

# Stock Options: A Significant but Unsettled Issue in the Distribution of Marital Assets

by  
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## I. Introduction

A dramatic change has occurred in the components of executive compensation over the past 15 years. In 1985, 60% of a corporate executive's total compensation was base salary, 20% was short-term incentive payments and 20% was long-term incentive payments. By 2000, that mix had shifted so that only 20% of a corporate executive's compensation was base salary and 80% was attributed to short-term and long-term incentive payments.

Shown graphically, the shift is as follows:

**Executive Compensation:**

**Changing Mix of Elements**

Component:	1985	1990	1995	2000
<i>Base Salary</i>	60%	50%	35%	20%
<i>ST Incentive</i>	20%	25%	25%	25%
<i>LT Incentive</i>	20%	25%	40%	55%
<b>TOTAL</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b> <sup>1</sup>

Stock based programs,<sup>2</sup> particularly stock options, have long been a key component of short-term and long-term incentive

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<sup>1</sup> Based upon data compiled by Paul R. Dorff, APD, Managing Director of Compensation Resources, Inc. 310 Route 17 N., Upper Saddle River, New Jersey 07458.

<sup>2</sup> In addition to stock options, restricted stock programs which are an outright grant of corporate stock to an employee with restrictions as to its use, sale or transfer; stock bonuses pursuant to which all or a portion of employee's

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compensation for upper level corporate executives. In recent years, not only has the use of stock options as a component of compensation increased, it has been extended well beyond the executive level employees to employees of all levels, including middle management and even non-management personnel.<sup>3</sup>

Recent articles address the increasing use of stock options as a component of employee compensation.<sup>4</sup> IBM, for instance, has made a substantial break with its former policy and expanded “stock option programs to a wider group of employees - namely non-executives.”<sup>5</sup> IBM President, Louis Gerstner, identified a need to offer an expanded group of employees long-term incentives to prevent them from being wooed by smaller high-tech companies which typically offer significant stock or stock option incentives as sign-on or compensation bonuses. Experts state that IBM had “to halt the brain drain and give employees an incentive to stay with the company.”<sup>6</sup>

A growing number of corporate employers, particularly technology companies, are granting their employees stock options in lieu of large pay checks. Start-up and under capitalized companies can reduce their payroll costs by giving the employees a stake in the company’s future through the issuance of stock options.<sup>7</sup>

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annual bonus is paid in company stock; contingent stock which is an award of stock which takes on value in the event of a contingency (usually a public offering of the stock); or, stock appreciation rights whereby the employee is not awarded the stock itself, but rather a right to the appreciation in the value of the company stock are other common forms of executive compensation. While some of the legal issues applicable to stock options may be the same or similar to the issues presented by these programs, each of these programs also may present their own unique factual and legal issues in the context of the distribution of marital assets which are not addressed in this paper.

<sup>3</sup> Dr. Frank D. Tinari, Professor of Economics, Seton Hall University, South Orange, New Jersey, in release of Tinari Economics, dated January, 2000.

<sup>4</sup> Ira Sager, *Stock Options: Lou Takes a Cue from Silicon Valley*, BUSINESS WEEK, Mar. 30, 1998, at 34, Sana Siwolop, *More Fired Workers Are Suing for Stock Options*, NEW YORK TIMES, Nov. 21, 1999, at 11, Brian J. Hall, *What You Need to Know About Stock Options*, HAR. BUS. REV., Mar./Apr., 2000.

<sup>5</sup> Sager, *supra* note 5, at 34.

<sup>6</sup> *Id.*

<sup>7</sup> Siwolop, *supra* note 5, at 11. Employees holding stock options who feel that they have been discriminated against or have been wrongfully fired are

Stock options are being used as:

1. A component of current and future compensation for start-up companies that cannot afford large cash payrolls;
2. A method of retaining employees who may otherwise be subject to raiding by competitors; or
3. A method of increasing future, long-term motivation (i.e., enhanced performance) by employees.

The business community has comprehensively analyzed the issues that stock options may create in the context of corporate compensation. In contrast, the matrimonial courts have had an insufficient number of cases submitted to them to address a myriad of issues that stock options can present in the context of the distribution of marital assets at the time of a divorce.<sup>8</sup>

The purpose of this article is to address the issues of defining stock options, discussing alternative valuation methodologies, and offering practice points for handling stock options in the context of marital litigation.

## II. Glossary

Fundamental to an understanding of stock options is an understanding of the nomenclature to understand the options themselves and to interpret and apply the cases that have been decided to date. An assumption is often made that “all options are created equal.” In fact, stock options vary significantly in their fundamental nature, their economic implications, their characteristics, and their tax implications. To understand the fundamental differences in the various types of stock options, the following basic terminology must be understood:

### A. *Incentive Stock Option (ISO)*

An ISO is an Internal Revenue Service qualified stock option, whereby the employee may purchase stock at a specified price usually over a period not to exceed ten years, with the requirement that the stock must then be held for at least one year

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now seeking redress not just for their lost wages, but for the value of their lost stock options.

<sup>8</sup> As will be discussed subsequently, New Jersey, a highly corporate state, has only two reported decisions and one unreported decision addressing stock options. *See infra* text accompanying notes 13-14.

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after exercise or two years after the stock option grant. An ISO is not taxed to the employee when granted or when exercised. Only the appreciation (the increase of stock price over the exercise or strike price) is taxed at the capital gains rates upon sale of any stock acquired by use of the option.

*B. Non Qualified Stock Option (NQSO)*

An NQSO is a stock option that does not meet the Internal Revenue Service criteria for an ISO.<sup>9</sup> The principal difference between an ISO and NQSO is that with an NQSO the employee is not taxed at the time of the grant of the option (the same as in the case of an ISO), but an ordinary income tax is assessed when the option is exercised. Unlike the ISO, at the time of exercise the appreciation from the exercise or strike price to the then market value is taxed at an ordinary income rate. If the acquired stock is sold thereafter, like the ISO, a capital gains tax applies to the appreciation in the value of the stock from the date of exercise to the date of sale.

*C. Exercise Price or Strike Price*

The terms exercise price or strike price are used interchangeably. The exercise or strike price is the price at which the employee may purchase the stock under the terms of the option agreement.

*D. Market Price*

The market price is the market value of the stock. For publicly traded companies, the market value is the reported trading value (e.g., NYSE and NASDAQ). For non-publicly traded companies, the market value could arguably be the book value or a forensically determined value using accounting or a valuation formulae and theorems. The market price is relevant not only for determining the “intrinsic value” of the stock option, but also for determining the ordinary income tax imposed at the date of

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<sup>9</sup> The matrimonial practitioner seldom, if ever, has to make a judgment whether a particular stock option is an ISO or an NQSO. The stock option agreements themselves and the SEC Prospectus issued by the company for the stock option program will define whether or not the particular program is an ISO or an NQSO.

exercise for an NQSO and the capital gains tax that will be imposed at the time of sale of the acquired stock for either an ISO or a NQSO.

#### *E. Intrinsic Value*

The intrinsic value of the stock option is the difference between the exercise or strike price and the market price.

