CHANGES IN VALUE BETWEEN FILING OF THE COMPLAINT AND TRIAL: GOLDMAN REVISITED

For all the hype the Goldman case received, the Appellate Division, in affirming Judge Glickman's decision treated the issue most lawyers thought to be critical in an almost perfunctory fashion. Most importantly, the Court reaffirmed the obligation of the Trial Court to effectuate a distribution of assets which, over all, "was equitable to both parties" Goldman, slip opinion at pg. 5. By reaffirming the fundamental obligation of any decision to be fair and equitable to both parties, the Court appropriately focused inquiry on the ultimate objective of any system of justice - fairness. It provided the strongest argument a proponent of a position has that if a Court followed any other rationale, the end result would be unfair thus undermining the principle purpose of equitable distribution.

Dealing with the issue of changes in value between the filing date and trial, in only three sentences, the Appellate Division did not provide the guidance this important legal issue requires. Judge Wefing's comment that the consequence of changes in value should not turn on whether the asset is active or passive does not permit broad conclusions to be drawn from the decision which, arguably, can be limited to its unique facts an observation the Court itself made by characterizing the situation as "unique". Goldman, slip opinion at pg. 5.

Their perfunctory analysis, albeit correct on the facts of Goldman, never resolved the questions posed in my initial article. It leaves the law still somewhat in the state of flux and such

uncertainty will inevitably result in more litigation and, unfortunately, determinations by some Judges that in the final analysis are simply not fair because they continue to focus on the nature of the asset and not why there was a change in value. While the Court did clarify Judge Kraft's analysis in Scavone v. Scavone, 230 N.J. Super. 482 (Ch. Div. 1988), by rejecting the concept that the result is determined by the nature of the asset itself, (was it active or passive) thus raising the inference, albeit unstated in Goldman, that the analysis must be as to the reason there was a change in value. The law must develop so the focus is not on the distinction between passive and active assets but rather whether the change in value was caused by passive or active reasons.

The easiest way to understand what on first blush might seem a complex analysis is to think of a simple matrimonial case involving a home. It is generally acknowledged that you utilize the trial date for determining the value of a home. Lawyers frequently refer to the asset, somewhat simplistically, as a passive asset to be valued as of trial. This terminology became accepted after Scavone which was generally perceived to be correct by lawyers. In fact, Judge Kraft characterized the marital home as a "passive asset". Scavone at 490. He cited the Appellate Division decision in Wadlow v. Wadlow, 200 N.J. Super. 372 (App. Div. 1983) as establishing the principle that the "incremental value of the marital residence was purely the result of market forces" and, as a result "the Trial Judge should have considered the appraisal value of the property at the time of the hearing".

Wadlow at 385. In most circumstances, that is undoubtedly correct because the value of the home is established by the marketplace, not necessarily what either of the parties did or did not do. Yet, would the result be the same if between the filing date of the Complaint and final hearing one spouse made significant improvements to the house using immune funds. The house is still the same type of an asset but the change in value was caused not by passive market forces but by the active actions of one of the parties which directly affected the value of the property. In other words, to reach the correct result, a Court would have to analyze why there was a change in the value, not blithely assume that the trial date is the valuation date because the asset is a home. The trial date is significant because it signifies the end of the marital partnership and personal efforts which enhance the value of an asset should not be shared.

Conversely, if the home is worth $200,000.00 as of the filing date and the occupying spouse negligently or even purposely permits it to fall into disrepair to such a degree that it adversely affects it's market value, would not that decrease be chargeable to that spouse as opposed to the non-occupying spouse. Once again, the analysis would have to be directed to the reason for the change in value, not the nature of the asset.

Such an analytical approach is consistent with the arguments in my initial article (attached) where a change in value of a McDonald's Restaurant, which people normally would assume to be an active asset, required more detailed thought. If the value of the

restaurant increases after filing but before trial because an exit ramp was constructed for a nearby highway, the change is attributable to passive reasons unrelated to the efforts of either member of the marital partnership. If the parties are still married why would the legal owner receive the benefit if the change in value was entirely unrelated to how the restaurant was operated. Yet, if the McDonald's Restaurant decreases in value because the operating spouse fails to devote the necessary attention to the operation of the business and service declines, revenues decrease and the value is affected, then the change is hardly passive and should not be chargeable to the innocent non-operating spouse.

This analysis requires lawyers to think differently than we have up to now. An example of this approach would be in valuing a professional practice arguably, an active asset valued as of the filing date of the Complaint. If, however, you represent, for example, a physician, who works as hard and as many hours as was done during the marriage but that by virtue of passive changes in the health care industry and modifications to medicare reimbursements, the gross income of the practice decreased resulting in a lesser value what is the appropriate valuation date? The simple answer up to now has been that this is an active asset valued as of the filing date of the Complaint. Yet, if the physician can demonstrate that the decrease in income, assuming the decrease translates into a lower value caused by governmental action entirely unrelated to whatever the physician did or could have done, what public policy is served by requiring that physician

to pay a spouse a percentage of a value that no longer exists when the change in value occurred during their marriage and was created by passive reasons.

If a couple owned a home that was partially rented and there was a zoning change that prohibited such a rental and the resultant loss of income decreased the value of the property, would it be fair to utilize the filing date as the valuation date. No one would seriously dispute that this change, caused by governmental regulation, required a change in the valuation date. It would, returning to the Goldman reaffirmation of the essential element of equitable distribution, simply not be fair.

The interesting analysis that we as attorneys must undertake is first to identify whether a change in value has occurred and, if so, why, we must then prove to the Judge why the change occurred and that our client had no control over that reason for the change. In short, you argue if the change was caused by passive reasons why prejudice my client.

Returning to the medical practice, one way of demonstrating this is by comparing the rates physicians charged for services as of the filing date and the rates the physician received at trial. Always keep in mind that the fundamental question is value and what someone would pay for the asset. It should not be hard to have the opposing expert concede that governmental regulation that reduced fees a physician could charge is a factor a willing buyer would consider in determining value and in all probability, would result in a lower value for a practice that could no longer generate the

same income it had in previous years.

I simply do not consider the Appellate Division decision in Goldman as materially advancing the law. Goldman, is of lesser precedential value because of it's extraordinarily unique facts. In a case where there is a stipulation of good faith, it is not surprising that a business which, by the time of trial has no value, is determined not to be a distributable asset. It is also not the kind of case we as lawyers deal with on a daily basis. In our cases, the change of value is not as drastic but it may, nevertheless, be material and particularly significant if the titled spouse must buy out the non-titled spouse by paying risk and tax free dollars utilizing a value that no longer exists not because of anything your client did.

This approach, if adopted by our Courts, will not necessarily simplify equitable distribution. It is not intended as a simplification. Rather, it is intended to do what Judge Glickman recognized at Trial in Goldman and which, most importantly, the Appellate Division reaffirmed - the ultimate goal must always be fairness and if the price we must pay systemically is a more complex system, then so be it.

I ended my earlier article by observing that the ultimate issue is whether the Family Part System is fundamentally concerned with reaching just results, or whether it is willing to sacrifice justice on the cross of expediency. The Appellate Division decision in Goldman did not answer that question. We, as practitioners, await that final answer.