

## Value of a Business for Equitable Distribution: COVID-19 and the 'Goldman' Rule - *New Jersey Law Journal*

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The equitable distribution of the value of a business is often a highly contested component of a divorce. It is common for the parties to disagree about the value of the business and, in certain circumstances, even disagree about the date upon which the value should be set. The COVID-19 pandemic has caused significant economic turmoil and fluctuation in the values of assets in recent months. The extreme and unprecedented financial impact of the pandemic creates some uncertainty concerning how and when to value business assets for purposes of equitable distribution for parties divorcing during this pandemic.

Family courts are charged with resolving claims for the equitable distribution of marital assets upon divorce pursuant to N.J.S.A. 2A:34-23.1. In so doing, the court employs a three-step analysis to: (1) identify the property subject to equitable distribution; (2) determine the value of property; and (3) decide how to allocate each asset pursuant to the myriad of factors set forth in the statute. *Rothman v. Rothman*, 65 N.J. 219, 232 (1974). To that end, the goal of equitable distribution is to devise a “fair and just division” of the assets. *Steneken v. Steneken*, 183 N.J. 290, 299 (2005). Consequently, courts must be guided by principles of equity in applying the statutory factors and in allocating the assets between the divorcing parties. *Scavone v. Scavone*, 230 N.J. Super. 482, 484 (1988), *aff'd*, 243 N.J. Super. 134 (App. Div. 1990).

Once the parties identify the assets in the marital estate, equity generally requires that the parties value those assets as of a common date and, in most instances, that date is the date of the filing of the divorce complaint. *Bednar v. Bednar*, 193 N.J. Super. 330, 332 (App. Div.1984). That said, there is “absolutely no iron-clad rule” for determining the date of valuation, and there are circumstances when the date of the judgment or distribution is more appropriate “depending upon the nature of the asset and *any other compelling equitable considerations.*” *Id.* at 333 (emphasis added).

### **Nature of the Asset (Passive vs. Active)**

In terms of fixing a valuation date, the “nature” of the asset generally refers to whether the asset is “passive” or “active.” Passive assets are defined as those assets “with value fluctuations based exclusively on market conditions.” *Scavone*, 230 N.J. Super. at 486. In contrast, active assets involve “contributions and efforts” by one or both parties toward the “growth and development” of the asset which “directly affects” the value of the asset. *Id.* at 487.

In assessing the appropriate date of valuing a marital asset upon divorce, “active” assets are typically valued as of the date of the complaint. That approach considers the equitable principle that the personal industry and efforts of the spouse in control of the asset should not inure to the benefit of the non-controlling spouse once the complaint is filed. *Bednar*, 193 N.J. Super. at 333. Businesses are typically treated as “active” assets because the nature of the asset is such that the efforts and business judgment of the spouse controlling the business directly impact the value of the business.

In contrast, parties value passive assets as of the date of trial or distribution and not the date of the complaint. *Platt v. Platt*, 384 N.J. Super. 418, 427 (App. Div. 2006). This is based upon an equitable principle that each party should share equitably in a change in value if the change is simply due to market factors or inflation. *Id.*; *see also Bednar*, 193 N.J. Super. at 333.

In on-going divorce cases where the parties own a business as a marital asset and have filed a complaint for divorce prior to the onset of the COVID-19 pandemic in or about March 2020, there is some question regarding how COVID-19 market influences should impact the valuation of the business. It could be argued that, if the unique COVID economics have substantially and negatively impacted a business’ value post-complaint, the extreme and unprecedented circumstances may be the precise type of “compelling equitable considerations” considered by the court in *Bednar* in noting that even “active” assets need not always be valued as of the date of the complaint.

The simple answer to when business assets should be valued based upon COVID-19 is: “it depends.” It depends upon the degree to which COVID-19 market forces affect the business finances. It depends upon whether the impact is permanent, long-term, or short-term. As noted earlier, courts should be guided by equity and consider all the factors in play in making an equitable distribution decision to devise a “fair and just” division of the assets. In certain unique circumstances, “the consequence of value fluctuations for purposes of equitable distribution should not ... turn wholly on whether an asset is properly classified as an active or passive asset.” *Goldman v. Goldman*, 275 N.J. Super. 452, 457,

(App. Div. 1994), *aff'g in part*, 248 N.J. Super. 10 (Ch. Div. 1991)(*citing Scavone*, 230 N.J. Super. 482, (Ch. Div.1988), *aff'd* 243 N.J. Super. 134 (App. Div.1990)).