#### *F. Vesting Period*

The vesting period is the period of time which the employee must wait before exercising the option. Most options have a scheduled vesting period. For example, the options will vest at the rate of 10% per year for 10 years or 20% per year for five years.

#### *G. Expiration Date*

The expiration date is the date after which the employee loses the right to exercise the option.

#### *H. Cashless Exercise*

Pursuant to the Federal Reserve Board and Securities and Exchange Commission regulations and approval, stock options may be exercised through a margin transaction in which no cash is exchanged. The option is exercised on margin, the acquired stock is immediately sold, the margin loan is repaid and the remaining proceeds are paid over to the employee.<sup>10</sup>

#### *I. Underwater Option*

An underwater option is an option for which the market price is less than the current exercise or strike price.

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<sup>10</sup> To the extent the use of marital funds may be a relevant factor in determining whether a stock option and/or the proceeds from the subsequent sale of stock acquired pursuant to the option is marital property or determining the appropriate percentages of distribution of the proceeds from the sale of the stock, the use or non-use of marital funds for the purpose of exercising the option may be of some significance.

### **III. The Three Step Process for the Distribution of Marital Assets.**

The distribution of assets at the time of a divorce involves three basic steps.

1. The assets which were “acquired during the marriage” must be identified.
2. The assets acquired during the marriage must be valued.
3. The assets acquired during the marriage must be fairly allocated or distributed.<sup>11</sup>

The distribution of stock options at the time of a divorce is no exception to this three step process. However, the very nature, the specific characteristics, and the many variables in the nature and timing of the stock option awards has and will continue to raise myriad issues regarding the implementation of what may appear to be a rather simple three step process.

#### *A. STEP 1: Was The Stock Option Acquired During The Marriage?*

Generally, the operative period for the acquisition of marital assets is the period of time from the date of the marriage to the date of separation, the date of filing the complaint, or another terminating date defined by state statute or case law.<sup>12</sup> In the context of stock options, multiple factual alternatives can arise regarding whether a stock option was “acquired during the marriage.” Consider, for example, the following factual variations (using the date of filing of the divorce complaint as the ending date for the acquisition of assets subject to distribution).

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<sup>11</sup> Alan M. Grosman, *New Jersey Family Law*, § 9.2, 236 (1999); Skoloff & Cutler, *New Jersey Family Law Practice*, N.J. ICLE, § 1.5A(1), 1-157 1999; Rothman v. Rothman, 320 A.2d 496 (N.J. 1974).

<sup>12</sup> Painter v. Painter, 320 A.2d 484 (N.J. 1974). Although the courts have, where deemed appropriate, advanced the commencement of the acquisition period for assets acquired “in contemplation of the marriage” or extended the “cut off date” beyond the filing of the divorce complaint when equity required. See, e.g., Pascale v. Pascale, 660 A.2d 485 (N.J. 1995).

1. *The option is granted prior to the marriage, was unvested at the time of the marriage, and vests during the marriage.*

Under this scenario, the employee/recipient of the option may argue that the option was acquired prior to the marriage and is, therefore, exempt from equitable distribution. The nonemployee spouse may argue that the option was of no value until it was vested, that it vested during the course of the marriage and that marital efforts went into vesting the option.

2. *The option is granted during the marriage, was unvested at the date of the complaint, and will vest over a period of time subsequent to the complaint.*

Under this scenario, the nonemployee spouse might make an argument contrary to that of the nonemployee spouse in scenario 1. In this scenario, the nonemployee spouse would argue that the option was “acquired” (i.e., granted) during the marriage and is, therefore, subject to equitable distribution. The fact that it will vest over a period of time subsequent to the marriage would be irrelevant.<sup>13</sup>

3. *The option is granted shortly after the marriage, but the employee spouse argues that it was granted for past performance that pre-dated the marriage.*

Again, unlike the nonemployee spouse in scenario 1, the nonemployee spouse in this case would argue that the option was acquired during the marriage because it was granted within the marital period and that the past performance argument is irrelevant.<sup>14</sup>

4. *The option is granted after the filing of the complaint for divorce.*

Similar to scenario 1, the employee/recipient spouse would argue that the option was outside the duration of the marriage and the nonemployee spouse would argue that it is nonetheless subject to equitable distribution because it was for performance and efforts expended during the marriage.<sup>15</sup>

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<sup>13</sup> See, e.g., *Green v. Green*, 494 A.2d 721 (Md. Ct. Spec. App. 1985), *Lomen v. Lomen*, 433 N.W.2d 142 (Minn. Ct. App. 1988), *Cohen v. Cohen*, 937 S.W.2d 823 (Tenn. 1996), and cases cited in *Cohen* for examples of this fact pattern.

<sup>14</sup> See, e.g., *Demo v. Demo*, 655 N.E.2d 791 (Ohio Ct. App. 1995).

<sup>15</sup> See, e.g., *Pascale*, 660 A.2d 485.

5. *The option is granted at or about the time of the complaint for divorce but is alleged to be in exchange for prior options that were forfeited by the employee/recipient.*

This scenario most often occurs when one spouse is recruited to a new position at or about the time of the complaint for divorce. As a consequence of leaving prior employment, unvested options are forfeited. To offset or compensate for the forfeiture of those options, the new employer grants the spouse stock options. The nonemployee spouse would argue that the new options are simply a replacement of options that had previously been acquired during the marital period and were otherwise subject to equitable distribution. The employee/recipient spouse would argue that the nonemployee spouse has contributed nothing to the value of the options that were acquired at or about the time of the filing of the divorce complaint and that vesting of those options requires the continued (post-complaint) work performance.<sup>16</sup>

**B STEP 2: What Is The Value Of The Stock Options?**

The threshold question at this step of the process is: Does a stock option have a value in excess of its intrinsic value? Intrinsic value is simply the difference between the exercise or strike price and the market value of the stock.<sup>17</sup> The academic, accounting, Internal Revenue, and “marketplace” communities all seem to have concluded that the real value of a stock option may not simply be its intrinsic value. In the event of a present value off-set distribution of other assets to the non-employed spouse instead of a deferred division the options must be valued.<sup>18</sup>

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<sup>16</sup> Although beyond the scope of this article, query whether there is or should be a concept of “executive good will” which may be relevant and applicable to factual scenarios such as this. If at or near the end of a marriage, one of the spouses is recruited to a new company with a significantly increased earning capacity or benefits package, can the nonemployee spouse make an argument that the employee spouse’s increased fortunes are a result of “executive good will” which was developed and built up during the course of the marriage as a result of their joint marital efforts. Such an argument is similar to the manuscript which is “written and in the drawer” but not yet published at the date of the divorce complaint argument.

<sup>17</sup> See *supra* text at II E.

<sup>18</sup> For a discussion of present or deferred distribution of contingent assets, see *Kikkert v. Kikkert*, 427 A.2d 76 (N.J. Super. Ct. App. Div. 1981), in which the court held that when the trial court is satisfied that a present value can be established, and other assets exist against which an offset can be made, a final



### 1. Academic

In 1973, Professors Fischer Black and Myron Scholes developed the “Black-Scholes Model” for valuing stock options for which they were awarded the Nobel Prize in Economics in 1977. The Black-Scholes Model is generally accepted, but remains a highly complex method for valuing stock options – taking into account and mathematically modeling five fundamental factors:

- a. The time to the expiration of the option;
- b. The strike price;
- c. The market price of the underlying stock;
- d. The volatility of the underlying stock; and
- e. The risk-free interest rate.

