LAW AND THE FAMILY

"The Valuation Date"

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ONE'S MAIDEN VOYAGE through the "sea of valuation" is nothing less than a thought-provoking adventure in which one can be increasingly adrift. Valuation is by far one of, if not the greatest, challenges to an attorney preparing a divorce case for trial under the Equitable Distribution Law. To ascertain effectively and properly the appropriate date to use in presenting proof of value of marital property is a task not to be underestimated. The problem begins to unfold at its conception. While not unmindful of a cut-off date for the acquisition of marital property, [FN1] the Legislature failed to specify a valuation date. Factor into this the burden being on the non-title holding spouse to identify and value marital property as a predicate to the court making a property distribution. [FN2] Add to that the many rules contained in the less than clear, indeed perhaps contradictory cases. There's the rub.

Section 236(B) of the Domestic Relations Law defines "marital property" as what is acquired "during the marriage" and before "the commencement of a matrimonial action." [FN3] It provides that in determining an equitable distribution, the court is to consider, among other things, income and property at the time of the commencement of the action [FN4] and loss of inheritance and pension rights, "upon dissolution of the marriage as of the date of dissolution." [FN5]

The lack of statutory definition of the valuation date prior to 1986, compelled the courts to fix valuation dates: the date of the commencement of the husband's pre-equitable distribution action that was joined for trial with the wife's equitable distribution action,

despite the husband withdrawing his action at the commencement of trial [FN6]; one month prior to trial [FN7]; the time of trial, [FN8] and the date of the commencement of the action. [FN9] The sole undisputed area seems to be with regard to retirement benefits, which should be valued as of the date of the commencement of the action. [FN10] This result is confusing because DRL s236 (B)(5)(d)(4) requires the court, in determining an equitable distribution, to consider the loss of pension rights upon dissolution of the marriage as of the date of the dissolution. [FN11]

Lawyers beware. One court has held the applicable date to be the date contained in the defendant's affidavit of net worth because no evidence was presented by either party as to the husband's assets when the action was commenced. [FN12] In Ward v. Ward, [FN13] the court held that because the wife was granted leave to discontinue her 1978 divorce action without opposition, the proper valuation date was 1980, the date of second commenced action for divorce. [FN14]

Economic Status at Time of Trial

In Roffman v. Roffman, [FN15] the court held that the determination of the value of the marital property should reflect the economic situation of the parties at the time of the trial. For that reason, the court used the most "current available valuation" for each item of property. It reasoned that if marital stock holdings decreased in value after the commencement of a divorce proceeding, it would be unjustifiable to penalize the party holding title by treating the former value as an available resource. The court noted, however, that waste or dissipation of property would present a different situation.

One court even held that the cut-off date for marital property was the date that a previously dismissed action for divorce was commenced. [FN16]

As the court may not make a physical distribution of marital property without first determining the value of each marital asset, [FN17] it is important to be prepared to present evidence of value at trial or for purposes of settlement discussions, knowing which date to use. Notwithstanding the importance of knowing which date is the appropriate date to use, the Legislature originally left it to the discretion of the courts to choose the appropriate valuation date. Naturally, this caused confusion.

In 1986, the Legislature attempted to remove some of the guessing regarding valuation dates by amending DRL [FN18] to add Subdivision 4-b to DRL s236 (B). It provides:

As soon as practicable after a matrimonial action has commenced, the court shall set the date or dates the parties shall use for the valuation of each asset. The valuation of date or dates may be anytime from the date of commencement of the action to the date of trial.

