



Real estate experts & client testimony
Disputing passive increases in value

By Jeralyn L. Lawrence and Robin G. Bogan

A family lawyer seeking to dispute passive increases in real estate should first review Judge Krafte’s decision in *Scavone v. Scavone*, 230 N.J. Super. 482 (Ch. Div. 1988), *aff’d* 243 N.J. Super. 134 (App. Div. 1990). In *Scavone*, Judge Krafte distinguished between the accretion in value of passive assets and active assets. The *Scavone* controversy concerned the valuation date of a seat on the New York Stock Exchange that was in the husband’s name alone. The parties stipulated the seat was a passive asset, the value of which fluctuated with the market and that any increase in value was not due to either party’s contributions. The pivotal question was whether this passive asset should be valued as of the date of complaint of divorce in 1985 or as of the date of distribution in 1988.

Judge Krafte defined passive assets as those whose value fluctuations are exclusively from market conditions. In contrast, he defined active assets as those involving contributions or efforts toward the asset’s growth and development that directly caused an increase in the asset’s value. The court then provided guidance as to the valuation date (date of complaint or date of distribution) that should apply to various assets depending on how the asset was acquired and whether the asset was passive or active. The rules that *Scavone* set forth based on the court’s review of New Jersey case law is summarized below:

	PASSIVE	ACTIVE
Immune Asset (Pre-marital, gift, inheritance)	Not distributable according to N.J.S.A. 2A:34-23; not subject to equitable distribution.	1) If the increase in value is brought about solely by efforts of owner, value is not distributable; 2) If increase in value is partially or wholly due to non-owner’s efforts distributable as of <u>date of distribution</u> .
Contemplation of Marriage	Distributable and incremental value determined at <u>date of distribution</u> .	Distributable and incremental value determined as of <u>date of complaint</u> .
Joint Asset Acquired During the Marriage	Distributable. Valuation as of <u>date of distribution</u> .	Guiding principle set forth in <i>Bednar v. Bednar</i> , 193 N.J. Super. 330 (App. Div. 1984). Unless there is fraud or bad faith, incremental value is distributable and value is determined at the <u>date of distribution</u> unless the increment results from active participation of one party with no contribution by the other, then the value is determined as of the <u>date of complaint</u> .
Asset Acquired During Marriage in One Name	Distributable. Value determined as of the <u>date of distribution</u> .	Distributable. Value determined at the <u>date of complaint</u> .

A client disputing passive increases in real estate acquired either during the marriage or in contemplation of marriage is seeking for the property to be valued as of the date of complaint. For immune real property, a client disputing passive increases is either an owner seeking to demonstrate that the increase in value is due to the owner's efforts and therefore not distributable; or a non-owner seeking to demonstrate that due to the non-owner's efforts the increase in value of the property should be distributed as of the date of distribution.

The family law practitioner representing such a client must demonstrate that the client's efforts to improve or enhance the property directly contributed to the property's increase in value. The client must testify in detail concerning his or her efforts. It is not enough for your client to simply indicate the improvement. Your client should recount each and every step of the process that resulted in the finished project. Such contributions may include physically making improvements or hiring contractors to perform the improvements. Physical improvements in residential property may consist of constructing an addition, installing a new roof or renovating the kitchen or bathrooms. Installation of pools, decks, gardens or other landscaping are physical improvements. Site improvements include installing curbs, paving, sidewalks and signs.

Another example of your client's efforts is hiring other professionals such as architects and engineers to prepare drawings and plans. A lawyer may have been retained to represent your client in obtaining approval for the drawings from the town planning board or board of adjustment. Depending on the project, this process may have taken several months. Effort may need to be expended to obtain permits from the town and certificates of occupancy. All of the aforementioned efforts are relevant and dispositive in an argument that the growth is active or passive.

