

Comment,  
THE ROAD TO SPLITSVILLE: HOW THE  
TIMING OF VALUATION DURING  
MARITAL DISSOLUTION LEADS TO  
COSTLY DETOURS

### I. Introduction - Dissolution Gridlock

Courts across the country adjudicated 1.2 million divorces in 1997.<sup>1</sup> Today, statistics indicate that one out of every two marriages will likely end in dissolution,<sup>2</sup> accounting for approximately 4.8% of the U.S. population in a given year.<sup>3</sup> Yet, these stirring figures cannot illustrate clients' emotional entanglement with this legal process or the specific problems during property division that can undermine judicial efficiency and leave clients in the financial dust. As divorce rates have increased, courts have also reassessed marriage in terms of an economic partnership.<sup>4</sup> Practitioners must raise clients' awareness of this general perception and prepare them for the challenges they will face down the road toward marital dissolution.

---

<sup>1</sup> *Statistical Rolodex: Fastats A to Z [Divorce]*, NAT'L CENTER FOR HEALTH STAT. 2, ¶ 2 (Apr. 20, 1999) <<http://www.cdc.gov/nchswww/fastats/divorce.htm>>; see also, Brad Edmondson, *Golden Opportunities: In Spite of Our High Divorce Rate, the Number of Married Couples Celebrating Their 50<sup>th</sup> Anniversary Is on the Rise*, FORECAST (Cowles Business Media Newsletter, New York, N.Y.), Nov./Dec. 1997, at 1 (Available online at <<http://www.demographics.com>>.).

<sup>2</sup> See Karl Zinmeister et al., *Is America Turning A Corner?*, AM. ENTERPRISE, Jan./Feb. 1999, at 36; Edmondson, *supra* note 1, at 1; see also, Harriet N. Cohen & Patricia Hennessey, *Valuation of Property in Marital Dissolutions*, 23 FAM. L.Q. 339 (1989).

<sup>3</sup> Elia Kacapyr, *Population Update for October*, AM. DEMOGRAPHICS, Oct. 1996, at 1. This update includes a general chart and average statistics for marriage and divorce rates.

<sup>4</sup> See Ann O'Flanagan, *Distribution of Marital Property*, DIVORCE SOURCE.COM 1 ¶ 3 (Sept. 18, 1997) <<http://www.divorcesource.com/archives/index.html>>; see also, Cohen & Hennessey, *supra* note 2, at 339; Sanford K. Ain, & Anne Marie Jackson, *Professional, Personal & Celebrity Goodwill Valuation: Forecasting An Uncertain Future*, J. AM. ACAD. MATRIMONIAL LAW. 3, ¶ 1 (Aug. 28, 1999) <[http://www.aaml.org/new\\_articlesAin/professional/goodwill.htm](http://www.aaml.org/new_articlesAin/professional/goodwill.htm)>.

Other articles in this issue will assist practitioners' preparation for specific valuation arguments, since they address valuing explicit property items, such as stock, retirement plans, and contingency fee cases for attorneys. However to help frame the *possible* valuation arguments, the following analysis surveys available valuation dates that courts may apply: 1) separation date or commencement of action at the filing date, 2) the trial or hearing date, 3) date of dissolution when judge signs decree, 4) date nearest to actual partition/distribution of assets, or 5) allowing the court to apply whichever date suits the facts of that particular case (the factor analysis). Next, each of these sections highlights fundamental reasons for a practitioner to utilize that specific date and outlines logical fallacies in applying the date. Finally, this review interprets what effects a date will have on final distribution and recommends possible alternatives to achieve the trial courts' policy of fairness while providing necessary consistency for practitioners and clients.

#### A. *Problems Inherent in Property Valuation*

On this difficult road through divorce, the necessary steps to characterize, value, and divide marital assets may be the most volatile.<sup>5</sup> "Furniture and furnishings are not usually controlling financial issues, but they can be *filled* with emotion," offers Missouri domestic relations attorney Jack Cochran, who specializes in cases valuing significant assets and closely-held business entities.<sup>6</sup> These sentimental attachments to property, coupled with each party's perception of what constitutes a just and fair division,<sup>7</sup> contribute to the ongoing struggle to litigate emotional re-

---

<sup>5</sup> Thomas W. Crockett & J. Randall Patterson, *Dividing the Property in a Marital Dissolution*, 62 Miss. L.J. 57 (1992).

<sup>6</sup> Telephone Interview with Jack Cochran, Attorney at Law and Partner in the law firm of Cochran, Oswald, McDonald, Roam & Moore, P.C. (Aug. 27, 1999) [hereinafter Cochran].

<sup>7</sup> IRA MARK ELLMAN ET AL., *FAMILY LAW: CASES, TEXTS, PROBLEMS*, at 263 (3<sup>rd</sup> ed. 1998) ("'Equitable Distribution' is today the dominant form of property distribution on divorce."); see also, Lee R. Russ, Annotation, *Proper Date for Valuation of Property Being Distributed Pursuant to Divorce*, 34 A.L.R. 4<sup>th</sup> 63 § 2[a] (1984) ("[T]he majority of jurisdictions have adopted, either by statute or judicial decision, a doctrine of 'equitable distribution,' which gives trial courts in divorce actions authority to apportion marital assets between the parties in a manner that is 'just,' 'equitable,' 'fair' or the like." However, title

---

still controls property division in “very few states.”); *see also*, Linda D. Elrod et al., *A Review of the Year in Family Law: Children’s Issues Dominate*, 32 FAM. L.Q. 661, app. at 716 (1999) (Detailing in the *Property Division Chart 5*, specific provision in community property and equitable division states); *Cox v. Cox*, 882 P.2d 909, 914 (Alaska 1994); *Sample v. Sample*, 731 P.2d 604, 607 (Ariz. Ct. App. 1986) (quoting ARIZ. REV. STAT. § 25-318(A)(1999)); CAL. CIV. CODE § 4800(a) (West 1998); COLO. REV. STAT. § 14-10-113(1) (1998); *Wendt v. Wendt*, No. FA96 0149562 S., 1998 WL 161165, at \*217 (Conn. Super. Ct. March 31, 1998); *Lynham v. Gallagher*, 526 A.2d 878, 885 (Del. 1987) (quoting DEL. CODE ANN. tit. 13 § 1513(1998)); *Ritter v. Ritter*, 690 So.2d 1372, 1376 (Fla. Dist. Ct. App. 1997) (referring to distribution guidelines under FLA. STAT. ch. 61.075(4) (1991)); *Josephson v. Josephson*, 772 P.2d 1236, 1243 (Idaho Ct. App. 1989) *Josephson v. Josephson*, 772 P.2d 1236, 1243 (Id. Ct. App. 1989) (overruling recognized by *Smith v. Smith*, 860 P.2d 634 (Idaho 1993)). Author cites this case *only* in reference to IDAHO CODE § 32-712(1); In re Marriage of Talty, 623 N.E.2d 1041 (Ill. App. Ct. 1993) reh’g denied, (Dec. 23, 1993); *Taylor v. Taylor*, 436 N.E.2d 56, 58 (Ind. 1982) (citing IND. CODE §§ 31-1-11.5-11(a)-11(b) (Burns Supp. 1979)); In re Marriage of Driscoll, 563 N.W.2d 640, 641 (Iowa Ct. App. 1997) (citing IOWA CODE § 598.21(1)); *Cray v. Cray*, 867 P.2d 291, 295 (Kan. 1994) (quoting KAN. STAT. ANN. § 60-1610(b) (Supp. 1992)); *Kentucky Property Division Guidelines*, (May 22, 1999) <<http://www.lawstreet.com/lawguide/KYDIPRP.html>> (referring to division guidelines in KY. REV. STAT. ANN. § 403.190); *Poirier v. Poirier*, 664 So.2d 532, 535 (La. Ct. App. 1995) (citing division guidelines in LA. REV. STAT. ANN. § 9:2801(4)(b) (1998)); *Prahinski v. Prahinski*, 582 A.2d 784, 788 (Md. 1990) applying MD. CODE ANN., FAM. LAW § 8-203 (1988); *Bollenbach v. Bollenbach*, 175 N.W.2d 148, 159 (Minn. 1970) (referring to equitable division of property in MINN. STAT. ANN. § 518.58.1 (West 1998)); MISS. CODE ANN. § 93-5-23 (Supp. 1992) (Although Mississippi is the only state still employing legal title theory for property division, it does so under the policy of achieving a fair result.); *Gustin v. Gustin*, 861 S.W.2d 639, 643 (Mo. Ct. App. 1993) (citing Mo. REV. STAT. § 452.330.1(1) (Supp. 1988)); In re Marriage of Wagner, 679 P.2d 753, 757 (Mont. 1984) (citing adopted guidelines for equitable distribution under MONT. CODE ANN. § 40-4-202); NEB. REV. STAT. § 42-365 (1998); *Gemma v. Gemma*, 778 P.2d 429, 430 (Nev. 1989) (referring to division guidelines in NEV. REV. STAT. § 123.259 (1997)); *see O’Flanagan, supra* note 4, at 1 (noting that New Jersey law directs courts to consider fifteen factors to determine an “equitable, fair and just division of assets” under § 2A:34-23); N.Y. DOM. REL. LAW § 236.5(c) (Consol. 1999); *White v. White*, 324 S.E.2d 829, 832 (N.C. 1985) (quoting N.C. GEN. STAT. § 50-20(c)(1987) where the statute requires a 50/50 split of assets unless doing so proves inequitable); OHIO REV. CODE ANN. § 3105.171 (Anderson 1992) (Available online at <<http://orc.avv.com/title-31/sec-3105/sec-3105.171.htm>>); *Thielenhaus v. Thielenhaus*, 890 P.2d 925, 932 (Okla. 1995) (referring to OKLA. STAT. tit. 43 § 121 (1991)); *DeMasi v. DeMasi*, 597 A.2d 101, 105 (Pa. Super. Ct. 1991); *Sutliff v. Sutliff*, 543 A.2d 534, 537 (Pa. 1988); *Vanni v. Vanni*, 535 A.2d 1268, 1270 (R.I. 1988) (Court applied statutory division guidelines

relationships.<sup>8</sup> In addition to these challenges, more complex valuation problems surface in the resolution process.