The language is intended to allow the court to set more than one valuation date where necessary due to the nature of the assets. The Assembly Memorandum in Support of the Legislation provides:

In addition, the Court is not precluded by this language from requiring valuations of assets which were transferred, dissipated or encumbered by a spouse attempting to hinder equitable distribution. Finally, the Court is not constrained under this language from changing a valuation date for good cause once it is set. [FN19]

While the amendment establishes the legislative intent that the trial court, in the exercise of its discretion, fix the valuation date or date for marital assets, the key words are "as soon as practicable." Realistically, it is not practical to fix valuation dates early on in the litigation. No simple mechanism has been established for doing so, nor is it practical to do so until all of the marital assets have been identified and the action is ready for trial. The only effective means is to move to fix the valuation date or dates. In many cases the action will be delayed for years awaiting a determination of an appeal from an order fixing valuation dates, as an order fixing valuation date is automatically appealable. [FN20]

The 1986 amendment to DRL s236, Part 8, Subdivision [4] [b], does alleviate some of the confusion because it establishes limitations that require the court to fix the valuation date at or before trial, somewhere between the date of the commencement of the matrimonial action and the date of trial. The court may not fix the valuation date before the commencement of the action [FN21] or after the date of trial. [FN22]

Active Passive Approach

Since 1986, courts have struggled with the problem of fixing the appropriate valuation date under the facts and circumstances of each case and have dealt with such matters on a case-by-case basis. Only pensions and retirement benefits continue to be valued as of the date of commencement of the action. [FN23] Recently, "general rules" have evolved, with courts adopting an "active-passive" approach to the fixation of the valuation date.

In Wegman v. Wegman, [FN24] the Second Department held there can be no strict rule mandating the use of a particular valuation date as the trial court must have the discretion to select a date appropriate to the case before it, in light of the particular circumstances presented. It adopted the general rule that:

In many cases, valuation of marital assets as of a date as close to the time of trial as practicable will result in an award which is fair to both parties. As has heretofore been pointed out, there frequently may be a substantial lapse of time between the date of commencement of the action and the date of trial. For example, in the case before us, three and one half years elapsed between the commencement of the action by Mrs. Wegman in July 1981 and the trial of the economic issues in March 1985. During a delay of this kind, many assets, particularly business, such as that involved in the case at bar, may experience fluctuations that might dramatically change the logic of the distribution. Under such circumstances, the valuation of assets close to the time of trial, may result in the formulation of an award consistent with the purpose of equitable distribution and insure that each spouse receives a fair share of the family assets accumulated while the marital relationship endured. However, in other cases, circumstances may exist which would justify the use of a valuation date closer to the time of the commencement of the action. As we have already mentioned, a sharp increase in the value of a marital asset due solely to the efforts of the other spouse might be such a circumstance. Similarly, the dramatic reduction in value due to disposition or wasteful conduct of the other spouse might justify the use of a date earlier than the date of trial. These examples, of course, are not exclusive.

In Siegel v. Siegel, [FN25] the same court held that the husband's businesses should be valued as of the date of commencement, rather than the date of trial, where the corporate debt was much larger at the date of trial and this "might be more attributable to the Plaintiff's diversion of equity from the corporation to himself, rather than to neutral economic forces." It also held that the tangible real and personal property of the parties should be valued at the time of trial because, as a general rule, tangible assets such as real estate or art work, as opposed to intangible property such as an interest in any business, are less susceptible to having their apparent value manipulated by any party.

In Marcus v. Marcus, [FN26] the Second Department held that using a date of trial valuation date for the majority of marital assets was proper because most of the assets appreciated significantly during

the three-year hiatus between the commencement of the action and trial "as the result of marital influences."

Rigid View

In contrast to the flexible approach of the Second Department, the Third Department has taken a more rigid perspective, holding that "unless doing so would be patently inequitable, valuation of marital property is properly fixed at the commencement of the action." [FN27]

In Rosenstock v. Rosenstock, [FN28] the Third Department concluded it was not patently inequitable to value the assets as of the date of commencement of the action in February 1982. The financial issues were tried in January 1985. The Supreme Court valued the non-business marital property as of April 1983 and the business marital property as of December 1983. The Appellate Division held the valuation dates to be error, stating that no persuasive argument was made why it would be patenty inequitable to value the marital property as of the date the action was commenced.

Patelunas v. Patelunas [FN29] was an action commenced in February 1981 and the financial issues tried in February 1987. The Third Department held it to be error to value the marital home as of the date of commencement of the action. Distinguishing its holding in Lord, [FN30] the court reasoned that such a date is "patently inequitable" where six years elapsed between commencement of the action and the trial and there had been nearly a six-fold increase in the net value of this asset due to overall market actively, not attributable to the husband's efforts. These special circumstances extant, the court has the valuation should be as close to the time of trial as possible. [FN31] Here the parties were divorced in 1981, and the husband remained in the home, paid all expenses and collected all rents from the income-producing apartments during that time.

