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Civil Rules 33 and 36

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Civil Rules 33 and 36; Request For Interrogatories And Request For Admissions have been amended effective as of July 1, 2004. Amendments to Civil Rules 33 and 36 govern all proceedings and actions brought thereafter and to further proceedings in pending actions, except to the extent that their application in a pending action would not be feasible or would work an injustice. In that event, the former procedure applies. The amended language is as follows:

> Civil Rules 33 and 36 . . . a party serving a request for [admission/interrogatory] shall provide the party served **with both a printed and an electronic copy of the request for [admission/interrogatory]**. The electronic copy shall be provided on computer disk, by electronic mail, or by other means agreed to by the parties. A party who is unable to provide an electronic copy of a request for [admission/interrogatory] may seek leave of court to be relieved of this requirement. (Emphasis added)

Civil Rules 33 and 36(A), effective July 1, 2004.

The effect of the Amendments are any party who responds to Interrogatories or Request For Admissions, pursuant to Civil Rules 33 and 36, must quote the original Interrogatory or Request For Admission in the same document and immediately preceding the party's response or

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objection. Those propounding discovery under Civil Rules 33 and 36 are no longer required to provide at least one-inch space between each Interrogatory or Request for response or objection. The proponent of discovery under Civil Rules 33 and 36 is now to provide a printed and electronic copy of the Interrogatories or Request For Admissions.[1] There are no changes to Civil Rule 34 Request For Production Of Documents.

The electronic version must be provided in a format that will enable the responding party to readily include the Interrogatories and corresponding answers and objections in the same document without having to retype each Interrogatory. Staff Notes, Civil Rules 33 and 36. Thus, it requires the proponent to provide an electronic copy in a word processing program. A pdf program would not allow the responding party the ability to respond electronically.

Immediately, two ways to convey electronic versions of discovery requests are indicated. Either e-mail or providing a disk with the hard copy will satisfy the rules. Any party providing electronic versions, whether initiating discovery or providing responses, should note that electronic versions can contain metadata that allows the adversary to possibly review prior, i.e., drafts of documents allowing the reader an opportunity to peek into mental impressions. This metadata can and should be removed before the electronic versions of the discovery requests or responses are provided.

Those parties providing notice to the court, pursuant to Civil Rule 5, should include language representing that an electronic copy has been propounded upon a party or that a response in an electronic version has been provided to the propounding party. In preparing Requests For Admissions or Interrogatories, as well as responding, the final written draft must conform to the electronic version. Concerns regarding revisions made to the Interrogatories or Admissions should be alleviated by providing a true and correct written copy of the Interrogatories and Admissions.

[1] Civil Rule 11 requires that attorneys use their e-mail address, if any, to be stated on every pleading, motion or other document filed by a party.

5 pages in Word
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183 lines

Equitable Division in Ohio: *The business portion of property settlements*

by Terri A. Lastovka, CPA, JD, Cleveland

A common debate in the Domestic Relations Court is how much the family owned business is worth for purposes of property settlement. Property settlements are addressed in RC 3105.171, entitled "Equitable division of marital and separate property." Unfortunately, "equitable" is not defined anywhere in Title 31 of the Code. Additionally, Ohio does not publish its legislative history to provide guidance on what the drafters intended.

RC 1.49 states that: "If a statute is ambiguous, the court, in determining the intent of the legislature, may consider among other matters ... (D) The common law or former statutory provision, including laws upon the same or similar subjects." Furthermore, undefined words in a statute are to be interpreted by their usual, normal or customary meanings.[1] We must, therefore, go to the published cases for guidance. A review of published domestic relations cases in Ohio found that the terminology used in all Districts is "fair market value." But what does that mean? Let's look at the "customary meaning" of fair market value.

Most commonly "fair market value" is defined as the price, expressed in terms of cash equivalents, at which the property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arms' length in an open and unrestricted market, when neither is under any compulsion to buy or sell and when both have reasonable knowledge of relevant facts"[2] as

defined by the *International Business Valuation Glossary*.

The Internal Revenue Service defines "fair market value" as the price at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts.[3] These two definitions have different wording, but mean exactly the same thing.

The methodologies for valuing a business are fairly straight-forward, and well documented by authoritative sources such as the IRS and numerous business appraisal associations. Important factors that cannot be overlooked are the discounts that are applied against the value of the operating entity due to: (1) a business owner's lack of control if he owns less than 100% of the business (minority interest), or (2) the lack of liquidity (marketability) of the business owner's investment in the closely-held company.

