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**Touro Law Review**

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Volume 4 | Number 2

Article 7

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1988

## The Problem of Selecting a Valuation Date for Property Subject to Equitable Distribution in New York

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### Recommended Citation

(1988) "The Problem of Selecting a Valuation Date for Property Subject to Equitable Distribution in New York," *Touro Law Review*. Vol. 4: No. 2, Article 7.

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# THE PROBLEM OF SELECTING A VALUATION DATE FOR PROPERTY SUBJECT TO EQUITABLE DISTRIBUTION IN NEW YORK

## INTRODUCTION

In September 1986, the New York Legislature amended part B of section two hundred thirty-six of the New York Domestic Relations Law which governs the distribution of property when married persons divorce or their marriage is otherwise dissolved or annulled.<sup>1</sup> Under the law, in a matrimonial action where equitable distribution is at issue, both parties are compelled to disclose their respective financial states by means of a sworn statement of net worth.<sup>2</sup> Courts use this information to value and to dispose of the parties' marital property.<sup>3</sup> In disposing of this property, the courts are faced with the

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1. 1986 N.Y. Laws 884 (codified at N.Y. DOM. REL. LAW § 236(B)(4)(b) (McKinney 1986)).

2. *See* N.Y. DOM. REL. LAW § 236(B)(4)(a) (McKinney 1986).

3. *Id.* § 236(B)(1)(c), which states:

The term 'marital property' shall mean all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held, except as otherwise provided in agreement pursuant to subdivision three of this part.

*Id.*

Under Section 236(B)(5)(d), there are thirteen factors which the court considers to equitably distribute marital assets:

- (1) the income and property of each party at the time of marriage, and at the time of the commencement of the action;
- (2) the duration of the marriage and the age and health of both parties;
- (3) the need of a custodial parent to occupy or own the marital residence and to use or own its household effects;
- (4) the loss of inheritance and pension rights upon dissolution of the marriage as of the date of dissolution;
- (5) any award of maintenance under subdivision six of this part;
- (6) any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party;
- (7) the liquid or non-liquid character of all marital property;
- (8) the probable future financial circumstances of each party;
- (9) the impossibility or difficulty of evaluating any component asset or any interest in a business, corporation, or profession, and the economic desirability of retaining such asset or interest intact and free from any claim or interference by the other party;
- (10) the tax consequences to each party;

problem of fixing a date upon which they can fairly value the parties' assets. The New York Legislature enacted Domestic Relations Law section 236(B)(4)(b) which prescribes the proper time frame in which property subject to distribution must be valued.<sup>4</sup>

This note will discuss the history of this recent amendment, examine the problems associated with selecting a valuation date for property subject to equitable distribution, examine whether the amendment is likely to produce any significant change in the way courts value such property, and suggest the need for greater flexibility in the area of valuation dating.

## I. EQUITABLE DISTRIBUTION - BACKGROUND AND THE NEED FOR REVISION

On June 3, 1980, the New York Legislature passed divorce reform legislation which has become known as the Equitable Distribution Law.<sup>5</sup> Prior to the passage of this legislation, spouses who did not hold title to property upon the dissolution of a marriage did not share in its distribution. Until 1980, New York was one of a "[f]ew remaining states in which property—i.e. real estate, securities, bank accounts, businesses and other assets—was distributed strictly to the title holder."<sup>6</sup> The Equitable Distribution Law changed this by requiring that marital property be distributed equitably between the parties.<sup>7</sup>

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(11) the wasteful dissipation of assets by either spouse;

(12) any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration;

(13) any other factor which the court shall expressly find to be just and proper.

*Id.* § 236(B)(5)(d).

4. *Id.* § 236(B)(4)(b) states:

As soon as practicable after a matrimonial action has been commenced, the court shall set the date or dates the parties shall use for the valuation of each asset. The valuation date or dates may be anytime from the date of commencement of the action to the date of trial.

*Id.*

5. 1980 N.Y. Laws 281 (codified at N.Y. DOM. REL. LAW § 236(B) (McKinney 1986)).

6. OFFICE OF COURT ADMINISTRATION, UNIFIED COURT SYSTEM, REPORT OF NEW YORK TASK FORCE ON WOMEN IN THE COURTS 99 (March 31, 1986) [hereinafter TASK FORCE].

7. Equitable does not necessarily mean equal. *See Arvantes v. Arvantes*, 64 N.Y.2d 1033, 1034, 478 N.E.2d 199, 200, 489 N.Y.S.2d 58, 59 (1985) (the New York Court of Appeals said "there is no requirement that the distribution of each item of marital property be on equal or 50-50 basis"); *see also Sementelli v. Sementelli*, 102 A.D.2d 78, 87, 477 N.Y.S.2d 626, 632 (1st Dep't 1984) (trial court erroneously acted upon the basis that equitable distribution means a 50-50 division); *Rodgers v. Rodgers*, 98 A.D.2d 386, 391, 470 N.Y.S.2d 401, 405 (2d Dep't 1983) (distribution not on a simple 50-50 basis); *Ward v. Ward*, 94 A.D.2d 908,

Early in 1980, Governor Hugh L. Carey urged the members of the New York Legislature to adopt divorce reform legislation which would be gender neutral<sup>8</sup> and which would consider the economic impact upon spouses and children caused by the dissolution of a marriage.<sup>9</sup> In approving the Equitable Distribution Law, Governor Carey characterized the bill as the most sweeping reform of the divorce laws since the Divorce Reform Act of 1966, and stated that "The bill recognizes that the marriage relationship is also an economic partnership."<sup>10</sup>

The economic partnership theory is considered the major premise of the Equitable Distribution Law.<sup>11</sup> The theory is based on the concept that all assets acquired during the marriage, either by the individual or joint efforts of the spouses, are regarded as marital property and are subject to equitable distribution upon divorce in accordance with the factors set forth in the statute.<sup>12</sup> In deciding whether a medical practice was marital property subject to equitable distribution, Supreme Court Justice William R. Geiler, focusing on the economic partnership theory, said:

The nonremunerated efforts of raising children, making a home, performing a myriad of personal services and providing physical and emotional support are, among other noneconomic ingredients of the marital relationship, at least as essential to its nature and maintenance as are the economic factors, and their worth is consequently entitled to substantial recognition. Thus, the extent to which each of the parties contributes to the marriage is not measurable only by the

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909, 463 N.Y.S.2d 634, 636 (3d Dep't 1983) (distribution need not be equal, but should be made upon parties' needs and circumstances).

8. 1980 N.Y. Laws 1863 (Governor's Memorandum of Approval of Husband and Wife - Equal Treatment and Support Obligations, Matrimonial Actions, ch. 281, 1980 N.Y. Laws 445). This was to conform New York law with the mandate of *Orr v. Orr*, 440 U.S. 268 (1979), where the Supreme Court of the United States declared an Alabama alimony statute unconstitutional because of its classification by gender. Now, New York's Domestic Relations Law makes use of the word "spouse," "party," or "parent" throughout, and not "husband" or "wife." N.Y. DOM. REL. LAW § 236(B) (McKinney 1986).

9. 1980 N.Y. Laws 1863 (Governor's Memorandum of Approval of Husband and Wife - Equal Treatment and Support Obligations, Matrimonial Actions, ch. 281, 1980 N.Y. Laws 445). New York had been considering divorce reform legislation since 1974. However, due to rival bills and the Senate Judiciary Committee's refusal to move the bill out of committee, the Equitable Distribution Law was six years in the waiting. See Foster, *Commentary on Equitable Distribution*, 26 N.Y.L. SCH. L. REV. 1 n.1 (1981). Professor Henry H. Foster, with the assistance of Julia Perles of the Matrimonial Law Committee of the New York County Lawyers' Association and the approval of the Family Law Section of the New York State Bar Association, prepared the first draft of what came to be the Equitable Distribution Law.

10. 1980 N.Y. Laws 1863.

11. H. FOSTER, D. FREED & J. BRANDES, 3 LAW AND THE FAMILY—NEW YORK (1986).

12. *Id.*

amount of money contributed to it during the period of its endurance but, rather, by the whole complex of financial and nonfinancial components contributed.<sup>13</sup>

However, there existed much concern that child raising, home-making, and other such nonremunerated efforts were not being fairly considered by the courts in equitable distribution cases. Therefore, on May 31, 1984, Chief Judge Lawrence H. Cooke announced the creation of the New York Task Force on Women in the Courts. The Task Force's mandate was to ascertain whether, and to what extent, there existed unfairness or undue hardship on women in the courts. On March 31, 1986, after a twenty-two month investigation, the Task Force concluded that gender bias against women litigants was a pervasive problem with grave consequences.<sup>14</sup> The Task Force expressed the hope that the adverse conditions faced by women in the New York courts would be eliminated and that appropriate administrative and legislative action would follow.<sup>15</sup>

In determining the extent to which the New York courts contributed to the problem of increased economic hardship for women, the Task Force report devoted a lengthy section to an examination of the courts' decisions under the Equitable Distribution Law.<sup>16</sup> Some witnesses at the public hearings held by the Task Force suggested that the Equitable Distribution Law was "alive and well" and was being fairly administered.<sup>17</sup> The report, however, stressed that few witnesses concurred with this positive outlook.<sup>18</sup>

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13. *Wood v. Wood*, 119 Misc. 2d 1076, 1079, 465 N.Y.S.2d 475, 477 (Sup. Ct. Suffolk County 1983). Justice Geiler further stated:

The function of equitable distribution is to recognize that when a marriage ends, each of the spouses, based on the totality of the contributions made to it, has a stake in and a right to a share of the marital assets accumulated while it endured, not because that share is needed, but because those assets represent the capital product of what was essentially a partnership entity.

