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By Greg Gann

Tracing Marital vs. Non-marital values: How Far Do You Need to Go?

Facts of Case:

Husband and Wife married in 2001 and separated in 2016. Husband has been employed by the same employer both prior to and throughout their marriage, and participated in the company 401k prior to and after becoming married. Husband also had non-retirement brokerage accounts with T. Rowe Price prior to marriage in which he continued to contribute post-marriage. Parties do not dispute the value of the accounts at the time of marriage. Husband spent thousands of dollars with an actuarial firm to determine how much of the ending balance is marital versus non-marital.

Circumstances and Methodologies:

This is a case of direct tracing and very basic accounting. It did not require an actuary. Hiring an actuary was superfluous and a high and unnecessary expense. This is not meant to be disparaging to actuaries. They are needed for designing defined benefit plans and analyzing life expectancies. Determining what percentage of an ending balance is marital versus non-marital is not actuarial in nature. Nonetheless, the actuarial firm collected end of year statements for both the 401k and the T. Rowe Price brokerage account for every single year from 2001 to and including 2016. The year- end statement indicated how much the account grew or lost in comparison with the immediately prior year-end statement. That proportional growth or loss was attributed each calendar year based on what percentage the marital property comprised of the non-marital property in the prior year. This is not particularly sophisticated, and it is not rocket science. It does require reconstructing statements for every single year and doing the mathematical calculation for each year and/or loading the data into an excel spreadsheet. The point is that all of this takes time, and time can be costly, especially if it is performed by a company with high billing rates.

I do this exact same analysis, and I have done it in the exact same way as the actuarial firm. However, there is always a cost/benefit analysis that should be made to determine the practicality and efficacy. In the case that I am referencing, the 401k's value at the time of marriage was $24,000 and the ending balance was $240,000. A simpler and more cost-effective method for making this evaluation and one that is much easier for courts to get their arms around is to determine what percent the pre-marital value represents of the ending value, and apply that percentage to the cumulative growth over the years. Although the methodology that considers changes in values every single year might seem more reliable because it is much more detail oriented, it does not take into consideration the time value of when contributions were made and therefore their exact impact on the marital and non-marital values.

There is no one formula. None of this is that scientific. And different methodologies can result in different outcomes. My formula worked out better for the wife by whom we were retained. Understanding and appreciating the fundamentals and distinguishing features of various methodologies absolutely can help in negotiating on behalf of a client. And of course, sometimes the one that is best received by the judge is the one he or she can comprehend, and that should never be underestimated. My analysis required very little time or money, but went a long way in negotiating what the client wanted.

Other Issues/Observations/Arguments:

Because participants in a 401k plan cannot self-direct their investments beyond the selections provided on the menu, and because they are generally precluded from rolling over the assets into an IRA before reaching age 59.5, Husband in this case did not have the flexibility to preserve his 401k as separate non-marital property at the time of the marriage. However, none of these constraints applied to the non-retirement accounts with T. Rowe Price. After the marriage, Husband could have very easily opened a new, separate brokerage account with T. Rowe Price and discontinued making any further contributions to the account he held pre-marriage. To the extent that Husband continued to contribute to the same pre-marital brokerage account post marriage, one could argue that he commingled funds and/or gifted his pre-marital portion, making the entire account a marital asset, which would make the need and expense of tracing superfluous.

As a certified divorce financial analyst, I consider the totality of all the financial issues as well as the efficacy of financial methodologies in order to empower the parties with knowledge that serves to their negotiating advantage.

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