However, very little guidance is provided in Ohio Family Law as to whether to apply these discounts, and if so, then how much should be discounted? Let's go back to the published cases to look at how the Courts have addressed this issue and interpreted "fair market value."

The 8th District Court of Appeals in *Oatey v. Oatey*[4] addressed the discount for minority interest (lack of control). The Court disallowed any discount for lack of control because the shareholder spouse (who owned a minority interest) effectively controlled the company through family ownership. It stands to reason that the Court would have allowed the discount if the other shareholders were not family members.

The 4th, 6th, and 9th District Courts of Appeal have addressed the discount for lack of marketability (lack of liquidity). The 9th District Court in *Montisano v. Montisano*, 1993 WL 208324 (Ohio Ct. App. 9 Dist. Summit County 1993), stated that the shareholder buy/sell agreement was valid to determine value because the agreement was used four years earlier to buy out a 25% shareholder.[5] Because the buy/sell agreement was used to set the value, and the buy/sell agreement provides for a ready market, no discount for lack of marketability should be applied. The discount was not disallowed because it is not appropriate, but because the shareholder agreement provided for liquidity. The 4th District in *Kell v. Kell*, 1993 WL 525003 (Ohio Ct. App. 4 Dist. Ross County 1993), also allowed the use of a buy/sell agreement to set the value.[6] Yet the 6th District in *Barone v. Barone*, 2000 WL 1232391 (Ohio Ct. App. 6 Dist. Lucas County 2000), allowed a 35% discount for lack of marketability when considering the value of a medical practice.[7] The value of this medical practice was based upon earnings, not on a shareholder agreement. It is apparent that the Courts allow a discount for lack of marketability if traditional methodologies are used in the valuation process, but that same discount is not applied against a value that is determined by shareholder agreement.

Most closely-held companies have some type of shareholder agreement in place. An enforceable contract, such as a stock restriction or cross-purchase agreement, that specifies the price of company stock, may provide evidence of the value of the business for marital dissolution purposes. However, even if the agreement addresses what value to use for a buy-out, that value cannot be blindly applied for divorce valuation purposes, as it may not be consistent with the history of the business, based on independent market factors, or have other flaws.

Generally, the value stipulated in a buy/sell agreement may be used in the valuation process if the following conditions are met:

(1) The price is fixed or determinable by a specified formula;

(2) The price is updated periodically;

(3) The exchange is mandatory, rather than optional; and

(4) The agreement is enforceable among all of the parties during their lifetimes as well as at death.

It is also important to consider whether the agreement has ever been utilized, and if so, whether it was followed. If all of these conditions are not met, then the traditional valuation methodologies are utilized. We are now back to the question of how to deal with the discount issue.

A court is not precluded from discounting fair value because of minority interest or lack of marketability, but such discounts are not mandated either.[8] The valuation of a withdrawing owner's share in an entity which is not traded on an active market should be based on the capital and income accounts of the entity, taking into account asset appreciation or depreciation, goodwill, and any other relevant factors including possible minority discounts and marketability discounts.[9]

Let's apply these concepts to a hypothetical domestic relations case. The marital estate owns stock in a closely-held company. Each spouse has equal ownership in all the assets accumulated during the marriage. RC 3105.171 states that the court shall divide the marital assets in an equitable manner. One spouse will most likely retain the stock because he or she is working in the business, and the other spouse will receive marital assets of equal value.

But we still don't have a clear definition of "value". So to what do we compare this? The spouse receiving assets of equal value is analogous to the dissenter shareholder who wants his "fair value" in cash or the equivalent. The rights of dissenter shareholders are provided under Title 17 of the Ohio Revised Code.

RC 1701.85 and RC 1782.437 define "fair cash value" of a share as the amount that a willing seller who is under no compulsion to sell would be willing to accept and that a willing buyer who is under no compulsion to purchase would be willing to pay, but in no event shall the fair cash value of a share exceed the amount specified in the demand of the particular shareholder. In computing such fair cash value, any appreciation or depreciation in market value resulting from the proposal submitted to the directors or to the shareholders shall be excluded. This sounds decidedly similar to "fair market value", as defined by the appraisal associations and the IRS. But different words are used, so is it really the same?

