

Stock Options: Valuable Assets to be Divided in Divorce

By Marisa W. Higgins, Esq.

Stock options are no longer reserved for only high-level executives. Options are being offered to rank and file employees with much greater frequency. Accordingly, stock options have become increasingly valuable assets of the marital estate. If spouses decide to divorce, those stock options become a complex and often contentious aspect of the division of the parties' property.

Under Massachusetts law, stock options, both vested and unvested, are marital assets which may be included when dividing the marital estate in a divorce action. In *Baccanti v. Morton*, 434 Mass. 787, 797 (2001), the Court explained:

The division of property incident to a divorce proceeding is based on the principle that marriage is a partnership.... Assets are assigned in order to recognize and recompense the parties' contributions to the partnership.... The key question, then, in assigning one spouse's employee stock options is what, if any, portion of the options is to be considered marital property and what, if any, portion is to be considered nonmarital property because the options relate to a period subsequent to the marriage.

In order to determine whether and to what extent stock options may be included in the marital estate, a finding must first be made as to whether the stock options were granted for efforts expended before, during, or after the marriage. *Id.* at 799. If the options were granted for efforts expended before or during the marriage, the *Baccanti* Court concluded that they should be included in the marital estate. *Id.* at n.7. Stock options granted for efforts expended after the marriage may still be included in the marital estate if the judge concludes that such efforts were attributable to the marital partnership. *Id.* By way of example, if the non-employee spouse contributed to the employee spouse's ability to achieve the position for which the stock options were granted, those options may be properly included in the marital estate even if granted after the parties' separation.

In making a finding whether the stock options were granted for past, present, or future services, the *Baccanti* Court suggested that judges look to:

- Testimony from the employee spouse;
- Testimony from the employer;

- Testimony from an expert witness, if available; and
- The employee's stock option plan.

Judges may also consider whether the stock options were "intended to (1) secure optimal tax treatment, (2) induce the employee to accept employment, (3) induce the employee to remain with the employer, (4) induce the employee to leave his or her employment, (5) reward the employee for completing a specific project or attaining a particular goal, [or] (6) be granted on a regular or irregular basis." *Id.* at 800 (citations omitted).

The spouse challenging the inclusion of the stock options in the marital estate has the burden of proving the stock options were granted for efforts expended after the dissolution of the marriage. That spouse also has the burden of establishing that the other did not contribute to the acquisition of the options. Even if the spouse meets his burden, a judge may still divide the stock options "if equity requires the options be apportioned." *Id.* at 801.

In short, the division of stock options in a divorce action is often complex. As a result, individuals confronting this issue should not do so alone. The attorneys in Fletcher, Tilton & Whipple's Family Law Department are experienced in all aspects of matrimonial law and can navigate you through the divorce process.

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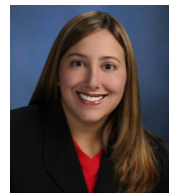
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