

Appointing a Receiver in the Family Court Setting

Unique Solutions to Common Divorce Case Problems

by Henry M. Nirenberg

Many of the recent articles concerning the appointment of a receiver have focused on the recent rule changes and the new requirements under those revised rules.¹ There are few articles that discuss the practical utility of seeking the appointment of a receiver in cases. Receivers are often appointed in business settings to liquidate or manage a host of assets, from commercial buildings to trade assets. However, a receiver can be appointed in *any* case before a circuit court judge where the facts and circumstances support such an appointment – including dissolution of marriage proceedings.

Circuit court judges, in the exercise of their equitable powers, may appoint receivers in all cases where appointment is allowed by law.² The Michigan Supreme Court has recognized that a trial court may appoint a receiver even in the absence of statutory authority by virtue of the trial court's inherent equitable powers.³ In other words, a circuit court may use its equitable power on a case-by-case basis to determine whether to appoint a receiver. Often the facts and circumstances surrounding a divorce proceeding indicate that the appointment of a receiver is not only within the discretion of the court, but is absolutely necessary.

The primary purpose for the appointment of a receiver is to preserve "property and to dispose of it under the order of the court."⁴ A receiver is, after all, often referred to as an arm of the court.⁵ Among the justifications for the appointment of a receiver is the need to conserve, preserve, protect and administer property.⁶ A receiver can be a useful tool in divorce proceedings, especially when the receiver is an "operating" receiver – an attorney or other professional

who takes a hands-on approach to his or her appointment and can use all of his or her legal and business knowledge and experience to navigate the myriad issues that need addressing. Under the revised rule, in fact, the court is required to appoint someone who has "sufficient competence, qualifications, and experience to administer the receivership estate" at issue.⁷ Beyond the requirements set forth in the court rules, the choice that confronts the court is whether to appoint a proactive receiver or a reactive receiver. As an operating receiver, I have been appointed in a number of divorce proceedings to address a number of different issues, each of which required, to one degree or another, a proactive hands-on receiver.

Scenario 1: Co-Owned and Co-Operated Family Business

Husband and wife own and operate a successful automotive parts business with many employees, a warehouse, millions of dollars in inventory and a substantial line of credit. The couple's feuding inevitably spills over into the workplace. As a result of their personal conflict, the business begins to suffer and starts to lose money. Often, conflicting instructions are given to workers and morale is low because employees are fearful of losing their jobs as a consequence of being seen as "taking sides" in the disputes between the owners. Vendors are not getting paid, because the spouses cannot agree on who is to be paid and in what order. Finally, the bank is on the brink of calling in its line of credit due to several technical defaults.

Similar issues concerning family owned and operated businesses are all too common in a divorce setting and are

not readily resolved through the filing of endless motions to show cause or other legal remedies. Unless something is done quickly, there will be nothing left of the business – and both parties will lose in that situation.

The appointment of a highly experienced operating receiver can assist the parties in stemming the losses, calming the situation – especially with the workers and lenders – and allow counsel for the parties to move forward with, and concentrate on, the legal aspects of the case. Because of the personal dysfunction that permeated the business, the operating receiver will have to investigate and address a number of issues upon appointment, including: 1) verify the existence of and/or obtain liability, property, casualty and workers compensation insurance; 2) determine the adequacy of the policies' coverage limits; 3) review the status of all taxes, including employment tax and sales tax; and 4) determine the status of contracts, work orders, vendor obligations, bank loans and payroll.

How is this investigation conducted? Ordinarily, the receiver will need to meet with the parties at their place of business (either together or separately, with or without counsel, based on their preference and the approval of their counsel), interview the management team, review current financials of the business, and perform a general walk-through of the business. Once a rapport is established, the

receiver will assemble a management team consisting of key employees and will learn about and discuss current and past business issues. This accomplishes two things. First, the receiver obtains current and "honest" intelligence concerning the business and its operations (both the good and the bad). Second, the process provides a psychological boost to the employees, who are now reasonably assured that they can do their jobs without fear of reprisal from either party for appearing to take sides.

