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Divorce and Division of Stock Options and Restricted Stock Units

Identifying, Classifying, and Valuing Options and RSUs for Equitable Distribution and/or Income Availability

TUESDAY, NOVEMBER 8, 2022

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Neil Cahn, Principal, **Neil Cahn, PLLC**, Carle Place, NY

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Divorce and Division of Stock Options and Restricted Stock Units

Stacy Francis, CFP®, CDFA®, CES™
Shawn E. Lampron
Neil Cahn

Tuesday, November 8, 2022

Goal

- The goal of today's session is to give you an in-depth understanding of exactly how to handle, divide and distribute the most common executive compensation awards in a divorce situation.

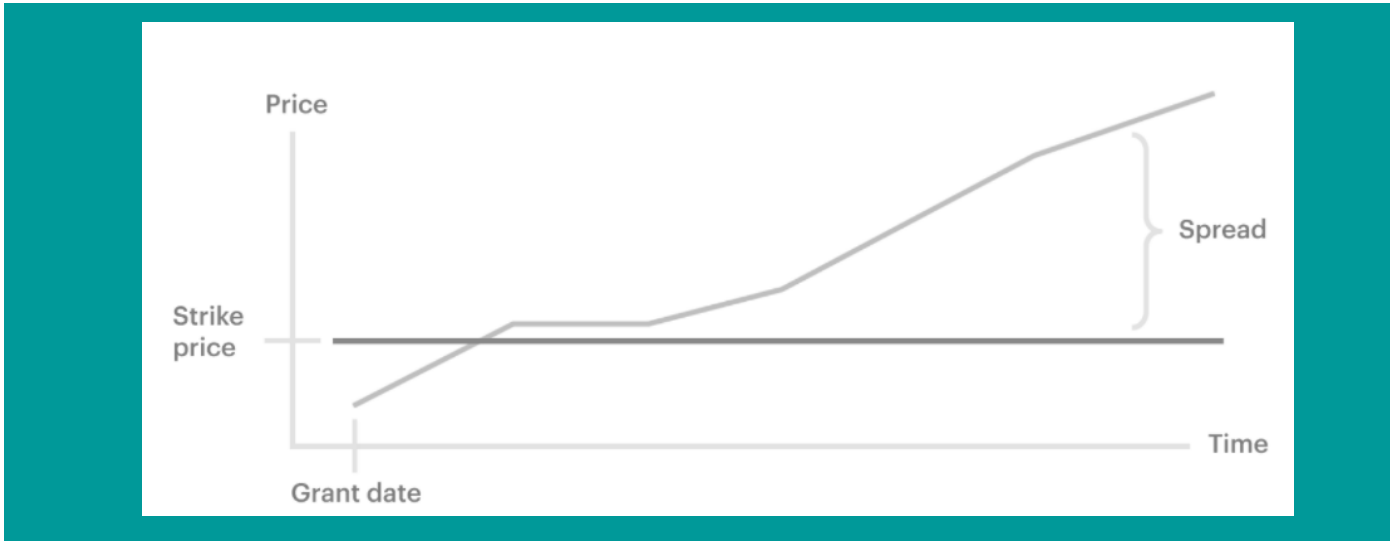
Non-Qualified Stock Option
Incentive Stock Option

How NQSOs Work

- Non-qualified stock options
  - Equity compensation to its employee
  - 15 million employees have stock option plans
  - Incentive to work hard and drive-up stock price
  - Typically given to highly compensated employees. Some companies grant to all employees.

How NQSOs Work

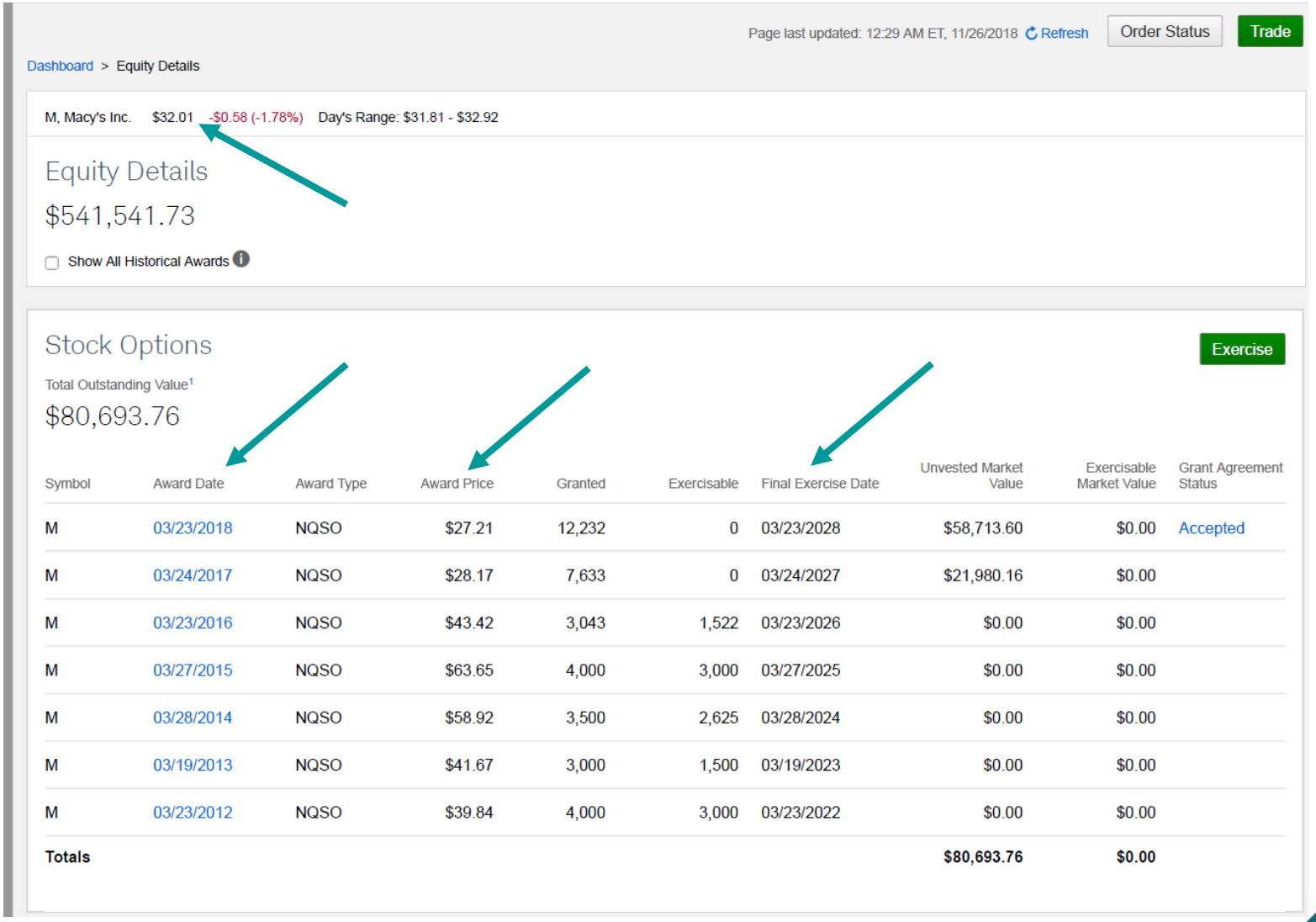
- Non-qualified stock options
  - A NQSO gives the holder the right to purchase a share of company stock at a particular price, “exercise” or “strike” price, for a set period of time, usually 10 years.
  - The strike price at which options may be "exercised" is usually the price of the company’s stock on the date the options are granted.



How NQSOs Work

- Non-qualified stock options
  - If the company performs well, the stock value will increase over the strike price, giving the options value and rewarding the employee for his/her role in the company's success.
  - NQSOs may not be exercised for a period of time, usually between one and five years, before they "vest."
    - Vesting schedules come in a variety of shapes and sizes:
      - Graded vesting: 4 years, 1 year cliff then monthly for 36 months is most common
      - Cliff vesting: 100% vests at 5 years

How NQSOs Work



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Dashboard > Equity Details

M, Macy's Inc. $32.01 -$0.58 (-1.78%) Day's Range: $31.81 - $32.92

Equity Details

$541,541.73

Show All Historical Awards

Stock Options

Exercise

Total Outstanding Value[1]

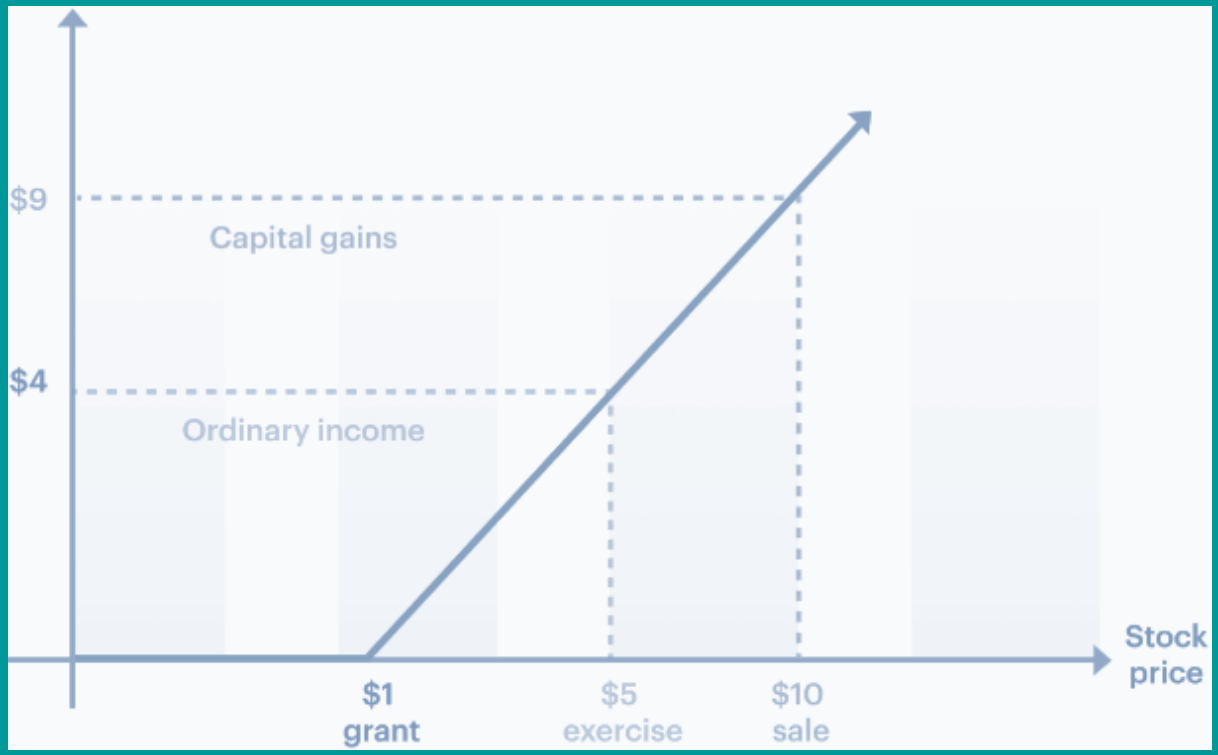
$80,693.76

Symbol	Award Date	Award Type	Award Price	Granted	Exercisable	Final Exercise Date	Unvested Market Value	Exercisable Market Value	Grant Agreement Status
M	03/23/2018	NQSO	$27.21	12,232	0	03/23/2028	$58,713.60	$0.00	Accepted
M	03/24/2017	NQSO	$28.17	7,633	0	03/24/2027	$21,980.16	$0.00	
M	03/23/2016	NQSO	$43.42	3,043	1,522	03/23/2026	$0.00	$0.00	
M	03/27/2015	NQSO	$63.65	4,000	3,000	03/27/2025	$0.00	$0.00	
M	03/28/2014	NQSO	$58.92	3,500	2,625	03/28/2024	$0.00	$0.00	
M	03/19/2013	NQSO	$41.67	3,000	1,500	03/19/2023	$0.00	$0.00	
M	03/23/2012	NQSO	$39.84	4,000	3,000	03/23/2022	$0.00	$0.00	
Totals							**$80,693.76**	**$0.00**	

Taxes On NQSOs

- Non-qualified stock options
  - When you exercise NQSOs, the difference between the fair market value of the stock and the exercise price (called the spread) is taxed as ordinary earned income.
  - Subject to income taxes
  - Subject to employment taxes (Social Security and Medicare) at employee spouse's tax rate.
  - If you hold the stock after exercise for more than one year, all additional gains are taxed as a capital gain (or as a capital loss if the stock goes down).

