

Are unexercised employee and director **Share Options and Rights** treated as property by the Family Court?

In **Nielson** (2012) the Family Court held that as both parties had expert witnesses who claimed to be able to value the share options and rights in the husband's current remuneration package, those entitlements were property to be included in the parties' pool of divisible matrimonial assets.

The Court elected not to adopt the approach submitted on the husband's behalf that while such employment entitlements could be valued, they should be categorised as merely "financial resources".

Financial resources are typically taken into account in a far more nebulous fashion than are assets categorised as "property".

The distinction between an asset which is treated as "matrimonial property" and one which is treated as a "financial resource" is significant.

An asset which is "property" is included in the overall valuation of the matrimonial asset pool to be divided between the parties; whereas a "financial resource" is excluded from the asset pool and only taken into account as one of a range of intangible factors which influences the proportions in which the pool is to be divided.

The husband submitted that the following features of the entitlements should distinguish them from the other items of matrimonial property, namely:

- their illiquidity and lack of marketability;
- the conditions imposed on their disposal;
- the risk of his employment being terminated and the entitlements forfeited before being exercised; and
- the risk of the company not clearing the performance hurdles upon which the right to exercise the entitlements was conditional.

However the Court considered that as the above features were also the discounting factors which both parties' valuers had taken into account in a substantive way when attributing a value to these future entitlements, it was not appropriate to treat them as being only a financial resource.

The Court concluded that if an asset can be valued it may be treated as matrimonial property even if it cannot be sold now or in the immediate future.

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