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Divorce and Dividing Stock Options

Identifying, Classifying and Valuing Stock Options for Equitable Distribution and Income Availability

WEDNESDAY, NOVEMBER 28, 2012

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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Divorce and Dividing Stock Options Identifying, Classifying and Valuing Stock Options for Equitable Distribution and Income Availability

A faint, stylized image of a scale of justice is visible in the background, centered behind the text. The scale has a vertical pillar and two pans hanging from a horizontal beam. The image is rendered in a light blue color that blends with the dark blue background.

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Mr. Vuotto is a partner with the Matawan based law firm of *Tonneman, Vuotto, Enis & White, LLC*. He graduated from Seton Hall University with a Bachelor of Arts degree in 1983 and from Ohio Northern University, Claude W. Pettit College of Law, with the degree of *Juris Doctor*, in 1986. He was admitted to the Bar of the State of New Jersey and to the U.S. District Court of the District of New Jersey in 1986.



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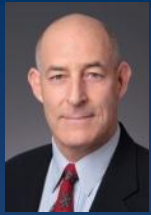
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- Mr. Beaton has particular expertise in the valuation of early-stage, venture-backed companies and has written and spoken extensively on valuation techniques for companies with complex capital structures. He has valued companies in most major industry groups including manufacturing, utilities, telecommunications, oil and gas, transportation, wholesale, retail and service industries both domestically and internationally. Mr. Beaton has also testified on valuation issues in federal and state venues across the United States, as well as in international arbitrations. He has been involved in more than 300 depositions and has testified in state and federal court more than 75 times.
- Mr. Beaton has valued patents, trademarks, trade secrets and a plethora of other intangible assets. He is regularly hired to perform purchase price allocations and valuations for the granting of stock options. Mr. Beaton also performs valuations for employee-owned companies, as well as municipal, state and federal entities. He has served as a neutral appraiser in numerous disputes and has served as a special master in a number of venues. Mr. Beaton has valued a number of unique assets including, but not limited to, celebrity goodwill, domain names, patents, trademarks, movie rights, licenses, wireless spectrum, franchise rights, software, hotels and non-compete agreements.
- Prior to joining A&M, Mr. Beaton was a Partner with Grant Thornton LLP for over nine years. He joined Grant Thornton from a Seattle-based boutique business valuation and litigation consulting firm, where he worked for 14 years, ultimately as a Partner. Mr. Beaton began his consulting career at Dun & Bradstreet Corporation.
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Today's Discussion

1. Types of Options
2. Tax Consequences based on type of Option
3. Transferability of Stock Options
4. Coverture Fractions
5. Distribution of Stock Options
 - A. In-Kind
 - B. Buy-Out (Valuation)
6. Valuation of Stock Options
7. Stock Options: Asset or Income
8. Case Law Overview
9. Discovery Requests
10. Other Issues
11. Q & A

Types of Options

- **Publicly Traded**
 - **Purchased on open market from third parties**
- **Employee Stock Options (ESOs)**
 - **Granted by company to employees, consultants, board members, etc.**
 - *Incentive Stock Options (ISO)* - receive favorable tax treatment
 - *Non-Qualified Stock Option (NSO/NQO)* - doesn't qualify for favorable tax treatment

Tax Consequences

- **ISO**
 - **At Grant**
 - **No tax recognized as you can't grant at more than fair market value**
 - **At Exercise**
 - **No tax recognized (watch out for AMT)**
 - **At Sale**
 - **Tax due at capital gains rate if holding period met; otherwise, tax due at ordinary income tax rate (difference between grant and net sales price)**

Tax Consequences (Continued)

- **NQO**
 - **At Grant**
 - **Tax recognized if granted at less than fair market value**
 - **At Exercise**
 - **Gain taxed at ordinary income tax rate (difference between grant and exercise price)**
 - **At Sale**
 - **Gain taxed at capital gain rate (difference between exercise and net sales price)**

Transferability

- **ISO**
 - **Generally not transferable**
 - **QDRO can be used if Plan allows**
 - **Tax consequences may result**

- **NSO/NQO**
 - **Generally transferable**
 - **See Revenue Ruling 2002-22**

Transferability, cont.

- Revenue Ruling 2002-22; 2002-19 IRB1 implies that the IRS will view a transfer of unexercised employee stock options incident to a divorce as a non-taxable event.
 - Many plans, however, will not allow the transfer of options to the non-employee spouse.