Taxes On NQSOs



How ISOs Work

- Incentive stock options
  - An ISO gives the holder the right to purchase a share of company stock at the “exercise” or “strike” price, for a set period of time, usually 10 years.
  - Like NQSOs, ISOs are incentive to work hard and drive-up stock price
  - The strike price at which ISOs may be exercised is the fair market value of the company’s stock on the date the options are granted.
  - Subject to vesting, like NQSOs. Typically 4 years, 1 year cliff of 25%, then 1/48th monthly
  - ISOs are non-transferable; can’t transfer on divorce as ISO

Taxes On ISOs

- Incentive stock options
  - When you exercise ISOs, no tax
  - If employee is subject to AMT, difference between fair market value of the stock and the exercise price (spread) is added to alternative minimum taxable income (AMTI).
  - Not subject to income taxes; not subject to employment taxes.
  - Taxes depend on how long the option/stock are held; if 2 years from grant and stock is held for >1 year after exercise, all gains are taxed as a capital gain.
  - If 2 year/1 hear holding period, not met, portion of gain will be ordinary income. Tax paid at time of sale.

Stock Option Valuation Methods

Stock Option Valuation Methods

- Intrinsic Value Model
  - Value is the difference between the market value of the stock as the date of valuation (date of divorce) and the strike price.
    - Simple
    - Judges understand

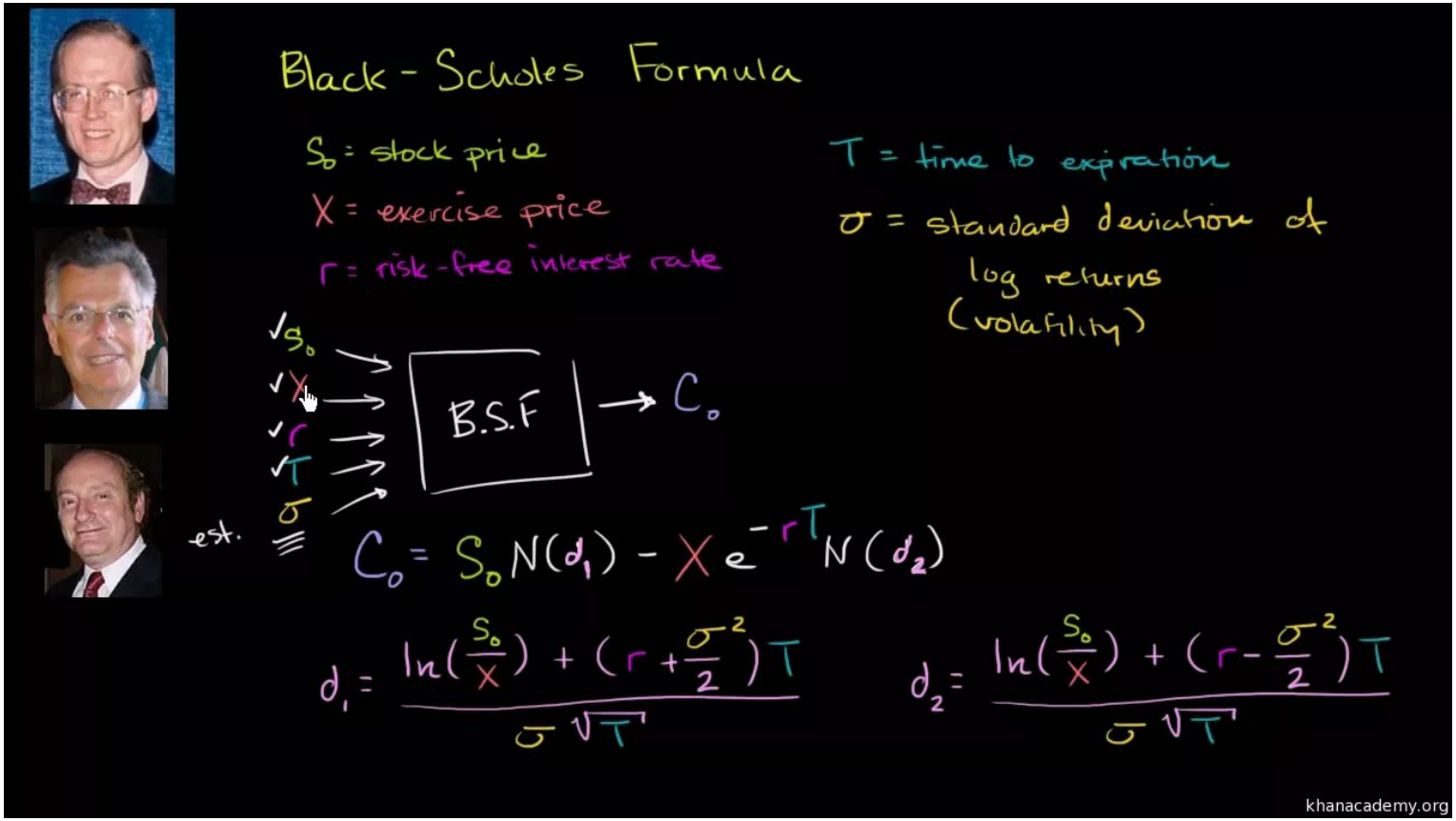
Non-Qualified Stock Option Valuation Methods

- Black- Scholes Pricing Model
  - Factors in:
    - Strike price
    - Time to NQSO expiration
    - Historical price volatility
    - Risk free rate of return

Pros	Cons
• Most widely used valuation method • Can attribute value to NQSOs underwater • Tends to produce a higher value	• Complicated • Some judges don't understand • Assumes employee holds until maturity • Does not consider tax hit of exercising NQSOs

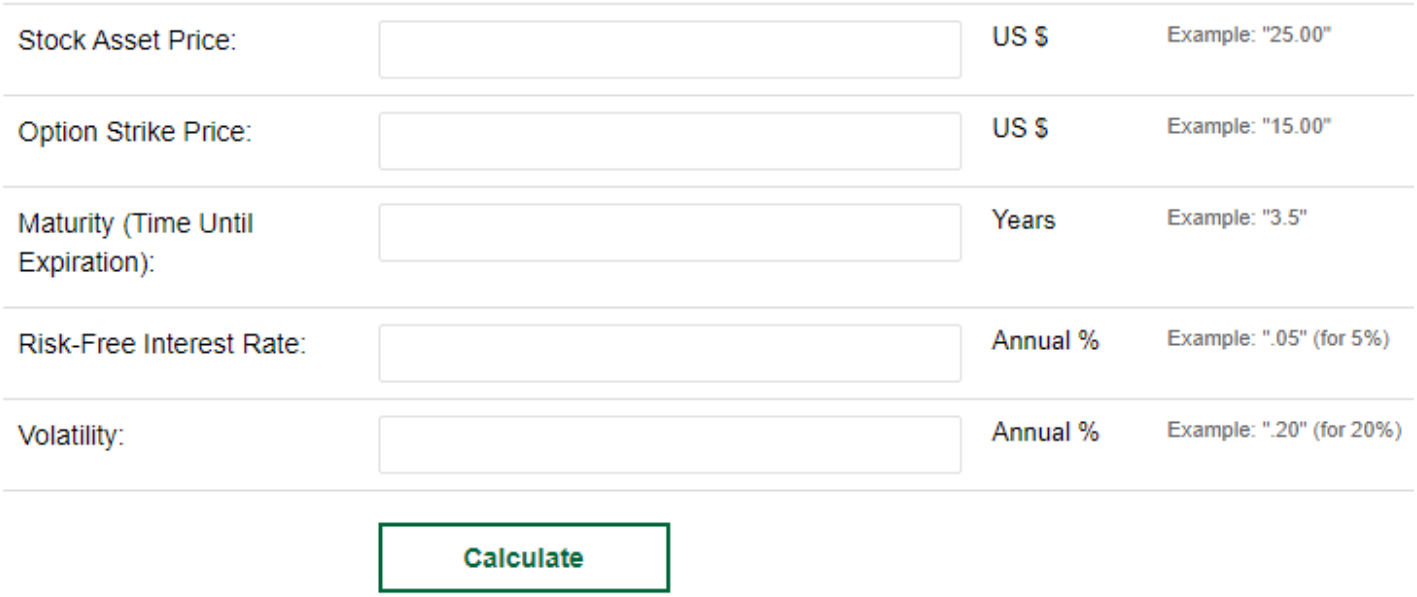
Non-Qualified Stock Option Valuation Methods

- The actual Black-Sholes formula looks complicated but is composed of these basics.



Non-Qualified Stock Option Valuation Methods

https://www.erieri.com/blackscholes



- *This calculator does not consider dividends paid on your stock and would thus not be accurate for companies that pay them.*

Non-Qualified Stock Option Valuation Methods

- Binomial Method
  - Creates a tree of possible NQSO values based on the same variables as the Black-Scholes method.

Pros	Cons
• Can attribute value to NQSOs underwater • Tends to produce a lower value • Takes into account the early exercise NQSOs	• Less widely used valuation method • Complicated • Some judges don't understand • Does not consider tax hit of exercising NQSOs

Stock Option Valuation Methods

- 409A Valuation
  - Private companies obtain independent valuations from independent appraisers to avoid penalties for granting discount options under IRC Section 409A
  - For non-traded stock, fair market value would ordinarily be determined by reference to 409A value

Restricted Stock and Restricted Stock Units (RSUs)

How Restricted Stock Works

- Restricted Stock
  - Form of stock-based employee compensation.
  - Stock can be purchased for a price (usually FMV) or given as consideration for services (“free”)
  - Restricted during a vesting period that may last several years, during which time stock cannot be sold.

How Restricted Stock Works (2)

- Restricted Stock
  - Vesting imposed through a repurchase right; issuer can repurchase unvested stock at cost on termination of employment (cost can be FMV on purchase date or zero)
  - Once vested, if issuer's stock is publicly traded, the vested shares are like any other shares of company stock.
  - Once vested, if issuer's stock is NOT publicly traded, the vested shares are owned but likely can't be sold or transferred prior to a liquidity event.

How RSUs Work

- Restricted Stock Units (RSUs)
  - Form of stock-based employee compensation.
  - Not stock – right to receive stock in the future
  - Restricted during a vesting period that may last several years, during which time they cannot be sold.
  - Once vested, issuer will settle the RSU, meaning shares will be transferred to the RSU holder
  - Once RSU is settled, owned shares are like any other shares of company stock.
  - Vesting can be based on:
    - Continued employment
    - Performance benchmarks

Restricted Stock and RSUs More Popular

- Top 10 Companies That Offer RSUs

Taxes on Restricted Stock

- Entire value of stock (less basis if stock was purchased) included as ordinary income in the year of vesting (unless 83(b) filed).
- Important for consideration of child support, alimony and distribution.
- Employer must collect income and employment taxes on vesting
- If you hold the stock after vesting for more than one year, all additional gains are taxed as a capital gain (or as a capital loss if the stock goes down).
  - Employee must pay ordinary income tax upon vesting even if decide to hold onto the shares and sell at later date.

Taxes on RSUs

- Entire value of stock included as ordinary income in the year of settlement.
- Important for consideration of child support, alimony and distribution.
- If you hold the stock after settlement for more than one year, all additional gains are taxed as a capital gain (or as a capital loss if the stock goes down).
  - Employee must pay ordinary income tax upon receipt even if they decide to hold onto the shares and not sell until a later date.