Clients may experience particular difficulty in understanding valuation of property, because valuation, or determining the worth of an item,<sup>9</sup> largely depends on whatever cutoff date for valuation of property the court selects. Assets come in all shapes and sizes, including varied titles and worth, and the court must classify each item as separate or marital property in order to assign it an appropriate value and then divide it.<sup>10</sup> A court may only divide property within its jurisdiction;<sup>11</sup> adoption of a specific cutoff date determines whether subsequent value increases are marital property, subject to the court's divisional jurisdiction, or separate and thus indivisible.<sup>12</sup> These decisions take time, but

---

according to the 1981 Reenactment of R.I. GEN. LAWS § 15-5-16.1 (1956)); TEX. FAM. CODE ANN. § 7.001 (West 1997); *Mitchell v. Mitchell*, 355 S.E.2d 18, 21 (Va. Ct. App. 1987) *later codified in* VA. CODE ANN. § 20-107.3(A); *McGraw v. McGraw*, 411 S.E.2d 256, 259 (W. Va. 1991) (quoting W. VA. CODE § 48-2-32(d)(1) (1984) concerning distribution); WIS. STAT. ANN. § 767.255 (West 1981) (statutory presumption for equal distribution).

<sup>8</sup> See *d'Elia v. d'Elia*, 68 Cal. Rptr. 2d 324, 326 (Cal. Ct. App. 1997) (discussing difficulty when "a human relationship – as distinct from a discrete event – is the subject of the litigation").

<sup>9</sup> BLACK'S LAW DICTIONARY 1551 (6<sup>th</sup> ed. 1990).

<sup>10</sup> *Dividing the Family Business: Financial Survival Guide During Divorce*, DIVORCENET.COM 3, ¶ 1 (Aug. 3, 1999) <<http://www.divorcenet.com>> [hereinafter *Dividing the Family Business*].

<sup>11</sup> *Ain & Jackson*, *supra* note 4, at 1; *see also*, *Russ*, *supra* note 7, at § 1[a] (citing 24 AM. JUR. 2D *Divorce and Separation* § 865).

<sup>12</sup> See *Cray*, 867 P.2d at 295-96 (exemplifies statutory jurisdictional basis for the court to determine and finalize extent of vested interest in marital property for division); *Wegman v. Wegman*, 494 N.Y.S.2d 933 (N.Y. Sup. Ct. 1985), *aff'd in part and modified in part*, 509 N.Y.S.2d 342 (N.Y. App. Div. 1986), *Motion to Amend the Remittitur granted as amended*, 512 N.Y.S.2d 410 (N.Y. App. Div. 1987) (Court did not divide increase accrued after set date, since it was separate property.); *see also*, *Moon v. Moon*, 594 So.2d 819, 823 (Fla. Dist. Ct. App. 1992) (where assets acquired after separation date (valuation) are not considered marital assets for distribution); Norman Perlberger, *Pennsylvania's Equitable Distribution: Progress or Confusion?*, 60 TEMP. L.Q. 293, 294 (1987) (discussing cases distinguishing property classifications and authority) [hereinafter *Perlberger*]. The court requires jurisdiction to divide *only* marital or community property. Any property acquired after a legal separation is generally considered separate and indivisible, but a possible exception to this exclusion may occur in an equitable distribution jurisdiction. See *In re Marriage of Taylor*, 425 N.E.2d 649, 651 (Ind. Ct. App. 1981) (citing IND. CODE § 31-1-11.5-11(a)

which date best defines the boundary delineating marital property that is even eligible for division while still supporting the courts' general objective of a just division?

### B. Differing Valuation Dates Lead to Numbers Race

It appears that neither the courts nor the legislatures provide a universal answer for the appropriate cutoff date for property valuation. Some courts analyze valuation dates by relying on definitions or factors listed in property division statutes,<sup>13</sup> but other jurisdictions use varying dates determined on a case-by-case approach.<sup>14</sup> The Supreme Court of Montana voiced its frustration with valuing marital assets whose value fluctuates, claiming that “[t]he time for proper valuation cannot be tied to any single event in the dissolution process. The filing of a petition, trial of the matter, or even granting of the decree of dissolution do not control the proper point of evaluation . . . .”<sup>15</sup>

This apparent lack of direction does not prompt married couples to make the courts' decision easier; understandably, few spouses purchase items together complete with ownership labels or value assignments in “what if” anticipation of a divorce. Fewer still are probably even aware of the quagmire within valuation timing.

However, practitioners often attempt to prepare clients for this challenge. Many request potential clients to complete financial information forms prior to the first conference, which aids

---

(Burns Code Ed., Repl. 1980) where the court discussed what is divisible and indivisible based upon the “marital pot”); 24 AM. JUR. 2D *Divorce and Separation* § 575 (1983) (referring to timing of valuation); and *Dividing the Family Business*, *supra* note 10, at 3, ¶ 6.

<sup>13</sup> Taylor v. Taylor, 736 S.W.2d 388, 391 (Mo. 1987) (citing implicit analysis in Giedinghagen v. Giedinghagen, 712 S.W.2d 711, 713 (Mo. App. 1986); *see also*, Wagner v. Wagner, 431 S.E.2d 77, 80 (Va. Ct. App. 1993) (affirming propriety of applying statutory factors).

<sup>14</sup> Cray, 867 P.2d at 298 (quoting GOLDEN, *EQUITABLE DISTRIBUTION OF PROPERTY* 251 § 7.01 (Turner Supp. 1992)) (“A growing number of courts are refusing to establish one mandatory date of valuation. These courts recognize that different dates should control in different cases and they leave the decision to the trial court’s discretion.”).

<sup>15</sup> In re Marriage of Lippert, 627 P.2d 1206, 1208 (Mont. 1981); *see also*, Cray, 867 P.2d at 298 (similarly noting that without a defined statutory valuation date, “no single event in the dissolution process necessarily establishes the time for proper valuation of property. . . .”).

financial discovery necessary to select a valuation date that best serves the client's interest.<sup>16</sup> The attorney hopes listing assets and assigning their perceived fair market value will initiate an honest dialogue concerning who should receive which item and how much it is actually worth.<sup>17</sup>

Attorneys also use such information to drive valuation arguments, attempting to persuade the court that their client's proposed award is worth less according to a particular date, while the client's former spouse received a lion's share of the marital assets based on a different valuation base. It becomes a race for numbers, where asset values are financial muscle cars speeding the court toward its final destination, the division and award of marital property. Each unvalued item then becomes fodder for another arguable issue during the in-court standoff, and litigation to resolve these issues may cost both sides fees that dissipate the very marital assets parties ask the court to value and divide. Though proper valuation of significant assets gobbles up both time and financial resources, practitioners note that "there's no substitute,"<sup>18</sup> when the practical effect of this procedure may make a difference in the amount of marital property awarded and prevent a potential decrease in the client's standard of living.

In the midst of such "domestic warfare,"<sup>19</sup> however, both counsel and clients should remember that "value is by no means a constant."<sup>20</sup> Indeed, what appears *just* at a particular valuation

---

<sup>16</sup> Cochran, *supra* note 6, at 2.

<sup>17</sup> *Id.*; Cf. John Shank, *How to Value Assets in a Marriage*, NORTHLAND BUS. LEDGER, Aug. 1999, at 33 (arguing the need for attorney and expert to "know everything" to value property, such as a business, and to "formulate opinions" regarding its value or worth).

<sup>18</sup> Shank, *supra* note 17, at 33.

<sup>19</sup> *Litmans v. Litmans*, 673 A.2d 382, 388 (Sup. Ct. Pa. 1996) (quoting *DeMasi*, 597 A.2d at 104); see Edward S. Snyder, *Direct Examination of the Furniture Appraiser*, 8 FAM. ADVOC. 38 (1986).