Once the management team is in place, the receiver can address a slew of outstanding issues that plague the business and permeate the divorce case: assist with regulatory or government investigations, take inventory to assist the evaluators, make decisions concerning liquidating or abandoning obsolete inventory, control waste, account for and secure potentially valuable scrap material, and re-open the doors to improve sales and to show the community that it remains a viable business. In addition, the receiver will meet with loan officers from the lender to present a plan going forward and try to avoid foreclosure or other collection activities. Finally, armed with all of the information and with a game plan in place, the receiver will report to the parties and their counsel so everyone is on the same page and everyone is operating with the same working knowledge concerning the business and its status.

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This knowledge, updated frequently, is vital as the parties navigate through the various proceedings surrounding their divorce. The receiver is not operating in a vacuum or doing this all on his or her own but rather is working with the parties, counsel and key management personnel to keep the business afloat and as healthy as possible while the marriage is winding down and being dissolved.

Of course, sometimes there is so much hurt, anger and vitriol between the parties that one of the spouses will refuse to cooperate with this “management team” approach. In my 28 years of practice as an operating receiver, this has occurred on more than one occasion. In those instances I have resorted to giving the non-cooperative party a paid leave from the business. The party is still kept informed regarding what is transpiring with the business, but the party’s presence has been removed from the place of business and he or she is no longer directly involved in the day-to-day operations. This paid-leave solution will continue until a property settlement has been reached or the court orders otherwise.

Scenario 2: Family-Owned Business and Only One Spouse Participates in its Operation

Sometimes, one of the spouses does not participate in the operation of the business; however, he or she still needs to have current financial information concerning the business to determine what, if anything, he or she is entitled to in the division of assets. Valuable and necessary information may be stored on the company computers and the non-participating spouse may be shut out from having access to this information. Sometimes attempts to mirror or copy the hard drive are being thwarted. Motions may have been filed seeking to compel discovery and impose sanctions; still, the information is not being made available. Counsel for the shut-out spouse cannot even contemplate attending mediation or facilitation without this information (nor would such attendance be fruitful), so the case has ground to a halt. A receiver can be appointed to assist in preserving and gathering the information and documentation necessary to proceed with the divorce proceeding, to work with experts to coordinate the vital and material information needed, and to cut through the red tape. The receiver’s job will begin by meeting with the accountants, advisors or business valuers. A discovery plan is created and the receiver will work with the company’s IT or accounting personnel (or, in some cases, the receiver’s own experts or a combination of the two) to have the items produced, usually in conjunction with a well-crafted confidentiality agreement. Often, it is the physical presence of the receiver, armed with the full authority granted by the court, that gets the ball rolling and allows for the smooth transfer of the necessary financial information to counsel for the parties.

Scenario 3: Complying with Support Obligations

Sometimes a recalcitrant party is unwilling to pay child support or spousal support. Sometimes the funds avail-

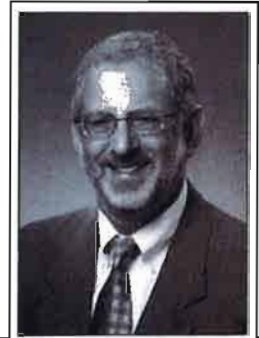
able to meet the support obligations are locked in an IRA account, 401(k) or other retirement vehicle and not readily available. Similarly, in the case of highly paid executives, some of his or her compensation and/or wealth can be found in an employee stock ownership plan (ESOP) or other stock options. Often, these types of assets comprise the bulk of the marital property to be divided or tapped into and, just as often, may be located out of state. In more complicated cases, there are tax liens filed against the taxpayer, making the collection of funds even more difficult. The court can appoint a receiver to control and manage the distributions from these types of funds and, with a properly drafted order, the receiver will be able to cut through a lot of the red tape associated with making withdrawals or liquidating these types of assets.⁸ The receiver, in this instance, is essentially appointed over the personal estate of the non-paying owner. All the necessary paperwork can be completed and submitted on behalf of the owner-spouse; if tax liens are filed, the receiver can address and/or negotiate a settlement with the IRS and the remaining funds can be released to the receiver for distribution in accordance with the court’s direction.