COVERTURE FRACTION/TIME RULE

- *Coverture* is defined as the “status and rights of the wife arising from the marriage relationship” (*Ballentin’s Law Dictionary, Third Edition, 1989*)
- In modern times, a coverture factor has reemerged as a mechanism for apportioning between spouses, the benefit or value of unvested stock options, retirement plans or other benefits that were earned partially during and partially after the marriage (see *In Re Marriage of Short*, 125 Wn. 2d 865, 872, 890 P. 2d 12 (1995) (*en banc*) (discussing “time rule” formula)); *Wendt v. Wendt*, 59 Conn. App. 656, 757 A. 2d 1225 (App. Div. 2000); and *In Re Marriage of Hug*, 154 Cal. App. 3d 780, 792, 201 Cal. Rptr. 676 (1984).

COVERTURE FRACTION/TIME RULE

(CONTINUED)

- **Flexible Concept:** As stated in the *Wendt* Appellate Court, no single Rule or formula is applicable to every dissolution case involving employee stock options. The Trial Court should be vested with broad discretion to fashion approaches which will achieve the most equitable results under the facts of each case. (*In Re Marriage of Hug, supra* and *Wendt, supra*).

COVERTURE FRACTIONS RULE

Formulas

I. $\frac{\text{Date of Grant to Cut-Off Date for Purposes of Property Distribution}}{\text{Date of Grant to Date of Vesting of Stock Option}} = \text{Marital Portion of Stock Option}$

II. $\frac{\text{Date of Employment to Cut-Off Date for Purposes of Property Distribution}}{\text{Date of Employment to Date of Vesting of Stock Option}} = \text{Marital Portion of Stock Option}$

DISTRIBUTION (Two-Step Process)

A. Determine “Marital Portion” Subject To Distribution

- 1. Distribute Vested Options Only**
- 2. Present Evidence Of Why Options Were Awarded In Order To Determine If Earned “During The Marriage” Or “Through Marital Efforts”**
- 3. Coverture Fraction/Time Rule**

B. Method Of Distribution Of “Marital Portion”

- 1. Valuation & Offset**
 - (i) Intrinsic Value**
 - (ii) Black-Scholes Method of Valuation**
- 2. In-Kind Distribution**
 - (i) Transfer of Title**
 - (ii) Trust Device**

METHOD OF DISTRIBUTION OF “MARITAL PORTION” (Valuation & Offset)

- **Intrinsic Value:** In *Wendt* the Court used an “Intrinsic Value” for determining the value of the relevant assets as of the date of dissolution. This method actually arrived at a higher valuation of the defendant’s unvested stock options than did the valuation under the Black-Scholes method advocated by the wife’s expert. However, as discussed, the intrinsic valuation method does not always accurately capture the present value of the employee stock options.
- **Black-Scholes Valuation Method:** This Method was specifically rejected by the Trial Court in the *Wendt* case.

In-Kind Distribution

- **Transfer of Title:** Typically, most company's Employees' Stock Option Plans do not permit in-kind distributions of options. However, recently, the Internal Revenue Service has enacted new legislation which permits the assignment of income attributable to interests in non-statutory stock options and non-qualified deferred compensation.
- **On May 13, 2002, the IRS released Revenue Ruling 2002-22 in order to address confusion concerning stock options and taxation. When stock options are transferred incident to divorce, two particular tax regulations apply to that transfer: 26 C.F.R. 1.1041-1T and 26 C.F.R. 1.83-7. The first specifically deals with the transfer of property between spouses during divorce. Under this regulation,**

A taxpayer who transfers interest in non-statutory stock options and non-qualified deferred compensation to the taxpayer's former spouse incident to divorce is not required to include an amount in gross income upon the transfer. Rather, the former spouse [receiving the options] is required to include an amount in gross income when the former spouse exercises the stock options or when the deferred compensation is paid or made available to the former spouse.

In-Kind Distribution

(CONTINUED)

- **Trust Device:** Although in most circumstances, this would not be a true trust (since the title to the employee stock options cannot be transferred in the name of the trust), a constructive trust is imposed (see *Callahan, supra*) on the owner of the employee stock options. Language must be crafted and inserted into the parties' Matrimonial Settlement Agreement which deals with various components of this Constructive Trust.
 1. A detailed list of all options granted and an explicit description of which options are marital and which are not;
 2. A description of whether and under what terms the non-owner can compel the owner to sell options after they vest;
 3. Provisions for payment of the "strike price" by the non-employed spouse and payment of taxes resulting from the exercise of the options;
 4. A description of how and when distribution is to be made to the non-owner spouse;
 5. Precise notification and document exchange provisions;
 6. Provisions for "claw-back" or forfeiture circumstances; and
 7. Any other issues which may be disclosed from a careful review of the stock option plan and related documents.

