

feature

Valuation Possibilities in a Confusing Economy

In a perfect world, the family law attorney can work with a divorcing client and help get assets and liabilities equitably distributed between the spouses. In the less-than-perfect financial world being faced today, it is substantially harder to achieve an equitable distribution. It is much more commonplace to encounter spouses who hold assets that are difficult to value given the current market forces. Based on standard valuation methods, the questions often wind up relating to how liabilities will be split.

The problem is that true values are hard to come by with respect to certain assets. While cash and equivalents will always be easy to calculate, certain other categories have been acutely impacted by the economic crisis and their true fair market values are a moving target. Real property and certain business ownership interests fall squarely into this

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category. Divorcing spouses face the dilemma of guessing whether or not the value of these assets has reached the bottom of the pendulum swing.

In attempting to settle a case where clients really feel this pinch, lawyers and experts are forced to deal with numbers that are simply not determinable; this is a huge problem because the clients want to be divorced now. So, instead of using standard appraisals and equitable distribution methods, lawyers and their clients are forced to consider



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alternatives that may result in a fair outcome. Specifically, there are at least three options that may help the spouses work out an equitable distribution scheme for these hard-to-value assets.

The first option is to defer and reserve. In a settlement agreement, the parties could simply agree to have assets valued at a specific date in the future and consent to the Court's reservation of jurisdiction if they cannot reach an agreement. If they cannot agree on value and asset disposition at the later date, the Court will step in and determine these issues as it would in any contested case.

Another option is to estimate and utilize a fair market value in settlement, but employ a "look-back" period—most reasonably one to three years from the date of the divorce. If a bona fide purchase offer is made with respect to the asset or if it is sold during that period, then the spouse who does not hold the asset is provided some proportion of the difference between the divorce-time estimate and the newly-determined fair market value. In the interest of fairness to the other spouse, that proportion would normally decrease over the look-back period; this helps account for post-dissolution efforts and carrying costs that may have been expended on the asset.

Finally, there is a possibility that the parties would simply continue to hold certain assets—including real estate and business interests—as joint tenants. In this scenario, the parties would be expected to share the carrying costs associated with the asset, but they would clearly share the risk or benefit of passive depreciation and appreciation. Upon sale of the asset, the parties would divide proceeds in proportion to their joint interests after accounting for any costs advanced by one party on behalf of the other.

Certainly, each of these options presents some drawback to one or both of the parties. There are concerns regarding lack of repose, continued post-dissolution litigation, and disputes over sales prices and procedures, along with the general concerns about the inexact science of valuing assets. Nevertheless, these avenues may offer the possibility for spouses to practically achieve an equitable

distribution and spread the risk that the economic pendulum has not yet reached bottom.

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