Taxes on RSUs (2)

- Employer must collect employment taxes (Social Security & Medicare) on vesting
- Employer must collect income taxes on settlement
- Most publicly traded companies vest and settle close to the same day
- Withholding taxes typically paid by selling vested shares in the market (sell to cover)
- Some issuers choose to withhold shares and use their own cash to fund withholding taxes
- Net number of shares issued on settlement of RSUs deposited to employee's brokerage account

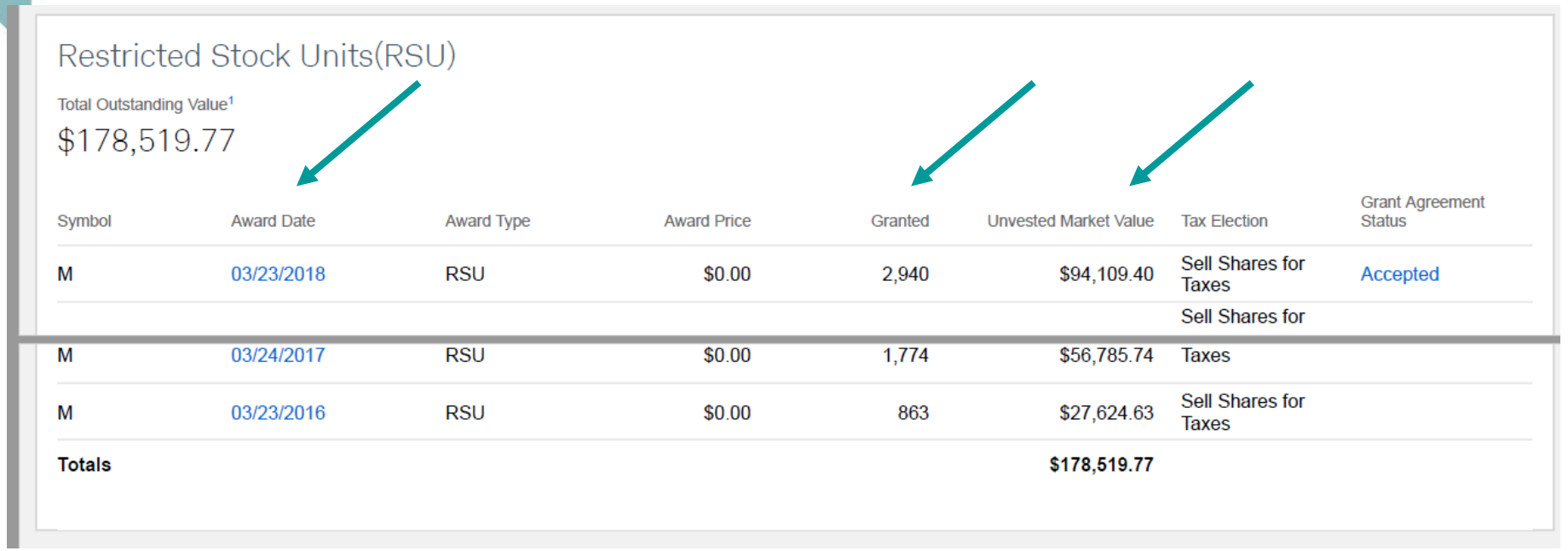
Taxes on RSUs (3)

- Challenges for Private Companies
- Need to pay withholding taxes on vesting and settlement is a challenge where issuer is not publicly traded
- No public market to permit sell to cover and issuer unlikely to use its own cash to fund taxes
- Most private companies vest on one day and settle later
- Deferring settlement implicates IRC Section 409A; limits how far in the future taxes can be deferred
- No public market makes it difficult to ascertain value; 409A value can be used

Taxes on RSUs (4)

- To solve problem of taxes due on settlement of RSUs, Fenwick created two-tier or double trigger RSUs
- RSUs vest based on two events: a time or service based vesting condition and a liquidity event
- Liquidity event defined as initial public offering (IPO) or change in control (CIC)
- No vesting until public market on IPO or publicly traded stock or cash proceeds on CIC to permit sell to cover or issuer can use its own cash to fund taxes
- RSUs must vest (IPO/CIC must happen) during term of RSU, usually 7-year term
- If no liquidity, RSU will be forfeited

How Restricted Stock and RSUs Work



Restricted Stock Units(RSU)

Total Outstanding Value[1]

$178,519.77

Symbol	Award Date	Award Type	Award Price	Granted	Unvested Market Value	Tax Election	Grant Agreement Status
M	03/23/2018	RSU	$0.00	2,940	$94,109.40	Sell Shares for Taxes	Accepted
M	03/24/2017	RSU	$0.00	1,774	$56,785.74	Sell Shares for Taxes	
M	03/23/2016	RSU	$0.00	863	$27,624.63	Sell Shares for Taxes	
Totals					**$178,519.77**		

Discovery of
Stock Options, Restricted Stock and RSUs

Identify What You Need to Know

- Documentation needed in divorce
  - ISOs, NQSOs and RSUs in a Public Company
    - Most company employee equity plans are administered by large financial company 3rd parties
    - "Typically" not difficult to get information
    - Online portal through 3rd party (e.g., Merrill Lynch, Shareworks, Etrade)

Discovery Of Stock Options, Restricted Stock and RSUs

- Knowing if RSUs exist may not be obvious to the non-employee spouse
- RSUs don't appear on tax returns, W-2s, or other financial statements unless stock is vested
- For a spouse looking to hide assets, it's easy to "forget" about unvested restricted stock

Discovery of Stock Options, Restricted Stock and RSUs

- Documentation needed in divorce

Plan document and summary plan description and all amendments	Annual statement of employee benefits
Award letter	Transaction history of past exercises
Employment offer letter/ Employment contract	Employee Manual/ Handbook
Paycheck	W-2

Discovery of Stock Options, Restricted Stock and RSUs

- Company procedures for liquidating and/or transferring stock in a divorce
- Trading restrictions, as well as SEC rules
- Tax treatment
- Disability or death of employee spouse
- Termination clauses/ receipt deferral

The Cases

The Main Questions

Are unvested Stock Options and Restricted Stock Units property?

- If so, to what extent are they marital or community property?
- If so, to what extent are they separate property?
- If so, how are they to be valued?
- If so, how are they to be divided?

Important Dates

- Date of Hire
- Date of Marriage
- Date of Separation
- Date of Commencement of Divorce Action
- Date of Trial
- Date of Divorce Decree
- Date of Award Grant
- Date of Prior Award Grant
- Date of Vesting
- Date of Exerciseability
- Date of Exercise

Cases Holding Awards Granted Before the Date of Separation (or Commencement) Are All Marital

- *In re Marriage of Hug*, 154 Cal. App. 3d 780, 201 Cal. Rptr. 676 (1984): ***the leading "time-rule" case***:
- there was nothing about the option plan that required the finding that the options were granted on account of future services only.

- *Green v. Green*, 64 Md. App. 122, 494 A.2d 721 (1985):
- Because the plans in the case sub judice granted stock options to the appellee while he was married to the appellant, those options were 'acquired' during the marriage
- ***But****, Otley v. Otley,* 147 Md. App. 540, 810 A.2d 1 (2002):
- Use a coverture fraction, if, as and when

- *Smith v. Smith*, 682 S.W.2d 834 (Mo. Ct. App. 1984)

- *M.G. v. S.M.*, 457 N.J.Super. 286 (2018):

Unvested Awards Are All Marital Property

- *DeJesus v. DeJesus*, 90 N.Y.2d 643, 650, 665 N.Y.S.2d 36, 40, 687 N.E.2d 1319, 1323 (1997):
  - Any portions of the stock plans which are intended as compensation for past services are deemed marital property to the extent that the marriage coincides with the period of the titled spouse's employment, up until the time of the grant.
- *Golden v. Cooper-Ellis*, 2007 VT 15, ¶ 24, 181 Vt. 359, 371, 924 A.2d 19, 29-30 (2007)
  - If award is for past services, it is all marital property regardless of vesting
    - *In re Marriage of Miller*, 915 P.2d 1314 (Colo. 1996):
      - Because the husband had already earned the right to receive those shares, they represent a form of deferred compensation and thus constitute marital. That the husband's full enjoyment of the benefit is conditioned on his remaining an employee affects the present value of the restricted stock shares, not their marital nature. Therefore, we conclude that the restricted stock shares constitute marital property for purposes of the Act and should be divided accordingly
- *Jensen v. Jensen*, 824 So. 2d 315, 316 (Fla. Dist. Ct. App. 2002)

Unvested Awards Are All Marital Property

- *Bornemann v. Bornemann*, 245 Conn. 508, 509, 752 A.2d 978, 981 (1998):
  - The trial court's determination that the options were earned prior to the dissolution was supported by the evidence, so that no apportionment between compensation for past and future services was necessary.
- *In re Fatora*, File No. CN95-10406, 1998 Del. Fam. Ct. LEXIS 195, at *1 (Fam. Ct. July 10, 1998):
  - to the extent the options were received at least in part for services rendered during marriage (whether compensation for past services, an incentive for future services, or both) they are ... marital property”

Grants Awarded After Commencement But Before Decree

- *Chen v. Chen*, 142 Wis. 2d 7, 416 N.W.2d 661 (Ct. App. 1987):
  - The marital estate is not to be limited to assets in existence at the time of the parties' separation but is to include assets as they exist at the time of the divorce.
- *Marriage of Scanlon*, 2003 ML 3488, 2003 Mont. Dist. LEXIS 1611:
- *M.G. v. S.M.,* 457 N.J. Super. 286,302, 199 A.3d 318, 329 (Super. Ct. App. Div. 2018:):
  - There is a rebuttable presumption the award is subject to equitable distribution.
- *Otley v. Otley*, 147 Md. App. 540, 810 A.2d 1 (2002):
  - The date of divorce is the applicable date for the determination of marital property.

Cases Holding Non-Vested Awards Are All Separate Property

- *Hall v. Hall*, 88 N.C. App. 297, 363 S.E.2d 189 (1987):
  - Options which are not exercisable as of the date of separation and which may be lost as a result of events occurring thereafter, and are, therefore, not vested, should be treated as the separate property of the spouse for whom they may, depending upon circumstances, vest at some time in the future. In our view, this rule more closely recognizes the purpose of stock options granted an employee which are designed so that they vest and become exercisable over a period of time; such options represent both compensation for the employee's past services and incentives for the employee to continue in his employment in the future. Those options which have already vested are clearly rewards for past service rendered during the marriage, and, therefore, are marital property; options not yet vested are in essence, an expectation of a future right contingent upon continued service and should be considered separate property.
- *Pianalto v. Pianalto*, 2010 Ark. App. 80, 374 S.W.3d 67 (Ct. App.)
- *Schiavone v. Schiavone*, No. 314058, 2014 Mich. App. LEXIS 650 (Ct. App. Apr. 10, 2014)
- *Skelly v. Skelly*, 286 Mich. App. 578, 780 N.W.2d 368 (2009)
- *Hagen v. Jones-Hagen*, No. 270930, 2008 Mich. App. LEXIS 699, at *9 (Ct. App. Apr. 3, 2008)

It's Not All or Nothing
Apportion Between Whether Award is For Past or For Future Services

- *MacAleer v. MacAleer,* 1999 PA Super 35, 725 A.2d 829 (1999):
  - Because a stock option may be awarded for a variety of purposes, including compensation for past or present services or as an incentive for future services, the purpose(s) for which the option was granted must be considered. If the employer awards a stock option solely to compensate the employee for past services, then the option is deemed to be earned when awarded. If awarded for future services, then the option is deemed to be earned when the right to exercise the option matures.
- *In re Marriage of Miller*, 915 P.2d 1314 (Colo. 1996):
  - Upon making that determination, the trial court should then determine an appropriate means of evaluating those portions of the stock options that reflect compensation for future services. The portions of the stock options granted in consideration of past services may, as we have indicated, constitute marital property in their entirety.
- *Brebaugh v. Deane*, 211 Ariz. 95, 118 P.3d 43, 45 (Ct. App. 2005):

The "Time Rule"

- *In re Marriage of Hug*, 154 Cal. App. 3d 780, 201 Cal. Rptr. 676 (1984):
  - [Date of Hire] to [Date of Separation]

  - [Date of Hire] to [Date of Vesting]
    - It was not an abuse of discretion, under the facts of this case, for the trial court to allocate those interests by applying a time rule, finding that the number of options determined to be community property is a product of a fraction in which the numerator is the period in months between the commencement of the spouse's employment by the employer and the date of separation of the parties, and the denominator is the period in months between commencement of employment and the date each option is first exercisable, multiplied by the number of shares which can be purchased on the date the option is first exercisable. The remaining options are the separate property of the employee.