Although the Black-Scholes Model remains the fundamental method of calculating the value of a stock option in the economic and mathematical communities, it is difficult to understand, complex to apply, and, arguably, of limited value in the marital context.<sup>19</sup>

### 2. Accounting

The accounting profession had a need to determine the value of stock options for corporate accounting and reporting purposes and has developed a protocol for doing so. The Financial Accounting Standards Board (FASB) issues Accounting Principle Board Opinions and Statements (APBO) and Statements of Financial Accounting Standards (SFAS) for guidance of the accounting profession. In 1984, an APBO established the accounting standards to be used for estimating the fair value of a

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division of the assets should be made. On the other hand, if no other assets are available to offset the present value of the deferred asset and/or the present value of the deferred asset cannot be sufficiently established, the court should “resort” to deferred distribution. Later in *Whitfield v. Whitfield*, 535 A.2d 986 (N.J. Super. Ct. App. Div. 1987), while recognizing that the *Kikkert* court found the immediate offset method to be “preferable,” the court concluded that absent the consent of the parties, a litigant should not be mandated to make immediate distribution of an asset which is not vested, is contingent or might never be received.

<sup>19</sup> In *Wendt v. Wendt*, No. FA96-0149562-S, 1988 WL 161165 (Conn. Super. Ct. Mar. 31, 1998), the trial court judge rejected the use of the Black-Scholes model for valuing stock options stating that it is “not an appropriate method of evaluating employment issued unvested stock options in a marital setting” and finding that the model “showed significant errors.” *Id.* at 197, 198.

stock option.<sup>20</sup> However, by 1993, the FASB recognized the need to revisit its stated procedures for valuing stock options and issued SFAS No. 123 to replace APBO No. 25. In issuing SFAS No. 123, the Financial Accounting Standards Board recognized that simply using the intrinsic value for the stock option often failed to recognize the true value or cost of the stock option and, therefore, ran the risk of creating corporate financial statements that did not accurately reflect the value of or the corporation's cost of stock options.<sup>21</sup> SFAS No. 123 states that a company must measure the actual fair value of a stock option without discount for vested or nonvested considerations, and without discount for non-transferability; it observes that in most instances, the actual fair value of the option would exceed the intrinsic value.<sup>22</sup>

### 3. *Internal Revenue Service*

In 1998, the Internal Revenue Service addressed the need to determine the value of stock options for estate and gift tax valuation purposes.<sup>23</sup> The IRS essentially adopted the Black-Scholes model.

### 4. *The Marketplace*

The marketplace itself regularly fixes a value for the public sale and purchase of stock options.<sup>24</sup> Dr. Les Barenbaum cited the actual May 24, 1999, *Wall Street Journal* listings for Dell stock options expiring in January, 2000 and January, 2001 to demonstrate the reality that the market place values stock options in

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<sup>20</sup> Financial Accounting Standards Board, Accounting Principle Board Opinion, No. 25. (1984).

<sup>21</sup> Financial Accounting Standards Board, Accounting Principle Board Opinion, No. 123 (1993).

<sup>22</sup> See Reva B. Steinberg, *Take Stock of Your Options – Understanding the New Accounting Rules for Stock Based Compensation*, 10 *INSIGHTS* 24 (May 1996). Ms. Steinberg is the Director of Accounting Research for Ten Eyck Assoc., Inc., King of Prussia, Pennsylvania.

<sup>23</sup> I.R.S. Rev. Proc. 98-34, 1998 WL 167549.

<sup>24</sup> *Unrestricted* stock options are regularly traded and have published values. It should be noted, however, that most, if not all, executive compensation stock option programs involve restricted stock options, meaning that they cannot be traded or transferred by the recipient employee, there are vesting schedules and there may be exercise restrictions.

excess of the intrinsic value.<sup>25</sup> As can be seen from the following table, the Dell options expiring in January, 2001, were actually “underwater” as of May 24, 1999. The intrinsic value was zero (or more correctly, minus 12.628) yet the option was trading at a price of \$8.75. The other two options (January, 2000 and January, 2001) had intrinsic values of only \$7.31, but were trading at \$11.75 and \$15.75, respectively.

<i>Stock Price</i>	<i>Firm</i>	<i>Expiration Date</i>	<i>Striking Price</i>	<i>Option Value</i>	<i>Intrinsic Value</i>
\$37.3125	Dell	January, 2001	\$50.00	\$8.75	\$ 0
\$37.3125	Dell	January, 2000	\$30.00	\$11.75	\$7.31
\$37.3125	Dell	January, 2001	\$30.00	\$15.75	\$7.31

Thus, the marketplace recognizes an opportunity value of options in excess of and distinctly different from simply the intrinsic value of the option.

If the process of distributing assets includes determining the “fair market value” of the assets as the second step in the equitable distribution process an argument can be made that the courts should look to the market itself to determine the “fair market value of stock options” as opposed to the mathematical model of Black-Scholes.<sup>26</sup>

## 5. Applications of Discounts

### a. Insider trading restrictions

In some cases, the option holder is a person who would be defined as an “insider” under SEC Regulations. Under SEC Regulations, an insider has limited periods within which that person can trade the company stock or exercise a company’s stock options. The purpose of the restrictions is to prevent insiders from capitalizing on information that they have obtained in their capacity as corporate executives, but which has not yet been dis-

<sup>25</sup> Dr. Barenbaum is a principal in the firm of Kroll, Lindquist & Avey and a Professor of Finance at LaSalle University, Philadelphia, Pennsylvania. Dr. Barenbaum illustrated the principle that stock options may have a value in excess of their intrinsic value by using the actual Wall Street Journal listings for Dell Stock on May 24, 1999. Les Barenbaum, *Intrinsic Value* (1999 unpublished manuscript on file with author).

<sup>26</sup> Rothman v. Rothman, 320 A.2d 496 (N.J. 1974).

seminated to the public. Therefore, most insider trading restrictions are tied to the quarterly report dates for the company; usually the “insider” can only trade in the company’s stock or stock options immediately after (and not before) the public release of the company’s earnings and financial statements so that he or she and the public would have equal access to available financial information.