In other instances, one spouse may be seeking to modify previously entered support orders. There may

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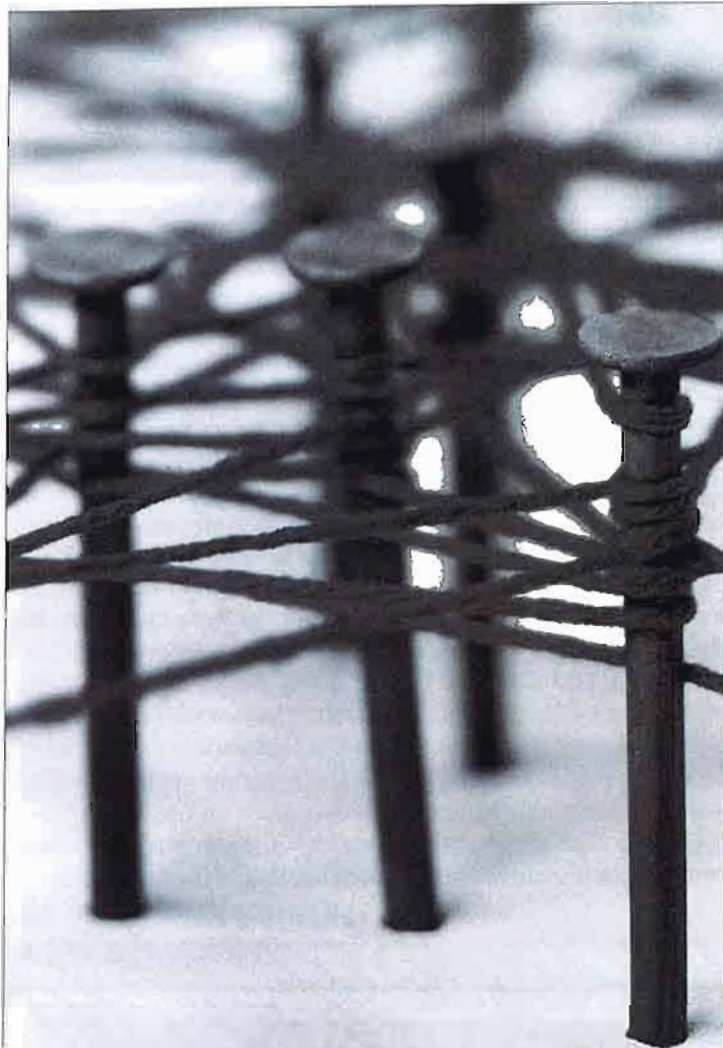


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be a change in financial circumstances, with either the receiving party earning less or the paying party presumed to be earning more. There may be a failure to comply with valid discovery requests or providing few or non-responsive documents. In one case, I was appointed as receiver over a self-employed handyman who was paid primarily in cash. His former spouse, seeking child support modification, believed his income reporting was inaccurate. I was able to subpoena bank records, tax returns, business contracts and similar documentary evidence and, thereafter, to employ a forensic accountant to determine whether the ex-wife's concerns regarding under-reported income were valid.

Scenario 4: Cash Businesses and the Disappearing Dollar

One of the more difficult scenarios a receiver will face in a divorce proceeding involves a closely held business that operates mainly in the world of cash: retail stores, repair shops, self-employed contractors, restaurants, bars and hair salons. This is made even more difficult when only one of the two spouses actually work in and control the business. One such case was *Shouneyia v. Shouneyia*.⁹ In *Shouneyia*, the trial court awarded the plaintiff property and attorney fees as part of the divorce judgment that was entered.¹⁰ The defendant claimed not to have the funds or resources necessary to satisfy the award.¹¹ The plaintiff moved for the appointment of a receiver over the defendant's assets, including a closely held business – a market that he operated with his brother. The trial court appointed me as receiver over the business even though the business was not a party to the litigation. Subsequent to my appointment as receiver and prior to an appeal being filed by the defendant, I was able to view firsthand the operations of the business. As the Court of Appeals noted, the pertinent facts appeared undisputed.¹² Among the facts cited by the Court of Appeals in determining the trial court had not abused its discretion in appointing a receiver over the corporation was the defendant's business practice of "multiple daily acts of zeroing out cash registers."¹³ Because the defendant claimed a lack of funds and assets prevented him from paying the plaintiff the sums previously awarded to her, it was imperative that the market operations become more visible and traceable than is typically common with cash-oriented businesses.