- *See, also. In re Marriage of Cheriton*, 92 Cal. App. 4th 269, 286 n.6, 111 Cal. Rptr. 2d 755, 767 (2001)

Hug Cases

- *Grich v. Grich*, FA93 525311S, 1996 Conn. Super. LEXIS 3451 (Super. Ct. Dec. 31, 1996): [*Award is for future services*]
- *McKeon v. Lennon*, 321 Conn. 323, 138 A.3d 242 (2016)
- *Ruberg v. Ruberg*, 858 So. 2d 1147, 1154-55 (Fla. Dist. Ct. App. 2003): [*Award is for future services*]
- *Robertson v. Robertson*, 381 N.J. Super. 199 (App. Div. 2005): [Stock options given as a **signing bonus** are for future services]

Date of Grant to Date of Separation or Commencement

Date of Grant to Date of Vesting

- *In re Marriage of Nelson*, 177 Cal. App. 3d. 150 (Ct. App. 1986):
  - Our reading of *In re Marriage of Hug* convinces us that no modification of the trial court's formula for apportionment is necessary. *Hug* specifically states, "we stress that no single rule or formula is applicable to every dissolution case involving employee stock options. Trial courts should be vested with broad discretion to fashion approaches which will achieve the most equitable results under the facts of each case." We find nothing inequitable in the formula adopted by the trial court; in fact, under the circumstances of this case it was probably a better method of division."
- *Davidson v. Davidson*, 254 Neb. 656, 578 N.W.2d 848 (1998):
  - "If, however, the option or retention share is granted during the marriage and will vest sometime after dissolution, ***the percentage of future services, if any, is determined by a fraction.*** The numerator is the period of time from the date of the grant until dissolution, and the denominator is the period of time from the date of the grant until the employee stock option vests." [***So, the fraction determines the allocation between compensation past and future***]

For Future Services, Only

- *Garcia v. Mayer*, 1996-NMCA-061, 122 N.M. 57, 920 P.2d 522 (1996):
  - As a general rule, for future services, date of grant to date of separation / date of grant to date of vesting; ***but*** not under the unique circumstances of that case where date of vesting was accelerated to be one day after decree.
- *DeJesus v. DeJesus*, 90 N.Y.2d 643, 665 N.Y.S.2d 36, 687 N.E.2d 1319 (1997):
  - that portion intended as incentive for future services, the marital portion is determined by a time rule like that employed by the California Court of Appeals in *In re Marriage of Nelson*.

For Both Past and Future Services

- *Wendt v. Wendt*, 59 Conn. App. 656, 757 A. 2d 1225 (App. Div. 2000):
  - The court's selection of the date of grant as the start date for determining the numerator of the coverture factor appropriately accounts for the fact that **the primary purpose of the unvested stock options was to compensate the defendant for performance occurring after the date of the granting of the options**. Accordingly, the selection of the options grant date as an appropriate marker for calculating coverture was within the court's discretion. Similarly, the court properly selected the date of separation as a coverture factor because it found that the plaintiff had ceased contributing to the marital assets on that date. [***for both past and future services***]
- *Hansel v. Holyfield*, 00-0062 (La. App. 4 Cir 12/27/00), 779 So. 2d 939, 945:
  - The trial court found that the stock options granted to Mr. Hansel served a dual purpose of rewarding him for past service and as an incentive for future performance. Based on this, the trial court ruled that the options should be pro-rated based on the amount of time between the grant date and the vesting date that took place during the community. This is in accordance with the principle that HN6 the determinative factor is whether work performed during the existence of the community was taken into consideration in granting the option.
- *Brebaugh v. Deane*, 211 Ariz. 95, 118 P.3d 43, 45 (Ct. App. 2005):
  - If even in part for future services, use a the time rule

Date of Grant to Date Divorce

Date of Grant to Date of Vesting

- *Salstrom v. Salstrom*, 404 N.W.2d 848 (Minn. Ct. App. 1987):
  - use *Hug* rule, but "Modifications of the rule may be warranted, especially because in Minnesota property is marital until the date of dissolution" "*Hug* also stresses that the time rule is not inflexible and can be modified depending upon the particular facts of the case, including the different purposes to be served by the stock options."
- *Otley v. Otley*, 147 Md. App. 540, 810 A.2d 1 (2002)
- *Duty v. Duty*, 2007 OK CIV APP 43, 162 P.3d 939:
  - We determine stock options can be marital property even if they are unvested at the time of the divorce decree and contingent upon conditions such as continued employment. . . .The court found Husband was entitled to two-thirds of the stock options, and Wife was only entitled to one-third because Husband had to continue to work to make the options vest. The court order finding the stock options were marital property and dividing the options was based on the evidence and was not an abuse of discretion.
- *Powell & Powell*, 147 Or. App. 17, 934 P.2d 612 (1997)

Date of Grant to Date Divorce

Date of Grant to Date of Vesting

- *Pascale v. Pascale*, 140 N.J. 583, 660 A.2d 485 (1995):
  - ***Stock options awarded after the marriage*** has terminated but obtained as a result of efforts expended during the marriage should be subject to equitable distribution (here, after complaint but before judgment). The court held that appellant's stock options ***awarded 10 days after she filed for divorce*** were obtained as a result of efforts expended during the marriage and were subject to equitable distribution. [*Grants awarded after Equitable Distribution cutoff (date of commencement)*]

The “Short Time Rule” (First to Vest):

- *Marriage of Short*, 125 Wn.2d 865, 890 P.2d 12 (Wash. 1995) [*For future services*]:
  - Unvested employee stock options granted during marriage for present employment services, assuming the parties were not "living separate and apart" under RCW 26.16.140 when the stock options were granted, are acquired when granted. Unvested employee stock options granted for future employment services are acquired over time as the stock options vest.
  - After determining whether employee stock options were granted to compensate the employee for past, present, or future employment services, the "time rule" is applied. For future employment services, the "time rule" is applied to the first stock option to vest after the parties are found to be "living separate and apart". This is the lone stock option that includes both a community effort and a separate effort. ***We do not apply the "time rule" to every stock option that vests after the parties are found to be "living separate and apart"*** because to do so ignores the separate property provisions of RCW 26.16. Multiple stock options granted for future services vest consecutively, not concurrently. Such a ruling insures that stock options are characterized and apportioned to reflect their marital and nonmarital aspects. This interpretation of the "time rule" differs from that announced in *In re Marriage of Hug*.
  - *In re Batra v. Batra*, 135 Idaho 388 (Ct. App. 2001) [*For both past and future services*]:

Statutes

- Texas Fam. Code § 3.007(d)(2):
  - provides how to calculate which portion of such stock options, if any, are separate property.
  - *See*, *Depriest v. Depriest*, 2022 Tex. App. LEXIS 4178 (2022)
- Virginia Code §20-107.3(G): Stock options are deferred compensation.
  - "Marital share" means that portion of the total interest, the right to which was earned during the marriage and before the last separation of the parties, if at such time or thereafter at least one of the parties intended that the separation be permanent.
  - *Dietz v. Dietz*, 17 Va. App. 203, 436 S.E.2d 463 (1993)
  - *Mann v. Mann*, 22 Va. App. 459, 470 S.E.2d 605 (1996)
  - *But see, Schuman v. Schuman*, 282 Va. 443, 717 S.E.2d 410 (2011)

Post-Divorce Grants

- *Goodwyne v. Goodwyne*, 639 So. 2d 1210 (La. Ct. App. 1994):
  - the husband was granted stock options in 1986, after the dissolution, yet the court partitioned this option along with the rest. The court stated that "the determinative factor is whether work performed during the existence of the community was taken into consideration in granting the option. Since the stock option was based partly upon work performed in 1985, the trial court's factual finding", giving the wife part of the proceeds, was affirmed.
- Rejected in *Clance v. Clance*, 127 S.W.3d 716 (Mo. Ct. App. 2004):
  - The court observed that the husband did not have an enforceable right to the stock options at any time during the marriage; hence, the trial court did not have jurisdiction under Mo. Rev. Stat. § 452.330 to divide them between the parties. [*Does this mean that no portion of unvested stock options are marital?*]
- *Ettinger v. Ettinger*, 1981 OK 130, 637 P.2d 63 (1981): [*no jurisdiction to award*]
- *Callahan v. Callahan*, 142 N.J. Super 325 (Ch. Div. 1976): [*court was unaware of grant at the time of the original distribution*]

Premarital Issues

- *Demo v. Demo*, 101 Ohio App. 3d 383, 655 N.E.2d 791 (1995):
  - The court stated that these options granted shortly after marriage, were in recognition for services performed before the marriage and awarded them as separate property to the employee spouse. [*The period of time between grant and vesting was not considered to be marital; no portion of options awarded for future services*]

Issue of Proof

- Factors:
  - Were they intended to:
    - secure optimal tax treatment
    - induce the employee to accept employment
    - induce the employee to remain with the employer
    - induce the employee to leave his or her employment
    - reward the employee for completing a specific project or attaining a particular goal
  - Were they granted on a regular or irregular basis

- *Anderson v. Anderson*, 2020-Ohio-4415 (Ohio Ct. App. 2020): [*no evidence that the company granted the stock as a motivation for future performance or an incentive for continued employment*]
- *Baccanti v. Morton*, 434 Mass. 787, 752 N.E.2d 718 (2001)
- *Davidson v. Davidson*, 254 Neb. 656, 578 N.W.2d 848 (1998)

Evidence

- Plan and award documents
- Frequency of awards
- Testimony from the employee
- Testimony from employer’s representative
- Testimony from an expert witness

Division if, as, and When (Constructive Trust)

- *Smith v. Smith* (Mo. App. 1984), 682 S.W.2d 834: Distribution of one-half of certain stock options to each party with the husband retaining the right to decide to exercise the options. The wife was to be given 30 days' notice and had to pay for her portion.

- *Green v. Green*, 64 Md. App. 122, 494 A.2d 721 (1985): The husband could not be compelled to exercise his stock options. However, the trial court could determine a percentage to each spouse by which the profits would be divided, *if, as and when* the options were exercised.

- *In re Marriage of Frederick*, 218 Ill. App. 3d 533, 541, 161 Ill. Dec. 254, 261, 578 N.E.2d 612, 619 (1991): The husband would have the sole discretion to exercise the options. The trial court also retained jurisdiction to allocate the profits. *See, also*, *In re Marriage of Isaacs*, 260 Ill. App. 3d 423, 198 Ill. Dec. 169, 632 N.E.2d 228 (1994)

Constructive Trust (*cont.*)

- *Dermigny v. Dermigny*, 2004 NYLJ LEXIS 619 (N.Y. Sup. Ct. Queens Co. 2004)
- *Otley v. Otley*, 147 Md. App. 540, 810 A.2d 1 (2002)
- *Baccanti v. Morton*, 434 Mass. 787, 752 N.E.2d 718 (Mass. 2001)
- *Salstrom v. Salstrom*, 404 N.W.2d 848, 850-51 (Minn. Ct. App. 1987)

Compelled Exercise

- *In re Marriage of Micheli*, 2014 IL App (2d) 121245, ¶ 33, 383 Ill. Dec. 734, 742, 15 N.E.3d 512, 520:
  - The trial court ordered that the husband "shall immediately exercise all Allstate vested stock options and vested [RSUs] held in the Fidelity account and the net value, after taxes are paid, shall be equally divided between the parties. *[Appellate court reversed as to the unvested RSUs, not the vested RSUs; Query: why not direct H to sell only the Wife's half of the vested RSUs?*]
- *Najt v. Najt*, 2007 Mich. Cir. LEXIS 510 (Sixth Judicial Circuit Court of Michigan, Oakland County):
  - the Plaintiff shall hold one-half of any and all such Stock Options/Awards in trust for and as custodian for Defendant. Plaintiff shall exercise each such Stock Option/Award on the earlier of his exercise of the share of such Award allocated to him hereunder or upon Defendant's written direction, whichever shall first occur.
- *Marriage of Scanlon*, 2003 ML 3488, 2003 Mont. Dist. LEXIS 1611:
  - The Husband was given two choices:
    - Choice No. 1: Cash the options immediately.
    - Choice No. 2: Husband may choose to retain the stock options until specified dates in 2004 and 2005 in the hope that they will increase in value. If he chooses this option, then no later than December 31, 2003, he shall pay the wife for her one-half share of the options at the current market value of the stock options as of the date of this Decree.