<sup>20</sup> *Sutliff*, 543 A.2d at 537. Other courts stress *Sutliff's* directive to select a valuation date "reasonably proximate to the date of distribution" to prevent staleness and divide assets according to their most current determination. See *Morgan v. Ackerman* 964 S.W.2d 865, 869 (Mo. Ct. App. 1998); *Gustin*, 861 S.W.2d at 643; and *Wagner*, 431 S.E.2d at 531-32. Overall, valuation is crucial to ensure that the court achieves its purpose of "economic justice," since many asset values oscillate with market conditions. See *Hillebrand v. Hillebrand*, 546 A.2d 1047, 1050 (1988). (noting that if the court selects an early valuation date, and the value decreases, the party receiving the item with an inflated value feels

date may not have an equitable effect down the road.<sup>21</sup> Given this opportunity that using different valuation dates impact the amount awarded and judicial policy seeks to make a reasonable division, an “attorney may have to be prepared to present valuations for all possible valuation dates if unclear as to which the court will choose.”<sup>22</sup> Critics charge that the myriad of dates and their respective variable effects create an illusion of equity.<sup>23</sup> Would standardized dates in a jurisdiction achieve more equitable results? It appears that the greatest opportunity for equity and certainty exists when courts enjoy the discretion for valuation after careful consideration of all facts in light of the statutory boundaries and retain the power, absent any stipulation between the parties, to select a suitable alternative date given special circumstances.

## II. Valuation Date Survey

### A. Valuation at Date of Separation

Application of the date of separation generally evokes images of a husband and wife living apart; yet, separation has no legal effect until a court recognizes the termination of marital

---

cheated and perceives equity as an illusion; the court provided a just and reasonable distribution on paper but not in fact). These variances can be staggering. *Newsmakers*, HOUS. CHRON., May 15, 1998, at 2 (noting a Connecticut appellate court’s decision to apply a couple’s separation date instead of the divorce date for division of assets “cost Lorna Wendt \$13 million”); *see also* Gustin, 861 S.W.2d at 644 (where valuation prior to trial instead of as of trial date created an award discrepancy of more than \$2 million).

<sup>21</sup> Lynn M. Vance, *When is a 50/50 Split Not Equal?*, AM. DIVORCE INFO. NETWORK 1, ¶ 4 (May 24, 1999) <<http://www.divorce-online.com/articles/283975.html>>.

<sup>22</sup> Cohen & Hennessey, *supra* note 3, at 344. In addition, the author does not intend this article to serve as an exhaustive survey of acceptable valuation dates in every jurisdiction; it is merely a vehicle to suggest possible arguments for different timing dates and outline advantages and disadvantages in applying certain valuation dates. While courts may distinguish cases in a practitioner’s jurisdiction, the essence of the valuation argument sometimes survives to fuel another client’s financial position.

<sup>23</sup> Crockett & Patterson, *supra* note 5, at 57-8; *see also*, 24 AM. JUR. 2D *Divorce and Separation* § 576 (1983) (“Principles of equity require a common valuation date for all marital assets.”).

ties.<sup>24</sup> Hence, the date's seemingly black-and-white definition tends to mislead practitioners and courts, and valuation determinations instead rest on a factual continuum clouded in shades of gray. If moving out and living apart is not enough to invoke judicial attention, then how does an attorney prove separation as a reasonable point in time for valuation of assets? Case precedent is not determinative, since many jurisdictions lack a fixed valuation date preference.<sup>25</sup> So, practitioners attempt every available technique to advocate for their clients, and some decisions support valuation as of the date of separation.<sup>26</sup>

A California appellate court quoted its state civil code and defined separation as "a parting of the ways with no present intention of resuming marital relations, but also, more importantly, conduct evidencing a complete and final break in the marital relationship."<sup>27</sup> Factors in the record, including joint checking accounts, credit cards, tax returns and a car title, illustrated a continuous financial partnership between a husband and wife living apart.<sup>28</sup> The von der Nuells also continued to see each other socially during the time of their "separation," which involved joint vacations, holiday celebrations, and sexual relations.<sup>29</sup>

---

<sup>24</sup> See generally, *supra* notes 11-12 and accompanying text; see also, *Brooks v. Brooks*, 486 N.E.2d 267, 271 (Ill. Ct. App. 1985) (refusing to qualify simply moving out as an opportunity for division because to do so would create a "common law division" defying both precedent and policy).

<sup>25</sup> See *Cray*, 867 P.2d at 297; *Thielenhaus*, 890 P.2d at 933 ("Oklahoma jurisprudence provides no definite rule to be used for the appraisal of marital property."); *Sutliff*, 543 A.2d at 536 ("Divorce Code contains no express provision governing the selection of a date . . . for valuation of marital property where equitable division is concerned"); *Taylor*, 436 N.E.2d at 58 (quoting property division statute that failed to list suggested valuation date). The *Taylor* court also discussed the reviewing court's lack of jurisdiction to "designate a certain date for valuation," because that direction should come from legislation. *Id.* See also, *Crockett & Patterson*, *supra* note 5, at 81 (discussing lack of guidelines in Mississippi statute or case law).

<sup>26</sup> *Hunt v. Hunt*, 698 P.2d 1168 (Alaska 1985); *Savides v. Savides*, 508 N.E.2d 617 (Mass. 1987); *Wegman v. Wegman*, 494 N.Y.S.2d 933 (N.Y. Sup. Ct. 1985) *aff'd in part and modified in part*, 509 N.Y.S.2d 342 (N.Y. App. Div. 1986), *amended*, 512 N.Y.S.2d 410 (N.Y. App. Div. 1987) (valuing property at physical separation date).

<sup>27</sup> *In re Marriage of von der Nuell*, 28 Cal. Rptr. 2d 447, 450 (Cal. Ct. App. 1994).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*



While the weight of such evidence denounces a total break and the court remanded the case back to the trial level to determine the actual separation date, the court did not suggest how much evidence *is* necessary to find that separation occurred. Does separation exist when the party vacates the marital residence *and* ceases sexual relations? Or, will the court require the presence of *all* of these factors before separation exists as an appropriate time for valuation?

To further blur the boundary lines, separation may also require a manifested intent to dissolve the marriage, such as the date of filing a petition for divorce. New Jersey courts thwart such a definition, holding in one instance that valuation is appropriate upon the date of filing a petition and later affirming an exception to the contrary when the asset increased in value prior to the trial date.<sup>30</sup> While the Superior Court in *Wadlow v. Wadlow*<sup>31</sup> noted a preference for consistency in valuation as of the filing date (i.e. proof of one's intent to separate), it agreed parties should equitably share any post-filing increases in value due to market factors or general inflation.<sup>32</sup>

In a similar fashion, Pennsylvania statutes indicate that the date of final separation is relevant for valuation, only to proffer equally appropriate dates (such as the date of the trial) within other sections and never assign a mandate.<sup>33</sup> Florida's statutes are equally nebulous; these legislative guidelines determine value at the "earliest of the date the parties enter into a valid separation agreement, . . . *or* the date of the filing of a petition for dissolution of marriage, *unless* the trial judge determines another date is just and equitable under the circumstances."<sup>34</sup> So, clients cry, "Which is it?"

These variances on the date of separation as a valuation date provide practitioners little direction at best. Instead of working

---

<sup>30</sup> DiPietro v. DiePietro, 475 A.2d 82 (N.J. Super. Ct. App. Div. 1984); *but see*, Bednar v. Bednar, 474 A.2d 17, 19 (N.J. Super Ct. App. Div. 1984).

<sup>31</sup> 491 A.2d 757, 764 (N.J. Super. Ct. App. Div. 1985) (citing Bednar, 474 A.2d at 19).

<sup>32</sup> *Id.*

<sup>33</sup> See PA. STAT. ANN. tit. 23 §§ 401(e)(4)-(5), 403(b), 401(d)(10) (Purdon Supp. 1986) However, Pennsylvania's Divorce Code does not name one universal valuation date, but it does determine a couple's "final separation" as the cutoff point for *identifying* marital property.

<sup>34</sup> Moon, 594 So.2d at 820 (citing FLA. STAT. ch. 61.075(4) (1989)).

under the certainty of a specific valuation date, attorneys must argue valuation according to the particular interpretation and application of each individual judge. One bench may adhere to a literal interpretation while another may gauge each issue under full discretionary analysis. The result is that new litigators find themselves at the mercy of unfamiliar courts, and seasoned veterans cannot offer clients more than their honest impression, rather than a prediction.<sup>35</sup> Indeed, courts could apply the “special situation”<sup>36</sup> loophole liberally, causing some valuations at the separation date while other courts select a date closer to trial. Regardless whether directives attempt to curb these discretionary joyrides by requiring courts to give reasons for deviations from the general rule,<sup>37</sup> between the decision and an appellate review to curb any economic injustice, one spouse may be left in the financial dust.<sup>38</sup>

#### 1. *Early valuation dates and emergency circumstances*

At first blush, the separation date appears to coincide with the purpose of a dissolution, allowing the court to sever economic ties as early as possible.<sup>39</sup> Clients may also desire valuation at the earliest date to get the case moving. Early valuation, such as at a separation date, also delivers certainty for pre-trial settlement negotiations based upon accurate financial data. This opportunity to finalize many cases without ever attempting a full-scale trial may alleviate stressed courts from protracted litigation due to valuation disputes.

