

Judge Mawla With A Primer On Equitable Distribution Of Restricted Stock Units In A Divorce

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As a late-Christmas (or Holiday) gift to the matrimonial bar, the Hon. Hany A. Mawla, J.A.D., published an Opinion in M.G. v. S.M., A-1290-17T1 (App. Div. Dec. 26, 2018), regarding the equitable distribution of a plaintiff-husband's restricted stock units ("RSUs") in his divorce action. The Opinion provides a good primer on this subject, which attorneys should look to if faced with this issue (or if you face this issue in your own divorce).

By way of background, the plaintiff earned RSUs as part of his compensation; the RSUs vested over a five-year period of time. As is often the case with a divorce, some of the RSUs had already vested as of the Date of Complaint for Divorce and some were set to vest after the filing of the Complaint. The issue, therefore, is whether the post-Complaint RSUs – RSUs that would only vest if the plaintiff remained employed with the same employer – were subject to equitable distribution and, if so, to what extent.

The trial court judge concluded that the defendant-wife "was entitled to fifty percent of all stock awards made before or near the date of complaint [for divorce]." The plaintiff appealed. On appeal, Judge Mawla analyzed New Jersey decisions on this score, see, e.g., Pascale v. Pascale, 140 N.J. 583 (1995); see also Reinbold v. Reinbold, 311 N.J. Super. 460 (App. Div. 1998), as well as an out-of-state decision, see Baccanti v. Morton, 752 N.E.2d 718 (Mass. 2001). After analyzing the decisions in this area, Judge Mawla reversed and remanded for a consideration of the RSUs with the following principles in mind:

1. Where a stock award has been made during the marriage and vests prior to the date of complaint it is subject to equitable distribution;
2. Where an award is made during the marriage for work performed during the marriage, but becomes vested after the date of complaint, it too is subject to equitable distribution; and
3. Where the award is made during the marriage, but vests following the date of complaint, there is a rebuttable presumption the award is subject to equitable distribution unless there is

a material dispute of fact regarding whether the stock, either in whole or in part, is for future performance. The party seeking to exclude such assets from equitable distribution on such grounds bears the burden to prove the stock award was made for services performed outside of the marriage. That party must adduce objective evidence to prove the employer intended the stock to vest for future services and not as a form of deferred compensation attributable to the award date. Such objective evidence should include, but is not limited to, the following: testimony from the employed spouse; testimony of the employer's representative; the stock plan; any employer correspondence to the employed spouse regarding the award; and the employed spouse's stock plan statements from commencement of the award and nearest the date of complaint, along with the vesting schedule. [(Emphasis added).]

As you can see, of paramount importance is whether the post-Complaint vesting is based solely on continued employment or continued employment and performance. Although the above-quoted considerations may require additional pre-trial discovery, the information (or “proofs”) should not be hard to obtain.

Credit should be given to Judge Mawla and the Panel for publishing this decision. I often represent executives (or spouses of executives) in cases in which RSUs are at issue. Whether right or wrong, attorneys often ground their analysis of this issue based on their position in the case (i.e. whether they represent the employee-recipient or they represent the spouse who wants distribution of post-complaint RSUs). Although prior published decisions touched on this issue, the decision in M.G. v. S.M. provides further guidance and clarification to the bar. The decision can be found at: <https://www.njcourts.gov/attorneys/assets/opinions/appellate/published/a1290-17.pdf?cacheID=UAeCeg4>