*Id.*; see also *Gibbons v. Gibbons*, 174 N.J. Super. 107, 415 A.2d 1174 (App. Div. 1980), *rev'd on other grounds*, 80 N.J. 515, 432 A.2d 80 (1981).

14. TASK FORCE, *supra* note 6, at 5.

15. *Id.* at 7.

16. *Id.* at 95-124.

17. *Id.* at 97; see Foster, *A Second Opinion: New York's EDL Is Alive and Well and Is Being Fairly Administered*, 17 FAM. L. REV. 3 (1985) (submitted to the New York Task Force).

18. TASK FORCE, *supra* note 6, at 98. Harriet N. Cohen, President of the New York Women's Bar Association, and Adria S. Hillman, Chair of the Matrimonial and Family Law Committee of New York, submitted a lengthy paper to the Task Force. Cited by the Task Force as the Cohen-Hillman Study, it stated that:

[D]ependent wives, whether they worked at home or in the paid marketplace were relegated to one or a combination of the following in an aggregate of 49 out of the 54 cases susceptible of this analysis: less than a fifty percent overall share of marital property;

The report also suggested that some judges do not recognize the economic partnership theory of marriage.<sup>19</sup> Furthermore, it added that New York courts have construed the Equitable Distribution Law in a manner that greatly disadvantages women and predetermines inequitable results.<sup>20</sup>

While the Task Force was conducting its hearings and analyzing its materials, the New York Legislature had begun to consider making changes in the Equitable Distribution Law. This revision came into being on August 2, 1986, in the form of a series of amendments to the Equitable Distribution Law.

The amendments were introduced by Senator John Dunne and Members of the Assembly May Newburger, Jerrold Nadler, Saul Weprin, and Gordon Burrows. The primary purpose of the revision was:

to alleviate the adverse economic consequences which have befallen women under the maintenance provisions of the Domestic Relations Law which are being interpreted by the courts to preclude awards of permanent maintenance for older homemakers in marriages of long duration, homemakers with responsibility for minor children, and homemakers who have sacrificed employment opportunities to give priority to family needs.<sup>21</sup>

The bill's introducers and sponsors believed that the Equitable Distribution Law and especially its maintenance provisions, was not always administered equitably. They also believed that by revising the Equitable Distribution Law they were responding to the needs of those women most seriously affected by gender bias. The Task Force report, relied upon by the Legislature, demonstrated the widespread

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short term maintenance after long term marriages; *de minimis* shares of businesses and professional practices which, in addition, the courts undervalued; terminable and modifiable maintenance in lieu of indefeasible and equitable distribution or distributive awards; and inadequate or no counsel fee awards.

*Id.* at 99 (quoting Cohen & Hillman, *Analysis of Seventy Select Decisions After Trial Under New York State's Equitable Distribution Law, From January 1981 Through October 1984, Analyzed November 1, 1984*, at 4).

19. *Id.* at 99-100.

20. *Id.* at 102-03. For other significant comments and conclusions made by the Task Force regarding the Equitable Distribution Law, see *id.* at 106 (the pattern of property division in reported decisions reveals that the view of marriage as an economic partnership has not taken hold); *id.* at 108 (undervaluation of homemakers' contributions); and *id.* at 110 (judges appear unaware of the economic opportunity cost to the one who has devoted long years to unpaid labor for her family).

21. Memorandum of Assemblywoman May W. Newburger, *reprinted in* NEW YORK STATE LEGISLATIVE ANNUAL 356-57 (1986) [hereinafter Newburger Memorandum].

abuse of the maintenance provisions of the Equitable Distribution Law.<sup>22</sup>

Another purpose of the 1986 revision of the Equitable Distribution Law was to prevent moneyed spouses from avoiding equitable distribution by dissipating or transferring assets before distribution could take place. The Legislature added three more factors which courts may now use in making equitable distribution decisions. Two of these new factors were designed to ensure that the full value of all marital assets would be equitably distributed between the parties.<sup>23</sup>

The final purpose for revising the Equitable Distribution Law was to streamline the litigation process by requiring matrimonial courts to set valuation dates for each asset in the preliminary stages of an action so the parties' experts could make use of them.<sup>24</sup> It is this purpose, the complexities surrounding the selection of the appropriate valuation date, which is the focus of this note.

## II. VALUATION

A New York matrimonial court performs three main functions when deciding a case. First, the court must determine whether any grounds for divorce exist.<sup>25</sup> Second, once grounds are established and the divorce is granted, the court must make custody and visitation determinations when minor children are involved. Finally, the court must perform its equitable distribution function by determining the

22. TASK FORCE, *supra* note 6, at 115-16.

Cohen and Hillman analyzed fifty reported decisions involving requests for maintenance. In forty-four of these cases, the marriages ranged from 7½ years to 57 years in duration. In ten cases, economically dependent wives married between ten and fifty-seven years (with eighteen years of marriage being the median) were totally denied a maintenance award. In fifteen cases, economically dependent women who had been married for between eight and thirty-six years (twenty years of marriage being the median) were awarded only rehabilitative maintenance for periods ranging from 1½ years to 5 years. In the remaining nineteen cases, economically dependent women were awarded long-term or permanent maintenance.

*Id.* It appears that in half the cases analyzed by Cohen and Hillman the women received little or no maintenance. However, in many of the cases they received substantial equitable distribution awards thereby obviating the need for maintenance.

23. See N.Y. DOM. REL. LAW § 236(B)(5)(d)(11)-(12) (McKinney 1986). The two additional factors are the "wasteful dissipation of assets by either spouse," and "any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration." The third additional factor deals with the tax consequences to the parties. *Id.*

24. See Newburger Memorandum, *supra* note 21, at 356.

25. See N.Y. DOM. REL. LAW § 170 (McKinney 1986). New York modernized its divorce law in 1966. There are now six grounds for divorce. They include cruel and inhuman treatment, adultery, abandonment, imprisonment of a spouse, and living separate and apart for a year or more. *Id.*

respective rights of the parties in their separate or marital property, providing for its disposition, and making child support and maintenance determinations.<sup>26</sup>

In performing this function,<sup>27</sup> the court has several tasks before it. Once the parties' attorneys identify each spouse's assets, the court determines whether they are marital or separate property.<sup>28</sup> Once this determination is made, the court receives evidence from the parties as to their value and makes distribution.<sup>29</sup> The valuation and equitable distribution of assets is considered the most perplexing problem created by the Equitable Distribution Law.<sup>30</sup>

The Equitable Distribution Law is silent regarding the method that courts are to use in order to value marital property.<sup>31</sup> Until August 2, 1986, the law was also silent as to a specific date at which to value such property.<sup>32</sup> However, under the revised Equitable Distri-

26. See *id.* § 236(B)(5)(a).

27. Distribution under New York's Domestic Relations Law may come in different forms. See, e.g., *id.* § 236(B)(1)(b) (distributive award by mutual agreement or the court); *id.* § 236(B)(5)(c) (equitable distribution of marital property upon consideration of the circumstances); *id.* § 236(B)(6)(a) (distribution in the form of temporary maintenance or maintenance in the interest of justice, giving regard to the standard of living established during the marriage).

28. Separate property is defined in Domestic Relations Law § 236(B)(1)(d) as:

(1) property acquired before marriage or property acquired by bequest, devise, or descent, or gift from a party other than a spouse; (2) compensation for personal injuries; (3) property acquired in exchange for or the increase in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse; (4) property described as separate property by written agreement of the parties pursuant to subdivision three of this part.

*Id.* Marital property is defined in Domestic Relations Law § 236(B)(1)(c), and may include residences, business interests, securities, cash, pensions, annuities, real property, tax refunds, licenses to practice law or medicine, or even teaching certificates. N.Y. DOM. REL. LAW § 236(B), commentary at 191 (McKinney 1986). This list is illustrative only. The court must distinguish between marital and separate property because, while only marital property is subject to equitable distribution, the appreciation in value of separate property may be deemed marital property. Also, the court will consider the separate property of both spouses when making equitable distribution. *Id.* § 236(B)(5)(d)(1).

29. Parties may make written agreements to distribute property before or during the marriage. Such agreements, often called "opting out agreements," are valid and enforceable. *Id.* § 236(B)(3).

30. See H. FOSTER, D. FREED & J. BRANDES, *supra* note 11, at 587-88.

31. When the marital property to be distributed involves a multitude of complex assets, especially pensions and businesses, parties often seek, and courts are aided by, the assistance of valuation experts. When the moneyed spouse is able to arrange for experts and the non-moneyed spouse is not, inequity can result. Courts often award the non-moneyed spouse expert fees. See N.Y. DOM. REL. LAW § 236(B)(5)(e) (McKinney 1986) ("The court in its discretion . . . may make a distributive award to . . . facilitate or effectuate a distribution of marital property.").

