THE Witness Chair

Leading-edge Ideas for CPAs Providing Litigation and Dispute Resolution Services

FALL 2016 California Society of Certified Public Accountants ISSUE 68

Tax Implications of Dividing Restricted Stock Units in Divorce

by Megan Thompson, CPA

Working in Silicon Valley I see a number of clients who have restricted stock units (RSUs) as part of their compensation packages. These benefits are becoming increasingly popular in the land of startups, where there is endless potential to become the next Apple or Google. They allow companies to offer the proverbial carrot and encourage employees to work to increase the company's equity because they have a vested interest in their company.

RSUs are great for the employee, but tend to add a complication to a divorce process. If granted during marriage, then these benefits can potentially contain both a community property and a separate property component, which need to be divided, as well as allocated for the purposes of determining income for support.

RSUs are compensation granted to an employee in the form of company stock, which vest over time, usually on a schedule where one-fourth of the units vest one year after date of grant and an additional one-fourth vest each year for the following three years. While this schedule is the most common, there are many other possible vesting schedules.

At the date of vest, the employee is awarded the number of vested shares at the current fair market value. A portion of the shares is usually sold to cover federal, state, Social Security and Medicare taxes, and the remaining shares are deposited into an account. At this point the employee can choose to sell the shares received or, if he or she thinks the stock may go up in value, can hold the shares until a later date. The RSU vest is essentially equivalent to the employee receiving a bonus in cash and then using the net check to purchase shares in the company on the open market. Once the employee receives the vested shares, they are no different from any other stock they may have purchased.

For the division of RSUs, the common problem is that most companies will not allow the employee to transfer the benefits to a non-employee ex-spouse. Because of this, the employee spouse ends up acting as a fiduciary for the non-employee spouse, which complicates the process for both parties. One of the biggest issues is that it is often difficult to discern how much the non-employee spouse should receive and whether there are tax implications related to the funds or shares distributed.

There are several possible methods to divide RSUs between divorcing parties.

First, though, you should check with the company to make sure you can't divide the grant. Some companies will allow a division between the spouses if they are provided with the appropriate paperwork. However, I would not count on this being the solution as I have only seen a company divide the grants between divorcing spouses a handful of times. The overwhelming majority of the time the employee spouse will have to maintain the shares under his or her name and divide them according to the judgment or stipulation.

The simplest option, aside from dividing the grant, is to have the parties file a joint individual income tax return so that all of the RSU vests are reported as wages on the joint tax return and the non-employee spouse can be given his or her half of the community shares net of actual taxes paid. Still, while this is the easiest solution, it can cause a problem in that it is possible that the parties' joint tax bracket is significantly higher than the tax brackets they would be in if they both filed separate returns

Additionally, if they are filing a joint return, the parties cannot have a dissolution judgment filed prior to Dec. 31 of the tax year in question.

If the parties decide to file jointly, they can report the entire vested amount of RSUs on one tax return and pay taxes at their joint tax rate. The parties can then determine what the tax implications are of the total community shares and the non-employee spouse is paid the net amount they are due either through shares or funds if the shares are sold.

In this case, it is not necessary to make adjustments to the tax returns for the shares that have been distributed. Applying the effective tax rates to the non-employee spouse's share of the RSU and reducing the distribution by the calculated taxes can determine his or her share of the taxes.

Under this scenario, the IRS does not have to be involved in the exchange of shares; however, a tax professional should be consulted to insure accurate calculation.

For example, Harry and Wanda are a

continued on page 6

In this issue

Section Action

Business Valuation

by Ben C. Towne, CPA

We are all looking for ways to better what we do and do it faster, so I asked some of our section leaders to share a good tip on how to run your practice better. Here's what I gathered, sorted in a roughly project lifecycle flow.