In Ducharme v. Ducharme, [FN32] the wife brought the action in 1980. The husband brought a separate action in 1984. The Third Department held that although it was error to classify marital property as of 1984, the error was harmless because all of the assets that came into existence between 1980 and 1984 were traceable to a 1980 marital asset or an automatic accretion. During this period the parties filed joint tax returns. Concluding it was not error to value the assets at the time of trial, the court reasoned it would be "inequitable" to value them as of 1980, where the husband kept all of the farm profits during this period and the farm increased in value. It

was under his complete control during this period. In modifying, the court agreed with the husband that the marital debts should also be valued as of the date that the martial assets were evaluated.

The Fourth Department in Hutchings v. Hutchings, [FN33] held that as a general rule, the value of the marital residence should be fixed as of the time of trial. Here, two years passed since the date of commencement and the trial court did not give any reasons for its selection of that date to value the marital residence and Defendant's condominium. This was held to be an abuse of discretion.

Workable Solution

The last pronouncement in this area is the decision of the Appellate Division, First Department, in Greenwald v. Greenwald, [FN34] which offers a workable and well-thought out solution to the problem, adopting an "active- passive" approach. The appeal presented a challenge to the trial court's distribution of marital assets on a 50-50 basis where the parties had separated in 1980 seven years prior to the commencement of the action and according to the husband, the parties marital assets increased in value during that time by nearly $7 million, without contribution thereto, either direct or indirect, by the wife. The parties were married 20 years prior to their separation.

The parties worked in related fields -- he in media, she in advertising. Even after the husband left the marital home, the parties continued to maintain a close business and personal relationship. They spoke regularly by telephone and frequently met for lunch or dinner, discussing their respective careers and seeking each other's advice and guidance. In at least one instance, at the husband's request, the wife interviewed a prospective company employee; in another, she gave the husband a new psychographic study for use by his company salesman.

Although not cohabitating, the relationship basically remained unchanged since their separation in 1980. At the time of the parties' separation, the son was 16 years of age, and the wife was a $125,000-per-year executive. The son continued to live with the wife. On March 10, 1982, the son, then 18, attempted suicide; the wife took him to a residential treatment program in Houston. In November that year, she was terminated from her executive position because of the time she was devoting to him. After his return from Texas, the son resumed living with the wife. During this period, the wife attended daily support meetings, accompanied the son on psychiatric visits, engaged tutors for him and helped him with his studies. He lived with her on and off until December 1986.

After a trial in 1989, the court awarded the wife 50 percent of the marital property accumulated to the date of the commencement of the action and half the shares of stock in a company Employee Stock Ownership Plan Trust Fund (ESOP) account held by the husband or, in the event of termination of the plan (as had happened), payment of half of the proceeds of the sale of such shares. It evaluated the marital assets already in the wife's control at $2,217,556 and those in the husband's control at $11,083,529 and, in addition, directed the husband to pay her a distributive award of $4,432,986 and to transfer $434,974 to her from his individual retirement accounts to effectuate an equal distribution.

The court's decision was rendered five months after the trial's conclusion. During this time the husband allegedly suffered a substantial change in financial circumstances due to market conditions beyond his control, which he claimed was incorporated into the judgment without consideration of the attendant tax implications, resulting in a financial windfall to the wife well in excess of 50 percent of the marital assets awarded. The husband moved for renewal, reargument and reconsideration as well as a reopening of the trial and modification of the decision so as to rectify the situation. In addition to alleging reliance on stale valuation figures from the trial notwithstanding a significant downturn in the securities market that substantially reduced the value of certain of his assets, the husband also claimed that the court evaluated his employee stock option plan as an active asset while distributing it as a passive asset by imposition of a Qualified Domestic Relations Order. The trial court denied the motion in its entirety.