## **Goldman**

In *Goldman*, the trial court addressed the “continuing evolution of the issue of when an asset should be valued for purposes of equitable distribution.” *Goldman*, 248 N.J. Super. at 11. In so doing, the court considered the Supreme Court’s observation in *Painter v. Painter* that: “The judicial task may upon occasion be a difficult one but it will hardly be novel. Seeking just and equitable results is and has always been inherent in the judicial function; it has been a chief concern of the courts for centuries.” *Id.* (*quoting Painter v. Painter*, 65 N.J. 196, 212 (1974)).

The Goldmans were married in 1966 and divorced in 1991. Mr. Goldman owned and operated a high-end luxury automobile dealership (“Coast”) during the marriage. He purchased the business in 1985, and the stock market crashed in 1987. During the divorce litigation, Mr. Goldman claimed that the market for luxury vehicles crashed along with the stock market and other poor market conditions such as the decline in the dollar and negative sales trends with some brands of vehicles.

Pending the divorce, Mr. Goldman loaned \$400,000 of marital funds to the suffering business. The trial court found the loan to have been made in good faith and for valid business purposes. The parties stipulated that the business had a value of \$294,000 as of the date of the complaint and no value as of the trial. Ms. Goldman argued that the dealership was an “active” asset and, consequently, the value for purposes of equitable distribution must be set as of the date of the complaint. *Goldman*, 248 N.J. Super. at 16. The trial court found that the case presented “special circumstances” and that it would have been “unfair” to attribute \$294,000 of value for distribution of a business with zero value as of the date of the trial “under the circumstances.” *Id.* The Appellate Division ultimately upheld that decision. *Goldman*, 275 N.J. Super. at 465.

In analyzing whether to value Coast as of the date of complaint or the time of trial, the trial court concluded that it would not be fair to apply the typical rules regarding active and passive assets. *Goldman*, 248 N.J. Super. at 16. To do so would force Mr. Goldman alone to suffer the consequences of the business’ collapse due to forces outside of his control. The trial court determined that a decision in that regard would ultimately be contrary to its primary legislative mandate “to distribute marital assets equitably.” *Id.* Thus, although the business was an “active” asset, equitable considerations dictated that the court value the property as of the date of trial.

In further support of affirming the trial court decision, the Appellate Division noted that Mr. Goldman acted in good faith in managing the business and that Ms. Goldman failed to present proof at trial that “Coast failed due to [Mr. Goldman’s] poor business judgment or mismanagement.” *Id.* at 457–58. In so holding, the court acknowledged that market forces can impact an active asset such that holding one party accountable for the value of the business as of the complaint filing may not be equitable if the business experiences a significant decline in value outside the effort and control of the

spouse operating the business during the pendency of the divorce.

### **Conclusion**

While matrimonial attorneys, forensic accountants and other divorce professionals typically value “active” assets, including businesses, at the time of the complaint and “passive” assets at the time of judgment or distribution, it is important to remember that equitable principles must prevail, and there is “no iron clad rule” to that end. *See Bednar*, 193 N.J. Super. at 333. Under *Goldman*, courts can take “special circumstances” into consideration when setting the valuation date and will do so when equity deems it necessary. *Goldman*, 248 N.J. Super. at 16.

The 2020 COVID-19 pandemic has had an extreme impact on the economy generally, with varying impact on businesses individually. Consequently, there is no “one size fits all” approach for how to address the impact of the pandemic on business values. While some businesses may not quickly recover (*i.e.*, bars, restaurants, live entertainment and related industries), other industries may flourish due to the health crisis (*i.e.*, personal protective equipment manufacturers, hygiene and cleaning supply companies, etc.). As is the case in all divorce matters, courts will review the facts of each matter on a case-by-case basis and set the valuation date for purposes of equitable distribution consistent with existing caselaw and equitable principles where necessary under “special circumstances.” In asserting that a business should not be valued as of a complaint date (particularly if the complaint was filed pre-March 2020), the parties and professionals will need to consider the severity of a decline in business value due to market forces and the longevity of the business disruption or decline. The bottom line in assessing the issue is “it depends,” and courts are charged with assessing the facts consistent with long-standing equitable principles.