In addition, an “insider” is forbidden to trade within defined periods. Such periods usually precede a substantial change of financial position by the company or a new stock offering. It could, therefore, be argued that options held by an “insider” cannot be freely traded and/or can only be traded within confined periods of time and are, thus, worth less than options held by a person whose trading time is not restricted.

b. *Non-transferability*

Virtually all stock options have transferability restrictions. The employee recipient cannot trade the options on an option exchange or transfer the options to any other person. Thus, there is an argument that the options which have restricted transferability should be discounted as opposed to unrestricted options. However, unless the restricted options in question are being valued in comparison to or against the publicly traded, unrestricted options, it would not appear that a transferability discount would be appropriate.

c. *Deferred tax liability*

By statute or case law, courts often are instructed to take into account the tax implications resulting from equitable distribution of marital assets and/or the tax liabilities (actual or deferred) that may be assessed against particular assets.<sup>27</sup> While courts often should not take into consideration tax consequences that are “too speculative,” depending upon the type of stock option (an ISO or an NQSO), the tax liabilities may or may not be “speculative.” With the NQSO, an ordinary income tax may be assessed at the time of the grant or, in some instances, at the time the grant vests. Such a tax liability, it would seem, is certain and definable both in time and amount. On the other hand, no tax lia-

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<sup>27</sup> *Orgler v. Orgler*, 568 A.2d 67 (N.J. Super. Ct. App. Div. 1989).

bility attaches to an ISO until it is exercised at some unknown time to acquire the underlying stock and the underlying stock is sold. If the underlying stock is held for a requisite period of time, it will be taxed at a long term capital gains rate or as ordinary income. Such tax consequences could be considered “speculative.” It could be argued that even with an ISO, at least a capital gains tax is ultimately certain. It also could be argued that capital gain is speculative in terms of time and amount depending upon the recipients decision to retain or sell the stock.

*C. STEP 3: The assets acquired during the marriage must be fairly allocated or distributed.*

Step three in the process of distributing marital assets does not pose any particular problem unique to stock options except with regard to the restrictions on their transferability.

Once the quantum and value of the options are determined, the usual factors for determining the parties respective entitlements should be applied.<sup>28</sup> The fact that stock options cannot normally be transferred to an outsider (i.e., nonemployee spouse of the employee recipient of the option) requires special handling. The New Jersey case of *Callahan v. Callahan*<sup>29</sup> addressed this problem by creating a “constructive trust” to implement the distribution.

#### **IV. Should a “Bright Line Rule” Exist or Would it Create a “Serbonian Bog?”**

In the highly publicized Connecticut case of *Wendt v. Wendt*,<sup>30</sup> the nonemployee spouse urged the court to establish a “bright line rule” that would include all vested and unvested employment plans (including unvested stock options) as property subject to marital distribution.

The trial court observed that establishing a “bright line” rule would have obvious appeal for practitioners, clients and judges alike, but refused to create one in family cases that require the

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<sup>28</sup> See, e.g., N.J. STAT. ANN. 2A:34-23.1 (2002).

<sup>29</sup> 361 A.2d 561 (N.J. Super. Ct. Ch. Div. 1976).

<sup>30</sup> No. FA96-0149562-S, 1988 WL 161165 (Conn. Super. Ct. Mar. 31, 1998).

application of principles of equity and are “fact specific” determinations.<sup>31</sup>

The court expressed its concern that “its decision or any decision that established a bright line determination would be read with a great deal of interest by corporate officers” with the result that such corporate officers could and would be able to “restructure” any corporate benefits plan in a way that would avoid any “bright line rule.”<sup>32</sup>

Drawing upon the poetic imagery of John Milton in *Paradise Lost* and the judicial humor of Justice Cardoza, the trial judge in *Wendt* held that to establish a “bright line” rule would be akin to plunging into a “Serbonian Bog.”<sup>33</sup>

The court held that:

To establish a bright line rule in the area of marital distribution of employment benefits, where no court has tread, where the landscape varies and the scenery is in constant change, is to take the step cautioned by Milton [and] Cardozo . . . this court will not trespass into that area without further guidance.<sup>34</sup>

The court in *Wendt* also observed that equitable remedies should not be bound by formulas, that the myriad forms of property ownership in the modern world dictate that no universal principle can be devised to fit every case, that there are few areas of law that are black and white and that in marital disputes the shades of gray are particularly numerous. Therefore, the court found that no “bright line” rule could or should be established to define what stock options would be subject to marital distribution and how they should be distributed.<sup>35</sup>

The following review of reported decisions across the country indicates an almost universal concurrence with the trial court’s observations in *Wendt*. However, these holdings vary widely regarding some specific questions as to division of stock

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<sup>31</sup> *Id.* at \*154.

<sup>32</sup> *Id.* at \*156.

<sup>33</sup> John Milton, in *Paradise Lost*, book 2, referred to the “Serbonian Bog” as a “gulf profound betwixt Damiata and Mount Casins, where whole armies have sunk.” Justice Cardozo is attributed with first using the reference to Milton’s “Serbonian Bog” in a legal decision, *Landress v. Phoenix Mutual Life Ins. Co.*, 291 U.S., 491, 499, where he referenced the attempt to distinguish between accidental results and accidental means as a plunge into a Serbonian Bog.

<sup>34</sup> *Wendt*, 1998 WL 161165, at \*155.

<sup>35</sup> *Id.* at \*145.

options in marital dissolution. The cases demonstrate that “bright line” rules do not exist as to:

1. What stock options should be considered marital property and, therefore, subject to equitable distribution; or
2. How stock options (or the value thereof) should be divided between marital litigants; or
3. How the varying factual differences between the nature of the particular options, the timing of the party’s receipt of the options and the vesting characteristics of each option affects that party’s marital distribution.

A review of the cases across the country indicates that the distribution of stock options is driven more by the equities and underlying facts of the particular case than enunciated principles of law.

## V. The Multiple Approaches of the Existing Case Law

No states have held (nor presumably will ever hold) that a stock option that was granted and that has become vested during the marriage is not subject to marital distribution. The issues arise with regard to options granted before or after the marriage or options that are not vested at the time of termination of the marriage.<sup>36</sup>

### A. *Granted But Unvested Stock Options*

Several states have held that stock options granted during the marriage, but unvested at the date of the complaint for divorce, do not constitute assets subject to marital distribution. Indiana, North Carolina, and Oklahoma are such states. The court in *Hann v. Hann*<sup>37</sup> held that the unvested options that were subject to forfeiture in the event of the employee’s death or termination of employment were contingent and speculative in nature and, therefore, not subject to equitable distribution. It should be noted that the *Hann* court apparently analyzed unvested stock

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<sup>36</sup> Thus, cases that raise factual issues as to whether the asset was acquired (i.e., does its vested or nonvested status affect whether or not it was “acquired”) and whether it was acquired “during the marriage.” See *supra* Section III.

<sup>37</sup> 655 N.E.2d 566 (Ind. Ct. App. 1995).

options in the context of an Indiana statute which excludes unvested pension benefits from equitable distribution.

In *Hall v. Hall*,<sup>38</sup> the North Carolina Court of Appeals held that inasmuch as unvested options could be lost as a result of events occurring after the date of the divorce, they could not be treated as marital property. The *Hall* court referred to a North Carolina statute which provided that “nonvested pension, retirement and deferred compensation rights shall be considered separate property” for the purposes of marital distribution.<sup>39</sup>

*Ettinger v. Ettinger*<sup>40</sup> was a case in which a wife was denied a share of unvested stock options. However, the case seemed to turn more on unique provisions of Oklahoma marital property law and a *res judicata* issue than a substantive analysis of the stock options themselves.