Practitioners may also argue that the court should employ this valuation date in special, time-is-of-the-essence-type situa-

---

<sup>35</sup> See generally, Perlberger, *supra* note 12, at 309 (addressing inherent difficulties when valuation date(s) are uncertain, adversely affecting dealings with the court).

<sup>36</sup> Moon, 594 So.2d at 820 (referring to the “unless” exception).

<sup>37</sup> Cox, 882 P.2d at 917 (citing *Ogard v. Ogard*, 808 P.2d 815, 819 & n.8 (Alaska 1991) (must provide evidentiary reasons for deviation from valuation at trial date to earlier date of separation)).

<sup>38</sup> *Id.* at 918.

<sup>39</sup> *In re Marriage of Wagner*, 679 P.2d at 379-80 (court-selected valuation at date of separation was most suitable, because significant facts, including husband’s increased liabilities, wife’s acquisition of personal wealth through her own initiative, and two-year span when individual financial status certainly changed, warranted the earlier date to ensure a just distribution.).

tions, especially “where there is evidence that a marital asset was dissipated, wasted, or converted to a non-marital form.”<sup>40</sup> This quick alternative protects a spouse from another’s squandering of marital assets, and allows the protected spouse to retain more resources to start a new life.<sup>41</sup>

## 2. *The risks of an early valuation date*

On the other hand, practitioners should weigh both the pros and cons of arguing a particular date. Early valuation data could become stale,<sup>42</sup> because the divorce trial occurs *after* filing the initial pleading, comprehensive financial discovery, and presentation of all evidence supporting one’s position. By the time the court hears valuation testimony from a party’s accountant, appraiser, or other qualified expert based upon separation date figures, its relevance may have vanished with market fluctuations.<sup>43</sup> The inherent timing problem in applying this date could lead to increased litigation expenses for a new appraisal “team.”<sup>44</sup>

One must also caution practitioners about the effect of early valuation dates on increases in marital assets, like stock plans, securities, or business partnerships. Property value may rise and be divisible following valuation at the date of commencement due to a former spouse’s earlier, marital contribution or general

---

<sup>40</sup> *Id.* On later review of the appeal of this remanded decision, the Supreme Court of Alaska approved use of the date of the *first* trial as the valuation date for remanded valuation of property initially erroneously valued at date of parties’ separation without significant evidence as to *why* the deviation was proper. *Cox v. Cox*, 931 P.2d 1041, 1044 (Alaska 1997).

<sup>41</sup> *Sergi v. Sergi*, 506 A.2d 928, 931 (Pa. Super. Ct. 1986); Perlberger, *supra* note 12, at 309 (addressing value decreases due to asset consumption); *see also*, Associated Press, *Bill Seeks Equal Split in Divorce*, TUCSON CITIZEN, Feb. 12, 1999, at 13C (highlighting legislative push via House Bill 2212 toward protecting liquid marital assets through early and equal division in this community property state).

<sup>42</sup> *Sergi*, 506 A.2d at 931-32; *see also*, sources cited *supra* note 20 and accompanying text.

<sup>43</sup> *See* sources cited *supra* note 20 and accompanying text.

<sup>44</sup> *Vance*, *supra* note 21, at 1 ¶ 5 (“[I]t takes a team to make sure a divorce is settled in a fair and equitable manner: . . . [including] the accountant . . . [and] the certified financial planner. . .”).

interest and dividends.<sup>45</sup> Where a spouse's sole decisions and/or actions generate the increase, the court labels the asset as passive. Valuation of passive assets occurs as of the trial date, which prevents the titled spouse from receiving a windfall from the divorce action. This two-track valuation scheme prevents clients from "dumping" marital resources into passive assets in order to decrease net worth and shifting economic circumstances to sidestep maintenance or other support.<sup>46</sup>

Valuation at the date of separation offers a few crafty arguments to protect a less financially-sophisticated client. However if the court elects to require completion of *all* factors such as the date the marital home is vacated or the date sexual relations are ceased before labeling a date of separation, then this date hardly appears different from a later valuation time, such as the date of dissolution. After all, dissolution is the severance of *all* legal and economic ties between partners in a marriage.<sup>47</sup> Given its potential drawbacks and the fact that many of today's clients are more investment savvy, one hesitates to cultivate date of separation claims.

#### B. *Valuation at Trial or Evidentiary Valuation Hearing*

Many practitioners consider a trial or hearing as an opportunity to be heard; a trial allows an opportunity for keen "judicial examination" of evidentiary facts offered to support the valuation argument and assists the court in its "determination of is-

---

<sup>45</sup> See *Greenwald v. Greenwald*, 565 N.Y.S.2d 494, 500-01 (N.Y. App. Div. 1991) (citing *Wegman*, 509 N.Y.S.2d 342 (N.Y. App. Div. 1986)) (rejecting husband's argument to value employee stock ownership trust fund account (ESOP) as of separation date so that wife would not receive benefit of seven-year post-separation increase, and awarding her 50 percent of the ESOP as of the commencement or filing date for the action, as an active asset); *Morgan*, 964 S.W.2d at 872-73 (Mo. Ct. App. 1998) (citing evidentiary factors necessary to demonstrate proof that spouse should share proportionately in increase of other spouse's separate property).

<sup>46</sup> *In re Marriage of Wagner* 679 P.2d 753, 757-58 (Mont. 1984), (discussing protecting titled spouse's "sound business judgment" and preventing windfall to the other); *Greenwald*, 565 N.Y.S.2d at 499-500; see also, Interview with Michael S. J. Albano, domestic relations attorney and partner in the law firm of Welch, Martin, Albano & Manners, P.C. (Mar. 24, 1999) [hereinafter Albano].

<sup>47</sup> BLACK'S LAW DICTIONARY 473, 480 (6<sup>th</sup> ed. 1990).

sues”.<sup>48</sup> Since valuation assesses an item’s worth, valuation at/on the trial date supports a well-educated assessment, because the court reviews all financial data through gatekeeping procedural and evidentiary rules.<sup>49</sup> In-person expert financial testimony, rather than affidavits, may make application of valuation arguments more persuasive to the court.<sup>50</sup>

It is this consideration of presented evidence that makes appellate courts reticent to overrule a trial court’s decision to determine value at the trial date. Though Missouri’s characterization statute for marital property merely *implies* the proper date for valuation as the date of trial, the appellate court in *Taylor v. Taylor*<sup>51</sup> would “disturb the trial court’s division of property only where it is improper . . . or where an abuse of discretion is found.”<sup>52</sup> It held that the trial court correctly valued the wife’s chiropractic practice as of the trial date, since the wife made no claims that the trial court refused to hear her evidence and the date coincided with Missouri’s marital property definition.<sup>53</sup>

Failing to follow *Taylor* later, the trial court in *Gustin v. Gustin*<sup>54</sup> wreaked havoc on the property distribution between a well-to-do CEO husband and his wife of nearly 34 years.<sup>55</sup> During the seven-month lapse between the trial and the court’s decision, the couple’s largest asset, stock in Applebee’s International (a restaurant chain), increased from \$9.75 per share to \$12.50 per share according to Mr. Gustin’s trial testimony.<sup>56</sup> Yet instead of the March 12 th trial date for valuation, the court applied an earlier

---

<sup>48</sup> *Id.* at 1504.

<sup>49</sup> Snyder, *supra* note 19, at 38 (discussing expert qualification under FED. R. EVID. 702, credibility, and judicial impressions of appraisers in court).

<sup>50</sup> *Id.*

<sup>51</sup> 736 S.W.2d 388 (Mo. 1987).

<sup>52</sup> *Id.* at 391 (citations omitted).

<sup>53</sup> *Id.* (The statutory definition names marital property as including property acquired “after the filing of a dissolution action but before the entry of a dissolution decree”, instead of severing co-ownership ties as of the filing date. The Missouri Supreme Court affirmed property analysis from a later appellate case, and it overruled the wife’s legal basis, noting “*Shelor* should no longer be followed.”).

<sup>54</sup> 861 S.W.2d 639 (Mo. Ct. App. 1993).

<sup>55</sup> *Id.* at 640-41.

<sup>56</sup> *Id.* at 643.

date, which shifted the parties' economic circumstances by more than two million dollars.<sup>57</sup>

A statutorily mandated date would have prevented this error, but would it have achieved a more equitable distribution? The appellate court appeared to believe so. Its opinion detailed the interrelationship between the precedent to value property as of the trial date and the court's directive to consider relevant facts, including economic circumstances, prior to making a just division of marital property.<sup>58</sup> The court also explained that if the distribution following such valuation did not occur within reasonable proximity to the division, then "the court should hold another hearing to establish a valuation as close to the effective date of the division as possible."<sup>59</sup>

Apparently, black-letter law again becomes an amalgam that can undermine practitioners' ability to persuade the court to apply a specific valuation date. Missouri notes a *preference* for valuation at trial, only to list its exception for economic considerations as well as cautions against delay. This particular argument sputters with the same predictability and perceived-equity problems inherent in valuation according to the date of separation. Another difficulty in valuation as of the trial date concerns the docket calendar; unless the court bifurcates valuation from other issues in the dissolution hearing, a case may be tried like *In re Marriage of Harrison*,<sup>60</sup> taking place in "fits and starts" over a period of time during which practitioners may have difficulty presenting a cohesive valuation argument.<sup>61</sup> Values may shift as of each "partial" hearing, and then, the court faces valuation selection from a number of trial dates. Even so, certain jurisdictions list a trial or hearing date as the pace car for this numbers race.<sup>62</sup>

California's property division statute would also value the community estate's "assets and liabilities as near as practicable to

---

<sup>57</sup> *Id.* at 643-44.