Company Procedures for Liquidating and/or Transferring Stock Subject to Divorce

Two Main Ways To Divide NQSOs and RSUs

- Option 1:
  - "In Kind" deferred division.
    - Employee spouse continues to hold the unvested NQSOs or RSUs in his/her name until vesting and delivery.
    - At that time, the non-employee spouse would receive their share of the vested stock.
      - Vast majority of employee stock option and RSU plans explicitly prohibit the assignment or transfer of rights in the awards.
        - Held in constructive trust
        - Include directive language
      - Typically, taxable to the employee spouse and must be accounted for in the divorce agreement or Court Order.

Two Main Ways To Divide NQSOs and RSUs

- Option 2:
  - Value Options/ RSUs and Buyout
    - The employee spouse can keep the NQSOs/ RSUs and buy out the other spouse's interest based on the current value.
      - Take taxes into consideration
      - Significant single stock risk
      - Take into consideration future growth rates
        - Amazon stock vs. house

Pros vs. Cons "In Kind" Deferred Division and Buyout

Pros	Cons
• Simple • Equal to each party • Shared upside and downside • Removes issue about future valuation and growth • Sharing of single stock risk	• Value at vesting unknown • Delayed receipt of value due to vesting schedule • Taxes to employee spouse at vesting requires calculation • Subject to forfeiture due to nonperformance or termination • Subject to claw back • Subject to company's provisions in event of disability and death

Case Law

Valuations

- *Green v. Green*, 64 Md. App. 122, 494 A.2d 721 (1985): [*Present value*]
- *Golden v. Cooper-Ellis*, 2007 VT 15, 181 Vt. 359, 924 A.2d 19 (2007): [*The Court adopted a valuation roughly in the middle of the values proffered by the expert witnesses. Based on that valuation, it split the transferable stock options, giving each party fifty percent. It left the incentive stock options, which cannot be transferred, with husband*.]
- *Everett v. Everett*, 195 Mich. App. 50, 489 N.W.2d 111 (1992): [Current market price less exercise price: *The present value of stock options is calculated by subtracting the option cost from the market price of the stock. If the market price of the stock is lower than the option cost, then the options are worthless and need not be allocated between the parties.*]
- *Richardson v. Richardson*, 280 Ark. 498, 659 S.W.2d 510 (1983): [*To determine the value to give the wife for the stock options, the court subtracted the cost of exercising from the stock price on the day of trial and awarded the wife one-half of this amount. The court was silent regarding fees or taxes involved in exercising the options, and subsequently selling the shares for this profit*.]

Tax Considerations

- *In re Marriage of Harrison*, 179 Cal. App. 3d 1216, 1227-28, 225 Cal. Rptr. 234, 240-41 (1986):
  - The wife's last quarrel with the treatment of Loral stock is that the court erred in using an effective rate of 61 percent to determine the federal and state income tax impact on the net gain apportioned between the parties. The court's finding on this issue is supported by the evidence presented at the April 22, 1983, hearing.
- *In re Marriage of Nelson*, 177 Cal. App. 3d 150, 155, 222 Cal. Rptr. 790, 793 (1986):
  - In distributing community assets, a trial court is obliged to consider tax consequences only where it is proven that an immediate and specific liability will arise upon the ordered division. In the situation at hand, the time at which a tax liability may arise and the extent of that tax liability are exclusively within Harold's control. He is under no obligation as a result of the interlocutory judgment to immediately exercise the options. CA(4b) (4b) "The trial court need not . . . consider tax consequences that may or may not arise after the division of the community property." This is not to say that the trial court erred in ordering that Harold be issued a credit against possible tax liability and establishing a mechanism for possible future credits.
- *Hansel v. Holyfield*, 779 So. 2d 939, 944 (La. App. 4 Cir 2000):
  - *It is inequitable to value the stock without taking into account the tax liability*. at trial, Mr. Hansel submitted evidence that he is subject to the maximum applicable tax rate (39.5% in federal taxes and 6% in state taxes). Although it is possible that Mr. Hansel may be taxed at a lower rate, the rate of taxation is no more speculative than the value of the stock options themselves. We look to the date of trial to determine what the tax liability would have been had all the options been exercised at that time and give Mr. Hansel the appropriate tax credit.

Income and Support Issues

- *Seither v. Seither*, 779 So. 2d 331, 331 (Fla. Dist. Ct. App. 1999): Stock options are not an asset to be divided; use for income purposes.
- *In re Engel v. Landman*, 221 Ariz. 504 (Ct. App. 2009): Value of appreciation of vested but unexercised options included in income for child support case.
- *Murray v. Murray*, 128 Ohio App. 3d 662 (1999): Value of appreciation of vested but unexercised options included in income for child support case.
- *McKeon v. Lennon*, 321 Conn. 323, 138 A.3d 242 (2016): Exercised stock options and restricted stock that has vested ordinarily should be considered components of a party's gross income for purposes of calculating child support.
- *Heller-Loren v. Apuzzio*, 371 N.J. Super. 518, 853 A.2d 997 (Super. Ct. App. Div. 2004): The ability to exercise stock options does not by itself give rise to "income" for purposes of defendant's child support obligation, but that the actual exercise of the options may give rise to income.
- *In re Walker v. Taylor-Walker*, 2021 IL App (1st) 192491-U, ¶ 24: Only RSUs and PSUs actually cashed were to be considered income.

Income and Support Issues (*cont.*)

- *Fischer v. Fischer*, 68 N.E.3d 603 (Ind. Ct. App. 2017): As the $[value of stock options that vested after commencement] is not an asset subject to division as marital property, it is properly considered income.
- *Penner v. Penner*, 411 S.W.3d 775 (Ky. Ct. App. 2013): *Double-Dipping*: The trial court erred in treating the husband's restricted stock shares from his employer as both marital property subject to division and income for purposes of determining child support and maintenance.
- *Ludwig v. Lamee-Ludwig*, 91 Mass. App. Ct. 36, 69 N.E.3d 1005 (2017): *Double-Dipping*: Income generated by the separate property portion of unvested options at divorce; such would not be double dipping. Moreover, While disfavored, double counting is not prohibited as a matter of law.
- *Hoegen v. Hoegen*, 89 Mass. App. Ct. 6, 43 N.E.3d 718 (2016): *Child Support case*: The trial court erred in a child support modification proceeding when it held that a father did not have to include income realized from vested restricted stock units (RSUs) in the calculation of child support

Malpractice

- *Smith v. Schram*, No. 337826, 2018 Mich. App. LEXIS 2930 (Ct. App. July 26, 2018):
  - Plaintiff claimed that Stern provided erroneous information in connection with post-judgment enforcement proceeding. Such included the stock and stock options were only worth $1.70 per share at most; the stock options were essentially worthless, considering that they were set to expire in two more years and Leider had the authority to allow the options to lapse without exercising them; plaintiff would have to pay Leider approximately $320,000 in order to exercise the options granted her under the divorce judgment if she did not settle; and that even if plaintiff had the ability to exercise the options, their net value was only about $75,000. Stern had presented three options to client: (1) settle based on unverified information; (2) spend more money to attempt obtain additional information; or (3) drop the enforcement motion and wait and see. Plaintiff chose to settle and move on with her life. Case dismissed on summary disposition.

Panel Q&A

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Stacy Francis is the President and CEO of Francis Financial, Inc., a fee-only boutique Wealth Management, Financial Planning and Divorce Financial Planning firm dedicated to providing ongoing comprehensive advice for successful individuals, couples and women in transition such as divorce or widowhood. Stacy has over 20 years of experience in the financial industry. She attended the New York University Center for Finance, Law and Taxation, where she completed the Certified Financial Planner™ (CFP®) designation. Stacy is also a Certified Divorce Financial Analyst® (CDFA®) as well as a Certified Estate and Trust Specialist (CES™). Stacy has mastered specialized training in the financial issues of divorce and is the Director of the Association of Divorce Financial Planners (ADFP) Greater New York Metro Chapter.

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Neil is a graduate of Yale College and a Law Review graduate of the Hofstra University School of Law. He has practiced law on Long Island for more than 40 years. He is also admitted in the United States District Courts, as well as the Supreme Court of the United States.

Neil Cahn has been selected as a New York Super Lawyer for the past nine years. Based on peer and judicial reviews, he has received Martingale-Hubbell's highest rating, AV® Preeminent.

Neil now serves as a Supreme Court Special Master and is former member of the Supreme Court Matrimonial Neutral Evaluation Panel. He has also served as a court-appointed arbitrator for the United States District Court for the Eastern District of New York.

Neil is a member of the Family and Matrimonial Law Committees of the American, State, and Nassau County Bar Associations (and ADR and Family Court committees, as well), and a former member of the Ethics Committee of the Nassau County Bar Association; a member of the New York Family Law American Inn of Court, the Association of Family and Conciliation Courts, and the Family & Divorce Mediation Council.

Neil has served for several years as an Adjunct Faculty Member and Instructor at the Hofstra University School of Law Family Law Trial Advocacy Program and the Family Law skills courses. Neil is active in promoting the use of the Collaborative Law Process as a member of the International Academy of Collaborative Professionals, the New York Association of Collaborative Professionals (a former member of its Board of Directors), and of Collaborative Divorce Resolutions, an interdisciplinary group of collaborative professionals.

He is a past revision author of Matthew Bender's New York Civil Practice, Matrimonial Actions, and have written and lectured for the New York State Bar Association, the State University of New York, various other bar associations and professional organizations, CLE sponsors, as well as other lay groups. My blog at www.divorceny.com, commenting on recent family law decisions, is read by thousands each month.

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Divorce and Division of Stock Options and Restricted Stock Units
The Cases

Neil Cahn

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1. May non-vested stock options be considered community or marital property at all

    a. Most of the cases deal with stock options that were granted by the employer before the commencement of the action, but not vested, not exerciseable until some point after the commencement of the action or the Judgment of Divorce.

    b. Some cases hold that they are all marital:

        i. *In re Marriage of Hug*, 154 Cal. App. 3d 780, 201 Cal. Rptr. 676 (1984): ***the leading "time-rule" case***: there was nothing about the option plan that required the finding that the options were granted on account of future services only;

        ii. *In re Marriage of Miller*, 915 P.2d 1314 (Colo. 1996): RSUs that cannot be unilaterally repudiated by HP; Because the husband had already earned the right to receive those shares, they represent a form of deferred compensation and thus constitute marital property for purposes of the Act. That the husband's full enjoyment of the benefit is conditioned on his remaining an employee affects the present value of the restricted stock shares, not their marital nature.. Therefore, we conclude that the restricted stock shares constitute marital property for purposes of the Act and should be divided accordingly.

    c. Some cases hold that they are all separate:

        i. *Hann v. Hann*, 655 N.E.2d 566 (Ind. Ct. App. 1995): "the stock options not exercisable as of the date of separation, and which will become exercisable at a particular date in the future conditioned upon Daniel's continued employment, are not subject to division as marital property." *See, also*, *Fischer v. Fischer*, 68 N.E.3d 603 (Ind. Ct. App. 2017);

        ii. *Pianalto v. Pianalto*, 2010 Ark. App. 80, 374 S.W.3d 67 (Ct. App.): The trial court's application of a North Carolina case, *Hall*, was not clearly erroneous. That case held that stock options that were not exercisable

as of the date of separation and that could be lost as a result of an event occurring thereafter were not vested and had to be treated as the separate property of the spouse for whom they could vest at some time in the future.

