COMMONWEALTH OF MASSACHUSETTS APPEALS COURT

CHRISTINA L. PALMERINO vs. MARK H. PALMERINO.

09-P-1853

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Mark H. Palmerino appeals from a Probate and Family Court judgment of divorce from his wife, Christina L. Palmerino. He contends that the judge erred by including his interest (30.63 percent) in Big Bunny Market, Inc. (Big Bunny), a closely held S corporation founded by his father in 1947, in the divisible marital estate. He also challenges the judge's valuation of his shares in Big Bunny. We affirm.

Background. The parties were married in 1984. They have three children and enjoyed a comfortable lifestyle during the marriage. The husband worked outside of the home and earned a substantial income. The wife was primarily a homemaker, although she is employable as a massage therapist. Following a five-day trial, the judge issued a lengthy decision in which she divided the marital assets including the marital home, retirement investments, bank accounts, and personal property equally between the parties.[1] The judge also awarded the husband his shares in Big Bunny, which she valued at $870,435. After the division of the assets was equalized, the husband was ordered to pay $392,515 to the wife in annual installments of $50,000 per year.

2. *Discussion.* The husband argues that his interest in Big Bunny was erroneously classified as a divisible marital asset because 'the Big Bunny assets were maintained and managed separately from the marital estate and that the Wife made no significant contribution to them.' We disagree. The husband's interest in Big Bunny falls within the broad definition of marital property set forth in G. L. c. 208, § 34, and was properly assigned to the marital estate.

'The appropriate weighing and balancing of the § 34 factors, and the resulting equitable division of the parties' marital property, is left to the judge's broad discretion.' *Kittredge v. Kittredge,* 441 Mass. 28, 43 (2004). Here, the judge made express findings indicating that all relevant factors under § 34 had been considered. She evaluated the parties' relative contributions to the marriage, ages, health, station in life, and future employability and concluded that 'an approximately equal distribution of marital assets' would be most equitable. Because this determination is fully supported by the judge's findings and the evidence, we will not disturb it. See *Williams v. Massa,* 431 Mass. 619, 631 (2000) (judge's determination on equitable division of marital property will be upheld unless plainly wrong and excessive).

We now turn to the husband's claim that the judge overvalued his interest in Big

Bunny. 'Valuation of a business is a question of fact. Thus, the standard is whether the judge's findings were clearly erroneous.' *Bernier v. Bernier,* 449 Mass. 774, 785 (2007) (citation omitted). See Mass.R.Civ.P. 52(a), as amended, 423 Mass. 1402 (1996). 'A finding is clearly erroneous when there is no evidence to support it, or when, 'although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Custody of Eleanor,* 414 Mass. 795, 799 (1993), quoting from *Building Inspector of Lancaster v. Sanderson,* 372 Mass. 157, 160 (1977).

During the trial, the judge heard conflicting testimony regarding the value of the husband's interest in Big Bunny. The husband presented the testimony of David M. Gannett, a certified public accountant (CPA) and professional business appraiser who had been jointly retained by the parties to appraise the value of the husband's stock. In his written report (entered as a joint exhibit), Gannett valued the husband's interest at $557,000. In reaching his valuation, Gannett employed the 'asset-based approach'[2] to determine the value of the business and then applied a twenty percent discount for lack of marketability[3] and a twenty percent discount for lack of control or minority ownership.[4] During cross-examination by the wife's counsel, Gannett was asked about the then recent case of *Bernier v. Bernier,* 449 Mass. 774 (2007), in which the Supreme Judicial Court stated that absent evidence of a possibility of a sale, neither a marketability nor a minority discount should apply ordinarily in valuing closely held corporations in divorce proceedings. *Id.* at 792. Gannett testified that valuation professionals were still 'wrestling' with the import of the *Bernier* decision (which was issued after Gannett submitted his written report), but opined, in light of its holding, that it is likely that discounts were no longer applicable. He further testified that the value of the husband's interest without marketability and minority ownership discounts was $870,435 rather than $557,000 as he had stated in his report.

As a result of the change in Gannett's opinion, the husband requested and received permission to present rebuttal testimony from another expert, Felix Betro, a CPA, certified valuation analyst, and attorney. Betro criticized Gannett's asset approach analysis for improperly equating net book value to fair market value without adjustments, and for including leasehold improvements in its asset valuation. More broadly, Betro testified that the asset approach used by Gannett was an inappropriate measure of the value of an ongoing business like Big Bunny.[5] He opined that the more accurate and accepted means of assessing the value of such a business was the income approach,[6] which Gannett had discussed in his report but dismissed without explanation. Applying this methodology to the data compiled exclusively by Gannett, Betro calculated the value of the husband's interest at $534,000. Notably, Betro also excluded marketability and minority discounts from his final valuation, agreeing that such discounts were inapplicable after *Bernier.*

The husband argues that the judge erred in failing to apply minority and marketability discounts to his interest in Big Bunny. He contends that *Bernier* is distinguishable because in that case (1) the husband affirmatively testified that 'the supermarkets were not for sale at any price,' *id.* at 790, n.28, and (2) minority discounts, although mentioned, were not specifically at issue.[7]

The husband's attempt to distinguish *Bernier* is not persuasive. First, the absence of direct testimony indicating that Big Bunny would not be sold is inconsequential in light of other evidence, including statements by the husband that the next generation of Palmerinos was being groomed to operate Big Bunny, which made it

sufficiently clear that '[t]he subject compan[y] will continue as [a] going concern[] and [is] not being converted to cash.' *Id.* at 792.

