, including a discussion of certain prominent differences between Sweden's rules and the rules of other legal systems. Through interviews with practicing lawyers, we identify practical problems related to the division of marital property when a business is involved. We conclude with a discussion of the legal instruments that can be used by different stakeholders to avoid the damaging results of a divorce.

Divorce and family business

In a perfect world, we would enjoy both harmonious families and prosperous family businesses. However, in several Western countries, the rate of divorce is nearly 50%, and the Organisation for Economic Co-operation and Development (OECD) reports a steady increase in most countries' divorce rates since 1970 based on the "divorce to marriage ratio", which is calculated as the number of divorces to the number of marriages in a given year (OECD). According to Sildon (2006) a lawyer must assume that a client, one or more of his children, or his co-owner will get divorced sometime during the life cycle of the business. With respect to the influence of the law, the otherwise complex web of roles in a family business must be set aside to fulfill legal requirements, which is problematic because such a narrow focus disregards the potential of divorce to affect other business stakeholders. Because almost all the relevant legal rules are optional, the relationships among the actors in a family business related to their various roles (i.e., as owners, leaders and family members) appear to be decisive. The law becomes of utmost importance only when the parties involved do not agree with one another. In the event of divorce, we assume that family harmony is disrupted. Thus, the optional rules will be decisive for the divorce outcome and a cautious attitude is recommended with respect to potential future divorce(s) affecting a family business. If the business is damaged during the divorce process, employees are not only affected but their jobs are also jeopardized. Advance preparations must be detailed and should include the potential tax implications of a divorce, which are not addressed in this paper but have been treated in other studies (e.g., Long & Sissel, 2007).

Although the issue of divorce has been acknowledged in the family business literature, such acknowledgment has generally not proceeded beyond its identification as a potential threat (e.g., Gersick, Davis, Hampton & Lansberg, 1997: 60). Studies have also found that divorce has a negative impact on family firm performance (e.g., Galbraith, 2003). However, as Zhou (2012) notes, there may also be reverse causality; divorce can be triggered by sagging firm performance. The literature has predominantly focused on the economic implications for the family unit, whereas this paper examines the implications of divorce for the future of the family business. The questions that arise for a business based on divorce can be complex (Drake & Lawrence, 2001). These questions are psychological, social and financial in nature with respect to the family; however, other stakeholder groups can be affected, such as employees and suppliers, and this issue has not yet been properly addressed in the literature.

A divorce can be equated with a crisis—both in the family and for the business. Nonetheless, it cannot be managed like other business challenges, such as externally induced threats, against which a family's strength can be utilized (Carter & Beal, 2014). However, it is possible to prepare for a divorce (Long & Sissel 2007; Sund, Almlöf & Haag, 2010). The division of marital property can directly cause financial constraints and ownership transfers; in addition, such division can indirectly lead to a plethora of problems.

Method

We use the traditional legal method to assess the law (Lehrberg, 2006). Thus, we rely on statutes, leading cases from the Supreme Court and legal writings. Expert interviews with practicing lawyers are used to identify practical problems and to ensure practical relevance (Van de Ven & Johnson, 2006). The interviews are recorded and transcribed. The transcripts are analyzed by both authors, first individually and then jointly. According to Reay (2014), there is value in studies based only on a limited number of interviews provided they focus on unexplored topics. The purpose of this study is explorative and thus all the issues identified are of potential interest to shed new light on the problem.

Division of marital property and unwanted acquisition of shares

The drawbacks of divorce-induced costs

In a divorce under Swedish law, all the marital property of a couple is divided, including assets that were acquired by each spouse before the marriage. Other national legal systems result in different outcomes. For example, in Germany, only the accumulated value of each spouse's property from the date of marriage to divorce is divided equally (Zugewinnausgleich) (e.g., Schwab 2012, pp. 122-130). A major purpose of the legal rules that govern the division of marital property is to protect the spouse who owns relatively less marital property. Thus, the legal system disregards the potential negative effects of divorce on the interests of a family business.

For example, if one spouse owns shares in a family business valued at € 700 and wants to keep those shares—assuming that there is no other property and no debt—the other spouse must be compensated with money or other assets valued at € 350 (for further details on these calculations, see Sund et al., 2010: 105). It is notable that the main rule (equal division of the marital property) is supplemented by an adjustment rule in favor of the spouse who owns more marital property (Marriage Code 12:1). However, adjustments are made only if the marriage has lasted less than approximately five years, and ownership of shares in a business is not recognized as grounds for adjustment.

If the owner-spouse takes a loan from a bank to finance business-related compensation, such expenditure is most often paid by the family business through additional salary or dividends (Drake & Lawrence, 2001). Ultimately, these negative financial consequences affect not only a firm's capacity to make investments but also its willingness to take risk (Rutherford, Muse & Oswald, 2006).