Client and referral screening. Ted Israel and Denise Frey at the Israel Frey Group provided a reminder that since we all work hard to build our reputations, we should work just as hard to protect them. And it's often easiest to do that at the beginning of scoping an engagement. Who is the referring party? What is their status of licensure? Do they know what they are doing? Has the client had multiple experts on their case and what exactly did they do to burn the others?

Data collection. Lynda Schauer of Zivetz, Schwartz & Saltsman says using a digital pen is a novel way to capture your meeting notes in three ways: physically on paper, digitally and through audio recording. The ability to record a complex conversation with a client several ways simultaneously helps you capture all of the nuances, as well as allows thorough review.

Resources. Large companies very often give away content in the form of useful research and stats. I recently used data from Integra Realty and Cushman & Wakefield on a real estate related assignment.

Checklist and final review. Megan Thompson of Thompson Accounting suggests committing to a checklist to ensure compliance with standards. At the end of every engagement, run through your list to make sure you've tagged all the bases.

Get paid what you're worth. Lionel Engelman at Engelman Accountancy says informing the client of costs as they incur and billing at intervals, rather than waiting until the end of a project, keeps expectations in line. Keep a portion of the retainer for the last bill and reduce that credit risk.

Do you have any hints and tips? Email me at *btowne@towneadvisory.com*—if we get lots of good responses we can do a part 2!

Ben C. Towne, CPA, ABV, CFF *is Business Valuation Section secretary and the owner of Towne Advisory Services Corporation in San Jose.*

Economic Damages

by Travis Armstrong, CPA and Eugene Henson, CPA

The U.S. Supreme Court's announcement to hear Samsung's appeal in *Apple v. Samsung* marks the first time in 122 years that the Supreme Court will address design patents. In addition to the remedies of lost profits and reasonable royalties available for utility patents, design patents allow for disgorgement of an infringer's profits.

Section 289 of the Patent Act authorizes an award of an infringer's profits as a remedy for design patent infringement "to the extent of [an infringer's] total profit." The Federal Circuit has held that Sec. 289 entitles a design patent holder to recover all of an infringer's profits made from sales of any product that infringes the patented design, without apportionment.

The question in Samsung's petition that the Supreme Court will review is, "Where a patented design is applied only to a component of a product, should an award of infringer's profits be limited to profits attributable to that component?"

Samsung's phones were found to infringe three of Apple's design patents related to the layout of icons on a phone's screen and the phone's rectangular shape with rounded corners and a surrounding rim. Samsung's damages expert, Michael Wagner, said damages should be apportioned to the profits attributable to the patented design features.

The district court excluded this evidence, ruling that any apportionment was a "clear contravention of 35 U.S.C. Sec. 289." The district court also rejected Samsung's proposed jury instructions that an award of profits should be limited to the profits of the particular "article of manufacture" found to infringe Apple's design patents.

The Federal Circuit affirmed the district court's decision, noting that Congress rejected any apportionment of an infringer's profit in the current statute. Apple was awarded Samsung's entire profit for the infringing smartphones of $399 million.

An amicus brief filed by 37 IP law professors argues that when the patented design is only a minor feature of a product, the Federal Circuit's interpretation "makes no sense in the modern world" and drastically overcompensates design patent owners and undervalues technological innovation.

If the Supreme Court upholds the exclusion of apportionment, it will confirm the disparity in damages available for infringement of design patents in multi-component products relative to utility patents. Such a holding will likely encourage increased litigation for design patents, which have historically been far less litigated.

If the Supreme Court determines that apportionment is appropriate, then damages analyses for design patent cases will require much more sophistication going forward.

Travis Armstrong, CPA, CFF, CFE *is Economic Damages Section chair and a partner with Hemming Morse, LLP in San Francisco.*

Eugene Henson, CPA, CFF *is Economic Damages Section secretary and a principal with LitiNomics, Inc. in Oakland.*

Family Law

by Darlene L. Elmore, CPA and Kristen Gillespie, CPA

When "I do" becomes "I don't," the financial issues of a marriage immediately come to the surface. One of the first areas addressed in a marital dissolution is the calculation of temporary support.