The prior section of the General Code did not include a definition of "fair cash value." Accordingly the Court in *Roessler v. Security Savings & Loan Co*, 147 Ohio St. 480, 72 N.E.2d 259 (1947), defined the term as follows:

> The 'fair cash value' which a dissenting shareholder in a corporation is entitled to receive for his shares in a proceeding brought pursuant to Section 8623-72, General Code, is the intrinsic value of the shares determined from the assets and liabilities of such corporation, upon consideration of every factor bearing on value.[10]

The Court in *Roessler* further found that the trial court had erred in instructing the appraisers that "fair cash value" meant a sum equal to that at which a willing buyer would purchase stock from a willing seller, i.e. the "market value" of such stock. It was then determined that such instruction was prejudicial to the stockholder, in that market value may be less than the intrinsic value of the stock.[11] Subsequently, and by what has been termed a response to *Roessler*, the General Assembly enacted RC 1701.85(C) in 1955, which provided the definition of "fair cash value" as the willing seller-willing buyer test.

Significantly, the Comment of the Ohio State Bar Association Committee which recommended the addition of the definitions to this section, stated:

> Division (C). This division contains a frequently used definition of 'fair cash value.' This definition is one that is found in a great mass of judicial decisions both in Ohio and elsewhere, in litigation involving the value of property, in appropriation suits, tax controversies, and other legal proceedings in which property must be valued. It is believed that this definition will give the Bar a clearer test than that of "intrinsic value" established by the Ohio Supreme Court in *Roessler v. Security Savings & Loan Co.*, 147 O.S. 480.[12]

The adoption of RC 1701.85, including its definition of fair cash value, was a legislative overruling of the holding of the *Roessler* case by a deliberate adoption of the hypothetical market value standard and that standard is applicable to the valuation of shares held by dissenting shareholders regardless of the existence or nonexistence of comparable sales in a suitable existing actual market.

Since that time, the Ohio Supreme Court had the opportunity to provide clarification of "fair cash value" in *Armstrong v. Marathon Oil Co.*, 32 Ohio St.3d 397, 513 N.E.2d 776 (1987). The 3rd

District court of appeals had held in *Armstrong v. Marathon*, 1986 WL 810 (Ohio Ct. App. 3rd Dist. Hancock County 1986) that: "[W]hat is to be valued is not the value of a single share if it were to be sold in an isolated sale, but instead the value per share of all the shares of the corporation, which can be determined only upon the basis of a hypothetical market or sale of all the shares of the corporation."[13] The Supreme Court did not agree with this analysis. Instead, it overruled the appellate decision and concluded that "the court of appeals mistakenly viewed the intent and meaning of the words of the statute as well as the holdings of (other appellate cases).The view that fair cash value must be determined by calculating a pro-rata share of a constructed or hypothetical purchase price for the entire corporation where there is an actual market for the stock of the company particularly when the stock is actively traded is simply incorrect."[14]

The statutory scheme of RC 1701.85 was established to enable courts and their advising appraisers to determine not only the value of actively traded stock, but also the value of closely held stock in privately or closely held corporation, which stock has little, or no, trading activity. It is appropriate to apply the hypothetical market valuations to the dissenters' shares of privately held companies. Amounts tendered to obtain a controlling interest of the company are not properly includable in the determination. Additionally, the volume of market activity of the stock, or lack thereof, should be taken into consideration to make the proper adjustments.[15]

So now we can see that the discounts for lack of control (minority interest) and lack of marketability (lack of liquidity) are appropriate. Now the question becomes how much are the discounts? Numerous empirical studies have been done over the past 30 years. These studies only provide average discounts. From the averages, it is imperative that the specifics of the company that is being valued are considered. When determining whether a company's discount for lack of marketability should be above or below the average, consider the following factors:[16]

(1) A thorough analysis of the company's financial operations and current financial condition;

(2) Whether the company pays dividends or distributions to its shareholders;

(3) What is happening currently in the economy and in the specific industry in which the company operates;

(4) Management structure, capabilities, and whether there is a succession plan;

(5) How much control the specific block of shares enjoys;

(6) Whether there are any restrictions on transferability of the stock and whether the company has a redemption policy in place; and

(7) The projected holding period for ownership of this block of stock.