Drawbacks of divorce-induced ownership changes

If the owner-spouse compensates the other spouse with shares in the family firm, a new owner will enter onto the scene, which can complicate running the business—particularly if the ex-spouse is guaranteed a position on the board and/or the management team as part of the divorce. Further, if there are several owners of the business, the other owners may disapprove of the new owner, leading to additional problems. A reluctant and/or unwanted owner can be anything from an annoyance to a disaster for a family firm's circle of shareholders and its future for several reasons (Sund & Bjuggren, 2012): (1) Ultimate *control* of the business may be disrupted if an ex-spouse either acquires a majority position or can form a powerful coalition; (2) Because family business owners are frequently involved in management, the presence of an ex-spouse might disrupt cooperation and daily operations; (3) An ex-spouse as a reluctant owner might be disloyal to the business and might, for example, sell his or her shares to a competitor; and (4) The presence of an ex-spouse can cause problems for succession because the opportunity for descendants to enter the business as (majority) owners can be altered or even forfeit.

The drawbacks of divorce-induced injustices
The spouse who is not involved in the family firm might be working part time and devoting the rest of his or her time to caring for the household and children. This division of tasks within a marriage is often essential for the shareholding spouse because he or she otherwise would not be able to dedicate the bulk of his or her efforts to the business. Furthermore, there is typically no insurance to cover retirement benefits for the homemaking spouse, which leads to a considerable reduction in the homemaking spouse's income after retirement. We will return to these issues in the final section.

Often, both of the parties to a divorce wish to keep their discord out of the judicial system, not only because of the expense of legal proceedings but also because of privacy considerations. In many cases, such couples wish to conciliate, and their dispute is not publicized. If the parties do not succeed in reaching an agreement, each can apply to the courts to have a property division executor appointed, and the resulting settlement is not published unless it is appealed, which is uncommon (Beckman, Höglund, Lind, Teleman & Vängby, 2012).

Stakeholder instruments

Spouses and descendants
Spouses can draft a marriage settlement in which their shares of a family business are deemed separate property. Thus, the value of those shares will not be included in a division of marital property. However, such agreements can be difficult to enforce (Krasnow & Wolkoff, 1998), which makes alternative tools important. In some countries, such as Great Britain, separate property may yet be divided at the discretion of the court (Masson et al, 2008, pp. 340-347). A marriage settlement (i.e., a prenuptial agreement) should be drafted prior to the marriage because the non-owning spouse may have only a limited interest in executing such a settlement post-marriage. One study of families that own businesses shows that only 9.7% had a prenuptial agreement, although 21% had experienced at least one divorce during the previous five years (MassMutual, 2002).
In a succession context in which a parent bequests shares to his or her children through a gift or in a will, it is crucial for the bequest to state that the shares are to be owned as separate property by the recipient. Thus, in the event of divorce, the shares will not be included in the property division (if correctly made). In some countries, such as the USA, in the absence of an explicit statement to the contrary by a parent gifting shares to a child, such shares are the separate property of the recipient (Oldham, 2009).
In a stipulation that is part of a written agreement, family members—for instance, descendants—can be granted the right to prevent transfers of shares to a new owner. Individuals

who have signed such a document are legally bound by its stipulations. However, a third party presumably has no obligations as result of such an agreement.

Co-owners and other stakeholders
Co-owners can use clauses in a family business's articles of association and shareholders agreements to exercise options to purchase shares either before or after an unwanted new owner has entered the shareholders' circle (Sund et al., 2010). Such clauses should explicitly entail the transmission of shares (in the event of a divorce). Otherwise, they may be useful in cases of share transfers (for example, through a sale or gift), but useless when an owner undergoes a divorce. However, one American study finds that only 37.4% of family businesses have buy-sell agreements or other arrangements defining who can own stock and how stock must be transferred (MassMutual, 2007; Neville 2013). According to Morrow (2001), businesses frequently neglect to include divorce in such transfer restrictions.

If shares in a family business are transferred to an ex-spouse through a divorce and a co-owner (other than a family member) is entitled to buy the shares, a bank loan may be required, resulting in the costly withdrawals described above. For a co-owner, potential costs of this type make it even more important that all shares are owned as separate property and are thus not included in a divorce. The shareholders can be reminded of this rule in the shareholders agreement, i.e., this rule can be contained in a clause that encourages shareholders to execute proper prenuptial agreements.

Other stakeholders, such as members of the management team, have no legal tools at their disposal to avoid an unwanted acquisition of shares in the event of a divorce (Bjuggren & Sund, 2014; Sund & Melin, 2013). The next section describes practitioner interviews that illustrate how the regulatory framework on divorce (dys-) functions in practice.

Division of marital property in practice

Introducing the practice
The law regulating the division of marital property in the event of divorce is brief and generic, meaning that much is left for legal practitioners to interpret. In addition to our analysis of legal texts, we conducted an interview study with practicing lawyers to learn how division of marital property is undertaken in practice. This section is based on those interviews, which involved three lawyers from different Swedish firms who shared their extensive experience (77 years combined) with divorce cases.