In a case where both spouses are W-2 employees, the initial calculation is often made utilizing wages as reported on paystubs or W-2s, input into a support program. Often, this quick first calculation is not always correct.

In recent years, there has been a trend by companies to have non-traditional structures of wage compensation for their employees, which may include RSUs (Restricted Stock Units), stock options and forgivable loans, in addition to salary.

On the surface, it may seem that the earnings are wages and the time rule applies; those wages earned during the marriage are community earnings and those earned after separation are separate earnings. However, sometimes these non-traditionally structured earnings have an ownership component to them and then the questions are many, including: When were the benefits "earned" or acquired? Are these benefits income available for support or an asset to be divided by the parties?

Answers vary depending on the facts in

every case. It is important to recognize the various forms of compensation, which will provide value to your clients.

Let's assume that all of the income, both the usual and unusual, has been identified. The next step is to make the support calculations. Generally this is where one of the software programs utilized by the courts for calculating support comes into use—and where mistakes can be made. This is especially true when dealing with complex compensation methods like those identified above.

For example, in the case of forgivable loans, the party is being taxed on earnings that he or she is not receiving as cash flow in that particular year. One must consider the tax ramifications of this "phantom income" and ensure that the support program is capturing that issue correctly. Is the support program accurately considering items like Alternative Minimum Tax when calculating the guideline support?

Understanding the potential limitations of various support programs used by professionals and courts is an integral part of our job as forensic accountants and an area where we can add value to the client, attorney and court.

To learn more about these issues, attend this year's Family Law Conference (*www.calcpa.org/conferences/family-law-conference*), which will be held Oct. 27 (Los Angeles) and Oct. 28 (San Francisco or webcast). Complex/unusual compensation arrangements and planning for potential pitfalls of support software are just two of the six topics that will be covered.

Darlene L. Elmore, CPA, ABV, CFF *is Family Law Section vice chair and has a forensic accounting practice in Santa Rosa.* **Kristen L. Gillespie, CPA, ABV, CFF** *is Family Law Section secretary and a litigation manager at Gursey | Schneider LLP in Century City.*

MessagefromtheChair

by B. Marie Ebersbacher, CPA

I still remember walking into my first Steering Committee meeting and seeing the professionals in the room. Honestly, I was plain terrified. I've never been shy, but this room was full of people who I was sure would be too smart, too advanced and too busy to be bothered by the newbie. But what I found was an amazing group of people. Mentors. Friends. Many are both.

Ted Israel recently wrote an article for *California CPA* (*http://bit.ly/2cBE8IU*) discussing the history of the Forensic Services Sections, or the CIMS as they were originally known. The groups began as professionals who wanted to make the profession better. And that tradition continues today. If you haven't been to a meeting lately, you are missing the most recent developments in your craft and missing the opportunity to interact with others passionate about what we do.

I have always been surprised by those who have said, "Why would I spend time with other CPAs—my competition?" The Sections aren't about competition. As they were 20 years ago when they were created, and 15 years ago when I went to my first meeting, they are about advancing our profession. They are about mentors and friends. You will not be disappointed if you make the effort.

Nervous like I was? Call me; I will introduce you to everyone that I can. I could not be more grateful to my mentor who encouraged me to attend, and I want to pay it forward.

If you've been to a meeting and think we could improve something, please reach out. I believe the Sections are the best resource California CPAs have, and if we can make them even better, I'm listening. At the Steering Committee, we have determined to have all of our members speak at the local and section level, emphasizing case studies.

Over the next two years I will do my best to continue the tradition of the extraordinary chairs before me. There are too many to name here, but each one raised the bar of our profession. I only hope I can make them proud.