A number of the jurisdictions that have considered whether an option granted during the marriage but unvested at the date of the complaint for divorce is subject to equitable distribution have held that unvested options constitute assets that are subject to marital distribution. Maryland, New Mexico, Oregon, Pennsylvania, Tennessee, and Wisconsin all seem to have cases that squarely stand for the proposition that options which are unvested at the termination of the marriage are subject to marital distribution.<sup>41</sup>

*Pascale v. Pascale*<sup>42</sup> has been cited to support the proposition that stock options, which are unvested at the date of the filing of the complaint for divorce, are subject to equitable distribution. However, a closer reading of *Pascale* suggests that the court focused more on the timing of the grant in relationship to the filing of the complaint for divorce and the possibility that an employee could file a divorce complaint prior to and in anticipation of receiving a grant of stock options rather than having done an anal-

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<sup>38</sup> 363 S.E.2d 189 (N.C. Ct. App. 1987).

<sup>39</sup> N.C. GEN. STAT. § 50-20(b)(2) (2001).

<sup>40</sup> 637 P.2d 63 (Okla. 1981).

<sup>41</sup> *Green v. Green*, 494 A.2d 721 (Md. Ct. Spec. App. 1985), *Garcia v. Mayer*, 920 P.2d 522 (N.M. Ct. App. 1996), *In re Powell*, 934 P.2d 612 (Or. Ct. App. 1997), *Fisher v. Fisher*, 769 A.2d 1196 (Pa 2001), *Cohen v. Cohen*, 937 S.W.2d 823 (Tenn. 1996), *Chen v. Chen*, 416 N.W.2d 661 (Wis. Ct. App. 1987).

<sup>42</sup> 660 A.2d 485 (N.J. 1995).



ysis of the vested versus unvested, past-performance versus future efforts substantive issues.

B. *The Coverture Fraction Approach.*

In *In re Marriage of Hug*,<sup>43</sup> California, a community property state, has attempted to develop a coverture fraction approach to the distribution of stock options. A coverture fraction consists of the numerator which is the period of months between the commencement of the spouse's employment by the employer and the date of separation of the parties and the denominator which is the period of months between the commencement of employment and the date when each option is exercisable.

Two years later in *In re Marriage of Nelson*,<sup>44</sup> the court decided that the *Hug* fraction appeared to reward past services too generously and gave insufficient recognition to future increases in value of the stock. It therefore modified the numerator of the coverture fraction to represent the number of months from the date of grant of each option to the date of the parties' separation and the denominator to represent the number of months from the time of the date of each grant to the grant's date of exercisability.

Within another few months, in *In re Marriage of Harrison*,<sup>45</sup> the court again modified the coverture fraction to take into account the date upon which an unvested option became fully vested. Finally, in *In re Marriage of Walker*,<sup>46</sup> the California Court of Appeal, after reviewing the *Hug*, *Nelson*, and *Harrison* coverture fractions, observed that "[n]o single rule or formula is applicable to every dissolution case involving employee stock options. Trial courts should be vested with broad discretion to fashion approaches which will achieve the most equitable results under the facts of each case."<sup>47</sup>

Thus, while striving mightily to craft a coverture fraction that could be consistently applied to the apportionment of vested

<sup>43</sup> 154 Cal. App. 3d 780 (1984).

<sup>44</sup> 177 Cal. App. 3d 150 (1986).

<sup>45</sup> 179 Cal. App. 3d 1216 (1986).

<sup>46</sup> 216 Cal. App. 3d 644 (1989).

<sup>47</sup> *Id.* at 650, *citing Hug*, 154 Cal. App. 3d at 792. This language resembles *Wendt's* rejection of a "bright line" rule. *See supra* text accompanying notes 33-38.

and unvested stock options, the California Court of Appeal seems to have come full circle, realizing that no single formula can be devised and finding that courts should determine each case on its own equities.

### C. *The Multi-tiered Approach*

Beginning with *In re Marriage of Miller*,<sup>48</sup> Colorado, then New York, Minnesota and New Hampshire, have adopted what has been referred to as the “multi-tiered method” of determining what portion of a stock option is marital property and how that portion should be distributed between the parties. The *Miller* court addressed the issue whether stock options will typically have elements that are compensatory for past services and elements that are incentive for future services and, thus, will require a continuation of efforts by a party beyond the termination of the marriage.<sup>49</sup>

The *Miller* court used a four step approach:

(1) The number of shares granted, whether traceable to past or future services is to be determined.

(2) If any portion of the stock option is found to be intended as compensation for past services, it is deemed to be marital property fully subject to equitable distribution to the extent that the past services were rendered during the term of the marriage.<sup>50</sup>

(3) If any portion of the stock option is found to be intended as an incentive for future services, it is subjected to a coverture fraction reduction. The numerator of the fraction is the number of months from the date of the grant to the date of the filing of the complaint for divorce; the denominator is the number of months from the date of the grant to the date of its exercisability.<sup>51</sup>

(4) The portions found to be marital property pursuant to steps two and three are then to be divided between the spouses,

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<sup>48</sup> 915 P.2d 1314 (Colo. 1996).

<sup>49</sup> *Id.*

<sup>50</sup> Although not specifically discussed, it can be implied from the *Miller* opinion that if the past services pre or post dated the marriage, the court would have used a coverture fraction to apportion the value of those options.

<sup>51</sup> *In Re Marriage of Nelson*, 177 Cal. App. 3d 150, 155, discusses the coverture fraction.

utilizing the otherwise applicable principles of law governing equitable distribution<sup>52</sup> and considering the facts of the particular case.

Citing *Miller* with approval, the New York Court of Appeal in *DeJesus v. DeJesus*<sup>53</sup> held that “a *Miller* type analysis best accommodates the twin tensions between portions of stock plans acquired during the marriage versus those acquired outside the marriage and stock plans which are designed to compensate for past services for those designed to compensate for future circumstances.”<sup>54</sup> Similarly, in *Lomen v. Lomen*,<sup>55</sup> the Minnesota appellate court distinguished a prior Minnesota case in which the options had been found to have been granted solely for future services, *Salstrom v. Salstrom*,<sup>56</sup> and used a *Miller*-type multi-tiered approach. Most recently, the New Hampshire Supreme Court held that a trial court must consider what portion of the unvested stock options were attributable to services rendered during the marriage (and therefore marital) and what portion was intended to be an incentive for post-divorce services.<sup>57</sup>

#### D. Valuation of Options and the Option of a Constructive Trust

Several miscellaneous cases deal with specific, if not unusual factual issues concerning stock options. For example, *Goodwyne v. Goodwyne*<sup>58</sup> is a case that involved an “underwater” option. At the time of the divorce, the stock option had no intrinsic value and the court imposed a constructive trust and deferred distribution to a post-judgment proceeding which was conducted when the options had developed a value.

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<sup>52</sup> In New Jersey, presumably, the statutory criteria set forth in N.J. STAT. ANN. § 2A:34-23 (2002).

<sup>53</sup> 687 N.E.2d 1319 (N.Y. 1997).

<sup>54</sup> *Id.* at 1323.

<sup>55</sup> 433 N.W.2d 142 (Minn. Ct. App. 1988).

<sup>56</sup> 404 N.W.2d 844 (Minn. Ct. App. 1987).

<sup>57</sup> In Re Valence, 2002 WL 97-951, May 7, 2002.

<sup>58</sup> 639 So.2d 1210 (La. Ct. App. 1994).

