

VALUATION METHODOLOGIES
in
NC EQUITABLE DIST'N CASES

Introduction

- 1981 – Moved away from “title” jurisdiction
- Recognized marriage as economic partnership
- Authorized “equitable” division of property
- Public policy favored equal division

Steps in Distribution

- [Identify and gather all assets of parties]
- 1. Classify – marital, separate, & divisible
- 2. Value the marital and divisible property
 - (including debt)
- 3. Distribute property and debt in equitable manner.

Valuation is Mandatory

- MUST determine net value of estate, including divisible property in order to make equitable distribution.
- SIZE of estate is an important distributional factor – can’t decide how to divide without valuing assets to be distributed.
- THOMAS (1991) – Can’t just order property sold and proceeds divided.

Determining Value

- Fair Market Value – informed Buyer & Seller, neither under compulsion to act
- NET FMV – subtract any associated debt
- Some items (family photo albums) have only sentimental/nominal value. Best practice to distribute them, despite McManus (1985)

Determination of Net FMV

- Beware of accounting for speculative events, such as tax consequences, the costs of sale, broker/realtor commissions, etc., unless
- Reasonably certain they will occur or be required by judge's distribution order.

Dates of Valuation

- Marital Property and Marital Debt are to be valued on the Date Of Separation.
- Divisible Property and Divisible Debt are to be valued as of the Date of Distribution.
- Not necessarily error to use a different valuation date, but always a risk
- Practice Pointer: See if parties will stipulate; At least make finding that no change occurred.

Role of Trial Judge

- Without jury, judge is to list all marital assets and value each – definitely enough to allow appellate scrutiny.
- As in all non-jury matters, the court has wide discretion.
- There is no exclusive method of valuation.
- Practice pointer: Make sufficient findings to support your determination of value.

What evidence admissible on value?

- Owners are presumptively qualified to testify about value of their assets.
- Non-expert third parties with special knowledge may testify (no presumption).
- Experts may, of course, testify, but weight is for the trial judge. Expert witness testimony not necessarily have more weight than lay owner-witness. Laughter (1971)

Evidence proving value II

- Where conflicting expert testimony, the trial court may decline to accept the opinion of one expert, but accept opinion of another.
- Christensen (1992).
- What happens if the parties don't offer enough evidence to allow determination? Or if court doesn't find either expert's opinion of value worthy of adoption?

What if Value Evidence Absent?

- If evidence insufficient, trial court may appoint an expert, per Rule 706, Ev Rules.
- Does that include appointing Referee?
- Bright-line rule in GRASTY (1997):
If court not appoint expert, and cannot value asset, then asset NOT subject to distribution. Better practice may be NOT to invite litigation. Is an equitable remedy, after all.

The Truth's Usually in the Middle

- Suppose you don't put reliance in either expert's report, but think there's enough evidence to calculate value yourself.
- Must indicate the sound method(s) you rely on, find detailed facts explaining why you rejected some factors used by the experts (or gave them different weight)
- Cannot just choose a middle figure. Offerman.

Valuing Specific Assets: Household Goods & Misc. Items

- Need not indicate valuation method in valuing personal effects & household goods, but may not just “split the difference.” If you must value these, better practice is to have evidence of (at least) the (1) purchase price, (2) app. date of purchase, and (3) condition.
- Q: Should you accept stipulations of distribution, where parties disagree on value.

Personal Property, continued

- Autos – many guides on the internet
- Guns – actually hold value fairly well
- Computers – try selling a 5-year old laptop!
- Jewelry – Not insurance value. Get a jeweler to furnish opinion. 33 – 40 % of price?
- Collectibles – price paid is suspect. It is a cyclical industry. Some collectibles at bottom now – beanie babies, angels, basketball cards..