2. The Court needs to determine whether the stock options or RSUs were awarded for:

   a. past performance

      i. If any portion, use time rule

         (1) Brebaugh v. Deane, 211 Ariz. 95, 118 P.3d 43, 45 (Ct. App. 2005): use *Hug*

         (2) *In re Marriage of Hug*, 154 Cal. App. 3d 780, 201 Cal. Rptr. 676 (1984): ***the leading "time-rule" case***: there was nothing about the option plan that required the finding that the options were granted on account of future services only; that mere difficulty in valuing an asset was not a basis on which to refuse to divide it; and that the trial court properly exercised its broad discretion to select an equitable method of allocating the parties' property interests in those options.

         (3) *In re Marriage of Cheriton*, 92 Cal. App. 4th 269, 286 n.6, 111 Cal. Rptr. 2d 755, 767 (2001): Quoting *Hug*:

         "there is no compelling reason to require that employee stock options must always be classified as compensation exclusively for past, present, or future services. Rather, *since the purposes underlying stock options differ, reference to the facts of each particular case must be made to reveal the features and implications of a particular employee stock option.*" (In re Marriage of Hug, supra, 154 Cal. App. 3d at p. 784.) There, the court adopted a time rule for allocation, but it took pains to "stress that no single rule or formula is applicable to every dissolution case involving employee stock options." (Id. at p. 792.)"

   b. If award for past services, all marital:

(1) *Jensen v. Jensen*, 824 So. 2d 315, 316 (Fla. Dist. Ct. App. 2002): The appellate court found that the issue of whether unvested stock options were marital assets was an issue of first impression in Florida. Two expert witnesses testified that the unvested stock options were incapable of being valued or transferred at the present time. Even so, the appellate court agreed with the trial court, and found that the unvested stock options, acquired during the marriage and prior to the filing of the divorce petition, were marital property subject to equitable distribution. In the instant case, if the husband had not performed his job so well during the marriage, the stock options arguably would not have been granted to him.

c. future incentive ("golden handcuffs")

i. if all

(1) *Brebaugh v. Deane*, 211 Ariz. 95, 118 P.3d 43, 45 (Ct. App. 2005): use *Nelson* (grant to separation/to date of exerciseability)

(2) ***Mostly future:*** *Wendt v. Wendt*, 59 Conn. App. 656, 757 A. 2d 1225 (App. Div. 2000): Unvested Sock Options and RSUs given partially for future services incentive. "The [lower] court found that the "420,000 shares of [the] GE Unvested Stock Option plan . . . were granted partially for present, but largely for future services and, therefore, a coverture factor should be used to distribute the resource." "The court's selection of the date of grant as the start date for determining the numerator of the coverture factor appropriately accounts for the fact that **the primary purpose of the unvested stock options was to compensate the defendant for performance occurring after the date of the granting of the options**. Accordingly, the selection of the options grant date as an appropriate marker for calculating coverture was within the court's discretion. Similarly, the court properly selected the date of separation as a coverture factor

because it found that the plaintiff had ceased contributing to the marital assets on that date.

(3) *Ruberg v. Ruberg*, 858 So. 2d 1147, 1154-55 (Fla. Dist. Ct. App. 2003): The issue is whether at the time the grant is made the primary purpose of the grant is to provide compensation for past services or for future services. If the primary purpose is to compensate for past services, the award is a form of deferred compensation. If the primary purpose is to compensate for future services, the award is not a form of deferred compensation. The primary purpose of an option grant is, of course, a factual question that depends on the pertinent circumstances. And the expressed purpose of the employer is an important factor in determining that factual question. 1

In the instant case, the record shows that the plan documents clearly provided for option and restricted share grants to employees for future services. Likewise, the individual agreements which made the grants clearly indicate that the grants were intended as incentives for Mr. Ruberg to remain employed with the company, to render future services, and to otherwise advance the future interests of the company. *But see Jensen (marital)*

d. both

i. Determine portions

(1) In re Marriage of Miller, 915 P.2d 1314 (Colo. 1996):

(a) As to stock options: his rights under the options cannot be unilaterally repudiated by HP; In view of these considerations, we conclude that to the extent an employee stock option is granted in consideration of past services, the option may constitute marital property when granted; On the other hand, an employee stock option granted in consideration of future services does not constitute marital property until the

employee has performed those future services. Under this circumstance, *the case must be remanded to the trial court with directions to determine, with respect to each option, what portion was granted in consideration of past services and what portion was granted in consideration of future services. 9 Upon making that determination, the trial court should then determine an appropriate means of evaluating those portions of the stock options that reflect compensation for future services. The portions of the stock options granted in consideration of past services may, as we have indicated, constitute marital property in their entirety.*

(b) But see above as to RSUs

(2) *Bornemann v. Bornemann*, 245 Conn. 508, 509, 752 A.2d 978, 981 (1998): The husband was employed during the marriage with the right to receive annual stock options while employed. Following the separation of the parties, but prior to the dissolution of the marriage, the husband entered into a termination agreement with his employer that kept him as a nominal employee for the sole purpose of receiving the remaining options. The husband agreed not to compete with the employer. On appeal, the court determined that the unvested options conferred a contractual right upon the husband, as opposed to a mere expectancy interest, so that the options were property subject to distribution under § 46b-81. The court adopted the majority rule that the benefits should be apportioned between marital and nonmarital property according to the date earned, but also held that the trial court's determination that the options were earned prior to the dissolution was supported by the evidence, so that no apportionment was necessary. The husband could not challenge the trial court's facially reasonable method of evaluation because he did not provide values required by Conn. Gen. Prac. Book, R. Super. Ct. § 25-30 (formerly § 463) or suggest better methods of evaluation.

(3) *Hansel v. Holyfield*, 00-0062 (La. App. 4 Cir 12/27/00), 779 So. 2d 939, 945: The trial court found that the stock options granted to Mr. Hansel served a dual purpose of rewarding him for past service and as an incentive for future performance. Based on this, the trial court ruled that the options should be pro-rated based on the amount of time between the grant date and the vesting date that took place during the community. This is in accordance with the principle that HN6 the determinative factor is whether work performed during the existence of the community was taken into consideration in granting the option. Goodwyne v. Goodwyne, 94-0079 (La.App. 4 Cir. 6/30/94) 639 So. 2d 1210, writ denied, 94-2035 (La. 11/4/94) 645 So. 2d 211. Accordingly, we find no error in the trial court's pro-rating the stock options.

3. Date of Hire to Date of Separation/Date of Hire to Date of Vesting-Exerciseability

    a. Distinction between Vesting and Exerciseability:

        i. *In re Marriage of Walker*, 216 Cal. App. 3d 644, 265 Cal. Rptr. 32 (1989): Here, however, the trial court abused its discretion in failing to apply the *Harrison* formula. It relied on the dates the options were exercisable rather than the dates the stocks became vested.

        Considerations of exercisability of the options and vesting of the stocks are, however, extremely significant. As discussed above, *Harrison* recognized the distinction between the ability to exercise an option and the ability to purchase the stock received pursuant to the exercise of the option. To ignore this difference is to misconstrue the entire time rule concept. The community has an interest in employment benefits conferred during marriage. In In re Marriage of Brown (1976) 15 Cal.3d 838 [126 Cal.Rptr. 633, 544 P.2d 561, 94 A.L.R.3d 164], our Supreme Court acknowledged *the community does not lose its interest in those benefits simply because they are received after separation. Conversely, however, when the parties separate before the benefits are vested, the community does not receive all of them. There must be an allocation taking into account the periods of time before and after separation.*

        ii. *In re Marriage of Harrison*, 179 Cal. App. 3d 1216, 1224-25, 225 Cal. Rptr. 234, 238 (1986): In family law cases involving retirement benefits "vested" has been defined as "a pension right which is not subject to a condition of forfeiture if the employment relationship terminates before retirement." (In re Marriage of Brown (1976) 15 Cal.3d 838, 842 [126 Cal.Rptr. 633, 544 P.2d 561, 94 A.L.R.3d 164].) CA(1b) (1b) Eugene's nonqualified stock options *[stock purchaseable on date of grant, but subject to forefeiture is leaving employment*] present an analagous situation. [Court says these are not vested; “only the *options* were vested”]; but lower court’s use of denominator of the date on which restrictions were removed. [***option vesting date is date on which stock may be purchased, even if stock is subject to forefeiture]***

b. *In re Marriage of Hug*, 154 Cal. App. 3d 780, 201 Cal. Rptr. 676 (1984): ***the leading "time-rule" case***: there was nothing about the option plan that required the finding that the options were granted on account of future services only; that mere difficulty in valuing an asset was not a basis on which to refuse to divide it; and that the trial court properly exercised its broad discretion to select an equitable method of allocating the parties' property interests in those options.

c. *Grich v. Grich*, FA93 525311S, 1996 Conn. Super. LEXIS 3451 (Super. Ct. Dec. 31, 1996): The numerator of the fraction was the difference in months between the beginning employment date and the parties' separation date; the denominator was the difference in months between the beginning employment date and when the option was first exercisable. [***but Wendt, in 2000, disagrees***]

d. *Brebaugh v. Deane*, 211 Ariz. 95, 118 P.3d 43, 45 (Ct. App. 2005): If the trial court concluded, after reviewing the agreements, that the unvested stock options were, even in part, incentives for future performance, it should analyze the issue using a formula and use a time rule to determine the community and separate property interests in the unvested stock options. Use *Hug* for unvested past services award; the *Nelson* formula is more appropriate for stock options which are intended to compensate an employee for future efforts.

e. *McKeon v. Lennon*, 321 Conn. 323, 138 A.3d 242 (2016)

f. *Hansel v. Holyfield*, 00-0062 (La. App. 4 Cir 12/27/00), 779 So. 2d 939, 945: The trial court found that the stock options granted to Mr. Hansel served a dual purpose of rewarding him for past service and as an incentive for future performance. Based on this, the trial court ruled that the options should be pro-rated based on the amount of time between the grant date and the vesting date that took place during the community. This is in accordance with the principle that HN6 the determinative factor is whether work performed during the existence of the community was taken into consideration in granting the option.

g. Date of Hire to Date of Vesting (vesting during marriage); so premarital employment is separate

   i. *In re Fatora*, File No. CN95-10406, 1998 Del. Fam. Ct. LEXIS 195, at *1 (Fam. Ct. July 10, 1998):"to the extent the options were received at least in part for services rendered during marriage (whether compensation for past services, an incentive for future services, or both) they are ... marital property" *Here there was premarital employment; so number of months of marriage to date of Vesting/date of hire to date of vesting:*

4. Date of Grant to Date of Separation-Commencement/Date of Grant to Date of Vesting

    a. *In re Marriage of Nelson*, 177 Cal. App. 3d. 150 (Ct. App. 1986): “In contrast, the trial court here utilized a formula in which the numerator was the number of months from the date of grant of each block of options to the date of the couple's separation, while the denominator was the period from the time of each grant to its date of exercisability.