The husband argued on appeal that, for all practical purposes, although the parties were married for 27 years, the marital partnership terminated in May 1980 when, after 20 years of marriage, he left the marital residence. The husband ignored the wife's significant post-separation contributions to the marriage and her self-sacrifice in that regard. During the seven-year span, as well as throughout the marriage, she was the primary caretaker of the parties' son.

In its decision, the court adopted an "active-passive" approach, valuing "active" assets at the date of commencement and "passive" assets as of the date of trial.

With regard to the valuation of the shares of the ESOP, the Appellate Court said:

As to the valuation of the shares, courts have consistently recognized that assets such as undeveloped real estate or mutual funds, which appreciate in value strictly as a result of random market fluctuations or the efforts of others, constitute passive assets, while assets that appreciate due to the efforts of the titled spouse are active. (See, Price v. Price, 113 AD2d 299, 307-308, affd. 69 NY2d 8, 18; Jolis v. Jolis, 98 AD2d 692; Nolan v. Nolan, 107 AD2d 190). Passive assets should generally be valued as of the trial date so as to prevent a windfall to the titled spouse if the asset has increased in value; active assets should generally be valued as of the commencement date of the action in order to benefit the titled spouse, since any appreciation in value is the product of that spouse's labors. (See, Wegman v. Wegman, 123 AD2d 220, 234, 236).

The court agreed that the ESOP was an active asset that should be valued as of the date of commencement and modified the judgment accordingly. It also held that a stock brokerage account was an "active" asset to be valued at commencement and a limited partnership interest was a "passive" asset to be valued at trial.

With regard to stock brokerage accounts, the court noted:

Any increase or decrease in value was due to the husband's investment strategy and decisions, not mere market conditions. In that regard, however, we are of the view that for purposes of determining whether an asset is active or passive, it is of no significance that the financial decisions were made exclusively by the titled spouse's financial advisor. Though he/she acts through an agent, the decisions are still those of the titled spouse and the results, be they beneficial or adverse, are the product of his/her labors, not random market fluctuations.

Insofar as an investment in a limited partnership was concerned:

The trial court properly found this asset to be passive in nature since the husband's interest was that of a limited partner, who had no voice in partnership's investments or trades. While a general partner may have a fiduciary duty to a limited partner, the former is to the latter's agent. Thus, any appreciation in value was purely passive.

The Appellate Division rejected the husband's contention that the trial court conveniently failed to consider the tax consequences of its distributive award, because he "failed to offer any evidence on this issue." It distinguished its holding in Teitler v. Teitler, [FN35] where both parties submitted post-trial briefs on the subject and the record

made it clear that a substantial tax liability would accrue upon the sale of a townhouse valued at $1 million.

It also rejected the husband's argument that the trial should have been reopened because certain assets declined in value by a total of $1.9 million during the 10-month period after the trial. It stated that, however unfortunate, this is an irrelevant circumstance, as DRL s236(B) (4) (b) provides that "[t]he valuation date or dates may be anytime from the date of commencement of the action to the date of the trial." Thus, post-trial changes in value may not be considered.

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FN1 See New York Domestic Relations Law s236 (B)(1)(c).

FN2 See D'Amato v. D'Amato (2d Dept.), 96 AD2d 849,466 NYS2d 23.

FN3 DRL s236 (B)(1)(c).

FN4 DRL s236 (B)(5)(d)(1).

FN5 DRL s236 (B)(5)(d)(4).

FN6 See Muller v. Muller, 116 Misc2d 660, 456 NYS2d 918.

FN7 See Kobylack v. Kobylack, 110 Misc2d 402, 442 NYS2d 392, mod (2d Dept.) 96 AD2d 831,465 NYS2d 581, revd 62 NY2d 399, 477 NYS2d 109, 465 NE2d 829, on remand (2d Dept.) 111 AD2d 221, 489 NYS2d 257.

FN8 See Stein v. Stein, 192 NYLJ, Aug. 19, 1984, at 12, col. 3 (Sup. Ct. Suffolk Co.) (valuing husband's business at time of trial); Barton v. Barton, 187 NYLJ, May 20, 1982, at 10, col. 6 (Sup. Ct., NY Co.) (setting present value of the marital residence at the time of trial).