For a client who routinely buys and sells properties, efforts may include researching and selecting properties to purchase. If a client is renting either residential or commercial property, contributions may include finding tenants, collecting rents, evicting bad tenants and managing the property. A client's efforts may also include paying down mortgages. See *Griffith v. Griffith*, 185 N.J. Super. 382 (Ch. Div. 1982) where the court held a non-owner spouse's contribution to the increase in value of a pre-owned asset could include a mortgage payoff during the marriage. Clearly, the type of contributions will vary depending on whether the property is residential, commercial, retail or industrial. Again, this effort is relevant to the gain being active or passive.

Real estate expert

The key to linking your client's contributions to the increase in value is the testimony of a real estate expert. The expert must provide sufficient credible evidence that your client's efforts created the increase in value. They should also seek to distinguish between value created by economic factors alone and growth in value attributable to the parties' respective contributions. See *Mol v. Mol*, 147 N.J. Super 5 (App. Div. 1977), holding that the wife was not entitled to

receive a share of the enhancement in home value created by inflation for other economic factors that had nothing to do with her contributions and requiring the trial judge to distinguish between value created by economic factors alone and growth in value attributed to party contributions.

To accomplish this link, the family lawyer must have the real estate appraiser prepare an appraisal of the value on the appropriate date — date of complaint or date of distribution, depending on the client's argument. The real estate appraiser must then determine the increase in value during the marriage and what part of that increase is due to market forces versus efforts of the parties. To quantify this, the real estate appraiser should prepare an appraisal of the value of the property as of the date of marriage and another appraisal of the

property excluding the efforts or improvements the parties made to the property. This will assist the real estate expert in valuing the increase during the marriage and the reasons for that increase. Appraisals of real estate are estimates of value. As a result, it is critical to select a qualified appraiser who provides well-developed, documented and unbiased estimates of value.

Equally important when representing a non-owner spouse concerning immune real property is his or her contribution to the marital partnership. A non-

owner's efforts are not limited to contributions associated with the property itself. In *Valentino v. Valentino*, 309 N.J. Super 334 (App. Div. 1998), the Appellate Division affirmed the trial court's decision to award 10 percent of a mini strip mall to the wife (plaintiff) that the husband (defendant) had acquired prior to the marriage and then used as a gas station. Relying on *Scavone*, the court reiterated that the appreciation in value of an active immune asset is subject to equitable distribution if it is attributable, in part or in whole, to the expenditures or efforts of the non-owner spouse. The court further indicated a finding must be made concerning the extent the original investment was enhanced by either spouse's contributions. Where the spouse has contributed to the increase in the asset, the valuation date of the increment occurs on the date of distribution.

In awarding the plaintiff 10 percent of the increase in value, the trial court considered that while the defendant devoted his time to the gas station, the plaintiff took care of the household, worked part-time and was responsible for raising their son. The court stated: "Here, plaintiff minimally helped get the gas station ready for its opening and may have helped somewhat after it opened. There is no doubt, however, that her contributions to the home and children allowed defendant to work at his business and thus pay down the mortgage on the property."

Valentino reaffirms that marital effort includes the non-economic contributions of a spouse such as raising children and maintaining a household. Such a case presents a challenge to the family lawyer as well as to the real estate expert. It is very difficult to determine what portion of the increase in real estate value is due to the non-title holder spouse's contributions to the marital partnership. The real estate

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appraiser should determine what portion of the increase in value is due to the efforts of the title holder spouse versus market conditions. Once that amount is quantified, it is up to the family lawyer to argue this increase would not have been possible if the title holder spouse also was responsible for raising the children, maintaining the home and performing other tasks undertaken by the non-title holder spouse. The more time the title-holder spouse expended to effectuate the improvements, the stronger the argument that the non-title holder spouse's contributions gave the title-holder spouse the time needed to perform contributions that led to the increase. It logically follows that if the title-holder spouse could not invest the time because he or she was also required to maintain the home and raise the children the increase in value would not be as significant.