Regarding the discount for lack of control, common prerogatives of control to consider[17] for the block of stock in question are the ability to:

(1) Appoint management;

(2) Determine management compensation and perquisites;

(3) Set policy and change the course of business;

(4) Acquire or liquidate assets;

(5) Select people with whom to do business;

(6) Make acquisitions;

(7) Liquidate, dissolve, sell out, or re-capitalize the company;

(8) Sell or acquire treasury shares;

(9) Register the company's stock for a public offering;

(10) Declare and pay distributions;

(11) Change the articles of incorporation or bylaws; and

(1) Prevent any of the above decisions.

The answers to these questions are not black and white, but require professional judgment. Where the evidence demonstrates that a marital asset has a significant value, such as an ownership interest in a business, the question of

its value should be submitted for valuation to a knowledgeable person who is a stranger to the proceedings. Parties to domestic relations actions are urged to appoint a disinterested and qualified appraiser to report to the court on the matter of value.[18]

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[1] *State ex rel. Bowman v. Columbiana Cty. Bd. Of Commrs.*, 1997-Ohio-265, 77 Ohio St.3d 398, 674 N.E.2d 694 (1997), RC 1.42.

[2] International Business Valuation Glossary adopted by the American Institute of Certified Public Accountants, American Society of Appraisers, Canadian Institute of Chartered Business Valuators, National Association of Certified Valuation Analysts, and the Institute of Business Appraisers.

[3] Treasury Regulation 20.2031-1(b), Revenue Ruling 59-60, 1959-1 C.B. 237.

[4] Oatey v. Oatey, 1996 WL 200273 (Ohio Ct. App. 8th Dist. Cuyahoga County 1996).

[5] Montisano v. Montisano, 1993 WL 208324 (Ohio Ct. App. 9th Dist. Summit County 1993).

[6] Kell v. Kell, 1993 WL 525003 (Ohio Ct. App. 4th Dist. Ross County 1993).

[7] Barone v. Barone, 2000 WL 981328, (Ohio Ct. App. 6th Dist. Lucas County 2000).

[8] 2 Bromberg & Ribstein on Partnership (2001 Supp.), 7:188, Section 7.13(b)(1).

[9] Id. at 188-189, Section 7.13(b)(1).

[10] Roessler v. Security Savings & Loan Co., 147 Ohio St. 480 (1947).

[11] Id.

[12] 28 Ohio Bar 102 (Jan. 10, 1955).

[13] *Armstrong v. Marathon Oil Co.*, 1986 WL 810 (Ohio Ct. App. 3rd Dist. Hancock County 1986)

[14] *Armstrong v. Marathon Oil Co.*, 32 Ohio St.3d 397, 513 N.E.2d 776 (1987).

[15] Id.

[16] Estate of Mandelbaum v. Commissioner, TC Memo 1995-255.

[17] The Analysis and Appraisal of Closely Held Companies, Shannon Pratt, Third Ed., 1996.

[18] O.Jur 3d Family Law §480

Briefly Noted

Child Support

Basista v. Basista

Citation: 2004-Ohio-4078, 2004 WL 1752928 (Ohio Ct. App. 8th Dist. Cuyahoga County 2004)

The parties' separation agreement required Father to pay into a trust fund for their minor child once his obligation to pay the mortgage on the marital home terminated. The mortgage obligation terminated upon Wife's remarriage and the trust payments commenced.

Husband attempted to modify his child support obligation, including the trust fund contribution. Both the trial court and Court of Appeals held that the trust fund contribution was not child support and could be modified.

The payments were in the nature of an ongoing gift, which added to the value of an asset for the child. Although the mortgage payment and succeeding trust payment might have been deemed as spousal support, because it partially relieved Wife of the obligation to provide housing for her and the minor child, there was no reservation of jurisdiction in the original decree or separation agreement to allow the court to modify the spousal support portion.

Beck v. Beck

Citation: 2004-Ohio-861, 2004 WL 350958 (Ohio Ct. App. 8th Dist. Cuyahoga County 2004)

Payee's motion to modify (increase) child support was granted, but the decision decreased her child support. On objections, the trial judge granted her an increase. Payor appealed. Evidence demonstrated that the incomes of the parents were the same, but expenses of the children had increased, and the expenses of the father had decreased. The Court of Appeals affirmed the increase.

Calvaruso v. Calvaruso

Citation: 2004-Ohio-1877, 2004 WL 785454 (Ohio Ct. App. 9th Dist. Ct. App. Summit County 2004)