The process of dividing marital property begins with an optional estate inventory in which each spouse's assets and debts are valued and listed. Each spouse's assets, minus his or her debts, provide a net value that is added together and divided equally. Although these steps are quickly described, executing them in practice involves several difficult hurdles. We describe below how the law is interpreted in practice, further illustrated by quotes from the lawyers. When an estate distribution executor is appointed by the court to arrange for the division of marital property, his or her function resembles that of a court because he or she has the power to settle the disputes. Furthermore, the executor's decision can be implemented by an enforcement officer if not obeyed. The critical practical issues identified in the interview study are elaborated under each of the following headings.

Severe conflict as the starting point
An estate distribution executor is typically appointed only in the event of a severe conflict in which the spouses have tried—but failed—to arrive at a common solution either on their own or through their legal representatives. Naturally, these prerequisites are not ideal for a

productive negotiation. In most cases, several years have passed since the couple filed for divorce, not including the period of conflict previous to the filing. The hardship of the situation greatly complicates the executor's task:

> It differs from case to case. Much is dependent on the history of the relationship and the cause of the divorce. If one of the spouses were cheating, the other's attitude becomes "that bastard will not get a nickel". (John)

> You must remember that these are sad and bitter people you are dealing with. Sometimes I get the feeling that the division of property is not the real issue but that there is just the urge to fight. (Andrew)

Based on the law, the executor's job is to end the financial relationship between the parties. In practice, this job is complicated by the fractious nature of the situation.

One common feature of marital conflict is the suspicion that the other party is hiding assets. More specifically, the spouse that has not been involved in the business suspects that the other spouse is attempting to withhold information because of the asymmetric knowledge between the spouses about the business. An ex-spouse can be forced to appear in court and take an oath certifying the accuracy of the estate inventory (Marriage Act 17:5). This procedure can be an incentive for each of the ex-spouses to provide accurate information about his or her estate; however, in practice, it can also be used as a threat to achieve compliance from an intransigent party.

> Sometimes you will suspect that things have disappeared or big loans have been given when you compare documents from previous years. Suspicions of attempts to commit fraud are common and often tied to unclear valuations. (Andrew)

The uncertainties of the divorce process also have negative implications for the business:

> Divorce can hinder business decisions; planned investments can be postponed or dropped. Uncertainties about the outcome of the divorce might lead to unwillingness to increase the value of the business before the outcome of the estate division is known. That is, of course, damaging to the business. (Kirsten)

If a family business's uncertain circumstances become known to its business associates, the business can experience additional strain. Customers and suppliers frequently restrict their business with the firm when they sense such uncertainty.

> I tell clients not to complain to anyone about the situation; they might give you some sympathy but they will still be put off from doing business with you. That is just how things work. You look after your own interests. Employees might look for new jobs and so on. You should not advertise these kind of things. (Kirsten)

Identifying assets

For the executor to divide the marital property, all the assets must first be known.

> A pitfall is failing to identify all assets; that can surface years later. (John)

The extent of the executor's obligation to identify all the assets is largely unclear and even contradictory:

> Estate division follows a summary approach, but legislative statements proclaim that the executor may identify assets by investigating as he or she sees fit. This is confusing because the purpose

> of the summary approach is *not* to scrutinize every detail. Moreover, although the law says that you *can* investigate, there is no regulation governing how you should do it. In other words, you can telephone here and there and ask around… but how far that obligation reaches, nobody knows. (Andrew)

The owners of shares in closely held corporations are known via official registration. In cases in which they have been required to separate property through a marriage settlement, for example, that fact is also officially registered.

One example of assets that are difficult to identify is money in foreign bank accounts. In some countries, that type of information is confidential and is not provided upon request. The problems with identifying foreign accounts also apply with respect to other types of foreign ownership, such as shares held in foreign businesses. Although the parties are obligated to report all their assets openly, the context of a divorce tends not bring out the best in people:

> I will sound judgmental, but most often it is the man that runs the business, and men can be very cunning. They are clever businessmen and can be very creative at hiding things. In addition, the wife generally has very little knowledge about the business but has the opinion that it is worth a lot. (Andrew)

The value of the assets

The estate distribution executors interviewed all were of the strong opinion that family businesses are among the most difficult assets to value.

> The most difficult assets to value are shares in a closely held company. We have no legal guidance regarding the valuation of the shares in a family-owned business. The Marriage Code states *what* is to be included but nothing about *how* to make the necessary valuations—this is entirely left to practice. Furthermore, there are no leading cases from the Supreme Court. (John)

> There are different methods, but no agreement about how these methods should be applied. Of course, it is common to use net asset value, but I have received valuations based on forecasted rising revenue. What can I say about that? I have no crystal ball to predict the future. If the valuation is made by a professional evaluator, I must consider it. That said, how should a valuation be treated when it is made by one of the spouses' accountants or by a business associate? (Andrew)

Valuations are difficult because of their loose boundaries; conversely, there is substantial need for flexibility:

> It is important to remember that no two cases are the same: most often, there is a need for solutions 'in casu'. When a suggestion is made, it will typically be used if nobody objects. (Andrew)

This problem partially explains why valuation is not regulated: It is simply too difficult to draft statutes that are both precise and flexible. Thus, the executors agree that they welcome future rulings by the Supreme Court.