32. See *supra* note 1; see also N.Y. DOM. REL. LAW § 236(B), commentary at 118 (McKinney 1984). Professor Alan D. Scheinkman observes, "There has been a trend in the courts to



bution Law, paragraph (b) was added to Domestic Relations Law section 236(B)(4).<sup>33</sup>

### III. VALUATION BEFORE THE ENACTMENT OF DOMESTIC RELATIONS LAW § 236(B)(4)(b)

While the economic partnership theory underlies the Equitable Distribution Law, courts have not followed strict partnership law concepts in determining the appropriate date for valuing marital assets. To do so would force the matrimonial court to apply partnership law principles to determine when marital assets are to be valued. This could be problematic because business partnerships may sometimes be considered dissolved from the date of the court decree ordering dissolution,<sup>34</sup> whereas marital property is valued at the time of trial or later. However, the date of dissolution for a business partnership more frequently is considered the date upon which any one of the partners manifests an election to dissolve the partnership.<sup>35</sup> The selection of a valuation date for marital property using this approach would be an added burden upon the court. It probably would prove to be unworkable because it would be extremely difficult for the court to determine exactly when a party manifested an election to dissolve the marriage partnership. Additionally, a marriage partner cannot terminate a marriage as easily as a business partner can terminate a business.

Instead, most courts fix different valuation dates depending on the asset involved and the individual circumstances of the case. The date

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look to the date of the commencement of the action as the valuation date." However, he also suggests that "[f]airness and equity, . . . the principle objectives of the statute, would seem to be best served by valuing property as of the time of trial . . ." *Id.* (citing *Rywak v. Rywak*, 100 A.D.2d 542, 473 N.Y.S.2d 239 (2d Dep't 1984)).

Professor Scheinkman theorizes that perhaps both dates be utilized by equitable distribution courts:

It would seem entirely proper to allow proof of valuation as of the date of the commencement of the action and as of the time of trial to be accepted into evidence. Having proof of both values and of the conduct of the parties during the pendency of the action, the court would be in a position to consider all relevant circumstances.

*Id.*; see also N.Y. DOM. REL. LAW § 236(B), commentary at 287-89 (McKinney 1984).

33. See *supra* note 4; see also *Yunger v. Yunger*, 133 A.D.2d 451, 453, 519 N.Y.S.2d 666, 668 (2d Dep't 1987) (in arriving at a valuation of a marital asset, trial court must state the valuation date it selects and the reasons therefor).

34. 16 N.Y. JUR. 2d *Business Relations* § 1456 (1981).

35. See N.Y. PARTNERSHIP LAW § 62(1)(b) (McKinney 1984); see also *Carola v. Grogan*, 102 A.D.2d 934, 935, 477 N.Y.S.2d 525, 527 (3d Dep't 1984) (the correct date of dissolution of a partnership at will was the date when plaintiff manifested an unequivocal election to dissolve the partnership).

most frequently falls between the date of commencement of the action and the date of the trial (i.e., the trial date time frame now mandated by Domestic Relations Law section 236(B)).

#### A. *Time of Trial*

Certain assets are almost always valued as of the time of trial. For example, in those cases where a marital residence is property subject to equitable distribution, a date at or near the date of trial is commonly used for valuation purposes.<sup>36</sup> Additionally, property in the form of bonds subject to equitable distribution has usually been valued as of the date of trial as well.<sup>37</sup> Because assets such as residences and securities are subject to great market fluctuation, trial courts often seek to ascertain the most up-to-date information available.<sup>38</sup>

#### B. *Commencement of Action Cases*

Most courts have attempted to follow the general rule that the commencement of the matrimonial action is the fairest time at which to evaluate marital property for the purpose of equitable dis-

36. See *Capasso v. Capasso*, 129 A.D.2d 267, 276, 517 N.Y.S.2d 952, 958 (1st Dep't 1987) (fairest distribution of the marital residence, absent custodial or other considerations, is to value it as of the time of trial, give each spouse fifty percent interest, and sell it); *Lobotsky v. Lobotsky*, 122 A.D.2d 253, 505 N.Y.S.2d 444 (2d Dep't 1986) (marital home should be sold for its fair market value at the time sale is actually made); *Sorrentino v. Sorrentino*, 116 A.D.2d 564, 497 N.Y.S.2d 420 (2d Dep't 1986) (marital premises valued at \$130,000 at time of trial rather than \$118,000 at time of commencement of action); *Griffin v. Griffin*, 115 A.D.2d 587, 496 N.Y.S.2d 249 (2d Dep't 1985) (valuation of residence made during the year immediately preceding the trial); *Barnes v. Barnes*, 106 A.D.2d 535, 483 N.Y.S.2d 358 (2d Dep't 1984) (upholding trial court's valuation of a marital residence as of the date of trial).

37. *Michalson v. Michalson*, 112 A.D.2d 269, 271, 492 N.Y.S.2d 44, 46 (2d Dep't 1985); see also *Tallering v. Tallering*, 129 A.D.2d 696, 697, 514 N.Y.S.2d 458, 459 (2d Dep't 1987) (where husband contended that his interests in an oil corporation be valued at commencement of action, court held that wife was entitled to disclosure of husband's finances up to the present time).

38. *Roffman v. Roffman*, 124 Misc. 2d 636, 476 N.Y.S.2d 713 (Sup. Ct. New York County 1983). In *Roffman*, Justice John Grow used the most currently available valuation for each item of marital property. The items of marital property included a cooperative apartment, the interest in a profit sharing trust, and stock in a furniture design business. *Id.* at 636-37, 476 N.Y.S.2d at 714. The court distinguished *classification* of marital property from determining its *value*. "Although the *classification* of marital versus separate property is to be fixed as of the date the action commenced (Domestic Relations Law, § 236, part B, subd 1, par c), the determination of the *value* of marital property should reflect the economic situation of the parties at the time of trial." *Id.* at 636 n.1, 476 N.Y.S.2d at 714 n.1 (emphasis in original). But see *Povosky v. Povosky*, 124 A.D.2d 1068, 508 N.Y.S.2d 722 (4th Dep't 1986) (wife's share of husband's interest in savings and investment plan computed on the basis of plan's value at commencement of action, not date of trial).

tribution.<sup>39</sup> The New York Court of Appeals has determined that the value of pension rights should be valued as of the commencement of the action.<sup>40</sup> Other courts have interpreted this to mean that the appreciation in value of a husband's pension and profit sharing plan, as well as other numerous business interests, should also be valued as of the date of commencement of the marital action.<sup>41</sup> Additionally, the court of appeals has concluded that a wife's indirect contributions to a marriage as a homemaker and mother warranted an award of a percentage of the husband's business interests which occurred from the inception of the parties' marriage to the date of the commencement of the matrimonial proceeding.<sup>42</sup> The reason some courts

39. See 48 N.Y. JUR. 2d *Domestic Relations* § 1364 (1985). "[T]he value for distribution purposes is that value which it has at the time when accumulation of marital property, as such, stops; the time of the commencement of a marital action or the execution of a separation agreement." *Id.* (footnote omitted).

40. *Majauskas v. Majauskas*, 61 N.Y.2d 481, 491-92, 463 N.E.2d 15, 20-21, 474 N.Y.S.2d 699, 704-05 (1984). The trial court, in computing the wife's portion of future pension payments, directed that the number of months the parties were married be used as the numerator of the computational fraction. *Id.* at 487, 463 N.E.2d at 18, 474 N.Y.S.2d at 702. The Appellate Division modified the judgment by limiting the numerator to the number of months prior to the commencement of the action during which the parties were married. *Majauskas v. Majauskas*, 94 A.D.2d 494, 497-98, 464 N.Y.S.2d 913, 916 (4th Dep't 1983); see also *McGowan v. McGowan*, 136 Misc. 2d 225, 230, 518 N.Y.S.2d 346, 350 (Sup. Ct. Suffolk County 1987) (well settled that pension and/or retirement benefits are valued as of commencement of divorce action).

41. *Posillico v. Posillico*, No. 4417-82, slip op. at 6 (Sup. Ct. Suffolk County 1982). In *Posillico*, there were eleven limited partnerships or investment properties which were valued at the date of commencement of the action. Where no viable evidence for the valuation as of the commencement of the action could be shown, the date of trial or the cost of the property to the husband was used for valuation purposes. Additionally, Justice Roberto, relying on *Barnes v. Barnes*, 106 A.D.2d 535, 483 N.Y.S.2d 358 (2d Dep't 1984), fixed the valuation date for the marital home at the date of trial. See also *Damiano v. Damiano*, 94 A.D.2d 132, 139, 463 N.Y.S.2d 477, 481 (2d Dep't 1983) (only that portion of pension benefits which accrued during marriage and prior to the commencement of the action should be considered marital property).

