

The evolution of assets and determining their value in divorce proceedings

BY GREGORY A. GIRVAN

In a nod to California's pre-statehood history, our state's founders adopted a regime for marital property that dates back hundreds of years to Spanish civil law. In the 21st century, newer forms of intangible property, from intellectual property rights to non-fungible tokens, are challenging the centuries-old community property system. Yet the law continues to evolve so that spouses can accumulate property, and at the time of divorce divide their property, consistent with well-established legal doctrines.

This article describes two issues that arise with difficult-to-value, non-tangible property in the context of a divorce proceeding. First, what information must spouses share with each other? Second, how do courts assess the community property interest in the assets?

DISCLOSURE OBLIGATIONS

In a divorce, as a precursor to the division of the community property estate, the parties must identify and value the community property assets. To that end, the law imposes substantial disclosure

obligations upon spouses. Various Family Code provisions impose on a managing spouse affirmative, wide-ranging duties to disclose and account for the existence, valuation, and disposition of assets during a divorce proceeding. *In re Marriage of Prentis-Margulis & Margulis*, 198 Cal.App.4th 1252, 1270-1271 (2011).

For commonplace assets like a home, disclosure is straightforward – there are generally mortgage statements, deeds, appraisals, and other documents that enable a valuation with some certainty. But with intellectual property, for example a copyright, the disclosure obligations necessary to enable a valuation are more complicated. And some newer forms of intangible property, such as non-fungible tokens, are still more complicated.

Let us first consider copyright. "A copyright has a present value based upon the ascertainable value of the underlying artistic work." *In re Marriage of Worth*, 195 Cal. App.3d 768, 775 (1987). Thus, the managing spouse of a copyright must disclose material information



that impacts the present value of the copyright. This could include, hypothetically, a publisher's interest in utilizing the work for a new project, or a contemplated lawsuit by the copyright holder for alleged infringement that could result in a financial recovery. In short, the managing spouse must provide all material information that allows the non-managing spouse to accurately assess the value of the copyright.

Next let us consider non-fungible tokens (NFTs) – that is a digital asset with its own unique identifier recorded on a blockchain. At a minimum, the managing spouse

must disclose information to allow the non-managing spouse to find the NFT on the blockchain. That information will provide the non-managing spouse transparency into the history of the NFT, including transactions involving the NFT at issue. But the managing spouse should be prepared to disclose much more. For example, the managing spouse should consider disclosing recent sales of similar NFTs if such information is known to the managing spouse. Further, the managing spouse should consider making a disclosure of past gains and losses to give the non-managing spouse insight into the managing spouse's performance in this asset sector. When dealing with an asset class that is new or largely unfamiliar, disclosure obligations take on greater importance.

In summary, regardless of the property at issue, the managing spouse must make a comprehensive disclosure to enable as accurate a determination about the value of the asset as possible.

EQUITABLE APPORTIONMENT OF INTANGIBLE PERSONAL PROPERTY

Sometimes, knowing the value of an asset is not enough to divide the asset. This is because some assets are the product of work performed during marriage, on the one hand, and before marriage or after separation or both, on the other hand. A quintessential example is a book for which the author dedicated years to writing. In

such a case, the author's marriage and subsequent separation could occur while the writing process continued. The book, then, is a mixed community and separate property asset, the product of so-called "commingling." Generally, "commingling" is a word of art used to connote the mixture of separate property with community property. *In re Marriage of Devlin*, 138 Cal. App.3d 804, 810 (1982).

So, even if the parties were able to agree upon the value of the artistic work, how is the value allocated between separate and community property? The answer, somewhat unsatisfyingly for those who prefer bright-line rules, is through "equitable apportionment." In *Zaentz*, the husband, through a production company founded prior to marriage, entered into an agreement during marriage to produce the movie *Amadeus*, which became a financial success. Since the profits contractually inured to the husband's separate property business, he argued the wife had no right to the money. The trial court disagreed and awarded the community a \$600,000 interest in the production company. Although the trial court did not specify how it arrived at the \$600,000 figure, the decision was affirmed based upon the discretion of the court to achieve equity. *In re Marriage of Zaentz*, 218 Cal.App.3d 154 (1990).

Thus, *Zaentz* shows that allocating a mixed asset through equitable apportionment is highly fact

dependent. Some generally applicable questions are: What was the length of time during which the property was created, and how much of that time occurred during marriage? Was there a "breakthrough moment" before, during, or after marriage? Did the amount of effort fluctuate over time or did it remain relatively consistent? Every case involving equitable apportionment will be highly fact dependent. Yet development of these facts is necessary to the equitable division of the community property estate.

CONCLUSION

Our state's dynamic, creative economy, and the global economy more broadly, will continue to generate new property rights and asset classes. These will pose new and difficult legal challenges in the divorce context, but the laws, properly applied, will ensure the full identification, accurate valuation, and equal division of such community property assets.

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