STRATEGIES FOR QUANTIFYING EXTRAORDINARY FINANCIAL POST-SEPARATION CONTRIBUTIONS

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The focus of this hot tip is attempting to quantify a fact pattern where one spouse expends extraordinary and/or significant personal efforts which have substantially enhanced the value of an estate when the marital relationship has undergone an irretrievable or irreconcilable breakdown, in essence, after the marital partnership has ended.

In all actions for dissolution of marriage, there is usually a substantial period of time that elapses between the date of filing a Petition for Dissolution of Marriage and entry of a Judgment for Dissolution of Marriage. Dependent upon statutory valuation dates, i.e., date of separation versus date of entry of a Judgment for Dissolution of Marriage, the practitioner should prepare two pro forma balance sheets, one valued as of the date the case is initiated and then compare it to a second version valued as of the date the case is getting ready to settle or be tried. Most equitable distribution statutes apply the concept of dividing marital property considering a number of factors without giving more weight to one over the other. I am looking for either the Court or the opposing party giving more financial consideration for extraordinary post-separation contributions of one party which significantly increases the value of the marital property. If there is a significant increase in the parties' net worth during the parties' separation, to ascertain the reason, you need to analyze each asset and attempt to determine if the appreciation is attributable to active or passive efforts.

In most actions for dissolution, the primary wage earner or proverbial breadwinner rarely seeks to increase his or her income or net worth for the benefit of the non-working spouse or marital estate after a lawsuit is filed. More often than not, the opposite scenario occurs where a business owner or member of a closely held business attempts to justify a decrease in income or business conditions in an attempt to reduce the amount of support to be paid, or valuation of their interest in a closely held business. The burden of proof is on the unusual litigant who expends significant personal efforts or assumes justifiable risk and there is a causal connection between those efforts which substantially enhance their income and/or the value of the entity they own or are employed by. The legal issue is how that party should be entitled to either all or a substantially disproportionate amount of the enhanced value to the balance sheet for the increased value directly attributable to that party's post-separation contributions. If the risks assumed resulted in a decrease in either income or value of the estate, the aggrieved party whose support is reduced, or divisible assets are worth less, would be making some claim that the Court should financially punish the risk taker for what has transpired. In essence, why not financially reward the party who assumed the risk which resulted in either a great reward or financial windfall for the estate.

In order to sustain your burden of proof, consider proving how the following facts might be applied:

ISSUES TO ANALYZE

1. Post-Separation Increased Income

   A. Salary: more hours worked; overtime

   B. Bonus for performance

   C. Deferred Compensation

      (1) Incentive Stock Options
      (2) Non-Qualified Stock Options
      (3) Reload Options
      (4) Vesting Schedules different from previous stock option grants

   D. Officer or Director of Publicly Traded Company

      (1) 10 K Filing
      (2) 10 Q Filing
      (3) Press Releases
      (4) Quarterly Statements
      (5) Annual Statements *(Look at footnotes.)*

2. Post-Separation Increased Value of Property

   A. Significant Trading Profits for Publicly Traded Portfolio or Decisions Not to Sell Which Enhanced the Value of Portfolios

      (1) Reload Options to Replace Underwater Stock Options based on Individual or Company Performance.
      (2) Deferred Compensation
      (3) ESOP

   B. Privately Held Entity

      (1) Book Value
      (2) Market Value
      (3) Change in Accounting Elections (i.e., FASB or others)
      (4) Economy
      (5) Decision to sell, merge, or not sell
      (6) Revised Employment Contract
      (7) Revised Buy/Sell Agreement