— **B. Marie Ebersbacher, CPA, ABV, CFF, CFE** *is Forensic & Financial Services National Practice Leader and Lead Managing Director for the Southern California offices of CBIZ MHM.*

Fraud

by David Callaghan, CPA

The SEC website (*www.sec.gov*) is a good source to find out about current SEC activities. For example, this summer, SEC total awards to whistleblowers reached more than $107 million, which has been awarded to 33 whistleblowers. The program's two largest awards exceeded $30 million and $22 million.

Congress established the program to incentivize individuals with specific, timely and credible information about federal securities law violations to report to the SEC. Enforcement actions beginning with whistleblower tips have resulted in orders exceeding $500 million in financial remedies, much of which has been returned to harmed investors.

"The SEC's whistleblower program has proven to be a game changer for the agency in its short time of existence, providing a source of valuable information to the SEC to further its mission of protecting investors while providing whistleblowers with protections and financial rewards," said SEC Chair Mary Jo White.

Whistleblowers who voluntarily provide information leading to a successful enforcement action may be eligible for an award, which can range from 10 percent to 30 percent of the money collected when monetary sanctions exceed $1 million. The SEC paid its first award in 2012.

"The ultimate goal of our whistleblower program is to deter securities violations and paying more than $100 million in whistleblower awards demonstrates the value that whistleblowers have added to our enforcement program," said Andrew Ceresney, SEC Division of Enforcement director.

By law, the SEC protects the identity of whistleblowers.

Whistleblower payments are made from an investor protection fund established by Congress and financed through monetary sanctions paid to the SEC by securities law violators. Money is not withheld from harmed investors to pay awards.

For more information or how to report a tip, visit *www.sec.gov/whistleblower*.

David Callaghan, CPA, CFF *is Fraud Section chair and a partner in the Forensic and Financial Consulting Services Group at Hemming Morse, LLP, based in Los Angeles.*

Keepin' It Legal

Reliance on Hearsay by Damages Experts in California Courts

by Michael E. Chase, Esq. and Patrick DeLangis, CPA

Historically, experts in court have been allowed to testify to hearsay. The California Supreme Court issued a decision in June 2016 to rein in experts' use of hearsay at trial. Although the written rules have not changed, judges have direction from the California Supreme Court to more closely adhere to the written rules and exclude the hearsay testimony of experts presented as fact, potentially limiting experts to describe only in general terms that she or he did rely on a statement or document considered hearsay.

The California Hearsay Rule

The Evidence Code generally bars admission of hearsay, which is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated" (Cal. Evid. Code Sec.1200(a)). These are sometimes called "out-of-court" statements.

Hearsay statements include verbal statements and statements in documents. For example, an email stating that a corporation has a certain amount of cash on hand is an out-of-court statement that would probably be barred by the hearsay rule.

Not all out-of-court statements are barred by the hearsay rule. The statement must be admitted "to prove the truth of the matter asserted" to be considered hearsay (*Id.*) Therefore, many common documents are admissible because they are not being admitted for their truth, but rather for some other purpose.

For example, a written agreement to purchase goods for a particular price is admissible despite the hearsay rule because it is not being admitted for the truth of the statements, but rather to prove the statements (the parties' promises) were made. The rule applies for other common legal documents, like promissory notes, wills and deeds.

There are also many exceptions to the hearsay rule. The most important one for the purposes of proving economic damages is the "business records" exception. This exception allows a document to be admitted if the proponent proves that the document was made in the regular course of a business; that it was made at or near the time of the act, condition or event which is the subject of the document; and that the sources of information and method and time of preparation were such as to indicate its trustworthiness (Cal. Evid. Code Sec. 1271).

This foundation must usually be provided by a live witness who is the custodian of the document and can testify to its identity and mode of its preparation (*Id.*).

Other exceptions to the rule exist, such as statements by a party opponent and official records. Each exception has its own foundational prerequisites.

People v. Sanchez

Sanchez was a criminal case; however, the California Supreme Court made rulings interpreting the Evidence Code, which governs all cases in California.