294 *Journal of the American Academy of Matrimonial Lawyers*E. *New Jersey Cases*

The two most frequently cited New Jersey cases with regard to stock options are *Pascale v. Pascale*<sup>59</sup> and *Callahan v. Callahan*.<sup>60</sup> There is also the 1999 unreported Appellate Division decision in *Klein v. Klein*.<sup>61</sup> *Callahan* imposed a constructive trust for the purpose of implementing the non-employee spouse's portion of the stock options given the inability of the court to effect a transfer of the restricted stock options to the nonemployee spouse.

With all due respect to the trial judge in *Callahan* and the Supreme Court in *Pascale*, neither of these cases offers much on the substantive issues regarding stock options. As noted above,

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<sup>59</sup> 644 A.2d 638 (N.J. Super. Ct. App. Div. 1994), *aff'd in part and rev'd in part*, 660 A.2d 485 (1995).

<sup>60</sup> 361 A.2d at 561 (N.J. Super. Ct. Ch. Div. 1976).

<sup>61</sup> No. A-5019-97T1, (N.J. Super. Ct. App. Div. June 24, 1999). In addition to *Klein v. Klein*, two unreported New Jersey Appellate Division decisions touch upon the distribution of stock options. *Allex v. Allex*, No. A-5739-95T3 (N.J. Super. Ct. App. Div. June 26, 1997), defines the issue before the court as "whether the disputed compensation [the stock options] was obtained as a result of efforts expended during the marriage." Although the court defines the determinative issue as being whether the options were granted for past or future services, its decision turns on the trial judge's acceptance of one expert's opinion in that regard over the other's. The appellate panel found that the trial judge "was presented with two interpretations, one from each expert and he chose to believe the Plaintiff's expert." The panel found that the judge had examined the overall plan and made his findings based upon sufficient evidence in the record and the panel, therefore, accepted the trial judge's conclusions that the options were granted in consideration for past (i.e., marital) employment performance without further discussion as to what would have been the result had the trial judge found that all or a portion of the options were granted in consideration for future services (i.e., nonmarital). *Mailman v. Mailman*, No. A-2321-97T3 (N.J. Super. Ct. App. Div. May 28, 1999) involved, inter alia, the distribution of stock options. However, the appellate decision turned upon an interpretation of R. 4:50-1 and whether the unemployed spouse's application to reopen the final judgment of divorce to address the stock option was filed within the time required by the rules. The plaintiff raised the issue that the stock options which were given to the defendant two years after the filing of the complaint for divorce were "legally and beneficially acquired" during the marriage. Citing *Pascale* extensively, the court remanded for further discovery regarding whether or not the options were acquired as a result of services rendered during the marriage or were to encourage future services. Although both of these cases are informative, neither specifically address nor turn upon the conceptual issues addressed in this paper.

*Callahan* is a trial court decision in which the employee spouse apparently argued that his stock options should be exempt from equitable distribution “because an expenditure on his part is required to exercise the option.”<sup>62</sup> The court almost summarily dismissed that contention and moved to what it defined as “the more perplexing problem” of crafting the manner of distributing the stock options in light of the restrictions against transfer of the stock options and the necessary expenditure of funds to exercise the options.<sup>63</sup>

The court devised what has become known as a “*Callahan* trust” whereby the employee spouse continues in ownership of the stock options as “constructive trustee” for the benefit of the nonemployee spouse. Under the court-imposed “constructive trust,” the nonemployee spouse would be required to tender the funds necessary to implement and exercise her share of the stock options held by her ex-spouse in “constructive trust” for her. The employee spouse would then exercise the option and the employee would then either remit the purchased stock or the proceeds from the sale of the stock to the non-employee spouse.

Perhaps the most significant point to be extracted from *Callahan* is found in a footnote. In footnote 1, the court comments upon the 25% portion that was given to the nonemployee spouse. The court acknowledges that 25% is substantially less than the percentage applied to other assets, but explains that the lesser percentage is appropriate due to the nature of the asset (without defining what is meant by “the nature of”); and if the stock price increases due to the defendant’s efforts (“albeit in some small way”), the plaintiff should *not* share in that increase.<sup>64</sup> The court does not further discuss these two very significant substantive issues regarding the marital distribution of stock options.<sup>65</sup>

*Pascale* is a 29 page opinion of the New Jersey Supreme Court, the first 26 pages of which address joint custody and child

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<sup>62</sup> *Callahan*, 361 A.2d 328.

<sup>63</sup> *Id.* at 329.

<sup>64</sup> *Id.* at 330 n.1.

<sup>65</sup> The court does not expand upon these points, but the reference raises interesting and significant questions as to what is the “nature” of a stock option that would support a 25% distribution to the nonemployee spouse and what does occur when an “active” increase occurs in the options value post divorce.

support issues. The last three pages of the opinion address the stock options. In *Pascale* the parties had reached agreement as to the distribution of all of the stock options awarded to the wife by her employer during the marriage (without discussion whether those options were vested or unvested). They further reached agreement that a stock option granted to the wife by her employer some thirteen months after the filing of the complaint for divorce was not subject to equitable distribution (again without discussion whether any portion of that option may have been intended to compensate the wife for services that she had performed for her employer during the marriage).

The only issue before the court was a stock option that was granted to the wife approximately ten days after she filed her complaint for divorce. The court observed that “serious mischief could arise” from a strict application of the date of the complaint rule and that a spouse considering filing a divorce could file her complaint just before she expected to receive a large bonus or commission simply to deny her spouse the benefit of that asset.<sup>66</sup> So the court relaxed the “date of the complaint rule” to include the option that had been granted to the wife ten days after she had filed her complaint for divorce.

In a single concluding paragraph, the court then reversed the Appellate Division, without significant discussion or analysis, stating that it was “unconvinced” that 4,000 stock options were awarded to the wife to encourage her continuation with future efforts on behalf of the company. The court’s decision apparently turned on its conclusion that the wife “had not met her burden of proof that the efforts she expended to obtain the two stock options awarded on November 7, 1999 were not put forth during the marriage.”<sup>67</sup>

The unreported Appellate Division decision in *Klein v. Klein* is, perhaps, the most substantive of the three New Jersey decisions. However, for whatever reason, it has not been published and is therefore of limited precedential value.

In *Klein*, the court addressed a number of questions. The court inquired whether the stock option was awarded for past

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<sup>66</sup> *Pascale*, 660 A.2d at 498.

<sup>67</sup> *Id.* the court specifically referenced the requirement that a party seeking to exempt an asset from equitable distribution has the burden of proof in that regard and went on to find that the wife had not sustained that burden.

services rendered to the employer during the marriage or as an incentive for future work. It also asked how the fact that the unvested options required the continuation of employment and work effort by the employee subsequent to the divorce should be addressed (recognizing that “there are no reported decisions in New Jersey to define this concept to unmaturing stock options”). The court then addressed how a post-complaint increase in the value of the options should be handled.

The trial court had apparently reviewed and analyzed the option grant letter, the stock option plan’s terms, the annual award of the grants and the employee spouse’s work record history and contribution to his company. The appellate court found that the trial judge had not abused his discretion in finding, based on the review of those documents and records, that the options in question had been awarded to the employee spouse in recognition of his past performance rendered to the company during the tenure of the marriage.

