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## COVID-19 impacts financial side of divorce process, valuing assets

Like many other facets of our daily lives, COVID-19 has created special challenges in divorce proceedings. Many are familiar with the unique challenges COVID-19 places on parenting time and parenting decisions, but COVID-19 also affects the financial side of the divorce process and has exacerbated already complicated financial issues. Specifically, COVID-19 has created a peculiar problem with respect to valuing assets.

Section 503(a) of the Illinois Marriage and Dissolution of Marriage Act requires a Court to “make specific factual findings as to... values...” Similarly, Section 503(d) of the Illinois Marriage and Dissolution of Marriage Act specifically requires a court to divide the marital property between the parties taking into account several factors including “the value of the property assigned to each spouse.” Therefore, it is imperative for a court to be provided with sufficient evidence to assign a value to assets. However, during this time of economic uncertainty, the question becomes, how can assets be valued such that both parties’ interests are protected?

This issue is particularly prevalent with respect to business valuations. From the 2008 Great Recession until COVID-19, the U.S. had seen the longest economic expansion on record. That all came to a screeching halt in March when quarantines and lockdowns needed to fight the virus’s spread forced many businesses to close their doors, and even those businesses that were able to keep their doors open

saw declines in revenues. Factor in the speculation surrounding the uncertainty of when we can return to “normal,” and parties currently in the midst of a divorce with complicated business valuation are presented with unprecedented challenges. When faced with such a paradigm, the best option is to turn to traditional methods of business valuation paying special attention to these various influencing COVID-19 factors that undoubtedly affect the value of a business.

Fair market value is generally “measured by what a willing buyer would pay a willing seller in a voluntary transaction.” In re Marriage of Grunsten, 304 Ill. App. 3d 12 (1st Dist. 1999). Many Illinois courts have affirmed the use of Revenue Ruling 59-60 as a guide for valuing closely held businesses. See, e.g., In re Marriage of Pulls, 268 Ill. App. 3d 882 (1st Dist. 1994). Revenue Ruling 59-60, as modified by Revenue Ruling 65-193, provides several salient factors to be considered in the valuation. These factors include, among others, “the nature of the business and the history of the enterprise from its inception,” “the economic outlook in general and the condition and outlook of the specific industry in particular,” “the earning capacity of the company,” “the dividend-paying capacity,” and “whether or not the enterprise has goodwill or other intangible value.”

When considering these factors in light of the external risks of COVID-19, there are several elements that will affect the value of a business: (1)



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there are conflicting reports on whether a recession is officially underway and how deep it may go. Like many other aspects of COVID-19, the lasting effect is unpredictable; (2) there are concerns that directly relate to entire industries ceasing operations, such as the restaurant and entertainment industry, with no real guarantee that these businesses can be fully operational in the foreseeable future; and (3) there are political uncertainties with respect to tax

rates which have been compounded by questions and speculation surrounding how the CARES Act will be ultimately funded.

There are also several internal risks of COVID-19 that vary from business to business that will affect the value of that business. Some of these general internal factors include but are not limited to: (1) earnings history for a business and whether or not such is stable or volatile; (2) earnings expectations and recalculating projections; and (3) cash flow challenges while the need for cash is heightened.

These various factors put divorce litigants in the precarious position of determining a valuation date for a business. Section 503(f) of the Illinois Marriage and Dissolution of Marriage Act states that the court “has the discretion to use the date of the trial or such other date as agreed upon by the parties, or ordered by the court within its discretion, for purposes of determining the value of assets or property.”

Under certain scenarios, it may be beneficial to argue that a Dec. 31, 2019, valuation date should be used for purposes of determining the value of the business. If the business was particularly profitable in the years leading up to COVID-19, it could be argued that the Dec. 31, 2019, valuation date more accurately captures the value of the business and you cannot compare the lasting economic effects of the 2008 Great Recession to the current economic climate of COVID-19 as a benchmark for the future given the difference that the

2008 Great Recession was a “demand shock,” whereas COVID-19 is a “supply shock.” This argument, however, could be easily flipped given that at its core, it is mere speculation. Truth be told, no one has a crystal ball that can with 100% accuracy predict whether a business can return to its pre-COVID-19 value, or whether it will become the

next COVID-19 victim. Under this scenario, the spouse would argue that a valuation date closer to trial would produce a more accurate picture for the value of the business. The answer may be to take an average of the value of the business as of Dec. 31, 2019, and as of the date of trial to arrive at a value for purposes of dividing property. Alterna-

tively, spouses can choose in their marital settlement agreement to essentially “kick the can” down the road and agree to value the business at a later date when things are more stable to determine the amount of a “buy-out.” During these times of uncertainty, it is reasonable to assume that it would be difficult or impossible to find a “willing buyer.”

Without a “willing buyer,” arguably a fair market value cannot be determined since the very definition of “fair market value” assumes a “willing buyer” and a “willing seller.” Of course, there are risks with all options which should be explored with an experienced attorney and/or expert that can help a spouse navigate this uncharted terrain.