

INTRODUCTION

In the world of family law we are faced with complicated assets every day. The purpose of this book is to provide the family law practitioner with a practical guide to understanding, negotiating, and dividing assets that fall into the category of “executive compensation.” The goal in writing this book is to provide a roadmap that will help you to avoid the common pitfalls associated with these complex assets and allow you to explain these issues to your clients.

The universe of executive compensation includes a dizzying array of arrangements, plans, bonuses, and agreements that can seem overwhelming to the uninitiated. Executive compensation can include stock options, restricted stock, restricted stock units, phantom stock, stock appreciation rights, long-term incentive plans, short-term incentive plans, cash bonuses, and supplemental executive retirement plans, among the myriad of other arrangements that can and do exist. It is not uncommon when practicing in this area to run across novel or foreign executive compensation arrangements that are unlike anything that you have seen before.

The unique feature that is common in all executive compensation discussed in this book is that the benefit falls within the category of non-qualified deferred compensation. Non-qualified deferred compensation can be defined as compensation that is paid in a taxable year after the taxable year in which the compensation is earned, and which does not otherwise meet the requirements of a plan that is “qualified” under Section 401(a) of the Internal Revenue Code of 1986, as amended (the “Code”). Some executive compensation is subject to the Employee Retirement Income Security Act of 1974 (“ERISA”), some is not, and some is subject only to certain limited requirements of ERISA.

In addition, executive compensation is often provided only to a select group of highly compensated employees, officers, directors, and sometimes independent contractors. Thus, a 401(k) plan, which is provided to rank-and-file employees and which is qualified under Code Section 401(a), is not an “executive compensation plan.” Similarly, an Individual Retirement Account (“IRA”) is not an executive compensation plan either. However, it is possible to have an excess benefit plan which mirrors the provisions of a qualified plan but which permits certain executives whose contributions to the qualified plan

are limited by the Code Section 415 limits to make contributions exceeding the maximum contributions and benefit limits for a qualified plan. Similarly, a Supplemental Executive Retirement Plan (SERP) allows the employer to make contributions on behalf of a select group of management or highly compensated employees, often as a supplement to an existing qualified plan. And, under a Top Hat Plan, executives may defer receipt of compensation such as salary, bonuses, commissions or other compensation to be paid out at retirement, similar to a qualified defined contribution plan, but without being subject to the rules applicable to qualified plans.

While it is impossible to provide a detailed explanation of each and every different form of executive compensation that a family practitioner may face in practice, there are ways to make sense of all such plans. This book strives to provide sufficient guidance to enable family law practitioners to understand and navigate issues that arise with respect to deferred compensation.

WHO WILL FIND THIS HANDBOOK USEFUL?

Family Law Attorneys

This book is designed to be an easy reference manual on how to gather information, negotiate settlements, divide executive compensation plans, and draft separation agreements addressing executive compensation so that your clients receive an equitable share of these assets in a dissolution of marriage or a legal separation action. It can also be useful when drafting court financial statements such as Sworn Financial Affidavits where income needs to be disclosed and explained.

Family Court Judges

This book is designed to give you a roadmap to the different issues associated with dividing executive compensation and determining income when drafting orders in a dissolution of marriage or legal separation action. Understanding these issues will assist you in crafting orders that properly address these assets and income sources, and avoid the need for costly appeals or post-decree court intervention.

Paralegals, Administrative Assistants, and Support Staff

This book is designed to provide you with a roadmap to the types of questions you should be asking clients and opposing parties when gathering documentation or creating first drafts of disclosure documents and discovery requests

in a dissolution of marriage or legal separation. To assist you in this regard, the Handbook includes model language and checklists that will be useful in the day-to-day management of your caseload.

HOW DO I BEST USE THIS HANDBOOK?

This book can be read cover to cover or used on an *ad hoc* basis to reference discrete issues. I have often found the ABA handbooks and guides to be most useful when they sit on my desk for quick reference while I am drafting pleadings or discovery requests. In addition, although not the most scintillating bedside-table reading, a cover-to-cover read-through of this book will give you an excellent understanding of this area of law that will be useful in spotting issues as well as in gathering information on income and marital assets at the beginning of your case.

While this book does address stock options, restricted stock, and stock appreciation rights in some detail, for those who are looking for an in-depth explanation of stock options, I commend you to *The Family Lawyer's Guide to Stock Options*, by Lester Barenbaum, Walter Schubert, and Robert Feder. This book has been a staple in my practice for some time.

BACKGROUND OF THE AUTHORS

I bring a unique skill set to family law. Prior to re-creating myself as a family law litigator, I was a tax attorney with a Master's Degree in federal taxation on top of my J.D. As a tax attorney, I practiced for 14 years in international, national, and regional firms across the country as an employee benefits attorney. My wanderings across the country were necessitated by my first husband's chosen career in medicine, which required me to follow him wherever he landed through his degree program and into his internship, residency, and fellowship. The upside of all this traipsing around the country was that I had the opportunity to represent an extraordinary number of employers across the United States in drafting and maintaining their benefit plans and benefit arrangements, managing participant concerns and claims, and overseeing compliance with the requirements of both the Code and ERISA.

In my benefits practice, I provided advice to employers sponsoring both qualified and non-qualified plans. However, my area of specialty ultimately became executive compensation for Fortune 500 companies. My early years in that practice occurred in the heady, pre-Enron days where executive

compensation resembled the Wild West. At that time, it was often simply a matter of drafting plans that provided for a sufficient risk of loss to avoid immediate taxation to the executive. However, after the Enron debacle, much of my practice revolved around redrafting non-qualified arrangements to assist employers in complying with the stringent requirements of Code Section 409A to avoid the burdensome tax regime associated with violating that provision of the Code. This experience provided me with an unparalleled opportunity to review and revise almost every form of executive compensation arrangement conceivable—and believe me when I tell you that employers have found many ways to assist their top executives in deferring taxation over the years.

Having moved to Denver at the beginning of the mid-2000s economic downturn, a city from which most Fortune 500 companies had exited, I found that work in my area of expertise dwindled after the process of redrafting plans to address Code Section 409A was finished. Thus, I was forced to find a new field on which to focus. While I was qualified to work as a general tax attorney, I had become so specialized by that time that the thought of starting over in a general tax practice was less than appealing. Litigation had been a dream of mine in law school and the field of family law provided the perfect venue to combine my existing skill set and my passion for litigation. Luckily for me, divorce continued to be a booming business in Denver even during the darkest days of the recession. In the years since, I have had the honor to work with many wonderful clients who have taught me much about life, resilience, and maintaining decency in the face of life's most difficult challenges. It is to those clients who I dedicate this book.

My former associate, Jon Eric Stuebner, fell into this project when he volunteered to assist me just after graduating from law school. His perseverance when researching and writing about the complex issues raised in this book helped to move this project forward whenever it became sidetracked by our busy litigation practice. Without his efforts, this book would not have come to fruition and I thank him for seeing it through to the finish. Jon Eric entered the legal field as a second career having spent a number of years as an elementary school teacher. He worked as a paralegal at his current firm while attending law school in the evening. As both a paralegal and as an attorney, Jon Eric has been involved in a variety of domestic relations cases, including divorce actions with complex financial issues.