Closely held businesses that transact business mostly in cash pose unique challenges: 1) finding trustworthy operators, if necessary, to replace those currently in control and who are suspected of hiding assets; 2) inventorying licensed products such as beer, wine, liquor, cigarettes and lottery tickets; 3) preventing improper business practices (e.g., check cashing services without proper licensing); and 4) preventing operators from zeroing out registers, thereby deleting the receipts of the day, or from taking other steps to disguise the true cash flow of the business. The receiver may first turn to other family members familiar with the business in trying to find a trustworthy operator. If no such family member exists, then the receiver will

look for other professional recommendations. Ultimately, the physical presence of the receiver in the business usually translates into the operator co-operating with the receiver or, if nothing else, agreeing to settle the case for fear of the business being shut down and the business assets liquidated.

Scenario 5: Refinancing Existing Loans Required

A term loan is due in the middle of a divorce proceeding and the operating spouse wants to either refinance the loan or needs to borrow additional funds. The other spouse, however, refuses to release the business asset from an existing status quo injunction in order to obtain new or additional financing. The judge, not knowing the business, is being challenged to make a decision that could negatively impact one or both of the parties. With the appointment of an operating receiver, the receiver has the opportunity to investigate the business, review and analyze the financial needs of the business, give a recommendation to the court as to the need for funds by the business and, if approved and authorized, make certain the loan proceeds are allocated to the needs of the business.

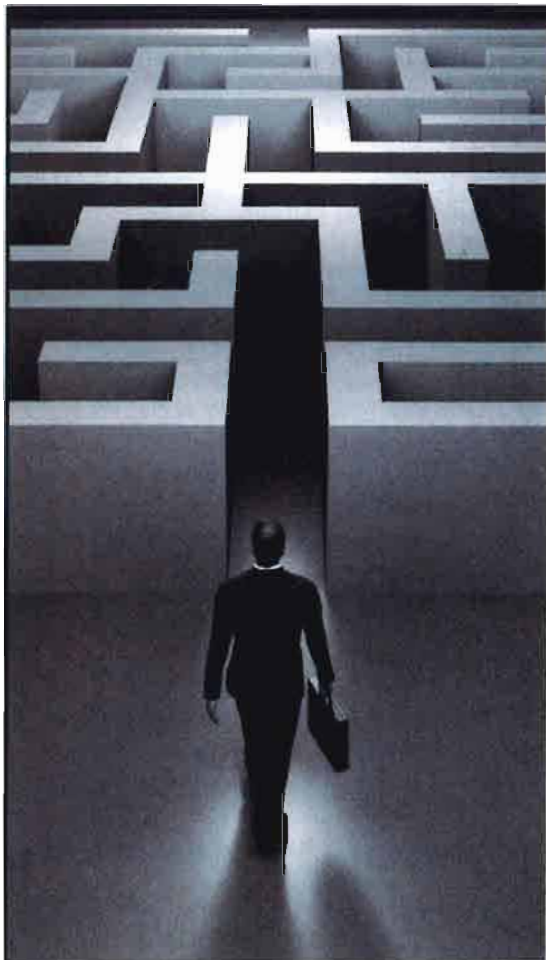
In other instances, refinancing of the business assets may be required to provide a spouse with sufficient liquidity in order to effectuate the settlement of the case. Again,

the appointment of a receiver will give the non-operating spouse the assurance that the attempts to refinance are on-the-level, represent a legitimate business purpose, and that the proceeds – or a sufficient amount of the proceeds – will be used for their intended purpose: the payment to the non-operating spouse of his or her fair share of the underlying business.

