Fair Value – Fair to Whom?
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Fair Market Value and Fair Value are both important terms in valuation. However, they are frequently mistakenly thought to be interchangeable. This is a common misconception as these two Standards of Value differ not only in their origins, but significantly in their applications.

The term “Fair Value” is a contextual and geographically sensitive term. It is a Standard of Value created by statute and precedent for specific circumstances to implement a specific public policy. The New Jersey Family Courts approach valuation from the perspective of fairness to the specific parties as opposed to Fair Market Value, which focuses on theoretical willing sellers and buyers. In this manner the Courts have created, through statutes and case law, a New Jersey version of value. This specific standard of value, uniquely developed to be applied for the specific circumstance of divorce, implements the public policy of treating marriage as a partnership.

Our courts’ viewpoint of valuation deviates from established valuation theory in the attempt to consider the unique circumstances and characteristics associated with matrimonial matters. Before the Supreme Court’s decision in Dugan, it was generally accepted that all marital assets should be valued in matrimonial litigation predicated on the asset’s Fair Market Value. The Dugan decision introduced a new concept into the dialogue: while Mr. Dugan’s practice could not be sold, it had value to its owner. In order to be fair to the non-titled spouse, a value other than “Fair Market Value” needed to be utilized in valuing and equitably distributing business interests. Certainly, Dugan is an example where the value of the law practice was greater to Mr. Dugan than any value he could receive for his law practice in the marketplace.

As there is a large body of interpretive case law, many practitioners may have forgotten is that it was originally developed by the IRS in the context of tax compliance for estate and gift tax purposes only.

The Internal Revenue Service (“IRS”) is regarded by many as the primary theoretician in the field of valuation of closely held businesses. Fair Market Value as defined under Revenue Ruling 59-60 is “the price at which property would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell; both parties having reasonable knowledge of relevant facts.” Although 59-60 is now almost 60 years old, it continues to exert great influence on business valuation standards. However, what many practitioners may have forgotten is that it was originally developed by the IRS in the context of tax computation for estate and gift tax purposes only.

There are also circumstances where the Fair Market Value of the business could exceed the value to the holder of the business. This may result when valuing companies in industries where there are many active buyers having resulting in many dozens of transactions (e.g. automobile distributors, etc.). Would it be fair to use Fair Market Value under those circumstances thereby effectively forcing the owner to sell the business?

There clearly is an issue related to the so-called “double-dip”. However, while this is an issue, it is not a factor, nor a component, of what should be considered in the business valuation. It is an issue of allocation and not one of valuation. The level and duration of the support payments, in conjunction with the equitably distributable business interest, are matters that fall under the purview of legal counsel and the Courts and not factors that come into play in the determination of the value of the business itself. In Orgler, the court held that taxes are a factor to be considered in effectuating equitable distribution, in the valuation of the asset itself. Similarly, in Painter the decision expressed the view that taxes should “ef-fect the allocation itself” and not the valuation.

We should be attempting to determine the value specifically to the business owner who will be retai-ning and operating the business. This is precisely what the owner will be enjoying henceforth, as opposed to determining the value that the business could immediately be sold for. The focus should be on the present value of the future income and benefits that the business owner will personally derive from the continued ownership of the business. The cash flow, pes-suities, benefits, appreciation, etc. in the future will all now inure to the business owner – all of which the spouse will forgo as a consequence of the divorce. By determining the present value of these various components you will have found a value that is “fair” and consistent with public policy in divorce.

Typically, as of the date of complaint, we know that the sale of the business was not imminent, the business owner was not retiring, and the business operator was still alive (although some spouses have been known to have questioned this as well during the mar-rriage). Therefore, the appropriate purpose in valuing the business at the date of complaint is what it was worth, at that time, to that specific business owner, as a going concern into the future. A standard that appropriately reflects this concept would thereby capture the net value that the marital partnership created.

The scenario of the continued operation of the business, as opposed to the imminent sale of the business, is an integral factor in the determination of the real marital equity of the ownership of the business. Whether we call it Fair Value, Divorce Value, or even an “Fair Value” (as certain litigants have labeled it), it must ultimately be fair in recognizing the particular circumstances of the dissolution of the marriage and not a transaction involving the sale of a business. Fair Value measurements in a divorce must be considered from the economic perspective of the business owner who is already owned and will maintain ownership of the business. Perhaps the concept of a “Marital Val-ue” would be the appropriate here – a value that is fair in a divorce setting.