Second, though dicta , the court in *Bernier* also made clear that neither a 'marketability nor a minority discount should be applied absent extraordinary circumstances.' *Ibid.*, quoting from *Brown v. Brown,* 348 N.J. Super. 466, 483 (2002). The husband has not directed our attention to any 'extraordinary circumstances' and none are disclosed by our review of the record.

Finally, the husband's argument ignores the basic premise of *Bernier* that in the context of a divorce: 'the judge must take particular care to treat the parties not as arm's-length hypothetical buyers and sellers in a theoretical open market, but as fiduciaries entitled to equitable distribution of their marital assets.'

Id. at 776, citing G. L. c. 208, § 34.

The husband also claims that the judge erred in adopting Gannett's valuation methodology (asset approach) over the valuation methodology (income approach) offered by Betro, and in failing to credit Betro's criticisms of Gannett's asset-based analysis. 'When the opinions of valuation experts differ, a judge may 'accept one *reasonable* opinion and reject the other." *Bernier,* 449 Mass. at 785, quoting from *Fechtor v. Fechtor,* 26 Mass. App. Ct. 859, 863 (1989). It is for the trial judge, not a reviewing court, to determine which evidence to credit and which to discredit or ignore, and to reconcile any inconsistencies or contradictions in the evidence. See *First Pa. Mort. Trust v. Dorchester Sav. Bank,* 395 Mass. 614, 621, 623-624 (1985).[8]

The judge's reliance on an asset-based valuation does not render the judgment unreasonable or 'materially at odds with the totality of the circumstances.' *Bernier,* 449 Mass. at 785. While the income approach has emerged as the dominant approach in business valuation, the weight of authority does not support the husband's assertion that it is the only appropriate measure of Big Bunny's value or that the use of any other methodology is clearly erroneous. See Pratt & Niculita, The Lawyer's Business Valuation Handbook, at 24-25 (2d ed. 2010). '[T]he valuation of an S corporation is an inexact science.' *Bernier,* 449 Mass. at 783. There is no standard method for the valuation of shares in close corporations. See 2A Kindregan & Inker, Family Law and Practice § 45:8, at 332 (3d ed. 2002) (noting that in the absence of a determinable market value, experts commonly value a closely held business by the assignment of value to the assets of the business [as was done here] and by the capitalization of earnings [as was done in *Bernier*]).[9]

Amended judgment of divorce nisi entered December 8, 2008, affirmed.

By the Court (Lenk, Vuono & Rubin, JJ.),

Entered: April 15, 2011.

1. The judge also addressed custody issues, child support payments, and alimony. None of these rulings are challenged on appeal.

2. The report indicated that there were three commonly accepted approaches to value a closely held businesses: (1) the market approach, (2) the income approach, and

(3) the asset approach.

3. '[A] marketability discount 'adjusts for a lack of liquidity in one's interest in [a closely-held corporation], on the theory that there is a limited supply of potential buyers for stock in a closely-held corporation." *Bernier v. Bernier, supra* at 792, quoting from *Tierney v. John Hancock Mut. Life Ins. Co.,* 58 Mass. App. Ct. 571, 577 n.8 (2003), cert. denied, 541 U.S. 903 (2004).

4. 'A minority discount recognizes that controlling shares [of stock] are worth more in the market than are noncontrolling shares.' *Shear v. Gabovitch,* 43 Mass. App. Ct. 650, 678 (1997), quoting from 12B Fletcher, Cyclopedia of Private Corporations § 5906.120, at 435 (1993).

5. Betro testified that the asset approach is only appropriate when valuing businesses with substantial assets but little or no cash-flow, such as holding companies.

6. See *Bernier, supra* at 778 (describing the income approach as 'taking [a business's] average adjusted income after expenses for a set number of years, divided by the appropriate capitalization rate').

7. In *Bernier,* the spouses each had a fifty percent interest in the corporations prior to their divorce. *Id.* at 777.

8. While it would have been helpful if the judge had not left us to speculate as to why she adopted Gannett's approach over Betro's, we are not inclined to disturb her conclusion especially since there is a basis in the record for it.

9. As one commentator has observed, a return on investment method is often speculative and therefore 'a dubious basis for evaluation' in the marriage dissolution context. 1 Goldberg, Valuation of Divorce Assets § 6.7, at 513 (2005).

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