

Hot Tips Seminar

The Present Value of the Property for Equitable Distribution Purposes

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At an initial glance, factor (k) of the Equitable Distribution Statute N.J.S.A. 2A:34-23.1, the present value of the property, would seem to be very straight forward. However, the present value is not simply a determination of the value of the property, but also a determination as to the date when the property will be valued. It is essentially a two (2) step process where first the date will need to be determined and then subsequently the value will be determined. With assets, do you look to the date of the divorce complaint filing as to the date when property is valued? Do you use the date an asset is actually distributed for a determination as to present value? Maybe you use the date when the divorce is final for the date assets will be valued? In certain circumstances the value on those three (3) dates can be drastically different. While these dates are the most common dates used to determine the value of a particular asset, parties can agree on any date, even a date prior to the filing of the divorce complaint for a determination as to present value.

So what date will a court use in determining present value of property for equitable distribution purposes? As with most equitable distribution issue analysis, we can start by going back to the case of *Painter v. Painter*, 65 N.J. 196 (1974). In *Painter*, the Supreme Court set the general rule that assets acquired up to the date of the filing of the divorce complaint would be included for equitable distribution. *Painter v. Painter* at 218. Based upon that analysis, with the filing of the divorce complaint terminating the marriage for asset purposes, the date for valuing assets was the same date as the termination date of the marriage. *Goldman v. Goldman*, 248 N.J. Super. 10, 14 (Ch. Div. 1991) aff'd, 275 N.J. Super. 452 (App. Div. 1994), certif. denied, 139 N.J. 185 (1994). See also *Smith v. Smith*, 72, N.J. 350, 361-62 (1977); *Borodinsky v. Borodinsky*, 162 N.J. Super. 437, 447 (App. Div. 1978). However, courts then began to take a more "equitable" approach in determining that the date of valuation should be based on the "nature of the asset and any compelling equitable considerations." *Bednar v. Bednar*, 193 N.J. Super. 330, 332 (App. Div. 1984). See *Scavone v. Scavone*, 243 N.J. Super. 134, 138 (App. Div. 1990) (*Scavone* II). See also *Wadlow v. Wadlow*, 200 N.J. Super. 372, 384 (App. Div. 1985). The initial trial court in *Scavone v. Scavone*, 230 N.J. Super. 482 (Ch. Div. 1988) (*Scavone* I) provided an analysis as to why the "nature of the asset" should determine the valuation date for equitable distribution. The court distinguished between passive assets that fluctuate based on market factors and active assets that fluctuate based upon the efforts of a particular party. Subsequent to the filing of a divorce complaint, if the value of a marital asset increases due to the labor of a particular party, independent of market forces, the increase will normally accrue to that party alone. *Scavone* I at 486-493. However, when the enhanced value is due to market factors only, the increase typically will be divided between both parties. *Id.* The Appellate Division affirmed the trial court's ruling specifically noting that in that case, as the asset (husband's stock exchange seat which increased due to the market) was passive, it would be valued at the time of distribution. *Scavone v. Scavone*, 243 N.J. Super. 134 (App. Div. 1990).

Subsequent to *Scavone v. Scavone* the court further expanded the analysis beyond simply whether an asset is active or passive in deciding *Goldman v. Goldman*, 248 N.J. Super. 10 (Ch. Div. 1991), aff'd. in part, remanded in part, *Goldman v. Goldman*, 275 N.J. Super. 452 (App. Div. 1994). In *Goldman*, the defendant operated a car dealership which had a value of \$294,000 as of the date of the complaint. Despite defendant putting additional marital funds into the business, trying to save it, as of the date of trial, it had no value. The trial court held that despite the fact that the business was an active asset and therefore would typically be valued as of the filing of the complaint, under *Scavone I*, due to equitable concerns it would value the business at the time of distribution. On appeal, this issue was affirmed as the Appellate Division noted it would have been inequitable for the defendant to bear the burden of the loss (from \$294,000 to zero) simply because it was an active asset. *Goldman v. Goldman*, 275 N.J. Super. 452, 457 (App. Div. 1994).

Thus, while the court initially viewed the filing date of the complaint as the general rule for determining value of assets for equitable distribution purposes, that analysis has clearly evolved over time. The process begins by looking at the date of the complaint filing for a value of an asset and then for any changes in value between the filing date of the complaint and the date of distribution. The next step is determining whether the asset is an active asset or a passive asset. Finally, the reason for any change in value leading up to the date of distribution must be analyzed. Then one can argue as to what is equitable regarding a date for valuing an asset under the circumstances as the case law provides. Essentially where there has been a change in value of an asset between the filing of the divorce complaint and the date of distribution, the “driving force” behind that fluctuation must be determined in order to properly distribute the asset. *Addesa v. Addesa*, 392 N.J. Super. 58, 77 (App. Div. 2007) citing, *Scavone*, supra.

Once the appropriate date for valuation is determined, the second step is calculating the actual present value on that date. For some assets it is easy to determine the present value, such as a bank or investment account. However, for other assets it is not as clear cut. For real property it would typically be the appraised value as determined by a licensed appraiser. For a pension determining the present value is based upon a future income stream which requires some calculations by an actuary. For a business it would often require a business valuation by an accountant. In valuing a business, the court has determined that “valuation is not an exact science.” *Brown v. Brown*, 348 N.J. Super. 466, 477 (App. Div. 2002) certf'd. denied 174 N.J. 193 (2002). Even valuing a pension or real estate is not an exact science. If the parties cannot agree on valuations for these types of assets, an expert will be needed.