<sup>58</sup> *Id.* at 644.

<sup>59</sup> Morgan, 964 S.W.2d at 868 (quoting Gustin, 861 S.W.2d at 644).

<sup>60</sup> 225 Cal. Rptr. 234 (Cal. Ct. App. 1986).

<sup>61</sup> *Id.* at 237 (describing situation where court heard first two days of trial nearly three weeks apart to value stock options).

<sup>62</sup> *Id.*; *see also*, Taylor, 736 S.W.2d at 391; Else v. Else, 558 N.W.2d 594 (Neb. Ct. App. 1997).

the time of trial,” unless a noticed exception for “good cause” shows that “a date after separation and before trial” will sufficiently and equitably allow an equal division of the estate.<sup>63</sup> Perhaps, this is the most logical directive for a community property state, because once the court values property, division is merely a 50/50 split.<sup>64</sup> However, the appellate courts had been applying this standard for more than a decade, and parties continue to appeal based upon perceived inequities in timing of valuation.

Though similar statutory requirements allowed the husband in *In re Marriage of Bergman*<sup>65</sup> to file a motion for an alternative valuation date, the California appellate court noted that the husband’s reliance on another case, *In re Marriage of Hayden*,<sup>66</sup> really supported “the court’s decision to value the property as of the time of trial”<sup>67</sup> instead of his alternative position. The court’s discussion of the *Hayden* decision reinforces the fact that “normally . . . [valuation] will be at trial,”<sup>68</sup> but practitioners must base their valuation date arguments upon which trial? *Hayden* also supported valuation at a trial “on remand after appeal.”<sup>69</sup> Here, the court may face the possibility of two valuation trial dates: the original and the trial on remand. The statute does not specifically address this situation.

However, the court does discuss its interpretation of *Hayden* as authority; it considers that a retrial upon remand for *all* community property should apply valuation as of the date of the retrial.<sup>70</sup> The court also notes that “the better interpretation . . . is that upon a retrial the court should consider equitable factors in determining whether community property should be valued as of the time of the original trial or the retrial.”<sup>71</sup> One questions why this decision offers two dates when the original trial court must have erred in some reasoning for the appellate court to review

---

<sup>63</sup> CAL. FAM. CODE §§ 2552(a)-(b) (West 1998).

<sup>64</sup> *Id.* at (b).

<sup>65</sup> 214 Cal. Rptr. 661 (Cal. Ct. App. 1985).

<sup>66</sup> 177 Cal. Rptr. 183 (Cal. Ct. App. 1981); *see also*, *Bergman*, 124 Cal. App.3d 72.

<sup>67</sup> *Bergman*, 214 Cal. Rptr. at 673.

<sup>68</sup> *Id.* at 673 (quoting *Hayden*, 124 Cal. App. at 79).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* (citing *Hayden*, 124 Cal. App. at 79).

<sup>71</sup> *Id.* (quoting *Hayden*, 124 Cal. App. at 79).

the decision and remand the case for retrial.<sup>72</sup> In addition, why would the *Hayden* court shift its reliance from a trial date valuation preference to the factor approach? Perhaps the “better” label denotes a more equitable outcome? This pseudo-balancing test wins again, but the hopes for clarity and *total* equity for both sides may not.<sup>73</sup>

Still, proponents for valuation at the time of a remand hearing assert that this valuation date (in the courtroom) delivers “the most current and accurate information available,”<sup>74</sup> but this positive intention may have stark results. The trial judge in *Gaynor v. Hird*<sup>75</sup> applied a valuation appraisal that was four years-old as of the date of the evidentiary hearing before dividing the marital residence, ignoring case precedent and a current year appraisal already in evidence.<sup>76</sup> Is such a decision equitable in a jurisdiction whose valuation supposedly takes place at the time of the remand hearing? The appellate court reversed the erroneous order and remanded the case back to the trial judge for reconsideration as of the value date at the remand hearing’s appraisal.<sup>77</sup> It forces the “equity” forgotten at the trial level. The date selection argument did not make that happen.

Trial and hearing valuation date arguments do, however, offer persuasive opportunities to fully articulate a client’s case. The attorney can employ valuation experts to communicate that message and presumably enjoys better control of its delivery.<sup>78</sup> In addition, clients may feel more comfortable with a trial date

---

<sup>72</sup> BLACK’S LAW DICTIONARY 1293 (6<sup>th</sup> ed. 1990) (considering that a remand sends the case back to the trial court to conduct new hearings).

<sup>73</sup> Since analysis for arguments supporting application of valuation at either separation or as of the trial or hearing date both reinforce the court’s basic tenet toward a just and reasonable division of assets, practitioners should seriously review the factors in defining or dividing marital property while developing particular valuation date arguments. *See generally*, sources cited *supra* note 7.

<sup>74</sup> Mitchell, 355 S.E.2d at 21 (The legislature later codified this holding rule, valuation as near as possible to the date of trial for most current values, in VA. CODE ANN. § 20-107.3(A)); *see also*, Wagner v. Wagner, 358 S.E.2d 407, 411 (Va. Ct. App. 1987).

<sup>75</sup> 400 S.E.2d 788 (Va. Ct. App. 1991).

<sup>76</sup> *Id.* at 790-91.

<sup>77</sup> *Id.* at 791.

<sup>78</sup> Shank, *supra* note 17, at 33 (noting, expert witnesses render opinions to the court).



argument, because the public anticipates the adversarial, courtroom proceeding.<sup>79</sup> Some clients may even find satisfaction in experiencing their “day in court.”<sup>80</sup>

The court day, or valuation at trial or at a hearing, may best suit volatile assets (stocks, business real estate, etc.) needing assessment following separation for just division. It is also a strong position when the effective date of the property distribution occurs many months, or even years, after the initial valuation. By then, the determining information may be “stale,” and such a distribution of formerly valued items cannot be based on present worth.<sup>81</sup> Then, the argument encourages the court to weigh the latest information before determining the value of a certain asset.

The court in *Morgan v. Ackerman*<sup>82</sup> highlighted the risk of applying such stale information; the 30- to 40- month delay in valuing property, such as real estate, automobiles, bank accounts, and shares of the husband’s closely-held corporation, makes the original date of valuation at trial almost moot. In that case and reading the directive from *Gustin*, the Missouri appellate court remanded the issue for the trial court to “receive evidence of the property and to consider the current economic conditions of each spouse” as of a separate property hearing more “reasonably proximate to the date the division is to be effective.”<sup>83</sup>

Regardless of these reasons to proffer a trial or hearing date valuation argument, a practitioner must consider the downside of this position in addition to other disadvantages noted earlier. Trials or hearings cost the attorney and the client time and money; smaller-scale property valuations may be better served outside the courtroom in settlement negotiation discussions.<sup>84</sup>

---

<sup>79</sup> Jennifer J. Rose, *Guiding Your Client Through Divorce*, LECTRIC LAW LIBRARY 1, ¶ 2 (Aug. 5, 1999) <<http://www.lectlaw.com/files/fam24.htm>> (discussing clients’ sophistication with divorce cases).

<sup>80</sup> Jennifer J. Rose, *The 10 Commandments of Family Law Economics*, 39 PRAC. LAW. 1, ¶ VII (Jan. 1993) <<http://www.lectlaw.com/files/att15.htm>> (assessing client satisfaction).

<sup>81</sup> *In the Courts: Valuation Information – Staleness*, 15 EQUITABLE DISTRIBUTION J., Aug. 1998, at 90.

<sup>82</sup> 964 S.W.2d 865 (Mo. Ct. App. 1998).

<sup>83</sup> *Id.* at 869 (citing *Gustin*, 861 S.W.2d at 644.)

<sup>84</sup> See Shank, *supra* note 17, at 33 (regarding costs and suitability for small assets); Cochran, *supra* note 6, at 2 (noting increased costs for valuing disputed significant items); Perlberger, *supra* note 12, at 309.

These options save the client litigation expenses, preventing loss of the divisible assets from paying exorbitant fees, while an attorney can redirect energy to more pressing cases. Feuding spouses may be left with nothing but the expensive affidavits of valuation experts assessing worth for items long-since sold to pay for the process.

Finally, be aware that the chance to offer argument at the date of trial or hearing does not transfer into an immediate answer from the court. An average dissolution takes about nine months from filing to judgment.<sup>85</sup> Clients may balk at waiting so long for valuation answers, unless the case includes extensive financial discovery or possibly hidden assets. Given the number of divorce filings clogging most dockets and the increasing acquisition of property in this society in which people do not expect to wait for anything, clients may be left waiting empty-handed at the starting line for years.