Distributing shares or realizing their value

Generally, a division of marital property, including a business, can have the following results: (1) the owner-spouse keeps all his or her shares because they are separate property; (2) the ex-spouse is compensated with money or other assets; and/or (3) shares are transferred.

The procedure for handling a business that is included in estate division is legally simple but practically difficult.

> If the spouse entitled to keep the company does not have other assets or the ability to obtain a loan from a bank to compensate the other spouse, the only solution is to split the business 50/50. In my view, the law leaves no other option. (Andrew)

The result is that the spouses divorce one another but end up as business partners. A remaining option is for the original owner to force the other spouse to sell:

> Either person can claim his or her right pursuant to the Joint Ownership statute, thus forcing the other to sell. This is a circumstantial process but can work out in the end. However, to sell under such circumstances will not result in a fair price, one can assume. (Andrew)

If the owner-spouse cannot find another way to compensate the other spouse, an additional option is for the couple to agree to delay the division. One solution is to wait to render compensation until the owner-spouse sells his or her shares:

> I have seen situations in which it is deemed better to wait to sell the business; typically, the other spouse, most often the wife, agrees to postpone the division for that reason. It is not a good solution, though. More common is to supplement the estate division with a stipulation for additional compensation when the shares are eventually sold. It's not a very good solution either but can seem like the only viable option. (Kirsten)

Shareholdings in a business can be powerful tools when negotiating compensation. The spouse who owns the business can threaten to give shares in the business instead of money because a minority post in a former spouse's business might seem undesirable. In other cases, the situation is reversed such that the spouse who does not own the business can threaten to take shares in the business if the share-owning spouse cannot buy him or her out. Both versions occur, and the results vary from case to case.

> It can be suggested in discussions, "if so, I can only give you shares" (…) Those arguments are used as a trick to gain advantage in the negotiations: "Then, you can sit there with nothing but a minority position in my business". (Kirsten)

One question is whether a minority post can be refused as compensation because it is 'clearly unsuitable' (Marriage Act 11:9). However, this strategy is speculative and has yet to be considered by the Supreme Court.

Psychological/emotional ownership

In working out an agreement, psychological attachment to a business can complicate the pursuit of a viable solution. A spouse's emotional attachment to an asset—whether conscious or unconscious—that is included in the division of property will strongly affect that spouse's evaluation of that asset (Zellweger & Astrachan, 2008). However, the estate distribution executor's task is solely to calculate the value of all the assets and to divide them equally, which suggests that executors should not account for the consequences of the division, i.e., no consideration should be given to the consequences for the business as a result of or following the division.

The estate distribution executors we interviewed were specifically asked about their reasoning process when a business is included among the assets in a divorce:

> My task is not to consider the perspectives of the parties but to make legal judgments; I do not have any other task. Sometimes, one might think that there are certain circumstances that could be considered, but it is not my job to lead the parties there. (John)

> Nothing special [if a business is involved]: it is simply an asset among other assets. The spouse that runs the business has first dibs on it because it was his or her property. If the asset is a limited

company that both parties own, it becomes tricky, particularly if both spouses were actively involved. (Andrew)

Therefore, if the business belongs to one of the spouses, that person is entitled to receive the shares in his or her lot and provide financial compensation to the other spouse to achieve the share valuation specified in the property division. Problems arise when such compensation cannot be financed or when both spouses have rights to claim the business in their lots (because of shared ownership):

> If so, I would tell them that they each receive half of the business. In my opinion, we have a tricky praxis here that dates back more than 100 years and relates to the fact that the rules governing the division of marital property are based on the inheritance laws for the distribution of an estate upon the death of the property owner. In both cases, there are assets to be divided. The old statement says that if the parties cannot agree on who gets what, they shall get equal shares of everything [Inheritance Act 23:3]. I think that this is a horrible solution that destroys value, but it is the norm. (Andrew)

A company is not easily split in half. In practice, splitting a business will lead to shared ownership by the divorced spouses. If the ex-spouses cannot collaborate, it would seem preferable for one or both to sell—which might be easier said than done. The consequences for the business and its stakeholders are undesirable if the firm is controlled by persons in conflict or if the shares are put up for sale by distressed owners.

In a divorce, emotional attachments should not be considered in the division. Even so, emotions can affect the negotiations.

> Property division is often not just judicial, it involves the people with whom you are working, and they must live with the results of the division afterwards. You somehow must weigh that, but how to do so is not found in the Statute Book. (Andrew)

When the spouses have children, their will to find viable solutions for both parties are generally stronger. In the case of a family business, the issue of succession then arises.