42. *Price v. Price*, 113 A.D.2d 299, 308, 496 N.Y.S.2d 455, 462 (2d Dep't 1985), *aff'd*, 69 N.Y.2d 8, 503 N.E.2d 684, 511 N.Y.S.2d 219 (1987); see *Clerk v. Clerk*, 132 A.D.2d 456, 517 N.Y.S.2d 512 (1st Dep't 1987) (where parties entered into family court stipulation in 1981, trial court erred in using date of separation for valuation purposes and, at a minimum, wife's nonremunerated homemaking contributions to be given consideration from date of marriage to date of stipulation). For additional cases where the commencement of the action rule has been followed see *Rosenberg v. Rosenberg*, 126 A.D.2d 537, 540, 510 N.Y.S.2d 659, 662 (2d Dep't 1987) (noted that a trial court is afforded discretion regarding the setting of valuation dates under the Equitable Distribution Law and utilized the date of commencement as the valuation date for the parties' brokerage accounts), *appeal denied*, 70 N.Y.2d 601, 512 N.E.2d 549; *Scalchunes v. Scalchunes*, 134 A.D.2d 337, 338, 520 N.Y.S.2d 812, 813 (2d Dep't 1987) (wife's interest in husband's stock valued day before commencement of action); *Lord v. Lord*, 124 A.D.2d 930, 508 N.Y.S.2d 676 (3d Dep't 1986) (unless patently inequitable, valuation of marital property is properly fixed at commencement of the action); *Brennan v. Brennan*, 103

value tangible assets, such as real estate or art work, as of the date of trial and intangible property, such as an interest in business, as of the commencement of an action is because the former are less susceptible to having their value manipulated by any one party.<sup>43</sup>

Some courts, while applying the commencement of the action rule, also consider post-commencement events in determining proper valuation.<sup>44</sup> Other courts believe that a date other than the commencement of the action may be appropriate in particular cases.<sup>45</sup> Prior to the enactment of Domestic Relations Law section 236(B)(4)(b), most courts determined that the dates between the commencement of the action and the time of trial were most suitable for valuation purposes. However, in the minority of cases in which unique facts existed, some courts sought to utilize dates before the commencement of the action or even after the date of trial.

#### IV. THE NEED FOR FLEXIBLE VALUATION DATES

##### A. *The Wegman Approach*

One commentator, prior to the August 1986 revision of the Domestic Relations Law, suggested that there should be no mandated valuation date and that the determination of appropriate valuation dates should ultimately rest in the discretion of the trial courts.<sup>46</sup> He

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A.D.2d 48, 479 N.Y.S.2d 877 (3d Dep't 1984) (where valuation of marital property was fixed at the commencement of the action).

43. Siegal v. Siegal, N.Y.L.J., Dec. 24, 1987, at 36, col. 1 (2d Dep't Dec. 14, 1987).

44. See Bofford v. Bofford, 117 A.D.2d 643, 645, 498 N.Y.S.2d 385, 386 (2d Dep't 1986) (trial court properly valued marital property as of the date of the commencement of the action, and properly considered post-commencement events in its determination); Lee v. Lee, 93 A.D.2d 221, 226, 462 N.Y.S.2d 34, 37 (2d Dep't 1983) ("The commencement of the action marks the termination of the time within which marital property can be acquired, [therefore,] the wife was not bound by her husband's estimate of the worth of his assets on that date." The court added that the post-commencement information relevant to the valuation of marital assets is a proper subject matter for inquiry.); see also Pignatelli v. Pignatelli, 135 Misc. 2d 800, 802, 516 N.Y.S.2d 591, 592 (Sup. Ct. Bronx County 1987) (a three year delay in complying with divorce decree should not benefit one party and work hardship on the other, and therefore wife was given benefit of 1987 appraisal of residence rather than one made in 1984). But see Siegal v. Siegal, N.Y.L.J., Dec. 24, 1987, at 4, col. 5 (2d Dep't Dec. 14, 1987). In *Siegal*, the court was concerned that parties who repeatedly sought modifications of final judgments, based on allegations that assets appreciated or depreciated, would undermine the finality of judgments in matrimonial actions. Thus, the court held that a trial court may not, by entertaining a post-judgment motion, re-evaluate a marital asset as of any date subsequent to the time of trial. *Id.*

45. Heaney v. Heaney, N.Y.L.J., Apr. 2, 1984, at 16, col. 3, 4 (Sup. Ct. Richmond County 1984).

46. Greenhaus, *Valuation of Marital Property: Choosing an Appropriate Valuation Date*, 13 Fam. L. Rev. 101 (1984).

concluded that the trial courts should be given the widest possible latitude in determining each case based upon the individual facts presented, and that rules regarding valuation dating should not be carved in stone. Rigid rules would defeat the ability of the trial court to effectuate truly equitable distribution.<sup>47</sup>

Perhaps the most noteworthy New York case in which flexible valuation dates are discussed is *Wegman v. Wegman*.<sup>48</sup> This case involved a marriage of long duration<sup>49</sup> and the troublesome problem of determining the proper dates for valuing the parties' assets where a nine year separation was involved.

The fact pattern in *Wegman* is quite complex. Subsequent to the parties' marriage in 1943, the husband received part interest in a mail order business from his uncle. The wife was a social worker who contributed her earnings to the household. The husband's business developed into a chemical manufacturing company that marketed the chemical collagenase, which was researched and developed in 1957. The husband's business also owned various properties. In 1972 the husband left the marital home in Freeport, New York, and in 1973 he commenced an action for divorce claiming cruel and inhuman treatment and constructive abandonment. The following year, he purchased a home in Hewlett, New York. The action was dismissed in a 1977 trial, whereupon he obtained a Haitian divorce and thereafter remarried.<sup>50</sup> In July 1981, Mrs. Wegman commenced a divorce action against her husband. The divorce was granted in 1983, and a trial on economic issues was held in 1985. In light of the parties' nine year separation, much of the testimony at this trial dealt with the complex valuation problems of the husband's business holdings, the parties' Freeport house, and the husband's Hewlett house.

Utilizing 1972, the year of separation, as a valuation date, the trial court awarded Mrs. Wegman a distributive award of \$741,230,<sup>51</sup> believing Mrs. Wegman had done nothing to contribute

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47. *Id.* at 8.

48. 129 Misc. 2d 968, 494 N.Y.S.2d 933 (Sup. Ct. Nassau County 1985), *modified*, 123 A.D.2d 220, 509 N.Y.S.2d 342 (2d Dep't 1986), *remittitur amended*, 123 A.D.2d 238, 512 N.Y.S.2d 410 (1987).

49. Thirty-eight years from the time the parties were married in June 1943, until the wife commenced the divorce action in July 1981. *Id.* at 969, 509 N.Y.S.2d at 935.

50. *Id.* at 980, 494 N.Y.S.2d at 941.

51. *Id.* at 976-78, 494 N.Y.S.2d at 939-40. The court calculated that the husband's business interests as of the date the parties separated equaled \$1,842,312. From this it subtracted \$16,800, the value of the husband's company as of 1947, when the husband and his brothers purchased the 3/7 interest of their cousins. The balance, \$1,825,512, was identified as the

to the appreciation of Mr. Wegman's business after the 1972 separation.<sup>52</sup> Additionally, the trial court determined that the marriage of the parties was irretrievably broken when the husband's matrimonial action was commenced in 1973. His Hewlett house, therefore, was not considered marital property for equitable distribution purposes.<sup>53</sup>

The trial court judge was aware that in 1985, the Equitable Distribution Law was silent on the question of the valuation date of assets for equitable distribution purposes. He knew that to be fair in situations such as this, where the unique fact of a nine-year separation was involved, various flexible theories and adjustable dates must be available in order to permit an equitable outcome.<sup>54</sup>

In *Wegman*, the trial court mentioned the fact that Mr. Wegman continued to pay the carrying charges on the Freeport house while Mrs. Wegman continued to live there and raise their two children.<sup>55</sup> For this reason, the court decided that it was marital property subject to equitable distribution. The court was equally aware that the Hewlett house was purchased by Mr. Wegman during the parties' marriage but after the 1972 separation and the commencement of Mr. Wegman's unsuccessful divorce action in 1973, the date the court believed the parties' marriage was irretrievably broken.<sup>56</sup>

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appreciation of the value of the husband's separate property subject to equitable distribution. The court then determined that, based on her contributions as spouse and homemaker, Mrs. Wegman's equitable share of the appreciation of the husband's business interest equaled forty-five percent, or \$821,480. From this sum, the court offset \$80,250 as Mr. Wegman's fifty percent share of the Freeport house valued as of the date of trial. The balance became the distributive award of \$741,230. *Id.* at 975-81, 494 N.Y.S.2d at 938-42.

52. *Id.* at 974, 494 N.Y.S.2d at 938.

53. *Id.* at 979-80, 494 N.Y.S.2d at 941-42.

54. Interview with Justice Robert Roberto (Oct. 31, 1986).

55. *Wegman*, 129 Misc. 2d at 970, 494 N.Y.S.2d at 936.

56. *Id.* at 979, 494 N.Y.S.2d at 941. The court followed a line of New Jersey cases beginning with *Painter v. Painter*, 65 N.J. 196, 320 A.2d 484 (1974), in which the Supreme Court of New Jersey said, "[w]e think the better rule to be that for purposes of determining what property will be eligible for distribution the period of acquisition should be deemed to terminate the day the complaint is filed." *Id.* at 217, 320 A.2d at 495. However, in a footnote the New Jersey court said, "[w]e are under no illusion that what we have said above will provide certain and ready answers to all questions which may arise as to whether particular property is eligible for distribution. . . . Individual problems must be solved, as they arise, within the context of particular cases." *Id.* at 217 n.7, 320 A.2d at 495 n.7. In *Di Giacomo v. Di Giacomo*, 80 N.J. 155, 402 A.2d 922 (1979), the New Jersey court followed *Painter* but recognized the need sometimes to rely on valuation dates other than the date of filing of a complaint, such as when the court was able to pinpoint the irretrievable breakdown of the marriage with a certain degree of accuracy. *Id.* at 156, 402 A.2d at 923. The *Di Giacomo* court recognized the date of a consensual oral separation agreement as the date on which to value marital assets. *Id.* at 159, 402 A.2d at 924. However, in *Portner v. Portner*, 93 N.J. 215, 460 A.2d 115 (1983), the New Jersey court, in reaffirming the *Painter* rule, said that mere physical separation of the parties was too difficult a date to be able to pinpoint as the terminal

Therefore, the court determined that the Hewlett house was not to be considered marital property.