In *Sanchez*, an expert was testifying for the prosecution about the defendant's alleged affiliation with a gang. In the course of doing so, he testified about the contents of a police record containing some incriminating assertions. Holding that the police record was hearsay, the Supreme Court partially reversed Sanchez's conviction and overruled its own prior cases that condoned the practice of allowing experts to testify about case-specific hearsay statements which they relied upon in reaching their opinions.

The Court was careful to make a distinction, however, between general "background information" that an expert has about his or her field that is unrelated to the case at hand (e.g., GAAP) from "case-specific" information about the lawsuit in which he or she is testifying (e.g., the defendant's net assets).

In reaching its conclusion, the Court recognized that an expert may rely on inadmissible hearsay as a basis for his or her expert opinion: "Evidence Code Section 801, subdivision (b) provides that an expert may render an opinion '[b]ased on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion." (63 Cal.4th at 678).

"Accordingly, in support of his opinion, an expert is entitled to explain to the jury the 'matter' upon which he relied, even if that matter would ordinarily be inadmissible. When that matter is hearsay, there is a question as to how much substantive detail may be given by the expert and how the jury may consider the evidence in evaluating the expert's opinion." (*Id.* at 679).

The Court also acknowledged that, historically, experts were allowed to describe case-specific hearsay matter in some detail, but that juries were to be instructed to consider that hearsay matter only for purpose of determining whether the expert's opinion has a solid basis:

"Courts created a two-pronged approach to balancing an expert's need to consider extrajudicial matters, and a jury's need for information sufficient to evaluate an expert opinion so as not to conflict with an accused's interest in avoiding substantive use of unreliable hearsay. ... The [Supreme Court previously] opined that most often, hearsay problems will be cured by an instruction that matters admitted through an expert go only to the basis of his opinion and should not be considered for their truth. … Sometimes a limiting instruction may not be enough. In such cases, Evidence Code Section 352 authorizes the court to exclude from an expert's testimony any hearsay matter whose irrelevance, unreliability, or potential for prejudice outweighs its proper probative value. … Thus, under this paradigm, there was no longer a need to carefully distinguish between an expert's testimony regarding background information and case-specific facts. The inquiry instead turned on whether

continued on page 5

AICPA Alert

by Joseph Emanuele, CPA

This is a busy time for AICPA volunteers and staff. On Aug. 2, the Treasury Department released the long-awaited proposed changes to the Sec. 2704 valuation regulations that may limit the availability of valuation discounts used for estate and gift tax purposes. The AICPA FVS Section has a panel in place that will draft and submit comments to the IRS prior to a public hearing Dec. 1 in Washington, D.C.

The inaugural issue of the AICPA's FVS *Eye on Fraud* newsletter came out this spring and focuses on executive impersonation fraud in which a criminal creates a fake email that closely resembles the company's own email and appears to come from a high-ranking executive. Future issues will come out semi-annually and follow the same format of original article, case studies and practice tips.

As most of us are aware, the AICPA is developing a new valuation credential in collaboration with the Royal Institution of Chartered Surveyors and the American Society of Appraisers. The most recent news is that the new credential will be knows as the Certified in Entity and Intangible Valuations (CEIV). It is intended for finance professionals who perform fair value measurements for U.S. public company financial reporting purposes.

To earn the credential, applicants must meet minimum business experience, education and exam requirements in the areas of valuation and fair value measurements. The AICPA has a new CEIV pathway tool (*www.aicpa.org/Membership/Join/Pages/credentials.aspx#tab-5*) to help applicants determine the most direct path to the CEIV credential, given their credentials and experience.

The AICPA's 2016 Forensic & Valuation Services Conference will be held Nov. 6-8 in Nashville. The AICPA continues to consolidate conferences in the FVS area and this year's conference will include a family law path. Also new this year is a NextGen path with sessions identified as learning opportunities for emerging FVS practitioners. As always, CalCPA members are active in the planning of the conference and as speakers.