        Our reading of In re Marriage of Hug convinces us that no modification of the trial court's formula for apportionment is necessary. Hug specifically states, "we stress that no single rule or formula is applicable to every dissolution case involving employee stock options. Trial courts should be vested with broad discretion to fashion approaches which will achieve the most equitable results under the facts of each case." (In re Marriage of Hug, supra, 154 Cal.App.3d at p. 792.) We find nothing inequitable in the formula adopted by the trial court; in fact, under the circumstances of this case it was probably a better method of division”

    b. Per *In re Marriage of Walker*, 216 Cal. App. 3d 644, 265 Cal. Rptr. 32 (1989): the *Nelson* court approved "a formula in which the numerator was the number of months from the date of grant of each block of options to the date of the couple's separation, while the denominator was the period from the time of each grant to its date of exercisability

    c. *Per Walker*: In *In re Marriage of Harrison*, supra, 179 Cal.App.3d 1216, the court recognized that a formula utilized to determine the separate and community property aspects of employer granted stock options must distinguish between "qualified and nonqualified options as well as the differences between the options themselves and stock purchased pursuant to the options." (Id., at p. 1224.) It found HN2 the appropriate method of determining the community property interest was to create a fraction, the numerator of which is the total number of days between the signing or granting of the option agreement and the date of separation and the denominator of which is the total number of days between the signing or granting of the option agreement and the day on which each portion of the

stock received pursuant to the exercise of the option became fully vested and not subject to divestment.

d. *In re Marriage of Harrison*, 179 Cal. App. 3d 1216, 1227, 225 Cal. Rptr. 234, 240 (1986): Katherine points out that unlike Hug the court here calculated both the numerator and denominator from the date the Loral stock options were issued to Eugene, not from the commencement of his employment. We appreciate the effect this difference will have on the community property percentage in the options. But the fact that there is a difference does not necessarily mean the court erred. Here, the court was satisfied that the option represented "golden handcuffs" to assure Eugene would stay with Loral. That finding is unchallenged. (See, e.g., In re Marriage of Nelson, supra, at p. 155, fn. 4.) [***so it's OK not to use Hug time rule (from date of hire) when purpose of grant is "golden handcuff"***]

e. *Widrin v. Powers*, No. C080319, 2018 Cal. App. Unpub. LEXIS 1778, at *4 (Mar. 19, 2018: Applies *Nelson* formula to Restricted Stock Units

f. *Wendt v. Wendt*, 59 Conn. App. 656, 757 A. 2d 1225 (App. Div. 2000):

5. Other formulas:

    a. “Short time rule” (first to vest):

        i. *Marriage of Short*, 125 Wn.2d 865, 890 P.2d 12 (Wash. 1995): For future services only:

        The characterization of employee stock options as separate property or community property under RCW 26.16 depends upon when the employee stock options were acquired. A vested employee stock option is acquired when granted. An unvested employee stock option is not so easily characterized and requires a more complex analysis. An unvested employee stock option is one that provides no legal title or rights of absolute ownership over the stock option to the employee. See Black's Law Dictionary 1418 (6th ed. 1990). The Microsoft stock options, contingent upon Robert's continued employment at Microsoft, were unvested when granted.

        To determine how unvested employee stock options are characterized under RCW 26.16, a trial court must first ascertain whether the stock options were granted to compensate the employee for past, present, or future employment services. This involves a specific fact-finding inquiry in every case to evaluate the circumstances surrounding the grant of the employee stock options. Unvested employee stock options granted during marriage for present employment services, assuming the parties were not "living separate and apart" under RCW 26.16.140 when the stock options were granted, are acquired when granted. Unvested employee stock options granted for future employment services are acquired over time as the stock options vest.

        *After determining whether employee stock options were granted to compensate the employee for past, present, or future employment services, the "time rule" is applied. For future employment services, the "time rule" is applied to the first stock option to vest after the parties are [***15] found to be "living separate and apart". This is the lone stock option that includes both a community effort and a separate effort. We do not apply the "time rule" to every stock option that vests after the*

parties are found to be "living separate and apart" because to do so ignores the separate property provisions of RCW 26.16. Multiple stock options granted for future services vest consecutively, not concurrently. Such a ruling insures that stock options are characterized and apportioned to reflect their marital and nonmarital aspects. This interpretation of the "time rule" differs from that announced in In re Marriage of Hug, 154 Cal. App. 3d 780, 201 Cal. Rptr. 676, 46 A.L.R. 4th 623 (1984).

ii. *In re Batra v. Batra*, 135 Idaho 388 (Ct. App. 2001): The magistrate here applied a modified Short time-rule adopted in prior cases by Ada County Magistrate Michael Dennard, a respected jurist in the area of family law. Under this modified Short time-rule, the community's interest is calculated on a per flight basis, typically a year-by-year basis. The community's interest is a fraction; the number of days of the marriage during the year of vesting of the flight of the stock option in question over the number of days in a year. The fraction is then converted into a percentage--the community's interest in the stock options in that particular flight. The modified Short time-rule is attractive, in part, because the denominator is always the same, providing ease of application. This approach also has the added attraction of a bright-line rule. The community's interest in vesting flights of stock options is limited to those vesting in whole or in part during the years of the marriage, eliminating whole years of vesting outside of the marriage and thereby hastening separation of the parties' interests consistent with Idaho law.

Having considered the costs and benefits of these two approaches, which typify those applied across the country, we adopt the modified Short time-rule as the appropriate rule where unvested stock options are granted to the employee spouse and vesting occurs in whole or in part during marriage. Accordingly, we conclude that the magistrate applied the correct substantive law in characterizing and valuing the unvested stock options at issue in this case.

Misstatement of the Short time rule

b. Post divorce grant:

i. *Goodwyne v. Goodwyne*, (La. Ct. App. 1994): the parties married in 1959, and the husband began working for Louisiana Land & Exploration in 1966. The couple divorced in 1985, and the husband retired in 1992. When they divorced, the husband did not disclose that he had stock options granted during the marriage; some vested, some unvested, because at the time of the divorce, the options were at a price above the fair market value of the shares, and he felt that they had no value. 118 A stock valuation expert testified that the options did have value in 1985. 119 Additionally, the husband was granted stock options in 1986, after the dissolution, yet the court partitioned this option along with the rest. 120 The husband argued that since the options were granted after dissolution, they were his separate property. The appellate court deemed the 1986 options were based on services performed during the marriage to which the wife had an interest. In so holding, the court stated that "the determinative factor is whether work performed during the existence of the community was taken into consideration in granting the option. Since the stock option was based partly upon work performed in 1985, the trial court's factual finding", giving the wife part of the proceeds, was affirmed.

[Prior to January 9, 1986, defendant did not know about the Compensatory Benefits Agreement (CBA); It was defendant's understanding that the CBA did not exist when the original property settlement was entered. He would not have been entitled to the CBA if he had not taken early retirement.] “Irrespective of whether the CBA was in existence at the time of the original partition, the evidence clearly established that without the 18 years of service during the time he was married and working for the company, Mr. Goodwyne probably would not have been eligible for benefits under the CBA because he would not have had enough years of service to qualify for the benefit.”

Defendant, Alvin Goodwyne argues that the trial court erred in including in the group of stock options it partitioned an option not granted until after the divorce and partition, and not having value or exercised until an even later date. In essence defendant argues that the trial court

erred in ordering the partitioning of the stock option granted in 1986 because the community was dissolved in August, 1985. This argument has no merit.

The testimony of Lynn Pyke and the letter from John Phillips clearly supports the trial judge's factual finding that the stock options were granted based on performance in the year prior to their granting. Thus the stock option granted to the defendant was based on worked performed during the existence of the community regime. As such the trial court correctly ruled that this group of stock options should be included in the order of partition. . . . The actual receipt date is not the determinative factor, rather the determinative factor is whether work performed during the existence of the community was taken into consideration in granting the option. Since the stock option was based partly upon work performed in 1985, the trial court's factual finding awarding Mrs. Goodwyne a portion of the proceeds of the stock option will not be disturbed.

6. Dividing the Options and RSUs: Use a "Constructive Trust":

   a. For example, in *Callahan v. Callahan* (1976), 142 N.J. Super. 325, 361 A.2d 561, the court upheld a constructive trust on the husband in favor of the wife's 25% interest in options. *The wife could direct him to exercise her share at her expense.*

   b. *Smith v. Smith* (Mo. App. 1984), 682 S.W.2d 834.) The Missouri Court of Appeals upheld a distribution of one-half of certain stock options to each party with the husband retaining the right to decide to exercise the options. The wife was to be given 30 days' notice and had to pay for her portion.

   c. In Green v. Green (1985), 64 Md. App. 122, 494 A.2d 721,t he court found that the husband could not be compelled to exercise his stock options. However, the trial court could determine a percentage to each spouse by which the profits would be divided, *if, as and when* the options were exercised.

   d. *In re Marriage of Frederick*, 218 Ill. App. 3d 533, 541, 161 Ill. Dec. 254, 261, 578 N.E.2d 612, 619 (1991): The fact that the options could not be valued until such time as they were exercised indicates that, under Evans (85 Ill. 2d 523) and Moody (119 Ill. App. 3d 1043), the options did not constitute property under section 503 of the Act until they were exercised. (Ill. Rev. Stat. 1989, ch. 40, par. 503.) Thus, petitioner should retain his interest in the options as his separate property until such time as they are exercised. This fact was accomplished by the trial court's determination that petitioner have the sole discretion to exercise the options. The trial court also properly retained jurisdiction to allocate the profits realized from the exercise of the options. (Moody, 119 Ill. App. 3d at 1048.) While Moody provided that the trial court should allocate an appropriate share to each spouse at its discretion if and when the options were exercised, ***we find no abuse of discretion with the trial court's determination now that such allocation will be 50% of any profit from the exercise of vested options and 50% of the marital fraction of any profit from the exercise of nonvested options to each party***. *See, also*, *In re Marriage of Isaacs*, 260 Ill. App. 3d 423, 198 Ill. Dec. 169, 632 N.E.2d 228 (1994)

e. But see: *In re Marriage of Micheli*, 2014 IL App (2d) 121245, ¶ 33, 383 Ill. Dec. 734, 742, 15 N.E.3d 512, 520: On October 9, 2012, the trial court entered an order disposing of most of the issues raised in the posttrial motions. In paragraph 3, the court ordered that "John shall immediately exercise all Allstate vested stock options and vested [RSUs] held in the Fidelity account and the net value, after taxes are paid, shall be equally divided between the parties. ***[Appellate court reversed as to the unvested RSUs; Query: why not direct H to sell only the Wife's half of the vested RSUs***]

7. Valuation

    a. Current/present value

        i. current market price - exercise price

            (1) underwater

            (2) positive value:

                (a) *Richardson v. Richardson*, 280 Ark. 498, 659 S.W.2d 510 (1983): Valuation case: the stock options were vested and exercisable on the date of dissolution. The husband had options for purchasing 3,000 shares of Murphy Oil Corp. at $ 13.71 per share. To determine the value to give the wife for the stock options, the court subtracted the cost of exercising from the stock price on the day of trial, and awarded the wife one-half of this amount. The court was silent regarding fees or taxes involved in exercising the options, and subsequently selling the shares for this profit.

    b. Tax considerations

        i. In re Marriage of Harrison, 179 Cal. App. 3d 1216, 1227-28, 225 Cal. Rptr. 234, 240-41 (1986): (7) Katherine's last quarrel with the treatment of Loral stock is that the court erred in using an effective rate of 61 percent to determine the federal and state income tax impact on the net gain apportioned between the parties. The court's finding on this issue is supported by the evidence presented at the April 22, 1983, hearing.

            HN8 Pursuant to Internal Revenue Code section 83(a), 3 stock transferred in connection with the performance of services is included in gross income "at the first time the rights of the person having the beneficial interest in [*1228] such property are transferable or are not subject to a substantial risk of forfeiture." (§ 83(a)(1), italics supplied.) The amount included in gross income is the fair market value of such property at the time it was transferable or not subject to a substantial

risk of forfeiture over the amount paid for such property. (§ 83(a)(1), (2).) A "substantial risk of forfeiture" exists when the right in the property transferred is conditioned, directly or indirectly, upon the future performance of substantial services and the possibility of forfeiture exists if such condition is not satisfied. (§ 83(c)(1); 26 C.F.R. § 1.83-3(c).) Pursuant to these provisions of Internal Revenue Code, Eugene incurred a tax liability on the date each restriction was removed on stock issued pursuant to option Nos. 2, 3, and 4. White's exhibit identified each of these dates, the market value on each date and Eugene's tax liability. Using the formula the court determined the net gain and awarded Katherine cash equal to her proportional interest in that sum. Based on this record the court properly determined Eugene's tax liability. Moreover White's testimony on the tax treatment of restricted stock was consistent with the court's earlier findings that the stock should be valued on the date the restrictions were removed, i.e., the date on which the stock irrevocably vested in Eugene.

ii. *In re Marriage of Nelson*, 177 Cal. App. 3d 150, 155, 222 Cal. Rptr. 790, 793 (1986): It is clear from the face of the option grants that any gain realized upon their exercise is taxable as ordinary income. In recognition of this fact, the trial court ordered that the portion of the options valued as community property be reduced to reflect an assumed tax rate of 20 percent, and correspondingly credited Harold directly with one-half this amount. . . .