Valuation of Stock Options

- **Black-Scholes and Binomial option pricing models each require six inputs:**
 1. **Value of underlying asset (stock price)**
 2. **Exercise (strike) price**
 3. **Annualized volatility (expected)**
 4. **Maturity (contractual)**
 5. **Interest (risk-free) rate**
 6. **Dividends (expected)**

Valuation, cont.

- ❖ Closely-held options or options on closely-held stock may require adjustments to one or more of these inputs.
- ❖ Models produce a “probabilistic” estimate of option value, which comprises two components:
 - ✓ Intrinsic value, i.e., the amount that the option is “in-the-money” on the valuation date
 - ✓ Time value, i.e., the value of the option based on the probability that the underlying stock price will rise prior to option maturity plus the ability to defer payment of the strike price.

Two Option Models

The Black-Scholes model achieves the same thing as the Binomial Model; but minor differences are:

- ❖ The Black-Scholes model assumes that an infinite number of up and down moves occur prior to expiry, whereas the binomial model has a finite number of such movements; it is up to the appraiser to decide how many are appropriate.
- ❖ As more and more periods (of smaller and smaller duration) are selected, the binomial model “converges” with (produces a similar estimate of value as) the Black-Scholes model.
- ❖ Black-Scholes has the “advantage of simplicity”

Stock Options

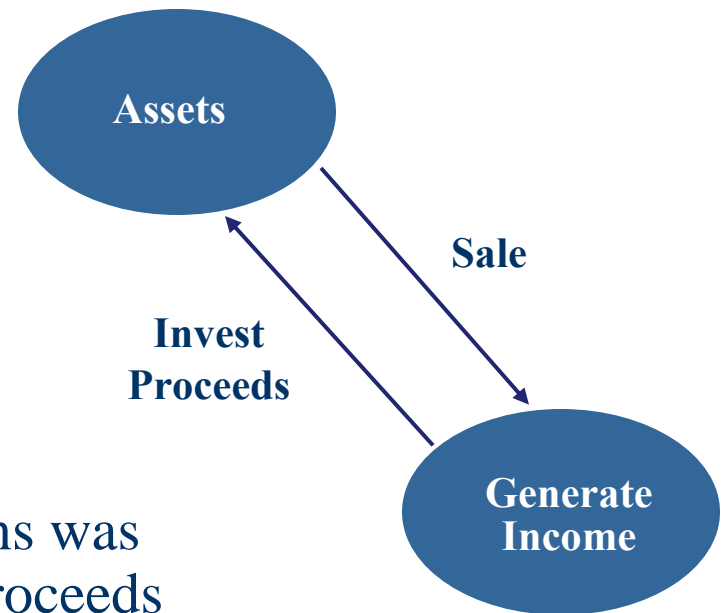
Assets Or Income

Circular Reasoning

1. **Options are assets before exercise**
2. **Exercise results in W-2 income**
3. **If proceeds aren't consumed then reinvest into assets**

Ayyad v. Rashid (110 Wn. App. 462 [2002])

1. Trial court ruled the exercise of options was merely a redistribution of wealth as proceeds were reinvested into other assets
2. Appeals Court said statute did not exclude option proceeds from child support income so they should be considered income



CASE LAW

(Key Cases)

- *Callahan v. Callahan*, 142 N.J. Super 325 (Ch. Div. 1976)
- *In Re Marriage of Hug*, 154 Cal. App. 3d 780, 792, 201 Cal. Rptr. 676 (1984)
- *In re Marriage of Nelson*, 177 Cal. App. 3d. 150 (Ct. App. 1986)
- *In Re Marriage of Short*, 125 Wn. 2d 865, 872, 890 P. 2d 12 (1995)
- *Pascale v. Pascale*, 140 N.J. 583 (1995)
- *In Re Marriage of Miller*, 915 P. 2d 1314 (Colo. 1996)
- *DeJesus v. DeJesus*, 90 N.Y. 2d 643 (1997)
- *In re Marriage of Stachofsky*, 90 WN. App. 135 (Ct. App. 1998)
- *Murray v. Murray*, 128 Ohio App. 3d 662 (1999)
- *Wendt v. Wendt*, 59 Conn. App. 656, 757 A. 2d 1225 (App. Div. 2000)
- *In re Batra v. Batra*, 135 Idaho 388 (Ct. App. 2001)
- *Heller-Loren v. Apuzzio*, 371 N.J. Super. 518 (App. Div. 2004)
- *Robertson v. Robertson*, 381 N.J. Super. 199 (App. Div. 2005)
- *In re the marriage of Brebaugh v. Deane*, 211 Ariz. 95 (Ct. App. 2005)
- *In re Engel v. Landman*, 221 Ariz. 504 (Ct. App. 2009)