> That is my experience [when children are involved]. You do not push it to the limits, you do not want it to drag out too much, and you want to reach a solution. However, problems still arise because it can be difficult to fund compensation even if the business has value. This occurs not out of spite but because of cash flow problems. You encounter practical problems: it is not always that easy to get a loan from a bank. (Kirsten)

It is still a sensitive topic to request a prenuptial agreement and many people avoid doing so for just that reason. In a multigenerational family business, a prenuptial agreement can be suggested by relatives when the younger generation—the potential successors—are marrying third parties.

> They often want their children to have prenuptial agreements. You often get more questions about that from the parents then from the children themselves, but they are no longer children in that sense, of course. (Kirsten)

Time and cost

A divorce in Sweden is technically a short process. If there are no minor children (under 16 years of age), a divorce can be completed within a few weeks. If there are underage children involved or if one of the spouses so wishes, there is a six-month period for consideration. In practice, it takes considerably longer before an agreement is reached. Legal representatives charge by the hour: the current rate is typically €156.

> It takes time… as a retired lawyer once told me: "it is not a bad thing that these estate divisions drag out in time because people tire and give in". At that time, I thought it sounded outrageous but now I can really see the point. In addition, when a company is involved, it definitely takes time. Bookkeeping data are presented and there are many items to be questioned. Each item that is questioned results in an exchange of letters between the parties' legal representatives. For each letter, there is a delay of several weeks. Time passes quickly. (Andrew)

The expenses for valuation can also be substantial, particularly for a business that is difficult to value and that therefore might require several expensive rounds of correspondence between the parties' lawyers before an agreement is reached—notably, the agreement has become more expensive due to the transaction costs (legal fees) necessary to reach it. The time and cost of the divorce, along with its aftermath, hampers the business even when the shares can be excluded from the division:

> The person who keeps the business will strain his or her private finances, and to mitigate his or her personal situation, he or she might need to burden the business with a larger salary and might be more interested in dividends than reinvestments. Additionally, that spouse might not perform well at work because of his or her family problems. All of this has a negative effect on the business. (Kirsten)

The "self-made" unofficial estate division

Divorces in Sweden are of the "no-fault" type, which means that there is no legal significance attached to who is at fault. Therefore, there is no need to make a legal determination of that issue. Accordingly, and because of the lengthy and expensive procedures required to divide marital property, many choose to resolve their divorces informally and on their own:

> It is very common that no estate division at all is conducted—no formal, written division, that is. Many choose to resolve their situations on their own and just leave it at that. It is not unusual for people to come to me years after the separation because they have been worried that it was not done honestly, and they feel deceived. I then ask if there is a written agreement. If there is a valid agreement, there is nothing I can do, but if there isn't, then the case can be processed. Such a case is more difficult, however, because you must establish what assets there were at the time of the divorce. (Andrew)

People who marry into families with businesses have been known to receive unfair treatment when separating from their spouse and the rest of the family. Without professional legal advice, such spouses can be left with no stake in the business, no compensation for their stake, and can remain ignorant of their actual rights.

The true number of "self-made" divisions is unknown because couples that reach agreements on their own and remain content do not typically contact lawyers. Conflicts that surface years after a divorce that was first handled by agreement between the divorcing spouses are worse because they often lead to new problems that would not have occurred had the process been handled professionally from the beginning. Therefore, finding ways to make the division of marital property less consuming of both time and money might also help improve the quality and fairness of property divisions, if they lead to a larger proportion of property divisions that are formally completed with proper legal support.

When family law and company law collide

Family law dictates the terms of a divorce, whereas companies are regulated by commercial law. When a business is included among the assets to be divided in a divorce, there are instances in which both regulatory frameworks must be considered in parallel. The co-owners can have a shareholders agreement that forbids the owners from transferring shares to a third party. This agreement is legally binding on the parties (co-owners), but not necessarily on third parties (e.g., an ex-spouse). Some clauses can also be included in company articles, which are binding on third parties. Furthermore, a clause concerning transmission (such as in a divorce case) is legally allowed in only one type of restriction (post-sale purchase rights) that can be contained in the articles. Transmissions included in shareholders agreements may be legally insecure.

> You might want to compensate your ex-spouse with a minority post in your business, but there can be a shareholders agreement stopping you if there are co-owners. (Kirsten)

When family law and commercial law collide because of contradictory terms in a prenuptial agreement and a shareholders agreement, for example, family law generally prevails:

> The legislation on estate division in the event of divorce is historically constructed as a safety net to protect the weaker spouse. Therefore, when the legal frameworks are juxtaposed, I believe that the obligation to split 50/50 will stand no matter what. If the business owner has not been farsighted enough to obtain a prenuptial agreement, he can suit himself. (Andrew)

The length of the marriage can, however, be cause for mediation:

> There is a so called staircase formula for the right to marital property; if you divorce after one year, you only share 20% of assets; after two years, you share 40%; after three years, you share 60%; after four years, you share 80%; and after five years, you share everything. However, I seldom see estate divisions of marriages that are so short. (Andrew)

This "staircase formula" is expressed in the preparatory works (government proposition 1986/87:1 p. 44 and 187) but not in the statutes and is thus not legally required to be followed, although it may be used as an informal norm. In theory, a spouse can obtain half of a business even after fewer than five years of marriage. One should remember, however, that many businesses are small and only modestly profitable, if at all. In such cases, it is difficult to pay the compensation required.