### B. *The Wegman Appeal*

Early in 1986, Mrs. Wegman appealed from those portions of the trial court's decision which held that her husband's business interests were separate property and that the valuation date for those assets should be the 1972 separation date, and not 1981, the date Mrs. Wegman commenced the divorce action. The appellate division concluded that the distributive award of \$741,230 in favor of Mrs. Wegman was erroneous and remanded the matter to the trial court for a new determination.<sup>57</sup>

In the *Wegman* appeal, the court was anxious to consider the troublesome matter of the proper date for valuing marital property under the Equitable Distribution Law.<sup>58</sup> In its discussion, the court expressed the concern that prescribing a fixed date as the date of valuation might be unjust, inequitable, and contrary to the entire purpose of the Equitable Distribution Law.<sup>59</sup>

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date of a marriage. *Id.* at 222, 460 A.2d at 119. And in *Wegman*, the trial court determined that more than a mere physical separation was involved. In addition to the physical separation of the parties in 1972, Mr. Wegman actually commenced an action for divorce based upon cruel and inhuman treatment and abandonment in 1973. 129 Misc. 2d at 979, 494 N.Y.S.2d at 941.

At least one New York court makes use of language similar to that found in *Wegman* and the New Jersey cases. In *Muller v. Muller*, 116 Misc. 2d 660, 456 N.Y.S.2d 918 (Sup. Ct. Nassau County 1982), Justice McCaffrey, in deciding whether to value a husband's business as of the commencement of a family court support proceeding, the commencement of the husband's divorce proceeding, which was later withdrawn without prejudice, or the commencement of the wife's divorce proceeding, chose the commencement of the husband's divorce proceeding since it represented "the uncontrovertible time at which the marriage, for all purposes, [was] dead." *Id.* at 674, 456 N.Y.S.2d at 927. However, the court in *Davis v. Davis*, 128 A.D.2d 470, 513 N.Y.S.2d 405 (1st Dep't 1987), emphatically rejected the notion that the irretrievable breakdown of the marital partnership, when it occurs before the commencement of the action, is to be given any relevance for defining or valuing marital property. *Id.* at 478, 513 N.Y.S.2d at 412. Such a concept, argued the court, would violate the explicit language of Domestic Relations Law § 236(B)(1)(c)'s definition of marital property. *Id.* In addition, the *Davis* court recognized that the trial court's decision in *Wegman*, relied on by the wife with respect to valuation, was reversed in pertinent part on appeal. *Id.*

57. *Wegman v. Wegman*, 123 A.D.2d 220, 509 N.Y.S.2d 342 (2d Dep't 1986), *remittitur amended*, 123 A.D.2d 238, 512 N.Y.S.2d 410 (2d Dep't 1987).

58. *Id.* at 230, 509 N.Y.S.2d at 349; *see* *Litman v. Litman*, 123 A.D.2d 310, 312, 506 N.Y.S.2d 345, 347 (2d Dep't 1986) (noted recent amendment to Domestic Relations Law § 236(B)(4)(b), and decided that case was not ripe for determination).

59. *Wegman*, 123 A.D.2d at 223, 509 N.Y.S.2d at 350. The Second Department pointed out that there are many situations where a rigid valuation date rule would be undesirable and unworkable. It concluded that there should be no strict rule mandating the use of a particular

While this might indicate the appellate division's agreement with the trial court's disposition of the *Wegman* case, the court did not go so far as to say that the date of separation could be used to value marital assets subject to equitable distribution. Rather the court erected guideposts which it felt would provide some degree of direction in this area.<sup>60</sup> These guideposts are consistent with the valuation dates now required by the Legislature in Domestic Relations Law section 236(B)(4)(b).<sup>61</sup>

In *Wegman*, the appellate division found that the valuation by the trial court of Mr. Wegman's business holdings at the date of separation was unjustified and concluded that Mr. Wegman's business assets should have been valued at a date close to trial. Thus, Mrs. Wegman was entitled to a larger share of the marital kitty based upon her substantial contributions to the marriage during the period of the development of collagenase, the chief cash product of her husband's business.<sup>62</sup>

With regard to Mr. Wegman's Hewlett house, purchased after the parties separated but during the marriage, the appellate division di-

valuation date and that a trial court must have discretion to select appropriate dates in light of the particular circumstances of each case. *Id.* at 234-35, 509 N.Y.S.2d at 351.

60. *Id.*

61. The court noted that Domestic Relations Law § 236(B)(4)(b) applies only to matrimonial actions commenced on or after September 1, 1986, and was, therefore, inapplicable in *Wegman*. *Id.* at 236, 509 N.Y.S.2d at 252. However, the court further noted that

[w]ith the exception of the requirement that the valuation date be between the date of commencement of the action and the date of trial, the amendment places no restrictions upon the discretion of the court in choosing any appropriate valuation date or dates. A court may set different valuation dates for different assets, may take into consideration transfers and dissipations by a spouse seeking to hinder equitable distribution, and may change a valuation date after it is set if equity so requires.

*Id.* at 236-37, 509 N.Y.S.2d at 352-53.

Many New York Supreme Court Justices disagree that the amendment places no restrictions on their discretion in choosing appropriate valuation dates. *See infra* note 106.

62. *Id.* at 237, 509 N.Y.S.2d at 353. The court stated:

The expert testimony . . . makes clear that the value of the business increased substantially during the period of the parties' cohabitation and that it continued to grow subsequent to the separation. The rapid increase in value after the separation was not due to any change in the direction of the business or other cause which could be attributed solely to the efforts of Mr. Wegman. Rather, it was due to the successful marketing of collagenase, a product which was developed during the 1960's, a period of time during which Mrs. Wegman contributed to her husband's success by maintaining the marital residence, raising the couple's children, entertaining her husband's business associates, attracting investors and new employees to the business, and contributing her own earnings to the household as well.



rected that the trial court make factual findings as to the source of funds used to acquire it.<sup>63</sup>

The question remains whether the appellate division's opinion in *Wegman* places an absolute limit on New York justices who seek to go outside of the date-of-commencement/date-of-trial guideposts in order to determine valuation dates. It would appear that it does not. The appellate division in *Wegman* carefully concluded: "*We find no special circumstances which would justify the use of the date of the parties' separation . . . as the valuation date for Mr. Wegman's business holdings.*"<sup>64</sup> From this statement it may be inferred that special circumstances might exist which would justify a court's use of the date of separation or other dates outside the guideposts prescribed as the valuation date. What would constitute special circumstances is a question for courts to decide in the future.<sup>65</sup> Additionally, the language of Domestic Relations Law section 236(B)(4)(b) in and of itself, does not limit the trial courts absolutely; the valuation date or dates "may" be any time from the date of commencement of the action to the date of the trial. The Legislature easily could have substituted the word "shall" for the word "may," thus completely limiting a trial court judge's discretion when seeking to utilize valuation dates outside the guideposts.

### C. *The Musumeci Alternative*

*Musumeci v. Musumeci*<sup>66</sup> was the first reported case to deal with section 236(B)(4)(b) of the Domestic Relations Law, and one in which a trial court, while staying within the date-of-commencement/date-of-trial guideposts for valuation purposes, adjusted a wife's contributions in its computation so as to mold an appropriate decree.<sup>67</sup>

63. *Id.*

64. *Id.* (emphasis added).

65. *Michalson v. Michalson*, 112 A.D.2d 269, 492 N.Y.S.2d 44 (2d Dep't 1985), held that certain of the husband's bonds with a face value of \$600,000 should have been included as marital property and valued at the time of trial. The appellate division directed that the matter be remitted to fix the present value of each bond and equitable distribution be made of the present value of the bonds. The trial court's judgment was entered in September 1984, and the appellate division's modification nearly one year later. Thus, when a party attempted to hinder equitable distribution by hiding assets, bonds were ultimately valued at a date nearly one year after the time of trial, well outside the prescribed guideposts. *Id.* at 271, 492 N.Y.S.2d at 46.

66. 133 Misc. 2d 139, 506 N.Y.S.2d 629 (Sup. Ct. Suffolk County 1986).

67. *Id.* at 142, 506 N.Y.S.2d at 632 (quoting *Rodgers v. Rodgers*, 98 A.D.2d 386, 391, 470 N.Y.S.2d 401, 405 (2d Dep't 1983)).

In *Musumeci*, the parties were married in 1978 and separated in 1980, twenty-nine months later. The wife commenced an action for divorce in 1984, more than forty-six months after the separation.