FN9 See Bentley v. Knight (3d Dept.), 92 AD2d 638, 459 NYS2d 935.

FN10 See Majauskas v. Majauskas, 61 NY2d 481, 474 NYS2d 699; Damiano v. Damiano (2d Dept.), 94 AD2d 132, 463 NYS2d 477; Bentley v. Knight (3d Dept.), 92 AD2d 638, 459 NYS2d 935; Largiader v. Largiader, __ AD2d __, 542 NYS2d 789; Thomas v. Thomas, 145 AD2d 477, 535 NYS2d 736.

FN11 See DRL s236 (B)(5)(d)(4).

FN12 See Weinstock v. Weinstock, 190 NYLJ, Dec. 15, 1983, at 13, col. 4 (Sup. Ct., Queens Co).

FN13 Ward v. Ward (3d Dept.), 94 AD2d 908, 463 NYS2d 634.

FN14 See Ibid., at 909, 463 NYS2d at 636.

FN15 Roffman v. Roffman, 124 Misc2d 636, 476 NYS2d 713.

FN16 See Seldon v. Seldon, 191 NYLJ, June 21, 1984, at 11, col 2 (Sup. Ct., NY Co.).

FN17 Rodgers v. Rodgers (2d Dept.), 98 AD2d 386, 470 NYS2d 401; Capasso v. Capasso, 119 AD2d 268, 506 NYS2d 686; Damato v. Damato (2d Dept.), 96 AD2d 849, 466 NYS2d 23.

FN18 Laws 1986, Ch 884, s2.

FN19 See New York Assembly Memorandum in Support of Legislation.

FN20 See CPLR s5701(a). It has been held that an order denying a motion to fix valuation dates is not appealable because a party is not aggrieved by such an order as it effects no substantial right. Eizien v. Eizien, 149 AD2d 783, __ NYS2d __. See also Sanford v. Sanford, __ AD2d __ 536 NYS2d 530 (2d Dept., 1989) affirmed order fixing valuation date of properties as of date of commencement.

FN21 Weinroth v. Weinroth, 146 Misc2d 98, 549 NYS2d 576, Greenwald v. Greenwald __ AD2d __, 565 NYS2d 494, (1st Dept., 1991).

FN22 Siegel v. Siegel, 132 AD2d 247, 523 NYS2d 517 (2d Dept., 1988).

FN23 Cohen v. Cohen __ AD2d __, 547 NYS2d 85 (2d Dept., 1989) held that it was improper to value a pension as of the date of trial. It should be the date of commencement. See also Glassberg v. Glassberg, __ AD2d __, 556 NYS2d 772 (2d Dept., 1990).

FN24 123 AD2d 220, 507 NYS2d 342, motion gr. amd __ AD2d __, 512 NYS2d 410.

FN25 __ AD2d __, 523 NYS2d 517 (2d Dept., 1987).

FN26 135 AD2d 261, 137 AD2d 131, 525 NYS2d 238 (2d Dept., 1988).

FN27 Lord v. Lord, 124 AD2d 930, 508 NYS2d 676 (3d Dept., 1986) [error to value Mercedes at time of trial]; Reina v. Reina __ AD2d __, 544 NYS2d 895 (3d Dept., 1989).

FN28 __ AD2d __, 531 NYS2d 133 (3d Dept., 1988).

FN29 __ AD2d __, 527 NYS2d 325 (3d Dept., 1988).

FN30 124 AD2d 930, 508 NYS2d 676.

FN31 Citing Wegman v. Wegman, 123 AD2d 220, 507 NYS2d 342, motion gr. and __ AD2d __, 512 NYS2d 410.

FN32 __ AD2d __, 535 NYS2d 474 (3d Dept., 1988).

FN33 __ AD2d __, 547 NYS2d 970 (4th Dept., 1989).

FN34 __ AD2d __, 565 NYS2d 494 (1st Dept., 1991).

FN35 156 AD2d 314, app dismd. 75 NY2d 963.

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