Valuing This Old House

- Tax Value not admissible without stipulation
 - Lay Owner may testify as opinion of value
Finney (2013)
- Experts use three approaches, generally:
- A. Cost
 - B. Income
 - C. Market Comparison Approach

Valuing This Old House II

- In Market Comparables Approach, the expert will look for similar properties, considering the location, date of sale, zoning, amenities, size of lot, etc. Then expert accounts for differences. The usual attack is that the comps used are not sufficiently comparable. Court is to consider factors used by experts, decide credibility, and determine weight.

Valuing This Old House III

- You do not have to, but may, accept the opinion of the appraiser. If you understand the factors upon which the expert relied, you may arrive at a “middle figure” but it must be more than a guess. NIX (1986).
- For example, were the comps reasonably near in location? Were sales near in time? Were properties too disproportionate in value?

Valuing Business Interests

- A. Publicly-traded stocks and bonds
- B. Closely-held corporations/LLCs
- C. Partnerships
- D. Sole Proprietorships
- For all types, consider: (1) fixed assets + (2) intangible assets, such as accts, rec'ble (3) Goodwill - (4) Liabilities

MUSTS in valuing businesses

- I. Must use, and identify, a sound method of valuation. Draughon (1986).
- Must make specific findings supporting valuation. Patton (1986).
- Must value Goodwill, or state clearly if there is none, and support with findings. Sonek (1992)

Valuation Approaches

- (1) Earnings/ Market Approach
- (2) Comparable Sales Approach
- (3) Buy/Sell Offers
- (4) P'ship – formula set out in agreement
- (5) Minority Stockholder Discount (Hartman)
- (6) Industry Standard

Approaches to Valuing Goodwill

- A. Three Capitalization Approaches:
 - Earnings (Straight Capitalization)
 - Excess Earnings
 - Excess Earnings – IRS Valuation
- B. Market Value
- C. Corporate/ p'ship buy/sell agreement
- D. Year's Gross Income (or % of same).

Pension and Retirement Rights

- “pension and retirement rights” – broadly defined by appellate courts
 - Court must determine present value of amounts to be received in future (Winning lottery, or Publishers' Clearinghouse)
- TWO primary types:
- Defined Contribution
 - Defined Benefit

Pension and Retirement Rights II

- DEFINED CONTRIBUTION:
 - Balance in acc't on date of separation
 - Apply Coverage Fraction:
 - Worked During Marriage/Total Worked
 - Tax Consequences may be too speculative unless court finds they are going to occur as result of the distribution.
 - May not be taxable event if merely rollover

Defined Benefit Plans

- 1. What amounts employee receives at Early – Retirement Age.
- 2. What was employee's life expectancy on DOS?
- 3. Calculate total expected to be received.
- 4. Reduce to value on ERA, using appropriate rate
- 5. Reduce to value on DOS, using app rate of return
- 6. Apply mortality discount? 5 – 10 %
- 7. Apply coverage fraction for marital portion

Subjective Elements of Pension Valuation

- Life Expectancy – GS table does not take into account gender distinctions – there are a number of other acceptable tables, including IRS tables.
- Rate of Return – very difficult now, with prospect of low interest rates for years. If dealing with 15/20 year period, difficult to find proper rate. PBGC uses “blended” rate.

Miscellaneous Assets

- Injury Settlements and Awards. Incident before DOS, but recovery afterwards.
- In Johnson (1986), NC Sup Ct said should use an “analytic” approach. What portions of the settlement represent payments for separate property loss?

Injury Settlements and Awards

- SEPARATE portions of monetary award:
 - Include Pain and Suffering;
 - Loss of future earning capacity;
 - Disfigurement;
 - » Wages lost AFTER DOS;
 - » Medicals AFTER DOS.

Other Miscellaneous Assets

- Insurance Policies
- Bonds and Evidence of Debt
- Stock Options
 - Are they vested? HALL (1987)
- Leased Property – lease can be valued
- Timber Rights –
 - If timber not mature and ready for harvest on DOS, then consider in valuing land. COBB.