### C. Valuation at Date of Dissolution

Valuation at dissolution, or termination of the marriage,<sup>86</sup> should be an appropriate, literal interpretation of worth occurring some time between the trial date and the date for final distribution of marital assets. The court has heard all the evidence and made a decision, which severs the legal ties between a husband and wife.<sup>87</sup> Each spouse should receive the present value of his or her share of the partnership's property to start life anew.<sup>88</sup> Yet, separating the valuation at dissolution argument from others, such as date of trial or distribution, exists more as an expensive hair splitting exercise.

---

<sup>85</sup> Rose, *supra* note 79, at 6 (section titled, When Will It All Be Over?); *see also*, Thielenhaus, 890 P.2d at 933 (delays in complex valuation disputes "often produce a significant interval between the commencement of an action and the time of trial").

<sup>86</sup> BLACK'S LAW DICTIONARY 473 (6<sup>th</sup> ed. 1990).

<sup>87</sup> *See* Philip R. Miller, *Division of Post-Divorce Pension Increases: A Re-consideration of Shill v. Shill*, 29 IDAHO L. REV. 999, 1002 (1992).

<sup>88</sup> *Id.*; *see also*, Tate v. Tate, 920 S.W.2d 98 (Mo. Ct. App. 1996) (citing Conaway v. Conaway, 899 S.W.2d 574, 575 (Mo. Ct. App. 1995)) ("The correct date for valuing property is generally the date of the dissolution."); Talty, 623 N.E.2d at 1046 ("It is well-established that the proper date of valuation . . . for purposes of distribution of marital assets is the date of dissolution."); Brooks, 486 N.E.2d at 271 (Ill. Ct. App. 1985) (making valuation at date of dissolution).

First, a practitioner may find this argument cumbersome, because it takes significant time and resources to prove, while some clients consider it just another example of legal “word-play.”<sup>89</sup> Even though the law does describe arguments for the three distinct valuation dates, a layperson may not appreciate the difference, and may lump them together. This misconception is even more likely with cases addressing fairly remedial valuation issues. Simpler cases make for shorter trials, and then, the valuation difference, especially between date of dissolution and trial, is likely lost.

The communication barrier may stem from confusion surrounding when dissolution actually occurs. The fact that states apply valuation at the date of trial, the date of decree, and at the date of distribution implies that termination does not happen at these events. Some courts suggest an oral decision of the judge grants dissolution.<sup>90</sup> Yet, the dissolution is not final until the judge signs the decree giving it effect in the legal system, but when a divorce is “final,” property has already been valued. So, a description of valuation at dissolution must look more like a range on the continuum instead of a specific date, just as dissolution is a time frame from the oral announcement to the actual distribution. Cases do not clarify this illustration, since courts apply a singular date of dissolution valuation<sup>91</sup> – not a range of dissolution valuation dates. Even though courts do not explain how long the “date of dissolution” valuation lasts, they frequently explicitly justify their decision as the most appropriate time to as-

---

<sup>89</sup> See Paul Campos, *Forum Discussion*, PBS ONLINE NEWS HOUR, (Oct. 27, 1998) <<http://www.pbs.org/newshour/forum/october98/media2.html>>. (Law Professor Paul Campos from the University of Colorado notes that today’s programs make the “American legal system look more arbitrary than it actually is.” He describes the public’s perception of “thinking like a lawyer” to come from shows, such as one discussing the Monica Lewinsky scandal in which a Harvard professor claimed Starr’s “report” was illegal, since the special prosecutor’s authority was limited to filing only a “referral” before Congress. Purely semantic arguments may frustrate many who expect support from black-letter law.

<sup>90</sup> Russ, *supra* note 7, at § 4.

<sup>91</sup> See cases cited *supra* note 88; *In re Marriage of McLaughlin*, 526 N.W.2d 342, 344 (Iowa Ct. App. 1994) (citing *Locke v. Locke*, 246 N.W.2d 246, 252 (Iowa 1976); *Schantz v. Schantz*, 163 N.W.2d 398, 405 (Iowa 1968)) (“The date of dissolution is the only reasonable time when an assessment of the parties’ net worth should be undertaken.”).

sess the “net worth” of the parties before taking the irreversible step toward division.<sup>92</sup>

This ad hoc justification supports the general awareness of the need for equity. An Illinois appellate court even dubbed equity a “controlling” factor, but still cautioned that equity does not require a 50/50 split of marital assets.<sup>93</sup> The court did not select valuation at the date of separation when the husband had not acquired significant assets and had obligations for a business venture; it applied valuation at the date of dissolution to promote equity. The valuation and later distribution reflected that the husband’s business, an automobile dealership, could both continue to provide for his economic needs and reward the wife for her contribution of domestic services and support of the children that assisted that later growth.<sup>94</sup>

Whereas valuation at static dates of separation or at trial severs opportunities for a spouse to share in post-event increases in value of already divided marital assets, the more fluid date of dissolution may support equity best, because significant assets acquired later are valued and included in the final division, like the Talty’s dealership. *In re Sacry*<sup>95</sup> also illustrates this advantage. The court valued two dental practices at dissolution when the wife’s contribution as both a dental hygienist and office manager enabled the husband to expand *after* the date of separation.<sup>96</sup> If the court had valued at the earlier date, the wife would not benefit from gains earned by the marital partnership.

Counsel’s preparation for a valuation at dissolution argument requires the same expert testimony and written appraisals for judicial review as is necessary for valuation at either a trial or hearing date. In addition, this argument takes just as long to explain, since valuation at dissolution depends on evidence presented at trial. The difference is time; with dissolution valuation, the temporal point occurs *after* the court has reviewed all

---

<sup>92</sup> *In re Marriage of McLaughlin*, 526 N.W.2d at 344; *see also*, Hammill, 732 P.2d at 406; Talty, 623 N.E.2d at 1046 (distribution order stands unless party proves an abuse of discretion occurred).

<sup>93</sup> Talty, 623 N.E.2d at 1046; *see also*, LaRue v. LaRue, 531 P.2d 84 (Kan. 1975) (“Nowhere . . . is it suggested that a division of all the property . . . must be an equal division in order to be just and reasonable.”).

<sup>94</sup> Talty, 623 N.E.2d at 1046.

<sup>95</sup> 833 P.2d 1035 (Mont. 1992).

<sup>96</sup> *Id.*

the evidence and made a decision. Attorneys should caution clients that the same risk of loss inherent in assessing ever-changing values still applies to the trial or dissolution date. Courts appreciate the risks, noting “unreasonable delays between the close of evidence and rendering of judgment may in some cases cause distortion in the value of certain highly volatile marital property resulting in prejudice to the parties.”<sup>97</sup>

In the same vein, the practical effect of a date of dissolution valuation mirrors the risk involved in the application of a valuation at trial date argument, potentially leaving a spouse and the marital assets vulnerable to the other’s poor business decisions. If the court waits to cutoff the “mutual powers, obligations, and interest” shared by spouses during marriage, then as the Montana Supreme Court noted in *Lippert v. Lippert*,<sup>98</sup> a spouse may “freely contract with others” and deplete marital assets through unwise investments.<sup>99</sup>

One may suggest that if these three arguments meet with a client’s approval for the proposed division, then a “bundling” approach of pursuing trial, hearing, and dissolution dates may conserve resources as a three-for-one consolidation of time and energy. Perhaps, a practitioner may select each in the alternative. Yet, the best valuation rule likely depends on “the kinds of marital assets under consideration.”<sup>100</sup> As with the practical effects of valuation at separation date and trial date, the court’s equitable assessment at the time of dissolution can certainly turn on unique facts and circumstances.<sup>101</sup>

---

<sup>97</sup> *Green v. Green*, 494 A.2d 721 (Md. Ct. Spec. App. 1985) (discussing problems inherent in using a fixed statutory valuation date where four months elapsed between the close of testimony and the date of decree); *see also*, *McLaughlin*, 526 N.W.2d at 343 (applying the date of dissolution for valuation when parties had been separated for eighteen months).

<sup>98</sup> 627 P.2d 1206 (Mont. 1981).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 1208. As noted earlier, this article does not associate which valuation date fits each type of property. For an introduction to valuation of stocks, retirement plans, and contingency fee cases for attorney spouses, please refer to other articles in the issue.

<sup>101</sup> *Id.* (cautioning that valuation at dissolution standard may be affected based upon the type of asset considered).

D. *Valuation at Date of Distribution*

As generally the last step to fulfill the court's responsibility in divorce proceedings, the date of distribution essentially puts the property into each former spouse's hands.<sup>102</sup> It resides at the farthest end of the timing valuation continuum.

Both equitable distribution and community property jurisdictions entertain this valuation date argument.<sup>103</sup> While some courts reason that valuation at distribution or partition results from an implicit directive given the statutory references for a just and reasonable division of marital assets, they ground the argument in the practical claim that valuing property at or right before the time of its division between spouses leads to the most equitable result. However, these advocates fail to weigh the additional litigation expenses inherent in applying this valuation date.<sup>104</sup>

As noted earlier in valuation on remand/trial problems, the jurisdictions using valuation at distribution require an additional valuation hearing prior to partition.<sup>105</sup> What makes this date any different from valuation at trial – or even at dissolution? This relatedness may nudge practitioners to describe these three valuation arguments, trial/hearing, dissolution, and distribution, together in order to prevent a feud over semantics. However, a critical review of these dates on a continuum, coupled with serious attention to their impacts on the final award, should reinforce how important the three separate arguments are to a client's case.