Harold argues that the trial court should have offset the community property value of the options by 55 percent, his "more likely income tax rate," and eliminated the adjustment mechanisms cited above. In support of this he points out that the court, in assigning to him a tax loss carry forward as an asset, recognized his 55 percent incremental bracket. He states, "[if] the court assumes realization of value [of the options], as it has done, it must also assume income taxation."

The case law does not support Harold's argument. CA(4a) (4a) HN2 **In distributing community assets, a trial court is obliged to consider tax consequences only where it is proven that an immediate and specific**

liability will arise upon the ordered division. (Weinberg v. Weinberg (1967) 67 Cal.2d 557, 566 [63 Cal.Rptr. 13, 432 P.2d 709]; In re Marriage of Sharp (1983) 143 Cal.App.3d 714, 718-719 [192 Cal.Rptr. 97].) CA(3b) (3b) **In the situation at hand, the time at which a tax liability may arise and the extent of that tax liability are exclusively within Harold's control. He is under no obligation as a result of the interlocutory judgment [***9] to immediately exercise the options. CA(4b) (4b) "The trial court need not . . . consider tax consequences that may or may not arise after the division of the community property." (** Weinberg v. Weinberg, supra, 67 Cal.2d at p. 566.)

CA(3c) (3c) **This is not to say that the trial court erred in ordering that Harold be issued a credit against possible tax liability and establishing a mechanism for possible future credits.** HN3 Civil Code section 4800 directs the trial court to divide community assets equally upon dissolution of a marriage, and where economic circumstances warrant to "award any asset to one party on such conditions as it deems proper to effect a substantially equal division of the property." (§ 4800, subd. (b)(1).) **The special economic circumstance present in this case is the fact that the options are nonassignable and therefore had to all be given to Harold. The court's tax reimbursement formula was therefore a substitute for what, as it declared, would have been a more equitable distribution: "to divide them [the options] in kind and let each party be at the mercy of his/her own tax circumstance."** 5

iii. *Hansel v. Holyfield*, 00-0062 (La. App. 4 Cir 12/27/00), 779 So. 2d 939, 944: The trial court refused to consider the income taxes which must be paid when the Hibernia stock options are exercised. Mr. Hansel contends that it is inequitable to value the stock without taking into account the tax liability. We agree.

At some point, Mr. Hansel will have to exercise each stock option grant or he will lose the right to do so. When Mr. Hansel exercises a stock option grant, any amount over the exercise price which Mr. Hansel receives for the stock will be recognized as ordinary income for tax purposes. As ordinary income the money which Mr. Hansel receives is subject to state and federal income taxes. The trial court disallowed tax

consequences not because it found the exercise of the options or the imposition of the taxes to be speculative, but, rather, because it found the amount of taxes to be speculative. However, at trial, Mr. Hansel submitted evidence that he is subject to the maximum applicable tax rate (39.5% in federal taxes and 6% in state taxes). Although it is possible that Mr. Hansel may be taxed [Pg 7] at a lower rate, the rate of taxation is no more speculative than the value of the stock options themselves. HN5 Recognizing the speculative value of a stock option but refusing to recognize the speculative rate of taxation on the value of those options is simply inequitable. Accordingly, the trial court erred in failing to consider the income taxes which must be paid when the Hibernia stock options are exercised. We look to the date of trial to determine what the tax liability would have been had all the options been exercised at that time and give Mr. Hansel the appropriate tax credit.

8. Income issues:

   a. Stock options are not an asset to be divided; use for income purposes:

      i. *Seither v. Seither*, 779 So. 2d 331, 331 (Fla. Dist. Ct. App. 1999): The trial court refused to treat the options as an asset and instead considered them as income available to appellant for both alimony and child support. The appellate court affirmed, holding it was not error for the trial court to treat the options as income.

   b. *In re Engel v. Landman*, 221 Ariz. 504 (Ct. App. 2009): Value of appreciation of vested but unexercised options included in income for child support case: look at each option separately; particularly if employer and employee agreed upon a value (Black-Scholes or otherwise)

   c. *McKeon v. Lennon*, 321 Conn. 323, 138 A.3d 242 (2016) The Connecticut Supreme Court concludes that exercised stock options and restricted stock that has vested ordinarily should be considered components of a party's gross income for purposes of calculating child support because they constitute deferred or incentive-based compensation. Conn. Agencies Regs. § 46b-215a-1(11)(A)(iv); and are not specifically excluded under the guidelines. The fact that the applicable guidelines in 2005 did not define deferred or incentive-based compensation as including such benefits is irrelevant. Stock options always have been understood as a form of incentive-based compensation. Stock option is often granted to management and key employees as a form of incentive compensation. Moreover, the Court has previously interpreted broadly the definition of gross income contained in the guidelines to include items that, in effect, increase the amount of a parent's income that is available for child support purposes.

      Restricted stock is considered income in the year that it vests rather than the year in which it is exercised. To the extent any ambiguity remains, the amended 2015 child support guidelines have settled the point by clarifying that incentive-based income includes stock options, restricted stock, restricted stock units, phantom stock, stock appreciation rights and other forms of delayed or deferred compensation.

d. *In re Walker v. Taylor-Walker*, 2021 IL App (1st) 192491-U, ¶ 24 Previously, this court has concluded that RSUs that have vested are to be considered income for purposes of the Act. In re Marriage of Schlei, 2015 IL App (3d) 140592, ¶ 19, 399 Ill. Dec. 248, 46 N.E.3d 286. Although we are unaware of a specific Illinois decision stating the same for PSUs, our courts have consistently ruled that various employee-stock benefits are to be included as income for purposes of the Act once a cash value has been realized. See In re Marriage of Anderson, 405 Ill. App. 3d 1129, 1136, 938 N.E.2d 207, 344 Ill. Dec. 938 (2010) (observing "the distribution of stock may constitute income for" purposes of the Act "if the stock is sold pursuant to an employment bonus-based option"); In re Marriage of Colangelo, 355 Ill. App. 3d 383, 392, 822 N.E.2d 571, 290 Ill. Dec. 986 (2005) (finding that "the realized stock distribution met the definition of 'income' for purposes" of the Act). Given this and because the circuit court ordered that only RSUs and PSUs that [**15] Bryce actually cashed were to be considered income, we cannot find the circuit court erred in treating Bryce's RSUs and PSUs as income to him.

e. *Fischer v. Fischer*, 68 N.E.3d 603 (Ind. Ct. App. 2017): [R]ather, we continue to apply the longstanding rule that only property that is vested in the parties on the date the petition for dissolution is filed is part of the marital pot.

   But “As the $149,739.62 is not an asset subject to division as marital property, it is properly considered income subject to the trial court's child support order regarding income over the weekly threshold.”

f. *Penner v. Penner*, 411 S.W.3d 775 (Ky. Ct. App. 2013) The trial court erred in treating the husband's restricted stock shares from his employer as both marital property subject to division and income for purposes of determining child support and maintenance;

9. Qualified vs. NonQualified:

   a. Generally:

      i. In re Marriage of Harrison, 179 Cal. App. 3d 1216, 1224, 225 Cal. Rptr. 234, 238 (1986): Katherine incorrectly argues the court erred when it decided "the only proper way to divide the stock option benefits is on a time basis." Although the formula is technically incorrect because it fails to recognize the distinction between qualified and nonqualified options as well as the differences between the options themselves and stock purchased pursuant to the options, we nonetheless agree with the trial court that a time formula was proper.

   b. Nonqualified:

      i. In re Marriage of Harrison, 179 Cal. App. 3d 1216, 1223, 225 Cal. Rptr. 234, 237 (1986): Options Nos. 2, 3, and 4 were nonqualified stock option agreements issued under Loral's 1976 and 1978 stock option plans. Each option was granted before separation. Under each option Eugene had the immediate right to buy stock. Any stock purchased, however, was subject to certain restrictions including forfeiture of the stock depending upon events described in greater detail later in this opinion.

         . . . .

         The restrictions provided that stock issued to any employee upon exercise of the options was to be forfeited to the corporation if the employee were terminated for cause or were to leave voluntarily without corporate consent. The forfeiture provisions lapsed in 20 percent increments starting two years after the stock was issued. The forfeiture provisions did not apply if the employee died, was terminated without cause, or left corporate employment voluntarily with corporate consent.

   c. Qualified:

i. In re Marriage of Harrison, 179 Cal. App. 3d 1216, 1224, 225 Cal. Rptr. 234, 238 (1986): Under option No. 1 Eugene had the right to buy nonforfeitable Loral stock in increments of 25 percent on specified dates extending over a period of four years; the option could not be exercised until the specified dates occurred.

10. Miscellaneous

a. *In re Marriage of Harrison*, 179 Cal. App. 3d 1216, 1226, 225 Cal. Rptr. 234, 239 (1986); quoting *Nelson*: Fringe benefits consisting of contractual rights to future benefits after separation, though unvested and unmatured, are property subject to allocation between community and separate interests at the time of dissolution. (In re Marriage of Brown, supra, 15 Cal.3d at pp. 844, 846.) HN5 While the "time rule" is the method most frequently used in allocating benefits earned in part during marriage (In re Marriage of Judd (1977) 68 Cal.App.3d 515, 522 [***12] [137 Cal.Rptr. 318]) the time rule is appropriate only where the amount of benefits is substantially related to the number of years of employment.. (In re Marriage of Poppe (1979) 97 Cal.App.3d 1, 8-9 [158 Cal.Rptr. 500].) CA(5) (5) HN6 With respect to benefits payable after separation, the employee spouse may not by unilateral election transmute community property into separate property in an effort to deprive the spouse of an interest in retirement benefits without compensating that spouse for the interest lost as a result of the election. (In re Marriage of Gillmore, supra, 29 Cal.3d at pp. 423-424, 426; In re Marriage of Stenquist (1978) 21 Cal.3d 779, 782 [148 Cal.Rptr. 9, 582 P.2d 96].)

b. *Smith v. Schram*, No. 337826, 2018 Mich. App. LEXIS 2930 (Ct. App. July 26, 2018): Plaintiff claimed that Stern provided erroneous information in connection with post-judgment enforcement proceeding. Such included the stock and stock options were only worth $1.70 per share at most; the stock options were essentially worthless, considering that they were set to expire in two more years and Leider had the authority to allow the options to lapse without exercising them; plaintiff would have to pay Leider approximately $320,000 in order to exercise the options granted her under the divorce judgment if she did not settle; and that even if plaintiff had the ability to exercise the options, their net value was only about $75,000. Stern had presented three options to client: (1) settle based on unverified information; (2) spend more money to attempt obtain additional information; or (3) drop the enforcement motion and wait and see. Plaintiff chose to settle and move on with her life. Case dismissed on summary disposition.

Divorce and Division of Stock Options and Restricted Stock Units
Table of Authorities
Neil Cahn
November 8, 2022

Arizona	*Brebaugh v. Deane*, 211 Ariz. 95, 118 P.3d 43, 45 (Ct. App. 2005)
	In re Engel v. Landman, 221 Ariz. 504 (Ct. App. 2009)
Arkansas	*Pianalto v. Pianalto*, 2010 Ark. App. 80, 374 S.W.3d 67 (Ct. App.)
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