> Capital is invested so that in practice, there is no money to be had. However, if the business has value, then that value should be shared according to the rules of estate division, regardless of how tied up it is. (Andrew)

A low priority for policy makers

The executors interviewed were frustrated about the lack of interest by policy makers to improve on the many obvious problems of applying the law. They experience a hierarchy among the legal disciplines in which family law is at the bottom:

> In the law, splitting up families [family law] has low status, whereas splitting businesses [commercial law] is considered more prestigious. That is just how it is. (Kirsten)

The absence of detailed regulations in cases involving the division of marital property leaves a great deal of room for interpretations. Standing alone, this lack of hard structure in itself is understandable because the legal text must be inclusive and leave room for individual adaptation to work. The problem is the lack of guidance from recent rulings by the Supreme Court.

> I am not so sure that we need more legal text, but we definitely need some rulings by the Supreme Court. However, we must simply accept the fact that the Supreme Court is not very interested in family law. I have a hunch that the government reasons along these lines: these disputes about division of marital property are common. We do not want them in court, so we want to make sure that there is a strong filter that stops most of them. I believe that less than 10% of the cases are appealed, not because the parties are content with the outcome but because they are exhausted. The government is quite pleased with this. They do not really care about how individual estate

> distribution executors are handling these cases. As long as not too many are shouting too loudly, they will let it be. That is my cynical view. (Andrew)

There are many examples of vague statements that force interpretations, for example, in the event of adjustments:

> The wording says that "the length of the marriage and the financial state of the spouses shall be considered" [Marriage Act 12:1]. However, when and how much should that be considered? It also says that "other circumstances" can be considered. That means essentially everything!
>
> Another example concerns property-division settlements. There is a rule stating that you must accept property instead of financial compensation "as long as it is not clearly unsuitable". [Marriage Act 11:9] Again, there is lack of praxis: what counts as clearly unsuitable? There are so many gaps like this. (Andrew)

Instead of support from statutes, lawyers rely on their experience and their networks:

> You ask if your solution seem reasonable. Because the few rulings available are so old, you ask colleagues instead. "What do you think about this? What would you have done in this situation?" (Andrew)

An update of the Marital Act would be welcomed by the practitioners who use it in their daily work:

> It is so old! Even the updates are old. Take the section on spousal property: the update is from 1958… Much of it is still aimed at protecting the weaker spouse, and I wonder whether young people today see the same need to do that. (Kirsten)

In sum, there are many problems with applying the Marriage Act in practice when a family business is involved in a divorce. Both the period of uncertainty during the process and the outcome of the property division will—directly or indirectly—affect the business. However, the task of the estate distribution executors is strictly to handle the property division without considering the consequences for the business and its stakeholders.

What can be done—a discussion

Policymakers
Legislative changes can be made so that the shares of an unlisted business are *not included in a division of marital property in the event of divorce.* This type of system is proven and has been implemented in Austria. According to Austrian legislation, shares in an unlisted business are not included in the division of marital property in the case of divorce, unless they are merely a capital investment (Ehegesetz 82§ [the Austrian Marital Act] e.g., Nowotny, 1988 and Deixler-Hűbner, 2009, pp. 170-174). Thus, the previously described uncertainties during the process, along with the potentially negative impacts on the business due to the outcome of a division of marital property, can be avoided by means of legislation.

To achieve this, we propose that shares in unlisted businesses should be separate property by default until other agreements are made (unless they represent a purely capital investment). However, our reasoning can be objected to on the grounds of injustice:

a) If the non-owner spouse has invested money in the business and/or been an employee, that should be accounted for.
b) More controversial are cases in which the non-owner has:
    1) Devoted much of his or her time raising a family and thereby enabled the owner-spouse to focus on the business; and/or

2) Invested all his or her money in the joint dwelling and other domestic matters and thus enabled the owner-spouse to invest in the business.

If and how should these situations be accounted for in a divorce process? First, the non-owner has no responsibilities for the debts of the other spouse—those debts are assumed to have been invested in the family firm and in its debts, for which the owner-spouse in most cases stands in surety. This factor can be understood to provide balance; although not entitled to the success of the business, a non-owner does not share in its risks.