The appellate court in *Klein* also addressed the increase in value of the stock options from the date of the complaint to the date of trial. The trial court found that the increase in value was “passive” and therefore the nonemployee spouse should be entitled to the increase in value.<sup>68</sup> The appellate court affirmed the finding of the trial court. A careful reading of *Klein* indicates that the answers to the questions set forth above will depend upon both the terms and conditions of the particular options themselves and the facts and equities of the particular case.

## **VI. Post Complaint and/or Divorce Increases in Value of Stock Options.**

As mentioned above, footnote 1 in the *Callahan* opinion addresses (but does not resolve) the issue of a post complaint increase in the value of stock options. “If the stock price increases,

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<sup>68</sup> Under the facts of *Klein*, the employee spouse was an employee of a multi-national corporation and the trial court apparently found that “there was no evidence that the increase in value of the stock linked to the Defendant’s personal industry. . . and that . . . the increases were the result of market forces.”

this may be due, in some small way, to the Defendant's effort, the Plaintiff should not share in this."<sup>69</sup>

The unreported *Klein* decision also addresses an increase in the value of the options from the date of the complaint to the date of the trial. Under general principles of marital distribution law, New Jersey courts distinguish between a passive and an active increase in value in determining whether the increase in either premarital assets or marital assets that have increased in value subsequent to the filing of the complaint for divorce should be included in equitable distribution.<sup>70</sup>

It would appear from both the *Callahan* footnote and the *Klein* opinion that the courts are suggesting that the passive versus active distinction should be applied to stock options. What does this mean in practice? Although an argument could be made that an individual employee may have contributed to the increase in value in the stock of a national or multi-national company, the practical impact of the employee's contributions is relatively *de minimis* in all but unusual and exceptional circumstances. Possibly an executive of significant stature could be argued to have actively contributed to an increase in the value of the company stock. Such a situation would be atypical at best.

However, in the age of fast growing high-tech start-ups and initial public offering companies with a limited number of key employees, the issue becomes significantly more relevant. Suppose, for example, a spouse joins a start-up company at or near the conclusion of the marriage. If a result of the employee's post complaint expertise, efforts, business connections or scientific and technical know-how, the value of the stock and thus the value of the stock options increases, should the non-employee spouse share in such increase in value? Under the active versus passive analysis, a strong argument can be made that s/he should not.

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<sup>69</sup> *Callahan*, 361 A.2d 325 n.1.

<sup>70</sup> See *Scavone v. Scavone*, 553 A.2d 885 (N.J. Super. Ct. 1988), *aff'd*, 578 A.2d 1230 (N.J. Super. Ct. 1990). See also *Mol v. Mol*, 370 A.2d 509 (N.J. Super. Ct. App. Div. 1977), *Scherzer v. Scherzer*, 346 A.2d 434 (N.J. Super. Ct. App. Div. 1975), *cert. denied*, 354 A.2d 319 (N.J. 1976).



## VII. Tax Consequences of Transfers of Stock Options

On November 1, 1999, the IRS issued IRS Field Service Advice 200005006.<sup>71</sup> Under the facts submitted for that ruling, the husband had been the holder of both ISOs and NQSOs. Pursuant to the judgment of divorce in Ruling 200005006, the nonemployee spouse was to receive one-half of the options. The options were transferred directly to the nonemployee spouse.

The Internal Revenue Service ruled that because the options were restricted while in the hands of the holder, but became unrestricted upon transfer to the ex-spouse, a taxable event had occurred. The service ruled that the option holder would be taxed at ordinary income rates for the value of the options (the strike price versus the market price) at the time of the transfer of the options to the ex-spouse. It is not clear from Letter Ruling 200005006 whether the use of a “*Callahan* trust” also would have triggered such a taxable event.

The IRS subsequently reversed its position with Revenue Ruling 2002-22, issued on May 8, 2002. Consistent with Section 1041(a) of the Internal Revenue Code, the transfer of stock options is no longer a taxable event. The transferee, not the transferor, is liable for taxes upon exercise of the options.

## VIII. Are Stock Options Assets or Income?

This article presupposes that stock options should be considered assets for the purposes of marital distribution in the event of a divorce. If stock options have been granted, are vested, and remain in existence at the date of termination of the marriage, they would, almost certainly, be considered assets subject to distribution between the parties, but should stock options that are unvested at the date of termination of the marriage or stock options that may be granted to the employee spouse subsequent to the termination of the marriage be considered income?

Statistically, the composition of corporate employees' pay has shown a dramatic change from 60% cash or salary just fifteen years ago to 20% today.<sup>72</sup> Business writers suggest that corpo-

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<sup>71</sup> IRS Field Service Advice 200005006 at Tax Notes Today 25-61.

<sup>72</sup> See *supra* text accompanying note 2.

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rate America sees the granting of stock options as a method of providing additional compensation to employees in a form that may help to insure their longevity with the company or enhance their future performance.

Therefore, should stock options that will vest or that will be granted at a date subsequent to the termination of the marriage be considered as income for the purposes of establishing child support and/or alimony? The Colorado Supreme Court in *Miller*<sup>73</sup> distinguished stock options from deferred pension benefits and found that unlike pension benefits, employee stock options could be considered a component of the employee's current or future compensation.

The Ohio Court of Appeals seems to have the most specific analysis of the issue. In *Murray v. Murray*,<sup>74</sup> the Ohio Court of Appeals held that unexercised stock options could be used in computing a payor's income for the purposes of calculating child support. In *Murray*, the trial court had found that the options were "the single most important element" of the employee's complete compensation package.<sup>75</sup> It also determined that the options were recurring regularly to the extent that the employee could "expect to receive the executive stock options so long as he continue[d] to work,"<sup>76</sup> and that the options in question were unexercised but fully vested. Under those facts and in the context of the Ohio child support statute's definition of gross income, the court of appeals found that the stock options were granted to the employee as an integral part of his compensation package and should be included in his gross income for the purpose of computing child support.<sup>77</sup>

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<sup>73</sup> In re Marriage of Miller, 915 P.2d 1314, 1318 (Colo. 1996).

<sup>74</sup> 716 N.E.2d 288 (Ohio Ct. App. 1999).

<sup>75</sup> *Id.* at 294.

<sup>76</sup> *Id.* Under the Procter & Gamble Stock Option Plan in *Murray*, the options were fully vested to the employee twelve months after the grant.

<sup>77</sup> The Ohio Court of Appeals in *Murray* addressed the valuation of a stock option. The court observed that "valuing stock options is difficult by nature" and that "the true value of the stock option to its owner is the potential for appreciation in stock price without investment risk." Therefore, it found that to value the stock option simply using the stock price (i.e., market price) on one day and comparing it to the exercise or strike price did not "accurately reflect the value of the stock options." *Id.* at 297, 298.