Scenario 6: As the Marriage Goes, So Does the Business

Sometimes the failure of the marriage will also result in the demise of the family-owned business. In this scenario, the receiver will take the necessary steps to either sell the business as a going concern or to liquidate the business assets for the benefit of its creditors, and then distribute any of the net sale proceeds to the parties in accordance with the terms of the final judgment of divorce (or an amicably reached property settlement). Selling the business as a going concern would require the receiver to investigate the financial status of the company, its current contracts and pending projects, obtain a business valuation and hire a broker.

Winding down the business requires the operating receiver’s experience and expertise to: 1) hire experts to value the company assets; 2) hire an auction company or broker to liquidate tangible company assets and inven-



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tory; 3) hire a broker to list, market and sell company real estate; 4) retain an accountant and advisors for tax planning and reporting; and 5) carefully review the company records to determine outstanding liabilities and the identities of creditors for notice compliance. The receiver also will need to investigate the status of federal, state and local taxes and make certain the business is in compliance with all.

The appointment of a receiver in winding down the marital business can provide transparency throughout the process with the receiver reporting to the parties, their counsel and the court on a routine basis. Also, major actions of the receiver will be presented to the court for approval, giving the parties the opportunity to object, if they so choose, to the proposed sale of an asset or assets. The receiver will collect all sale proceeds, satisfy the creditor claims that are allowed, account to the parties and, in the end, can distribute the net proceeds in the manner prescribed by the divorce judgment. More important, the parties can go their separate ways knowing that the winding down of the business was done in a professional, thorough way, in accordance with the law, and that years from now the parties will not be confronted with unresolved "surprises" from the business they once owned together.

Scenario 7: Receiver as Facilitator as a Last Resort

The receiver is in a unique position, becoming familiar with the ins and outs of the family-owned business as well as the family dynamics, to help facilitate settlements between the parties. Of course, this role cannot be mandated in the court's order, but often the parties and their counsel will voluntarily approach the receiver to try and negotiate a settlement of the remaining issues. In my experience, this is usually a last-resort effort when previous facilitation or mediation has not been successful. Generally, this will occur at the end of the appointment, when only one or two issues remain separating the parties from being able to finally resolve their case. If a good working relationship has been established between the receiver and the parties, this goodwill can often go a long way in bridging whatever distance remains between the parties, making the parties far more willing to negotiate an end to the litigation

Conclusion

Counsel and the family court should always keep in mind how the appointment of a receiver can be a useful and practical tool in navigating through a divorce proceeding. In the right case, with the appropriate facts and circumstances, the appointment of a receiver can greatly reduce the number of motions filed in a case and the amount of litigation. As an arm of the court, the receiver serves as an impartial buffer between the parties. The receiver's presence can help alleviate much of the mistrust between the parties that may be present. By doing his or her job effectively and by communicating with the parties, their counsel and the court throughout the process, the receiver can make the dissolution of a marriage that didn't work a bit smoother, less contentious and ultimately less expensive, both financially and emotionally – a result that benefits all involved.

Henry M. Nirenberg, J.D., LL.M., is a shareholder of Seyburn Kahn, P.C. Henry regularly serves as a mediator, facilitator, special master and receiver. Henry has more than 28 years' experience serving as a receiver and also speaks at continuing legal education seminars on receivership issues. In his career as a receiver, Henry has managed or sold tens of millions of dollars of assets, including those in numerous divorce cases. In his capacity as receiver, Henry has managed, among other things, automotive, industrial and retail establishments, as well as residential, commercial and industrial properties.


Footnotes.

- 1 MCR 2.621 and 2.622.
- 2 MCL § 600.2926.
- 3 *Michigan Minerals Inc. v. Williams*, 306 Mich. 515 (1943).
- 4 *Cohen v. Cohen*, 125 Mich App 206, 214 (1983).
- 5 *Westgate v. Westgate*, 294 Mich 88, 91 (1940).
- 6 65 Am Jur 2d, RECEIVERS § 27 at 676.
- 7 MCR 2.622(B).
- 8 MCL 552.27(c).
- 9 291 Mich App 318 (2011).
- 10 291 Mich App at 319.
- 11 *Id.* at 320-321.
- 12 *Id.* at 326.
- 13 *Id.* at 327.

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