Second, if we consider other stakeholders' interests, we believe that this reasoning also favors the owner-spouse and the business. These stakeholders (co-owners) have no, or limited, say in the divorce process. Nonetheless, the stakeholders (and their families) can all suffer severe losses if the family firm must liquidate due to the division of marital property, if it survives but suffers for the same reasons, or if the ex-spouse as a new owner poses problems that severely hamper the business's development or otherwise causes distress. The negative impact for the owner-spouse becomes even more apparent in cases in which a business has been owned by the same family for generations. In such a case, it seems unfair for the non-owner to become a new owner simply by marrying and divorcing a family member. A legal advisor should be able to account for both the family members and the future of the business.

Legal advisors
The complexities for legal advisors in the event of divorce in business families are primarily caused by three circumstances:

a) The still-influential stereotype of one spouse caring for the household and the other working to support the family financially: the legal system protects the interests of the spouse with a weaker position.
b) The legal system regards a divorce in a business family as an internal affair between the spouses, and the interests of other stakeholders (e.g., employees), who have no legal ability to influence the divorce process, are not (although it is arguable that they should be) considered.
c) The relationship between family law and company law is not sufficiently coherent and adapted to business families, whereas the legal instruments that might bridge this gap are frequently forgotten, ignored, bypassed or are too costly and complicated to enforce.

This background, along with its impact on the legal rules, makes it crucial to have a legal adviser who can identify situations in which the optional rules will be decisive. Furthermore, s/he can lead the spouses through the legal labyrinth, while remembering the future of the business (at least to the extent possible under the law of divorce). Otherwise, many stakeholders, in addition to family members, may be severely affected.

In the current case, we suggest that a legal adviser should provide the non-owning spouse with at least the following options:

a) A pension rights policy, at least if s/he has had no opportunity to obtain a pension by working in the open market; and
b) An opportunity to keep the joint dwelling following the divorce.

Conclusions

There is a complex web of roles in a family business. However, when the legal system dominates a process, as it does in the event of divorce, it will override otherwise complex and nuanced relations and roles within and between the entities of family, business and ownership. Instead, ownership will be regarded only in the strictly legal sense and the business will be reduced to one asset among many assets that are included in the division of marital property. Unwanted transfers and transmissions of shares can lead to numerous drawbacks. A divorce can be costly for both the owners and the firm, and it can result in ownership changes that hamper the firm's development. We contribute to the literature by broaching the issue of saving the family business from family failure, which is complementary to the important topic of preventing family failure in the event of business failure.

The expert interviews with practicing lawyers resulted in the identification of several problems during the divorce process that arise when a family business is involved. Many contradictory and conflict-laden aspects must be considered in parallel: legal ownership and psychological ownership; company law and family law; and the consequences for individual family members, other stakeholders and the firm itself. Complicating factors are self-made solutions and the execution of important financial agreements in the context of a family crisis. Many difficulties pertain to reaching agreement on the value of assets and whether to transfer shares or realize their cash value.

Today the best tool to avoid a divorce that leads to an unwanted transfer of shares or costly buyouts is a marriage settlement. Stipulations in a charter for family counsel can serve the same purposes. Furthermore, co-owners can use transfer restrictions to avoid having to accept a new owner (but not costs). These preparations require the use of legal advisors and are costly and time-consuming to form and uphold due to the interrelation between the family and the business system. Unfortunately, these precautions are also largely unused.

Thus, we argue that *policymakers* have solid grounds to establish rules in which shares in an unlisted business are by default assigned to separate property and therefore are not included in a division of marital property (unless they are merely a capital investment). Otherwise, without legal consideration of the future of the family firm, the executor will be bound by a legal system that prioritizes the interests of the seemingly weaker person without due consideration of the business and its stakeholders. In this sense, it is a pitiful excuse—in the words of one of the interviewed lawyers —to establish a "filter" that stops most cases involving the division of marital property from reaching the court system.

For the spouses involved, this solution has the potential to extensively simplify the divorce process, and thus also the level of conflict and negative impact on the business. If children are involved, this solution would seemingly be preferred by both parents because it will improve their future financial status and the possibility of intergenerational succession. With due preparations to compensate the non-owning spouse (pension right policies, etc.), the downsides to our suggestion can be overcome.

For *scholars* who study family businesses, divorce must be acknowledged among the factors that threaten the family firm and should thus be anticipated in legal documents, not least because the current legal framework disregards the interests of the business and its stakeholders. Finally, we wish to emphasize the importance of cross-disciplinary research on divorce and family businesses. The legal side of the phenomena is important for ownership issues. However, legal systems do not typically interfere with managerial issues. The impact of divorce on family business management requires empirical exploration, which is our suggestion for further studies.

References

Beckman, N., Höglund, O., Lind, G., Teleman, Ö. and Vängby, S. (Looseleaf-system), *Svensk familjerättspraxis* [Swedish case law], A VII f (updated August 2012), Nordstedts, Stockholm.

Bjuggren, P-O. and Sund, L-G. (2014), "A contractual perspective on succession in family firms: A stakeholder view", *European Journal of Law and Economics,* Vol. 38 No. 2, pp. 211-225.