The court was faced with the question of when to value the marital portion of the husband's pension, the parties' only asset.<sup>68</sup> In deciding whether the trial court should apply the *Wegman* date of separation rule,<sup>69</sup> or the *Majauskas* date of commencement of the action rule,<sup>70</sup> the court, construing Domestic Relations Law section 236(B)(4)(b), held that there was no longer a diversity of opinion. The court believed that the earliest date it could use was the date of the commencement of the action.<sup>71</sup>

The court preferred to value the pension as of 1980, the date of separation, because it believed it would be unfair to allow the wife the benefit of the pension for the entire period from the time of marriage to the date of service of the summons.<sup>72</sup> The court was concerned that, with inflation, a non-pensioned party would delay commencement of a marital action in order to benefit from the increased value of the pension resulting over time.<sup>73</sup>

By applying section 236(B)(5)(c) of the Domestic Relations Law, the court provided for Mrs. Musumeci's right in the pension in a slightly unorthodox way. Instead of awarding her a fixed percentage of the entire amount, it adjusted the wife's contributions for the first twenty-nine months of the marriage (the number of months the parties were together) at fifty percent. For the next forty-six and one

68. *Musumeci*, 133 Misc. 2d at 141-43, 506 N.Y.S.2d 631-32. The amount of the pension subject to equitable distribution was \$3,727.27. The numerator of the computational fraction would have been 29 (the number of months the parties were married until the date of separation) had the court used the date of separation (1980). However, the court used 75.5 as the numerator (the total number of months from the date of marriage until the date of commencement of the action) and 217.5 months as the denominator (the number of months of the marital portion of the pension was 34.71 percent or .3471). This was then multiplied by the husband's pension amount, \$10,738.33. The annual pension amount attributable to the marriage period was, therefore, determined to be \$3,727.27.

69. *Wegman v. Wegman*, 123 A.D.2d 220, 509 N.Y.S.2d 342 (2d Dep't 1986), *remititur amended*, 123 A.D.2d 238, 512 N.Y.S.2d 410 (2d Dep't 1987) (*Wegman* appeal was not decided until three months after *Musumeci*).

70. *Majauskas v. Majauskas*, 61 N.Y.2d 481, 463 N.E.2d 15, 474 N.Y.S.2d 699 (1984).

71. *Musumeci*, 133 Misc. 2d at 141, 506 N.Y.S.2d at 631. It is arguable that the court had to apply the mandate of § 236(B)(4)(b) of the Domestic Relations Law, since Mrs. Musumeci commenced the action for divorce on September 22, 1984. In *Wegman*, the appellate division said that § 236(B)(4)(b) applies only to matrimonial actions commenced on or after September 1, 1986. 123 A.D.2d at 236, 509 N.Y.S.2d at 352. Additionally, the legislation itself stated that this section of the act "[s]hall take effect on September 1, 1986, and shall apply to all matrimonial actions commenced on or after such date." 1986 N.Y. LAWS 884.

72. *Musumeci*, 133 Misc. 2d at 142, 506 N.Y.S.2d at 632.

73. *Id.* at 141, 506 N.Y.S.2d at 631.

half months (the number of months that the parties were separated until the commencement of the action) the wife received zero percent as her equitable share.<sup>74</sup> By apportioning her contributions in such a manner, the court, in effect, limited Mrs. Musumeci to that portion of her husband's pension which it felt she earned until the date of separation, and not beyond.<sup>75</sup>

While the court could not violate what it perceived to be the mandate of Domestic Relations Law section 236(B)(4)(b),<sup>76</sup> it was emphatic in exhorting the Legislature to delve into this subject so that both the law and equity would be one.<sup>77</sup>

If the date of separation approach used by the *Wegman* trial court has been legislated out of existence by the enactment of Domestic Relations Law section 236(B)(4)(b), the question remains whether the approach taken in *Musumeci* is to become the new rule.<sup>78</sup> Critics of the approach used in *Musumeci*, where the court apportioned certain percentages for the period during which the parties were together and different percentages for the period when they were separated, might argue that the court's method violates Domestic Relations Law section 236(B)(4)(b) because it allows for the circumvention of the valuation date guideposts provided in the statute.<sup>79</sup> Proponents of the approach, however, would counter with the

74. *Id.* at 143, 506 N.Y.S.2d at 632. This reduced the wife's annual amount to \$716.01, rather than a considerably higher amount had the wife received a fifty percent share of the pension amount attributable to the marriage.

75. *Id.* at 142, 506 N.Y.S.2d at 631. "[D]uring the latter forty-six months when the parties were not living together, it is obvious that the wife did nothing to contribute to the appreciation of the pension other than to be married to the defendant in name only." *Id.*

76. *Id.* at 144, 506 N.Y.S.2d at 633. The court further stated:

The question then becomes: Should the court reconcile the base for the pension by using the salary that the husband earned when the marriage was really over rather than the salary at the institution of the action? The answer to this must be, unfortunately, no.

To do so would cause the statute to be violated . . .

*Id.*

77. *Id.* The court expressed hope that the legislature would reconsider its amendment to Domestic Relations Law § 236(B)(4)(b).

78. *Wegman v. Wegman*, 123 A.D.2d 220, 509 N.Y.S.2d 342 (2d Dep't 1986), *remittitur amended*, 123 A.D.2d 238, 512 N.Y.S.2d 410 (2d Dep't 1987); *Musumeci v. Musumeci*, 133 Misc. 2d 139, 506 N.Y.S.2d 629 (Sup. Ct. Suffolk County 1986). *Wegman* and *Musumeci* are distinguishable on their facts. *Wegman* involved a marriage of long duration, two children, and many valuable assets. *Wegman*, 123 A.D.2d at 222-23, 509 N.Y.S.2d at 344. *Musumeci* involved a marriage of short duration, no children, and a moderate pension as the only asset. *Musumeci*, 133 Misc. 2d at 140-41, 506 N.Y.S.2d at 630-31.

79. Telephone interviews were conducted with members of the matrimonial bar in New York City and Long Island during November 1986. One interviewee described the approach used in *Musumeci* as "ugly, a farce, and typical of a bench that doesn't want to take care of women." Another said, "The court is not interested in taking care of anybody, or shouldn't be.

court's words in *Musumeci*: "[e]quitable distribution means doing justice as equity commands. To do otherwise is to violate the spirit of the law."<sup>80</sup>

Whether the decision in *Musumeci* will become the new rule remains to be seen. However, a few things are clear. For example, there will continue to be cases such as *Wegman* and *Musumeci* in which unique facts exist and judges must decide how to make equitable distribution in light of those facts. Likewise, judges will continue to face the dilemma of how to properly apply the discretionary powers given to them in Domestic Relations Law section 236(B)(5) in light of restrictive valuation date guideposts of Domestic Relations Law section 236(B)(4)(b). When lengthy separations occur before the commencement of a marital action, judges will continue to craft different equitable distribution approaches within the valuation date guideposts of Domestic Relations Law section 236(B)(4)(b).<sup>81</sup>

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Its goal is to do justice on a case by case basis." Other interviewees said, however, that *Musumeci* appears to be the new rule.

80. *Musumeci*, 133 Misc. 2d at 141, 506 N.Y.S.2d at 631. The law to which Justice Yachnin was referring is N.Y. DOM. REL. LAW § 236(B)(5)(a) (McKinney 1986) (unless otherwise provided, court shall determine respective rights of the parties in their property); *id.* § 236(B)(5)(c) (property to be distributed equitably given the circumstances); *id.* § 236(B)(5)(d) (factors to consider in equitable distribution include direct or indirect contributions to the acquisition of marital property as spouse, parent, wage earner and homemaker and to the career of the other spouse).

Proponents of the approach used in *Musumeci* might also argue that the new amendments to § 236(B) should not affect cases like *Musumeci* (marriage of short duration, no children). A spokesperson for Assemblyman Saul Weprin, co-introducer of the amendments, said, "[t]he bill was not intended to deal with two year marriages with no children, but with long term marriages." Telephone interview with Assemblyman Saul Weprin's office (Nov. 1986).

81. See N.Y. DOM. REL. LAW § 236(B), commentary at 289 (McKinney 1986). Commentator Alan D. Scheinkman suggests a method that appears to be in harmony with the *Musumeci* approach:

Of importance is the fact that valuation is only one part of the equation. The other part of the equation is the percentage of the property (or its value) that will actually be awarded or assigned to each of the parties. Using the most current valuation will not work a hardship or lead to distorted results since the court can select percentages of current value that are equitable, considering the appropriate statutory and discretionary factors. Indeed, the court can consider the reasons for any increase or decrease in value and, in particular, consider whether the change in value was the product of manipulation, the product of market conditions, or the result of efforts and contributions by either or both spouses, including homemaker services.

## V. DOMESTIC RELATIONS LAW § 236(B)(4)(b), THE LEGISLATURE, AND THE BAR

One intent of Domestic Relations Law section 236(B)(4)(b) was to encourage the court to establish early on a structure for the proof to be presented at trial.<sup>82</sup> The sponsors believed that in the beginning stages of litigation the parties should be made aware of the valuation dates the court intends to use so that each parties' experts can use them effectively.<sup>83</sup>

Prior to the Domestic Relations Law section 236(B)(4)(b) amendment, a committee of the Family Law Section of the New York State Bar Association<sup>84</sup> made a two-and-one-half year study of certain aspects of the judicial application of the Equitable Distribution Law. While the committee felt the Equitable Distribution Law was working, it believed that substantial revision was necessary and, therefore, it submitted several proposed changes to the Legislature.<sup>85</sup>

With regard to valuation dates, the committee suggested that the court establish a date or dates for valuation of all property. It further proposed that the valuation date as to any particular item of property be any date from the *date of the marriage* to the date of distribution, depending upon the circumstances of the case and the evidence presented.<sup>86</sup> Thus, the Domestic Relations Law section 236 (B)(4)(b) date-of-commencement/date-of-trial guideposts are drastically different from the date-of-marriage/date-of-distribution proposal made by the bar's Family Law Committee.