Joseph Emanuele CPA, ABV, CFF, CFA, ASA *is a principal with Hemming Morse, LLP in Irvine.*

---

continued from page 4

the jury could properly follow the court's limiting instruction in light of the nature and amount of the out-of-court statements admitted." [*Id.* (internal punctuation omitted)].

The Supreme Court in *Sanchez* then announced: "We conclude this paradigm is no longer tenable because an expert's testimony regarding the basis for an opinion must be considered for its truth by the jury" [*Id.* (underlining added)].

From now on, experts are prohibited from describing the contents of case-specific hearsay statements (including documents) upon which they relied in forming their opinions unless the statements have already been admitted through an exception to the hearsay rule during the testimony of an appropriate percipient witness, or the expert describes his or her reliance on case-specific hearsay statements only in general terms.

"Any expert may still rely on hearsay in forming an opinion, and may tell the jury in general terms that he did so" (*Id.* at 685). "What an expert cannot do is relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception" (*Id.*).

Application of *Sanchez*

Damages experts often rely on financial information obtained from their clients (that is, usually, the hiring attorney's clients). This financial information usually comes in the form of financial statements, including balance sheets and income statements, which are hearsay when they are admitted for the purpose of proving the assets or profits of the company.

However, such information may be admissible as business records if a proper percipient witness gives testimony establishing the foundation for business records described above.

Financial statements from an opposing party, on the other hand, are usually admissible as "admissions"—statements of the party opponent—and no further foundation needs to be laid once it is shown the opponent is the source of the documents.

Once financial documents are admitted into evidence, an expert may testify about their contents, and the rule of *Sanchez* is satisfied. However, before the documents are admitted, or at least shown to be admissible as business records or admissions, the expert will be prohibited from testifying about the contents of those documents.

Sometimes financial information or other business information is obtained from a client by way of a writing (for example, an email or even a spreadsheet) prepared during and for the purposes of the litigation, or from verbal conversations with the client. These statements are almost never admissible under a hearsay exception.

Therefore, a damages expert will not be allowed to testify about what the client told them in these types of out-of-court statements.

For example, if the expert learns through interviews with the client's management team that they plan to expand a particular line of business, the expert cannot testify about that fact unless someone from the client company with personal knowledge of the planned expansion has previously testified to its existence.

Conclusion

As the saying goes, "Old habits die hard." Some trial lawyers may be slow to adjust to the new rule set down in *Sanchez*, and the result might be to lessen the strength of critical damages expert opinion testimony where a lawyer has failed to ensure that any case-specific evidence has been admitted before the expert testifies. A wise expert will remind the attorney of this rule to ensure it does not happen to him or her.

In practice, objections on grounds of hearsay during an expert's testimony may be rare, but it is advisable to prepare a case as though the adverse attorney knows the rules and will object.

Michael E. Chase, Esq. *is a shareholder with Boutin Jones Inc. in Sacramento. His practice centers on commercial and complex business litigation, including intellectual property and real estate litigation.* **Patrick M. DeLangis, CPA, MAFF, CFE, CFF, CVA, EnCE** *is a director with EisnerAmper in Sacramento. He specializes in economic damage analysis and testimony.*

HAPPENINGS

FORENSIC SERVICES SECTION 2016-17 MEETING DATES

All Sections Joint Meeting	Nov. 17	LAX
Business Valuation	Feb. 9	LAX
	Aug. 17	North
Economic Damages	Feb. 15	LAX
	Aug. 24 (joint with Fraud)	North
Family Law	Nov. 18	LAX
	Feb. 10	LAX
	Aug. 18	North
Fraud	Feb. 16	LAX
	Aug. 24 (joint with ED)	North

You may register online: *www.calcpa.org/fss*.
For more information, call (818) 546-3502.

continued from page 1

married couple. Harry is granted 100 RSUs during marriage that all vest one year after date of grant. Halfway through the vesting period, the parties separate and, based on the "time rule," 50 shares are community and 50 shares are separate.