Cater III, J. and Beal, B. (2014),"Ripple effects on family firms from an externally induced crisis", *Journal of Family Business Management,* Vol. 4 No. 1, pp. 62 – 78.

Deixler-Hűbner, A. (2009), *Scheidung, Ehe und Lebensgemeinschaft*, LexisNexis, Wien.

Drake, M. and Lawrence, T. (2001), *Divorce and the family business*, Jordan Publishing, Bristol.

Galbraith, C.S. (2003), "Divorce and the financial performance of small family businesses: An exploratory study", *Journal of Small Business Management,* Vol. 41 No. 3, pp. 296-309.

Gersick, K., Davis, J., Hampton, M., and Lansberg, I. (1997), *Generation to Generation Lifecycles of the Family Business,* Harvard Business School Press, Boston, MA.

Government proposition 1986/87:1. Marriage Act [Äktenskapsbalken]

Krasnow, H.C. and Wolkoff, R.L. (1998), "Three proposals for interdisciplinary study", *Family Business Review,* Vol. 11 No. 3, pp. 267-274.

Lehrberg, B. (2006), *Praktisk juridisk metod*, [The practice of legal method], Institutet för bank- och affärsjuridik, Uppsala.

Long, W.M. and Sissel, S.A. (2007), "Divorce in the family business: What are the options?" *Business Entities*, March/April, pp. 30-35.

MassMutual Financial Group (2002), *American Family Business Survey*, George G. and Robin Raymond Family Business Institute and Massachusetts Mutual Life Insurance Company, Boston, MA.

MassMutual Financial Group (2007), *American Family Business Survey*, George G. and Robin Raymond Family Business Institute and Massachusetts Mutual Life Insurance Company, Boston, MA.

Masson, J., Bailey-Harris, R. and Probert, R. (2008), *Cretney's Principles of Family Law*, Sweet & Maxwell, London.

Morrow, E.P. (2001), "Your business succession plan: Are you going barefoot?" *Journal of Financial Planning,* Vol. 14 No. 5, pp. 2-4.

Neville, M. (2013), "Shareholders conflicts in the European private company (EPC)", In *The European private company – societas private Europaea (SPE)*, European Company and Financial Law Review, Special volume 3., Gruyter, Berlin, pp. 193-242.

Nowotny, C. (1988), "Ehescheidung und Unternehmensvermögen" [Divorce and business assets]. *Österreichische Juristen-Zeitung*, Vol. 43 No. 20, pp. 609-617.

Pierce, J. L., Kostova, T., and Dirks, K. T. (2001), “Towards a theory of psychological ownership in organizations”, *Academy of Management Review,* Vol. 26 No 2, pp. 298-310.

OECD (2014), “Family database”, available at: www.oecd.org/social/family/database (accessed November 27, 2014).

Oldham, J.T. (2009), *Divorce, separation and the distribution of property*, (Release 44.), Law Journal Press, New York.

Reay, T. (2014), “Publishing Qualitative Research”, *Family Business Review,* Vol. 27 No. 2, pp. 95-102.

Rutherford, M.W., Muse, L.G. and Oswald, S.L (2006), “A new perspective on the developmental model for family business”, *Family Business Review*, Vol. 19 No. 4, pp. 317-333.

Schwab, D. (2012), *Familienrecht* [Family law], Beck, München.

Sharma, P. (2004), “An overview of the field of family business studies: Current status and directions for the future”, *Family Business Review,* Vol. 17 No. 1, pp. 1-36.

Sildon, M.E. (2006), “Strategies for dealing with divorce and the family business”, *Estate Planning*, July pp. 34-41.

Sund, L-G., Almlöf, H. and Haag, K. (2010), “Divorce and death in the family firm - A business law perspective”, *European Business Law Review,* Vol. 20 No. 2, pp. 101-118.

Sund, L-G. and Bjuggren, P-O. (2012), “Protection of ownership in family firms: post-sale purchase clauses and management perspective”, *European Journal of Law and Economics,* Vol. 33 No. 2, pp. 359-370.

Sund, L-G. and Melin, L. (2013), “Intergenerational ownership succession. A stakeholder perspective”, *European Business Law Review*, Vol. 24 No. 4, pp. 407-429.

Van de Ven, A., and Johnson, P. (2006), “Knowledge for theory and practice”, *Academy of Management Review,* Vol. 31 No. 4, pp. 802-821.

Zachary, R.K. (2011), “The importance of the family system in family business”, *Journal of Family Business Management,* Vol. 1 No. 1, pp. 26-36.

Zellweger, T. and Astrachan, J. (2008), “On the Emotional Value of Owning a Firm”, *Family Business Review,* Vol. 21 No. 3, pp. 347-363.

Zhou, H. (2012), *Essays on Family Firms*, PhD Series 42:1012, Copenhagen Business School, Copenhagen.