In determining the present value of assets, the liquidity, potential tax consequences and/or penalties should be considered. Clients should be advised of the differences in values between a pension (which cannot be liquidated and will be taxed when received), a 401(k) (which can be liquidated but will incur taxes and potentially an early withdrawal penalty), real estate (which typically takes time to liquidate, and the sale results in closing costs, realty transfer fees, and potentially taxes), and a bank account (which is liquid and involves no other costs). At times it may be necessary to involve an expert to determine tax consequences and other costs, in order to make sure the comparison between assets is “apples to apples” rather than “apples to oranges”.

In the event the parties proceed to trial and have the court determine the valuation of assets, parties have a right to appeal the court's decision. On appeal, issues involving the issue of valuation of assets are generally subject to the “adequate, credible evidence” standard of review. *Borodinsky v. Borodinsky*, 162 N.J. Super. 437, 443-444 (App. Div. 1978). However, decisions regarding the proper date of valuation as well as the manner of equitable distribution itself are

reviewed under an “abuse of discretion standard”. See *Goldman v. Goldman*, 275 N.J. Super. 452 (App. Div. 1994), certf’d. denied 139 N.J. 185 (1994); *Scavone v. Scavone*, 243 N.J. Super. 134 (App. Div. 1990) and *Borodinsky*, supra. Discretionary decisions of the trial court will be upheld “as long as the trial court could reasonably have reached its result from the evidence presented, and the award is not distorted by legal or factual mistake.” *La Sala v. La Sala*, 335 N.J. Super. 1, 6 (App. Div. 2000).

For more recent detailed analysis of present value of property issues see also unpublished decisions: *Eisenstein v. Eisenstein*, 2007 WL 135912 (App. Div. 2007); *Bright v. Bright*, 2009 WL 1954458 (App. Div. 2009) and *Syed v. Syed*, 2004 WL 5326389 (App. Div. 2014). In *Eisenstein* the Appellate Division addressed whether the court properly determined the value of the house at the time of the sale (rather than a prior date set for a buy-out) should be used. In this case, as part of the settlement agreement either party was supposed to buy the other out of the marital home or the home was to be listed for sale in 1991. The trial court did issue a subsequent order allowing the plaintiff and the children to stay in the marital home until the youngest child graduates from high school. There was a long period of litigation over issues after the children were out of high school. Plaintiff claimed it was an error for the trial court to deny a buy-out option at an earlier valuation date (2000) and allow the defendant to force a sale at market value (2005). The plaintiff argued defendant’s legal strategy of appeals, recusal motions and collateral federal litigation resulted in unnecessary delays for which he should not now reap the benefit of any increase in value. However, the court determined that the increase the value was solely due to market forces and not a consequence of plaintiff’s efforts. The plaintiff also had the opportunity to buy-out defendant’s interest in the home as early as 1991 but did not. Plaintiff also failed to force the sale in 2000 when the youngest child had graduated from high school. It was defendant who filed the motion at that time. The Appellate Division affirmed the trial court’s decision that the proceeds from the house at the time of the sale would be divided.

In *Syed v. Syed* the defendant contended that the trial court erred in valuing an investment account titled solely in his name as of the filing date of the complaint rather than at the time of the trial. The investment account decreased in value after the complaint was filed, partially due to market forces, but also partially due to the defendant losing more by trying to trade against the losses on margin calls. The Appellate Division determined that it was not simply a passive asset. The unique situation in *Goldman* did not exist (to use the current value rather than value as of complaint filing) and the trial court’s decision was affirmed.

In *Bright v. Bright* the defendant appealed the trial court’s decision regarding equitable distribution of a vacation property. The vacation property was not completed until after the divorce complaint had been filed. The defendant paid \$116,000 from his own share of equitable distribution to complete the vacation home after the complaint was filed. He contended that this rendered the property an active asset that had to be valued as of the date of the complaint. He sought the entire increase in value which resulted from the completion of the home. The trial court rejected the argument noting that his payments to a contractor did not turn the asset into an active one and that it would be valued as of the date of distribution. The court did give the defendant credit for the post-complaint payment he made from his share of equitable distribution and as a result the defendant received a greater share of the increase in market value. The Appellate Division affirmed the trial court’s decision to use the value at the date of trial rather than at the filing of the complaint.

Hot Tips

1. Early in the divorce process identify all the major assets for distribution and try to determine the values at that point in time.
2. Identify whether assets are active or passive.
3. Whenever possible try to agree on distribution dates for certain assets early in the case to avoid a future dispute.
4. Consider distributing assets while a case is ongoing and implications therein.
5. Pay close attention to potential changes in asset values as the case moves forward.
6. Prepare equitable arguments to support your position as to the date of distribution.
7. Regarding the actual value of an asset, try to reach agreement whenever possible. If both parties have their own experts involved, try to have the experts meet in order to resolve any discrepancies between their positions.
8. If you are deferring distribution of an asset to a future date/event, be very careful (and specific) in drafting your MSA to identify the date of valuation in order to avoid future litigation. See *Pacifico v. Pacifico*, 190 N.J. 258 (2007).
9. If you are dividing an asset with a lot of potential volatility (e.g. publicly traded stock), try to divide it on an in-kind basis so one person does not receive all of the risk/reward in the event the value does change.