When the 100 shares vest, 30 are sold to cover taxes and 70 are deposited into Harry's stock account. His W-2 will show the full vest price of the 100 shares, but will also include the withholdings. Wanda would be entitled to the value of her 25 shares as half of the community shares reduced by the actual taxes (as opposed to the withholdings) that the parties pay for these specific shares on their joint tax return.

If the parties are in greatly different tax brackets, have other reasons to file separately or are no longer married, the employee spouse can distribute half of the community shares received net of withholdings. The community income and withholdings need to be allocated between the parties under *Poe v. Seaborn* (9 AFTR 576–1930), RevRul 2002-22 and PLR 2005190011.

To use this approach, the parties should attach a notarized W-2 allocation spreadsheet and IRS Form 8958 to their tax return allocating their portion of the wages, as well as their portion of the withholdings. Please also be warned: While this is the law, it is, sadly, common for the non-employee spouse to receive a notice disallowing the credit for the withholding. Most of these notices are automatically generated based on electronic W-2 information. Once the allocation information is resubmitted and a human reviews the return, the matter is resolved.

If we assume the same facts as in the prior example and Wanda and Harry choose to file separate tax returns and allocate both gross income and withholdings, Wanda would be entitled to receive one-fourth of the 70 shares that were deposited, plus one-fourth of the 30 shares that were withheld for taxes. She would still report the vesting of all 25 shares but she would also attach a W-2 allocation form and receive credit for her portion of federal and state withholdings and the parties would both need to file IRS Form 8958.

One problem that arises with this solution is that the employee spouse has paid Social Security and Medicare taxes and these amounts cannot be allocated to the non-employee spouse.

If this is a small amount of money, then many clients are willing to ignore this inequality. If your client chooses not to ignore the additional Medicare and Social Security withholdings, you can make an adjustment to the amount distributed to the non-employee spouse. How much you allocate could be a topic for negotiation.

Technically, the employee spouse will be receiving a future benefit for these funds; however, this benefit will likely not be dollar for dollar. Because it is not possible for them to opt out of these payments, it is arguable that some consideration should be given for these costs. Often, the non-employee spouse will be responsible for the Medicare tax, but not the Social Security tax since that ceiling will likely be reached by the employee spouse without the spouse's share of the income.

There is also the possibility of the employee spouse buying out the non-employee spouse based on a projection of the potential value of all of the community shares into the future. This is a risky proposition for both parties as it relies on several assumptions with regard to the future stock price, the future employment of the employee spouse, future tax consequences, etc. Most professionals are not comfortable with this approach for the obvious reason that very likely one party or the other may end up regretting this decision.

RSUs are becoming more and more prevalent in Silicon Valley and other areas that attract startup companies. These compensation packages carry relatively little risk for the company and can provide tax advantages. They can also provide a huge benefit for the employee if the company does well. The division of these benefits in a divorce action may seem complicated at first glance, but with a little help from a forensic accountant, this calculation can be completed efficiently and effectively.

Megan Thompson, CPA, CFF, CVA *is Business Valuation Section treasurer and a partner in Thompson Accounting in San Jose.*

The Witness Chair is published three times a year by the Forensic Services Section of the California Society of Certified Public Accountants.

Editor
Susan Bleecker

Associate Editors
Leslie O. Dawson
Emily Ku

Section Chair
B. Marie Ebersbacher

Individual Section Chairs

Business Valuation	Lynda Schauer
Economic Damages	Travis Armstrong
Family Law	Charles Burak
Fraud	David Callaghan

Nonmember subscription rate is $75 for one year. To subscribe, call CalCPA at (818) 546-3502 or (800) 922-5272.

We welcome your letters, articles, comments and suggestions, which may be sent to the editors at *witnesschair@calcpa.org*.

The Witness Chair does not provide legal advice. The material published, unless otherwise specified, represents the views of the authors and the individuals quoted and not those of CalCPA or the AICPA.

www.calcpa.org/FSS