Callahan v. Callahan, 142 N.J. Super 325 (Ch. Div. 1976)

- Options acquired during the marriage were subject to equitable distribution even though (1) the options were potentially terminable; (2) the husband had to make an expenditure to exercise the options; and (3) the options were subject to various SEC regulations.
- The Trial Court impressed a constructive trust on the husband in favor of the wife, for a portion of the options. The Court reasoned that the imposition of a constructive trust would result in the most equitable outcome to the parties without creating undue financial and business liabilities.
- All of the options were granted during the course of the marriage. Although not specifically stated, however, it appears that some or all of the options were not fully vested because they were subject to divestiture under certain circumstances. This may be why the wife was awarded only 25% of the options at their maturation.

In Re Marriage of Hug, 154 Cal. App. 3d 780, 792, 201 Cal. Rptr. 676 (1984)

- Seminal case where the Trial Court expressed the options that were part of the marital estate in terms of a fraction.
- The fraction was expressed as follows: The numerator represented the difference in months between the spouse's commencement of employment with the company and the date of the parties' separation. The denominator was established by first determining the difference, in months, between commencement of employment and the date when the first option was exercisable.
- The fraction was then multiplied by the number of shares that could be purchased and the date the option was first exercisable.
- The remaining options were determined to be separate property of the employed spouse.
- Although the employed spouse agreed that a coverture fraction should be used, he argued that the proper time rules should incorporate the date when the option was granted rather than the date he commenced employment because the options were not granted as an incentive to accept such employment.
- In supporting the "date of employment" as the start date in the fraction, the Court examined the various reasons why corporations give stock options to employees and found that so single characterization could be given to employees' stock option grants. Thus, the Court determined that whether they are properly characterized as compensation for past, present or future services, or all three, is fact specific. Therefore, the Trial Court concluded that, given the facts of that particular case, the two-year period of employment preceding the company's distribution of options contributed, at least in part, to the underlying reasons for the grant at issue.

Cases Questioning or Criticizing In Re Hug, 154 Cal. App. 3d 780 (1984)

In re Marriage of Nelson, 177 Cal. App. 3d. 150 (Ct. App. 1986)

Issue:

Whether the trial court erred in (1) holding that stock options that were granted and became exercisable before the parties separated were wholly community property; (2) Whether the trial court erred in holding that stock options that were granted before the parties separated but were not exercisable until after they separated were partly community property and partly husband's separate property; and (3) holding that stock options granted after the parties separated were wholly husband's separate property.

Holding:

No. The trial court did not err in varying from the Hug formula when determining distribution of those stock options that were granted before the parties separated but were not exercisable until after the separation since only prospective increases in the value of the stock could result in a profit. It was therefore appropriate to place more emphasis on the period following each grant to the date of the separation, as the trial court did, than on the employee's entire tenure with the company up to the time of separation as the Hug court did.

In Re Marriage of Short, 125 Wn. 2d 865, 872, 890 P. 2d 12 (1995)

- This case has an expansive discussion of the coverture factor, noting its reemergence into divorce litigation as a mechanism for apportioning between spouses the benefit or value of unvested stock options, retirement plans or other benefits that were earned partially during and partially after the marriage.
- Evidence of the purpose for the award of the option (i.e., compensation for past, present or future services) is usually found in the language of the option grant or employment agreement.