---

<sup>102</sup> BLACK'S LAW DICTIONARY 475, 479 (6<sup>th</sup> ed. 1990) (Defining distribution and division of marital assets may help describe this date.).

<sup>103</sup> See *Poirier v. Poirier*, 664 So.2d at 534; *Smith v. Smith*, 985 S.W.2d 836 841 (Mo. Ct. App. 1998) (citing *Gustin*, 861 S.W.2d at 644); *Sutliff*, 543 A.2d at 535.

<sup>104</sup> The only individuals to "benefit" from valuation at this date all the time are appraisers and expert witnesses, who collect their fees regardless of the perceived status of the division outcome. See *Crockett & Patterson*, *supra* note 5, at 82 (remarking that clients often cannot bear costs); *Shank*, *supra* note 17, at 33 (discussing expert witness fees ranging from \$20,000-\$40,000 or more.).

<sup>105</sup> *Poirier*, 664 So.2d at 534 (noting that state statute requires valuation as of date of the *partition trial*).

The state of Louisiana asks spouses to agree on a valuation date for the court,<sup>106</sup> in the hopes that if the parties select their own date, they will consider application of that date as equitable.<sup>107</sup> While this valuation date argument suits determining the present value of marital assets, it may not fit determination of interest income acquired from such property. Attorneys also must educate clients on the time value of money.

When the court uses a trial on the merits, both spouses still enjoy co-ownership<sup>108</sup> of the assets in question. Yet, only one party actually enjoyed the use and benefit of it, including any worth increase during the valuation period until partition. The court in *Poirier v. Poirier*<sup>109</sup> affirmed the trial court's awarding interest from the date of partition as reimbursement for the fact that the wife could not liquidate the community sugar cane crop.<sup>110</sup> While this limited interest award should have created an equal division, Mr. Poirier enjoyed the use of the 1989 harvest proceeds, \$59,431, for five years, minus the interest compensation award to his wife.<sup>111</sup> He benefitted from the opportunity to invest that large sum of money, and the value of the same amount five years later would be "worth" less due to market circumstances, the fiscal health of the U.S. dollar, and so on.<sup>112</sup> Since marital assets paid Mr. Poirier for his time and labor to harvest the money and for expenses inherent in this action of the marital partnership, Mrs. Poirier only received the "time value"

---

<sup>106</sup> *Id.* at 535 (remarking that since the spouse's ability to contract, the two may bind valuation on the marital partnership; here, the spouses agreed via a specific agreement to property values on a particular date).

<sup>107</sup> *Id.* at 534-35 Presumably, this exists because valuation at date of distribution considers any appreciation in value of marital property or vice versa occurring between demand for valuation trial and court's assessment. As a result, the *Poirier* court refused to conclude that the whole partition was unfair.

<sup>108</sup> Co-ownership here refers to rightful entitlement of ownership that both spouses enjoy in a community property state, like Louisiana.

<sup>109</sup> 664 So.2d 532 (La. Ct. App. 1995).

<sup>110</sup> *Id.* at 535 ("Interest is awarded from the date of partition to make the division of the assets truly equal by compensating the party who has not enjoyed the use of former community property to which he was rightfully entitled.").

<sup>111</sup> *Id.* at 535.

<sup>112</sup> See generally, *Interest on Deferred Payments*, 15 EQUITABLE DISTRIBUTION J., Apr. 1998, at 37 (It is well-established that payments made in the future do not equal the value of money at onset.).

of her money on the interest paid to her five years later. In addition, her individual contribution of effort to the household or whatever also should have been compensated as part of helping realize the 1989 harvest.

This time value issue will continue to surface in the future for valuation of pension fund divisions. While this issue arises mostly in cases where one spouse supported the other's career growth, these decisions could become even more complicated with the growth of two-income households. The court ruled the time value approach advantageous to valuation of pensions; it accepted precedential reasoning that stated, "early contributions . . . while smaller, are invested and earned more interest . . . and that the early working periods are building blocks to upward mobility and hopefully an increased salary."<sup>113</sup> The premise involves investing early with more time for money to grow, making the "value" of these early dollars worth more than those invested later, and since such investments made during marriage are often labeled marital property, courts look at interest opportunities to reimburse non-employee spouses for the value lapse in their award, which is usually distributed much later – upon retirement or at the first opportunity.<sup>114</sup> Equity in these situations also must consider parties' economic circumstances ("frozen assets") and the employee spouse's free choice to change careers, as well as potential penalties to the employee spouse and marital assets upon early withdrawal.<sup>115</sup>

Equitable distribution courts are also concerned with the timing for valuation of marital property; the Supreme Court of Pennsylvania in *Sutliff v. Sutliff*<sup>116</sup> recognized value is capricious.<sup>117</sup> Market conditions and the type of property, such as securities, affect value. What an item is worth on day one will not necessarily be the same tomorrow or even ten minutes from now, and the court warned, "reliance upon stale valuation data could lead to an unjust distribution of property."<sup>118</sup> The *Sutliff* court

---

<sup>113</sup> Gemma, 778 P.2d at 431; *see also generally*, Miller, *supra* note 87, at 1006-07 (quoting Gemma, 778 P.2d at 431 with time value rationale).

<sup>114</sup> Miller, *supra* note 87, at 1007-08.

<sup>115</sup> *Id.*

<sup>116</sup> 543 A.2d 534 (Pa. 1988).

<sup>117</sup> *Id.* at 537.

<sup>118</sup> *Id.*



proposes valuing at date of distribution to minimize fluctuation and pursue equity.<sup>119</sup>

Other courts should concur with *Sutliff's* reasoning as a proper valuation date, especially where the parties' economic circumstances sway an equitable decision. Missouri adopted *Sutliff's* precepts. "Valuation of property should be reasonably proximate to the date the division is to be effective."<sup>120</sup> The advantage of waiting to value marital assets also threatens attorney's cases with the potential negative effect of loss due to delay. Upon interviewing a client about his or her potential assets, the best advice may be to consult a financial analyst, who can determine the market volatility for each significant marital property item. As practitioners warn, valuation at any time is an expensive but vital decision to ensure a successful division award, and others consider Missouri's "wait-and-see" approach as serving a "more equitable purpose."<sup>121</sup>

*A Case-by-Case, Factor Approach to Valuation: What Occurs Along the Way*

Proponents of a case-by-case valuation approach see the utility of reviewing a broader picture. Their view is that courts should not disregard the forest for the statutorily mandated "trees" that dictate only one "right way" to solve a valuation dilemma. Few jurisdictions even provide the one right answer anyway.<sup>122</sup> Courts using factor analysis think outside the box and voice their progressive opinions.

New Hampshire courts recoil from standardizing something parties themselves cannot control, while the Supreme Court of Oklahoma considers this avenue the path that provides for flexibility and a more equitable outcome.<sup>123</sup> A final example from Arizona seeks simply "fairness of the result," and the legislature

---

<sup>119</sup> *Id.* at 536.

<sup>120</sup> *Smith v. Smith*, 985 S.W.2d 836, 841-42 (Mo. Ct. App. 1998) (quoting *Gustin*, 861 S.W.2d at 644 where the court adopted the supportive analysis in *Sutliff*).

<sup>121</sup> See sources cited *supra* note 17 concerning expense of valuation; see also, Albano, *supra* note 46, (addressing intent of Missouri's application).

<sup>122</sup> See sources cited *supra* note 25 and accompanying text.

<sup>123</sup> See *Hillebrand v. Hillebrand*, 546 A.2d 1047 (N.H. 1988); *Thielenhaus*, 890 P.2d at 933.

allows the court “wide discretion” when selecting a valuation date to achieve that objective.<sup>124</sup> The growing trend supports a valuation methodology that allows courts to base their decisions on the respective facts of each case.<sup>125</sup>

The case-by-case or factor valuation approach relies on the traditional principle that trial courts enjoy broad discretion over litigation issues.<sup>126</sup> Proponents also focus on state high court opinions that label no particular valuation date as being better than another.<sup>127</sup> If no time is more proper, then they are all equally helpful . . . or unhelpful in creating an equitable outcome, which is the ultimate goal.<sup>128</sup> Then, the only difference in these cases becomes these specific facts.

The Supreme Court of Indiana called on its state legislature to take the lead for specific statutory guidelines in *In re Marriage of Taylor*,<sup>129</sup> but until then, says it shall consider the facts and circumstances within a particular case before dividing marital property in a just and reasonable manner. The court affirmed valuation of the marital home based upon “the conduct and contribution of the parties toward . . . [its] acquisition and maintenance . . . both before and after . . . [the] separation in 1974.”<sup>130</sup> The wife also received all of the home’s appreciation after the separation, since she maintained it during that time.<sup>131</sup> An as-

---

<sup>124</sup> Sample, 731 P.2d at 607-08 (aligning the court’s discretionary analysis with the “pragmatic considerations” discussed in *Berish*).

<sup>125</sup> See Cray, 867 P.2d at 298 (listing several case examples).