Whether an unexercised stock option will be considered income is relevant principally from two perspectives. First, is the unexercised stock option a form of compensation that should be included in the determination of the payor's total compensation for the purposes of the payment of alimony or child support? Second, whether stock options that may vest or be granted subsequent to the termination of the marriage are assets which the employee spouse will acquire as a result of efforts beyond the date of termination of the marriage and, therefore, should be excluded from equitable distribution; or income which should be considered in determining child support and alimony.<sup>78</sup>

To illustrate the issue, consider the following alternative scenarios:

**Family A** - The employee spouse regularly received stock options through her employment. On a regular basis, the stock options would be exercised as they vested, the acquired stock would be sold and the proceeds from the sale would be used to pay the parties' ordinary and recurring living expenses.

**Family B** - The stock options granted to the employee spouse were treated the same as in Family A. However, the proceeds received from the sale of the stock were not used to pay recurring living expenses but instead were applied directly and exclusively to the payment of their children's college education expenses.

**Family C** - Similar to Family A and B, the employee spouse regularly received stock options. However, as the options vested, the family would make a decision whether they should retain the option or exercise option and acquire company stock. If they felt that it was economically prudent to not exercise the option, they would retain it for future use. If they did exercise the option, they kept or reinvested the acquired stock. They did not use any of the proceeds from the exercise of the option or sale of the acquired stock for the payment of any expenses and, instead, accumulated them for "a rainy day."

Applying the analytical statistics cited at the beginning of this paper, if the employee spouse in each of the three hypotheti-

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<sup>78</sup> This article will not discuss the issue that would arise if the amount or value of the stock options received in years subsequent to the marriage exceeds the value of the stock options which may have been received (and utilized by the parties) during the marriage. As a general premise, if such stock options are considered income, the increase in the employee spouse's income for years subsequent to the date of the marriage as compared to the years during the marriage would entitle the children to benefit from such increase but would not be considered with regard to spousal support or alimony which would be defined in the context of the standard of living during the marriage.

cal families had a total “compensation package,” including cash and salary, stock awards and stock option awards of \$500,000, approximately 20% of that total compensation or \$100,000 would be paid in cash or salary and the remaining \$400,000 would be in short-term or long-term incentives such as stock programs or stock option awards.

In Family A, the family’s standard of living would clearly have been established and was dependent upon utilizing the full \$500,000.

In Family C, the family’s standard of living would have been established and maintained utilizing only \$100,000 while the remaining \$400,000 was systematically accumulated as savings (i.e., assets).

Family B split the difference, maintaining their regular and recurring expense budget at the \$100,000 level, but paying extraordinary and temporary expenses (e.g., their children’s college expenses, which would have a finite life span) out of the additional \$400,000 income, presumably accumulating the remaining balance of the \$400,000 (i.e., assets).

Should the unvested future stock options in each of these three families be treated the same? Did the parties themselves treat them the same? Again, no definitive answer can be extracted from the case law. Thus, in attempting to answer the inquiry, guidance must come from logic and extrapolation of principles gleaned from the holdings in other matrimonial cases.

Such an analysis would seem to indicate that the determination may turn upon the pattern that the parties’ established during the marriage, the standard of living established during the marriage, and/or whether it was supported in whole or in part by the stock options. If the statistic that approximately 20% of corporate employees’ income is now salary and as much as 80% are short or long-term incentives including stock options, it is probable that in the majority of cases the parties would not have been living on 20% of their total income and would, in fact, have been using the incentives to sustain the marital standard of living. Assuming that to be the case, it would seem inescapable that the stock options should be considered as a portion of a person’s income for the purpose of fixing continuing support obligations.

## IX. Conclusion

### A. Practice Pointers

In any case involving the equitable distribution of stock options, careful analysis and discovery is required. The following practical suggestions may assist in the development of a case.

#### 1. *Develop a time line.*

The relativity of the date of the option grant to the beginning and end of the marriage and to the vesting dates may be critical. Therefore, the first document that counsel should develop regarding a stock option is a time line that should include:

- a. The date of the parties' marriage.
- b. The recipient's commencement of employment with the company in question.
- c. The date or dates upon which any grants or awards of stock options were received.
- d. The vesting date for the options.
- e. The expiration date for the options.
- f. The date of the filing of the complaint for divorce.

#### 2. *Obtain and read the stock option plan and the individual grant.*

All stock options will be issued pursuant to an underlying plan and will be implemented by individual grants, awards or contracts. Counsel should obtain both the underlying agreement that defines the company's stock option program in general and the individual grants, awards or contracts. The documents should be reviewed for:

- a. Any reference to the reason why the stock option plan, in general, was established by the company.
- b. Any reason as to why the particular grant was issued.
- c. Any language referencing awards for past service or incentive to insure continuation or future service with the company.

#### 3. *Obtain and review the prospectus for the stock option plan.*

SEC Regulations require a prospectus to be issued describing a stock option plan. The prospectus should be reviewed for any statements similar in nature to those referenced above with

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regard to the stock option plan or individual stock option grants or contracts.

4. *Obtain and review the employee's personnel file or, at the least, his annual evaluations relative in time to the option grant.*

If an argument is raised that options were awarded to reward past performance, the recipient's personnel file or evaluations should reflect past performance worthy of such reward. If, on the other hand, the argument is that the grant is to encourage the person's continuation with the company, there may be references in the personnel file or evaluations as to that person's future value and need to be retained by the company.

5. *If the employee has an employment agreement, it should be obtained and reviewed.*

The terms of a person's individual employment agreement may reference whether they are receiving stock options and the reason for the stock option award.

6. *Obtain any company booklets, memoranda or "company propaganda" relevant to stock options or other employee benefit programs.*

It is not unusual to find that the employee relations materials or handbooks that are distributed to the employees contain statements which differ from "legalese" set forth in the option plan, the individual grant awards or the prospectus for the option plan.

7. *Review the employment history of the option holder in detail.*

A review of the individual's employment history, employment responsibilities, promotions, job descriptions, and earnings history may prove to be relevant in helping to answer the question whether a person is being awarded for past performance or encouraged to continue with the company. Or they may show that all or a portion of the grants in question (particularly if they are grants from a relatively recent employer) are a result of an exchange, a golden parachute or a golden handcuff arrangement

regarding a change of employment and, thus, may relate back to past performance or “lock in” future performance.

8. *Analyze the marital history with regard to the use of the stock options as income that supported the marital standard of living.*

To assess the impact that future stock options should have on a person's ability to pay child support or alimony, discovery should be conducted and an analysis made as to:

- a. The parties' pattern regarding the use (or nonuse) of the stock options during the marriage.
- b. The amount of annual income that was derived from the exercise of the options.
- c. The type of expenses that were paid from the proceeds derived from the utilization of the options.
- d. A projection or future analysis of the income that an individual will be able to derive from the continued receipt and future utilization of the options.

9. *Retain an expert when appropriate.*

If, as a result of preliminary analysis, it appears that a substantial stock option issue exists, retain a competent expert. Any number of executive compensation specialists (some of whom are cited in this article) can assist in analyzing and valuing stock options. The complexity of executive compensation, the frequency with which executives change companies and the need for not only the executives, but the companies to engage professional advisors and negotiators to assist them in developing and analyzing the various compensation packages, has created a cottage industry of corporate and executive compensation specialists. Such persons can and should be accessed in an appropriate case.