Although the Appellate Division in *Valentino* did not make reference to *Weiss v. Weiss*, 226 N.J. Super. 281 (App. Div. 1988), cert den'd, 114 N.J. 287 (1989), the *Valentino* court returned to the principles set forth in that case which was decided approximately four months before *Scavone*. In *Weiss*, the court relying on N.J.S.A. 2A: 34-23 as well as *Painter v. Painter*, 65 N.J. 196 (1974) and its progeny, supported the finding that a date before the marriage ceremony could qualify as the marriage's commencement for purposes of deciding whether property is marital and subject to equitable distribution. The court's conclusion recognized marriage is a "shared enterprise, a joint undertaking, that in many ways ... is akin to a partnership" (citing *Smith v. Smith*, 72 N.J. 350 (1974), quoting *Rothman v. Rothman*, 65 N.J. 219 (1974)).

The *Weiss* court found the trial court properly valued the marital home as of the date of trial rather than the date the complaint was filed. The court noted the plaintiff continued to live in the marital residence and assisted in its maintenance for over a year after the divorce complaint was filed. Additionally, the increase in value of the marital residence between the filing of the complaint and the trial date was due to market factors as opposed to improvements or contributions from the defendant. *Weiss* found that denying the plaintiff her share of the accretion in value to the marital residence would be inequitable given the circumstances.

Another important lesson to be learned from *Weiss* is to avoid the blunder made by the experts retained to value the family business. While the expert for each party valued the business, neither expert expressed an opinion concerning how much the business increased in value during the marriage. As a result, the Appellate Division had no choice but to remand the matter and direct the trial court to reconsider "the enhancement in value of the defendant's interest in the family business during the marriage and for a redetermination of the plaintiff's equitable share of that enhanced value." Thus, *Weiss* emphasizes a fundamental practice point: An advocate must ensure the real estate expert quantifies the value of the increase and determines how much of that increase during the marriage was due to market forces versus either party's efforts. As discussed above, it is the real estate expert's job to express a well-supported opinion as to what portion of the property's increase in value during the marriage is due to the parties' efforts or contributions.

Finally, *Sculler v. Sculler*, 348 N.J. Super 374 (Ch. Div. 2001) provides direction concerning the burden of proof

that applies when a non-titled spouse seeks distribution of an immune active asset. In a case of first impression, the trial court explained that initially the spouse that is asserting an asset is immune, bears responsibility for establishing immunity. Once that immunity is proven, the increase in value will be immune unless the non-titled spouse can show that increase was due either in whole or in part to efforts of the spouse requesting equitable distribution of the increase. In sum, proof that an asset is immune creates a rebuttable presumption that any increase also would be immune. The burden of proof then shifts to the non-titled spouse to demonstrate that: "1) there has been an increase in the value of the asset during the term of the marriage; 2) the asset was one which had the capacity to increase in value as a result of the parties' effort (an active immune asset); and 3) the increase in value can be linked in some fashion to the efforts of the non-owner spouse." A real estate expert is essential for the non-titled spouse of an immune asset to meet his or her burden of proof.

In sum, to dispute passive increases in real estate and therefore argue they are active:

- 1) Utilize your client to set forth his or her efforts or contributions toward increasing the value of the real estate.
- 2) Utilize your real estate expert to create the causal link between your client's efforts and the increase in value. The real estate expert must distinguish between the increase in value attributable to market forces versus the efforts of either party.
- 3) In a case involving the increase in value of an immune asset, have the real estate expert not only value the property as of the appropriate date (date of complaint or date of distribution) but also perform appraisals to quantify the increase in the property's value during the marriage and what the increase would have been if the parties had not expended any effort.
- 4) Remember that a non-owner spouse's contributions to the marital partnership including raising children and maintaining a home may entitle the non-owner spouse to a share of the increase in value of an immune active asset as of the date of distribution. ☉



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