<sup>126</sup> *Id.*; see also, *LaRue v. LaRue*, 531 P.2d 84 (Kan. 1975); *Blackstone v. Blackstone*, 681 N.E.2d 72, 77 (Ill. App. Ct. 1997) (Trial court is the finder of fact.); *Staller v. Staller*, 570 N.E.2d 1328 (Ind. Ct. App. 1991); *Taylor*, 436 N.E.2d at 58 (citing *Loeb v. Loeb*, 301 N.E.2d 349 (Ind. 1973), *Henderson v. Henderson*, 401 N.E.2d 73 (Ind. Ct. App. 1980); *In re Marriage of Hirsch*, 385 N.E.2d 193 (Ind. Ct. App. 1979)); *Poirier*, 664 So.2d at 535 (citing *Queenan v. Queenan*, 492 So.2d 902 (La. Ct. App. 1986) (“[A] trial court is vested with great discretion in effecting a fair partition of the community.”); *Sagarin v. Sagarin*, 674 N.Y.S.2d 127 (N.Y. App. Div. 1998); *Berish v. Berish*, 432 N.E.2d 183 (Ohio 1982).

<sup>127</sup> See case cited *supra* note 15 and accompany text.

<sup>128</sup> Sample, 731 P.2d at 607 (citing *Neely v. Neely*, 563 P.2d 302 (Ariz. Ct. App. 1977)) (Arizona courts label “equitableness” as “the very touchstone of a proper apportionment.”).

<sup>129</sup> 436 N.E.2d 56 (Ind. 1982).

<sup>130</sup> *Id.* at 58-59.

<sup>131</sup> *Id.* at 59.

assessment of the labor investment in this case left the court saying, “no pains . . . no gains,” adding implicitly that allowing a husband who had not contributed to the home’s value in more than five years of separation would be illogical.<sup>132</sup> The husband received a \$2,000 equity award for the house’s original value, while the wife accepted the non-liquid property.<sup>133</sup> Surely if she was concerned with fairness, she would have appealed this award and asked for the cash value of her property investment instead of the property itself. Valuation at the date of separation would not have weighed each individual’s efforts or lack thereof.

Factors, such as the economic circumstances of the parties and conduct, like purposeful dissipation, color the court’s perception of what constitutes an equitable distribution. Why should the person who spends recklessly receive the benefit of valuation after he or she has spent marital assets? An earlier valuation date, prior to the spending spree, enables the court to divide the resources as if they still existed and forces the errant spouse to reimburse the marital partnership. The court should also be allowed to reward positive conduct, such as cooperation and attempts at reconciliation.<sup>134</sup>

The court in *Berish v. Berish*<sup>135</sup> reasoned why such factors are so important. It explained that each marriage functions according to its own partnership rules, which range almost as far as the number of marriages, and standard model valuation guidelines will not fit these one-of-a-kind issues well enough to suit underlying public policy considerations toward fairness or equity. Hence, the *Berish* court based its decisions on “pragmatic considerations.”<sup>136</sup>

Limits on a trial court’s unbridled discretion are also a good check on power, because not every court adheres as strongly to principle as is desirable. Statutory factors generate boundaries for judicial decisions. Referring to the earlier discussion regarding valuation at date of separation concerning *Gustin*,<sup>137</sup> a preferential directive did not protect the wife from the trial court’s

---

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 57.

<sup>134</sup> Cray, 867 P.2d at 299.

<sup>135</sup> *Id.* at 299.

<sup>136</sup> *Id.*

<sup>137</sup> 861 S.W.2d 639 (Mo. Ct. App. 1993).

decision to value the couple's most significant asset, Applebee's International stock certificates, as of an earlier date than that near division.<sup>138</sup> However, a series of statutory factors help the Missouri appellate court assure upon remand that the distribution decision meets the "contemporaneous needs and financial situations of the parties."<sup>139</sup>

Section 452.330.1 of Missouri's Statutes demands the court consider all relevant factors, including:

economic circumstances of each party spousal contribution to property acquisition value of each spouse's separate property; and each spouse's conduct during the marriage.<sup>140</sup>

Mrs. Gustin's appeal questions the trial court's division, and whether it gauged the impact on the parties' fiscal health prior to valuation and division. The appellate court's reliance on valuation reasoning in *Sutliff*<sup>141</sup> lead it to admonish the trial court. The appellate opinion noted that "[v]olatile market conditions and changing economic circumstances can render assets that had been valuable months or years earlier virtually worthless in the present, and vice versa."<sup>142</sup> As far as Mrs. Gustin's opinion on the trial court's valuation, the fact that she disagrees and moved for appeal speaks to a lack of equitable valuation and distribution. Indeed, the court agreed; "the value of Abe's shares [Applebee's stock] is a vital part of the economic circumstances."<sup>143</sup> To order otherwise laughs in the face of public policy for a just division. Factor application in this case would have properly valued and distributed the more than \$2 million increase in stock shares.

Case factor analysis does not grant the court carte blanche. Judicial decisions must still comply with division mandates listed in statutes, but a review of the whole picture leads to better un-

---

<sup>138</sup> *Id.* at 643.

<sup>139</sup> *Id.* at 644 (quoting *Sutliff*, 543 A.2d at 537).

<sup>140</sup> MO. REV. STAT. § 452.330.1 (Supp. 1988).

<sup>141</sup> 543 A.2d 534 (Pa. 1988). *Sutliff* also outlined the factors from the state divorce code considered in dividing marital property. Pennsylvania may review the marriage duration, prior marriages, age/health/station/skills/employability of parties, opportunity for each to acquire future assets, sources of income/benefits, and the couple's standard of marital living, similar to Missouri's factor analysis.

<sup>142</sup> *Id.* at 537.

<sup>143</sup> *Gustin*, 861 S.W.2d at 644.

derstanding of the true value of property, which should transfer to a more equitable outcome.

### III. Conclusion - The End of the Line

Just as with any planned road trip, the sequence of events toward divorce includes a beginning, middle, and an end. While the available valuation date arguments travel that same route, they are better understood in those three categories: date of separation as an early valuation, date of trial, dissolution, and decree as the stops along the middle of the journey, and the date of distribution as the final destination. The discretionary, case-by-case approach to valuation analysis most likely suits a description as the scenery and activities along the way that help make the trip worthwhile or more of an outright bust. Each factor colors the court's interpretation of what division constitutes an equitable outcome.

Multiple jurisdictions shun a single valuation date due to the varieties of property the courts must assess; yet, the number of valuation dates creates an almost equally "wide divergence in opinion[s]."<sup>144</sup> Even courts within one jurisdiction apply different dates to similar types of property.<sup>145</sup> The court cannot win everyone's perception of equity.<sup>146</sup>

Though divorce cases are not "won" or "lost,"<sup>147</sup> most demand the characterization, valuation, and subsequent division of property, which creates winners and losers in some sense. What one spouse enjoyed during the marriage may not be available as of dissolution. Is that inequitable? Courts hope not, but they are

---

<sup>144</sup> *Id.* at 298.

<sup>145</sup> See Missouri's application of valuation dates: date of trial, dissolution, and application of factors as an example of varying opinions; Taylor, 736 S.W.2d 388 (Mo. 1987) (date of trial); Tate v. Tate, 920 S.W.2d 98 (Mo. Ct. App. 1996) (at dissolution); Gustin, 861 S.W.2d at 644 (both for date near division and as candidate for application of factors as an example of varying opinions).

<sup>146</sup> See *Quote Search*, INTEGRATED PUB. (Aug. 15 1999) <<http://www.tpub.com/Quotes/t.htm>>. United States Supreme Court Justice Clarence Thomas said, "Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law." However a scholar of life's realities, Bill Cosby, notes, "I don't know the key to success, but the key to failure is to try to please everyone." See *Quote Search*, THE QUOTATION DATABASE (Aug. 15, 1999) <<http://www.mountainpoint.ch/cgi-bin/qdb>>.

<sup>147</sup> Rose, *supra* note 79, at 6 (within section on plain talk advice).

in a precarious position, since the facts in every divorce case are not the same.

Adoption of a single date fuels litigation from those that do not “fit” the parameters for valuation. Any divorce litigation depletes marital resources, and this “shrinking pie” frightens fiscally starved clients. It could force them to reposition their dissolution strategy to quell the suit, as finances become a bargaining chip on the other side of the judicial bench. What is saved in clarity, the courts, practitioners, and clients will lose in headaches.

Yet, a valuation framework helps practitioners and clients plan testimony and prepare appropriate arguments, which may also alleviate litigation as both sides can quickly determine the fiscal health of a marriage partnership. Working off of the “same page,” spouses may turn to alternative dispute mechanisms to negotiate and settle the case outside of court. This also may curb costs, since parties often attend these sessions without their attorneys present. Predictability brings peace, and the case-by-case factor analysis delivers the closest result to actual equity that is available for a reasonable price. Although, parties may always elect their own valuation date in a written agreement.

In the end, the developing trend toward a valuation range plus application of acceptable alternative dates under special circumstances delivers direction to trial judges and participants without limiting the court’s discretion, providing boundary lines on the road toward dissolution with directions to help parties get there.

Lynn Weddle Judkins