Pascale v. Pascale, 140 N.J. 583 (1995)

- The employed spouse (wife) was granted the option to purchase 5,000 shares of her new employer's stock, three years before the Complaint, which was filed on October 28, 1990. As of the trial date, the wife had acquired and owned 20,069 stock options, all of which were awarded by her employer between April 14, 1987 and November 15, 1991. Seven thousand three hundred (7,300) of those options were granted subsequent to the filing of the divorce complaint. The dispute arose in response to two separate options awards granted on November 7, 1990, one for 4,000 shares and another consisting of 1,800 shares. The disputed options were awarded approximately 10 days after the wife filed for divorce.
- The wife argued that the 1,800 options were not subject to distribution because they were "issued in recognition of past performance." In addition, she had asserted that the remaining 4,000 shares were also excluded from the marital estate because they were issued in anticipation of increased employment responsibilities resulting from a promotion. The wife relied on her company's transmittal letters to support her arguments. The Trial Court, however, held that neither of the two blocks of options could be excluded from the marital estate and that they were both subject to distribution. The Appellate Division found that only one of the two sets of options constituted part of the marital estate. The Supreme Court reversed the Appellate Court's ruling.
- The Supreme Court's holding made it clear that the determining factor, in stock option distribution cases, is whether the assets result from the parties' joint efforts put forth "during the marriage." To refute the presumption that the assets result from a joint effort, the party seeking exclusion of the assets bears "the burden of establishing such immunity (from equitable distribution) as to any particular asset."

Pascale v. Pascale, 140 N.J. 583 (1995)
(CONTINUED)

- Does not address the majority rule (i.e., application of coverture fractions or time rule formulas).
- Assets or property acquired after the termination of the marriage, but as a result of efforts expended during the marriage, will generally be included in the marital estate and are, therefore, subject to equitable distribution.
- Assets acquired after a marriage is dissolved, resulting solely from the earner's post complaint efforts, constitute the employed spouse's separate property.
- The problem is telling the difference. *Pascale* does not assist us in this regard except by way of introduction of testimony or evidence to allow the trier of fact to conclude whether or not the asset was awarded based wholly or in part upon marital effort.

In Re Marriage of Miller, 915 P. 2d 1314 (Colo. 1996)

- It should be noted that options *clearly* given to the employee spouse as compensation or incentive for future services are *wholly* non-marital property. Similarly, options *obviously* granted exclusively for past or present services are *fully* marital property. Thus, there is no need for the court to utilize a coverture factor or time rule fraction for either category to determine the marital interest since they are entirely either marital or non-marital property. Problems arise when: (1) the reasons for the options' grant are unclear; (2) when the options are unvested; or (3) when the options include an indiscernible mass of pre- and postmarital efforts. See generally *In re Marriage of Miller*, 915 P.2d 1314 (Colo. 1996).

DeJesus v. DeJesus, 90 N.Y. 2d 643 (1997)

- Follows majority rule.
- Four step procedure implemented:
 1. Determine the portion of shares issued for past and future services;
 2. Determine the shares related to compensation for past services to the extent that the marriage coincides with the period of the titled spouse's employment up until the time of the grant. This would be the marital portion;
 3. Determine the portion granted as an incentive for future services; the marital share of that portion will be determined by a time rule; and
 4. Calculate the portion found to be marital by adding:
 - i. that portion that is compensation for past services; and
 - ii. that portion of the future services deemed to be marital after application of the time rule.
- The Court concluded that this analysis best accommodated the tensions that often arise when attempting to determine how options should be distributed in cases where the reasons for the grant are unclear or competing.

In re Marriage of Stachofsky, 90 WN. App. 135 (Ct. App. 1998)

Issue:

Whether the trial court erred in failing to utilize the time rule applied in Short when determining distribution of shares of stock and stock options that were granted, vested and/or purchased at various times before, during and after the marriage.

Holding:

No. The trial court did not err since the time rule established in Short does not apply to shares purchased during the parties' marriage since such options are presumptively community property unless the presumption is rebutted.

Murray v. Murray, 128 Ohio App. 3d 662 (1999)

- This was the first case in the United States which deliberately treated an executive's unexercised stock options as income for child support purposes.
- The wife moved to modify child support on the ground that her ex-husband's income had increased, in part, from the increase in value of the stock options.
- Her husband argued that the appreciation in value of his options should not be considered because it was non-recurring income.
- The Court held that where employees have complete discretion to exercise the options, the appreciation in stock value should be included as gross income even if the employee chooses not to exercise the options in each year.
- The Court reasoned that since the employee had complete discretion to exercise the options, "the option then becomes an investment choice, and its value may be imputed as part of appellant's gross income." This precludes the employee from shielding a significant portion of his income from the Court and depriving his children of the standard of living they would otherwise enjoy.