The committee believed that there should be an extremely flexible valuation date range and that judges should have wide discretion in valuation date selection. It further believed that the Legislature, by proposing Domestic Relations Law section 236(B)(4)(b), was making a serious mistake because in many cases the moneyed spouse makes careful preparations and is able to manipulate assets and val-

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82. See Newburger Memorandum, *supra* note 21, at 2.

83. *Id.* at 3. Experienced matrimonial litigators indicate that setting valuation dates early on is impractical and may be impossible to achieve. In the early stages of a matrimonial action parties have not yet conducted any meaningful discovery and other disclosure devices have not yet been complied with.

84. The committee included representatives of various state bar associations who were practitioners in the field of matrimonial law and was co-chaired by Julia Perles of New York City and Barbara Handschu of Buffalo.

85. Statement of Julia Perles before Joint Assembly and Senate Judiciary Committee Hearing (Mar. 6, 1985).

86. *Id.* at 8 (emphasis added).

ues before commencement of an action.<sup>87</sup> For this reason, the Legislature's proposed valuation date guideposts were, in the committee's view, unfair and impractical.

The Family Law Committee's flexible approach toward valuation dating is worthy of close consideration. The committee seemed to be speaking not only for practitioners in the field,<sup>88</sup> but also for the parties they represent. In the heavily populated counties of downstate New York, it is not uncommon that a trial occurs two or more years after the commencement of an action.<sup>89</sup> During such long delays, the values of real estate, businesses, and other assets can fluctuate greatly. It is also true, however, that they can fluctuate greatly during the marriage until the commencement of the action. Furthermore, parties contemplating a matrimonial action can hide, transfer, or dissipate assets at any stage from the date of the marriage to the ultimate date of distribution. For this reason, the New York State Bar Association's Family Law Committee recommended that trial courts be given wide discretion in selecting valuation dates.<sup>90</sup>

When the Legislature amended the Equitable Distribution Law in August 1986, it made several significant changes in one piece of leg-

87. Letter from Julia Perles, Co-Chair, Family Law Section, New York State Bar Association, to Senator John R. Dunne, Chairman, Committee on the Judiciary (June 6, 1986).

88. The committee was not alone in favoring a flexible approach to valuation dating. Other speakers, such as Peter D. Sereduke, Principal Law Assistant, Supreme Court, Special Term, Part V, and President of the Matrimonial Bar Association of Suffolk County, also addressed the Joint Assembly and Senate Judiciary Committee on March 15, 1986. Mr. Sereduke said:

Each case and asset must be viewed individually. We believe the Legislature was purposely silent on [the] issue of valuation so as to give the courts a certain amount of discretion. . . . For the Legislature to [fix] a definitive date for valuation would . . . deprive the courts of the ability to examine each case and the assets in question with regard to the particular facts in [the] case. . . . Equity calls for Justices to have discretion in this regard.

P. Sereduke, Statement to the Joint Assembly and Senate Judiciary Committee (Mar. 15, 1986).

89. Perhaps this is due to the overburdening of judges hearing matrimonial cases in certain counties. "According to figures in a letter sent by the Suffolk Bar Association President [Peter D. Rubinton] to Governor Mario Cuomo, the 19 Suffolk justices have an average load of 925 cases, while their 31 Nassau counterparts average 650." *More Suffolk Judges Asked*, *Newsday*, Nov. 12, 1986, at 25, col. 1. This may be a conservative estimate. A Suffolk County Supreme Court spokesman said that the average load in Suffolk in January 1987 was over 3,500 contested cases and approximately 10,000 uncontested cases. In the same *Newsday* article, Acting Supreme Court Justice Morton I. Willen, one of only five Suffolk justices hearing matrimonial cases, said, "[w]e could use three additional judges in the matrimonial part just to make a dent. We are adjourning too many cases for too long a period of time because we simply do not have the time." *Id.*

90. It may be argued, however, that if extremely flexible valuation dates are used, then litigation may become more complex. Complex litigation may cost parties more money and

isolation. In so doing, it was chiefly concerned with the economic position of divorced women in New York, especially those from long-term marriages who received only short-term maintenance, or those with minor children. In justifying these changes, the sponsors relied heavily on the findings and recommendations of the New York Task Force on Women in the Courts, which described the "feminization of poverty."<sup>91</sup> Although the Legislature believed the Equitable Distribution Law was working, changes were made to, in their view, afford more protection to women.

With the enactment of Domestic Relations Law section 236(B)(4)(b), the Legislature totally disregarded the State Bar Committee's valuation date proposal because it felt the date-of-marriage/date-of-distribution range was too broad. The amendment attempted to narrow the discretion of trial court judges in making valuation date determinations without taking away all flexibility.<sup>92</sup>

The drafters were aware of the date of separation approach utilized by the trial court in *Wegman*, yet decided that there existed no circumstances which would justify the selection of a valuation date before the commencement of the action.<sup>93</sup> Relying on the report of the New York Task Force on Women in the Courts, the drafters of Domestic Relations Law section 236(B)(4)(b) believed that husbands in long-term marriages are generally left with the greatest asset of all, the ability to earn a higher income.<sup>94</sup> Thus, husbands were thought to be in a better financial position than their wives, whose resources were often limited, for the purpose of obtaining experts for valuation. Where a closely held business was involved, husbands, more often than wives, had the ability to gain access to information concerning valuation. The husband's expert could trace the business' value, often the object of great fluctuation, and present evidence to the court. Wives were often at a disadvantage because their experts were forced to rebut without being able to obtain the same business

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91. See Newburger Memorandum, *supra* note 21, at 2. The sponsors justified their bill by submitting that there was a need to "ameliorate the social and economic consequences of divorce upon homemaker spouses" and to change the "current judicial interpretations of the [Equitable Distribution Law] which fail to recognize or which minimize the homemaker's contributions to the economic partnership." *Id.*

92. Telephone interview with staff attorney from Assemblywoman May Newburger's office (Nov. 1986).

93. Telephone interview with staff attorney from Assemblyman Saul Weprin's office (Nov. 1986). Thus, it appears that the Legislature purposefully attempted to do away with the *Wegman* trial court's date of separation approach altogether.

94. Under Domestic Relations Law § 236(B)(5)(d)(1), the court must consider a party's income for purposes of equitable distribution; however, the income itself is not a marital asset subject to distribution. N.Y. DOM. REL. LAW § 236(B)(5)(d)(1) (McKinney 1986).

valuation information.<sup>95</sup> Domestic Relations Law section 236(B)(4)(b) was an attempt to simplify the valuation process and thereby relieve wives of the expense and burden of dealing with the complex valuation issues raised by the husband's experts at trial.<sup>96</sup> The Legislature was responding to those women whose needs were not being met by the Equitable Distribution Law. The Legislature attempted to compensate women for these economic shortcomings by restricting both the range of expert testimony and the discretion of the trial court. Experts, in evaluating marital assets, are now required to limit themselves to the time frame between the date of commencement of the action and the date of trial. The courts are now required to set valuation dates early in the proceedings so that both sides are better prepared to present evidence.<sup>97</sup>

To the extent that the 1986 amendments to the Equitable Distribution Law were a legislative response to the growing concern over the feminization of poverty, the valuation guideposts of Domestic Relations Law section 236(B)(4)(b) are likely to hurt women more than they help them. The Legislature believed that women would be aided by restricting a trial court judge's discretion. However, matrimonial practitioners and commentators predict additional pretrial valuation motions and appeals as a result of the new statute.<sup>98</sup> This will, in turn, overburden already crowded matrimonial courts and cause delays which are likely to have a deleterious effect on women. Additionally, since judges assign or award a percentage of the marital property to each of the spouses based on the thirteen factors of Domestic Relations Law section 236(B)(5)(b), they will, in their discretion, adjust the percentages to achieve the equitable outcome they judge necessary despite the effect of the valuation date guideposts of Domestic Relations Law section 236(B)(4)(b).<sup>99</sup>

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95. See *supra* note 92.

96. See N.Y. DOM. REL. LAW § 236(B), commentary at 288 (McKinney 1986). Professor Alan D. Scheinkman believes that the purpose of the statute is to avoid surprise at trial as to valuation date used. "The purpose . . . is to let the parties know, in advance of trial, the date to be used for valuation purposes so that they might gear their trial preparation accordingly." *Id.* Professor Scheinkman does admit, however, that there is a difficulty with the statute in that it mandates that the selection of date or dates be made at the earliest possible stage of the case. *Id.*

97. N.Y. DOM. REL. LAW § 236(B)(4)(b) (McKinney 1986). "As soon as practicable after a matrimonial action has been commenced . . ." *Id.*

98. See *infra* notes 99, 105.

99. Compare Samuelson, *The Evaluation of Marital Assets Revisited*, 18 FAM. L. REV. 1 (1986). Samuelson, an editor of the Family Law Review, suggested an alternative to Domestic Relations Law § 236(B)(4)(b) that would give justices this needed discretion in those cases:



## VI. DOMESTIC RELATIONS LAW § 236(B)(4)(b) AND THE COURTS

Domestic Relations Law section 236(B)(4)(b) is a political attempt to solve the economic problems faced by women leaving long-term marriages who often receive only short-term maintenance. As with most new legislation, the passage of time and the development of the law will tell whether its goal has been accomplished. Merely limiting the time frame within which marital assets may be valued and requiring courts to set valuation dates early in a matrimonial action is not enough to produce the changes desired by the legislature in the valuation area. As demonstrated by *Musumeci*, some courts, when faced with unique facts or when they believe equity will best be served, will attempt to craft different distribution approaches to evade Domestic Relations Law section 236(B)(4)(b) valuation date guideposts.