Wendt v. Wendt, 59 Conn. App. 656, 757 A. 2d 1225 (App. Div. 2000)

- **Adopts the intrinsic valuation method.**
- **Acknowledges that a coverture factor has no application where benefits are granted entirely in recognition for past or present services.**
- **The Court overruled the wife's argument and began the analysis of the formula as of the date of the grant of the options and not the date of the husband's employment. This was based on the Trial Court's determination that the purpose of the unvested stock options was to compensate the husband for performance occurring after the date of the granting of the options.**
- **The Appellate Court also found that the Trial Court's selection of the date of separation as the end date in the coverture factor was appropriate because it found that the wife had ceased contributing to the marital assets on that date.**

In re Batra v. Batra, 135 Idaho 388 (Ct. App. 2001)

Issue:

Whether the trial court erred in applying the modified Short time rule when distributing the husband's stock options instead of the Hug time rule.

Holding:

No. The trial court did not err in applying the modified Short time rule when distributing the husband's stock options since the modified Short time rule is the appropriate rule where unvested stock options are granted to the employee spouse and vesting occurs in whole or in part during marriage.

Heller-Loren v. Apuzzio, 371 N.J. Super. 518 (App. Div. 2004)

Issue:

Did the trial court err in interpreting the parties' Property Settlement Agreement ("PSA") as excluding from defendant's gross earned income for purposes of child support Husband's stock options and proceeds from sale of stock options?

Holding:

No. Although "the law generally holds that income is generated by the exercise of an option earned and acquired post-divorce if exercised at a price below fair market value or if sold at a profit", the law "does not support the contention that stock options should be treated as income upon mere vesting". *Id.* at 522. Despite this law, however, the parties' PSA specifically excluded such stock options, or the exercise of same, from income for purposes of child support. Accordingly, the trial court did not err in excluding same from any calculation concerning defendant's income for purposes of child support. In reaching this conclusion, the Appellate Court "emphasize[d]" that the "decision [was] based on the particular PSA in question". *Id.*

Robertson v. Robertson, 381 N.J. Super. 199 (App. Div. 2005)

Issue:

Did the trial court err in the distribution of Husband's stock options to Wife that were awarded to him as a signing and retention bonus by his new employer three days prior to the date of the Complaint for Divorce?

Holding:

Yes. Despite being awarded three days prior to the Complaint for Divorce, the stock options were provided as an incentive for Husband's future employment, not his past performance and, as such, were not the result of effort expended by either party during the marriage. Accordingly, they were exempt from equitable distribution.

In re the marriage of Brebaugh v. Deane, 211 Ariz. 95 (Ct. App. 2005)

Issue:

Whether the trial court erred when including 100% of husband's unvested stock options as part of community property.

Holding:

Yes. The trial court erred in its conclusion that all unvested stock options granted during marriage but vesting after the dissolution petition was served are community property. The Appellate Court remanded so that the trial court could consider the reasons husband received the unvested options and the most appropriate time rule formula, if any, to divide them.

In re Engel v. Landman, 221 Ariz. 504 (Ct. App. 2009)

Issue:

Whether the trial court erred in utilizing the Murray method of distribution when determining the valuation of husband's stock options for purposes of child support.

Holding:

Yes. The inherent problem with the Murray method is that it makes the interest of the child dependent on market fluctuations that have no actual effect on the funds available to support the children. Child support obligation should not be governed by the volatility of the marketplace, and the implicit assumption in Murray that options will appreciate year to year does not comport with the realities of the market.

Discovery Requests

1. **The company stock option plan (the applicable plan for each grant);**
2. **Each letter or other document awarding stock options to the employee;**
3. **All company documents summarizing the grants (date, vesting schedule, number of options, amount exercised to date, ISO vs. NQO, etc.);**
4. **The minutes of the meeting of the board of directors, compensation committee, or executive committee at which the options were granted;**
5. **The company's annual report and K-1;**
6. **Stock split information;**
7. **The employee's performance reviews.**

Other Issues

- **Microsoft share repurchases – all or nothing**
- **New alternatives – Restricted Stock**
- **New alternatives – Stock grants with call options**

Q&A

- **1. Assuming you cannot do a QDRO or a DRO, how do you secure an interest in stock options awarded in a divorce decree?**
- **2. Are all options treated the same - stock options, performance stock, restricted stock?**
- **3. How do you value RSUs and restricted shares that are likely to vest or mature after a divorce is finalized?**
- **4. What is the tax treatment under IRC sec. 83(b) with regard to options, RSUs, and restricted shares?**