In order to determine the courts' view of the new valuation date requirements of Domestic Relations Law section 236(B)(4)(b), a survey of the State's Supreme Court justices was conducted.<sup>100</sup> Of the forty responding justices, twenty were from the New York metropolitan area, ten were from medium-sized urban centers,<sup>101</sup> and ten were from rural areas or small urban centers.<sup>102</sup>

A geographic analysis of the responses revealed predictable results. Twenty percent of the justices from the New York metropolitan area indicated that they favored the Domestic Relations Law section 236(B)(4)(b) guideposts fixing valuation dates between the date of commencement of the action and the date of trial, and that

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1. Unless for good cause shown, all property that may constitute marital property shall be valued as of the date that an action for divorce is commenced.
  2. If, in the discretion of the court, it would be unfair or inequitable to value a marital asset as prescribed by this section because it has materially increased or declined in value, or has been rendered worthless through no cause or active participation by either spouse between the date of the marriage and the entry of the judgment of divorce, then the court upon application of either party may fix such other valuation date that will be fair and equitable to the parties.
  3. Legal interest shall be imposed upon all awards made pursuant to this section.

*Id.* Samuelson's proposal would allow the courts to presume that the date of valuation is the commencement of the action, but permit the court the flexibility to choose alternative dates in exceptional cases. He urged the Legislature to consider amending Domestic Relations Law § 236(B)(4)(b) to either adopt his proposed statute or allow the court the exercise of untrammelled discretion. *Id.* at 3.

100. The survey, conducted by the author, was a one-page questionnaire which was sent to 175 justices throughout the state. A total of 40 justices responded [hereinafter Survey].

101. *E.g.*, Albany, Rochester, and Binghamton.

102. *E.g.*, Bath and Walton.

Domestic Relations Law section 236(B)(4)(b) should not be changed. The remaining eighty percent indicated that they preferred to select the valuation dates of marital assets on their own, that Domestic Relations Law section 236(B)(4)(b) restricted their decision-making capabilities, and that Domestic Relations Law section 236(B)(4)(b) should be either changed or repealed. Responses from the medium-sized urban centers varied slightly from those from the New York area. Thirty-seven percent favored the fixed guideposts of Domestic Relations Law section 236(B)(4)(b), and sixty-three percent preferred to select valuation dates on their own. In contrast, eighty percent of the justices from the rural or small urban center areas favored the Domestic Relations Law section 236(B)(4)(b) guideposts, while only twenty percent preferred to select valuation dates on their own.

The reason for this upstate-downstate difference may be that justices in the urban or large metropolitan areas are confronted with significantly different equitable distribution decisions to make. Generally, property values in the New York metropolitan area are higher than those in rural parts of the state. Metropolitan area parties tend to own more securities and business property and, as illustrated by the *Wegman* case, generally have more complicated assets to be distributed than do parties in rural areas.<sup>103</sup> These reasons may persuade justices in large metropolitan areas to seek more independence in their selection of valuation dates so as to become more effective in equitably allocating assets in complicated cases.<sup>104</sup> When parties with several valuable and complex assets come before these justices, valuation becomes a very practical and technical business. Valuation experts often present quite conflicting evidence, and the justices may need to have greater flexibility in valuing assets.

Based on the survey, most justices, especially those in large metropolitan areas, find it difficult to fix valuation dates early on as Domestic Relations Law section 236(B)(4)(b) requires. They prefer, instead, to first hear the evidence at trial, and thereafter adjust the dates to shape an equitable outcome.<sup>105</sup> While this may produce re-

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103. See *Posillico v. Posillico*, No. 4417-82, slip op. (Sup. Ct. Suffolk County 1982); *supra* note 41 and accompanying text. But this distinction between upstate and downstate assets is a generalization. See, e.g., *Brennan v. Brennan*, 103 A.D.2d 48, 479 N.Y.S.2d 877 (3d Dep't 1984) (upstate case where complicated assets (cattle and livestock) were distributed).

104. See, e.g., *Wegman v. Wegman*, 123 A.D.2d 220, 509 N.Y.S.2d 342 (2d Dep't 1986).

105. Samuelson, *supra* note 99, at 1-2. In discussing how the "as soon as practicable" requirement of Domestic Relations Law § 236(B)(4)(b) may mandate even greater confusion than it sought to relieve, Samuelson stated:

sult-oriented decisionmaking, many equitable distribution cases are, in fact, result-oriented.

Perhaps more revealing than the geographic analysis of the survey are the comments of twenty of the justices. While there was wide disparity among their comments, the justices were forthright in explaining, supporting, or criticizing Domestic Relations Law section 236(B)(4)(b).<sup>106</sup>

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Another deficiency of the statute is that it now requires the court to determine prior to trial the valuation date of each specific asset comprising the marital estate. The matrimonial courts are already overburdened with pretrial discovery motions and the actual trial of matrimonial cases. To add the burden of a pretrial valuation motion in every new case will further congest our calendars and create havoc [in the trial courts] and in appeals that will be generated to the Appellate Division regarding such determinations.

*Id.*

106. On the requirement of setting valuation dates as soon as practicable after a matrimonial action has been commenced, justices remarked:

The only change is to request the court to make the valuation date decision at an early stage in the case and sometimes that is not practical. . . . Each item in each case requires a decision by the judge . . . and must be decided on a case by case basis. [Judicial District 1].

Best date revealed at trial! [Judicial District 2].

Valuation date should be set as close to the distribution of assets as possible. [Judicial District 3].

The fallacy with the present law is that even after conducting a hearing to determine the valuation date, facts and circumstances elicited at the trial might well indicate a different date to be infinitely more feasible than that initially chosen. [Judicial District 10].

On the requirement that the valuation date be any time from the date of commencement of the action to the date of trial, justices remarked:

Section 236(B)(4)(b) should be amended to allow further latitude if the interest of justice would be served. [Judicial District 4].

The major problem with the new law is that once in a rare while the date of separation may be long before an action is commenced, and in that sense, it perhaps does restrict a judge's decision. Again this is an exception not frequently encountered. [Judicial District 6].

The court should have the power to set a valuation date prior to the commencement of the action if the individual case so warrants. This would allow a valuation date as of the parties' separation, which may be more realistic. [Judicial District 7].

Very often the date of valuation is most fairly set after a review of all the facts. Many times, it should be set at the time of separation before any action is formally commenced. Each case may have its own special facts. Constant legislating in this area is making divorces harder to resolve equitably. [Judicial District 7].

The more the Legislature ties our hands, the less effective we become, and the less equity we can do. [Judicial District 10].

On Domestic Relations Law § 236(B)(4)(b) achieving its purposes of promoting efficient case management and establishing a clear valuation structure, justices remarked:

The amendment does nothing more than codify existing case law. [Judicial District 1].

This new rule enables the court to make the necessary time adjustments to effect a truly equitable distribution. [Judicial District 5].

The amendment will, in my opinion, expedite the disposition of matrimonial actions.

[Judicial District 7].

From this survey, it may be concluded that a wide disparity of opinion still exists among New York State Supreme Court Justices as to the helpfulness of Domestic Relations Law section 236(B)(4)(b), with many justices still desiring the ability to examine each case and the assets in question independently to achieve equity according to their judgment. In those areas where the equitable distribution case load is relatively light and the assets fairly simple to value, the statute may achieve its purpose and be a source of improvement. However, where the case load is extremely burdensome and the assets plentiful and complex, the statute will probably prove unworkable. It is simply too early to make a judgment, and case law over the next few years will provide the answer.

### CONCLUSION

The addition of amendment (b) to Domestic Relations Law section 236(B)(4) was an attempt on the part of the Legislature to address the problematic void in the Equitable Distribution Law with regard to a specific date for valuing marital property. The Legislature acted to curb the discretion of the state's supreme court justices when determining valuation dates. While the new legislation may streamline the litigation process, it does not take into consideration the exceptional case. Therefore, it falls short of affording justice in a complete sense. There will continue to be cases where the new date-of-commencement/date-of-trial guideposts produce inequitable results.

While the valuation date guideposts set forth in Domestic Relations Law section 236(B)(4)(b) seem a codification of most existing valuation date case law, there are some cases where a trial court needs the discretion, in the interest of equity, to set dates outside those required by the statute. Perhaps Justice Yachnin in the *Musumeci* case was correct in calling on the Legislature to delve into this subject so both the law and equity will be one.

*Peter White*

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As burdensome as the EDL [Equitable Distribution Law] has proven to be for the court, another guideline will neither help nor hinder. [Judicial District 9].

Since the inception of (B)(4)(b), attorneys are on notice in re dates and therefore no surprises. [Judicial District 10].

Survey, *supra* note 98.

