S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

JUDITH M. BUSSA,	UNPUBLISHED May 20, 2008
Plaintiff-Appellee,	
v	No. 272805 Kent Circuit Court
JAY L. BUSSA,	LC No. 02-003685-DO
Defendant-Appellant.	

Before: O'Connell, P.J., and Hoekstra and Smolenski, JJ.

PER CURIAM.

Defendant Jay Bussa appeals as of right the trial court's judgment of divorce. On appeal, Mr. Bussa challenges the trial court's valuation of his partial interests in several businesses and its decision to grant spousal support to plaintiff Judith Bussa. We conclude that the proofs properly supported the trial court's findings with regard to the value of Mr. Bussa's business interests. Hence, they were not clearly erroneous. Because these findings were not clearly erroneous, the trial court's equal division of the marital estate based on these values was equitable. Further, we conclude that the trial court properly awarded spousal support to Ms. Bussa. Because there were no errors warranting relief, we affirm.

I. Facts and Procedural History

Jay and Judith married in 1972. They had two children during their marriage. Although their marriage had difficulties from an early period, Ms. Bussa did not file for divorce until 2002. Because their children were adults by the time of the divorce, the primary issues at trial were the proper valuation of Mr. Bussa's business interests and whether Ms. Bussa should be awarded spousal support. The parties presented their proofs over 31 trial days from November 2003 to January 2005.

The proofs established that, during the early years of the marriage, Mr. Bussa worked as a driver for an oil distribution company. While working for the oil distribution company, he partnered with Gary Sjaarda and purchased several gas stations. Eventually Mr. Bussa left his employer to concentrate on his own businesses. By 2000, Mr. Bussa and Mr. Sjaarda had an equal interest in four related businesses: Byron Petroleum Corporation (Byron), Bussa Trucking, Inc., which does business as Byron Oil (Byron Oil), Byron Petroleum Properties, L.L.C. (Byron Properties), and Thrifty Petroleum Properties, L.L.C. (Thrifty). Byron Properties and Thrifty own several gas stations with convenience stores, some rental properties, and a four-unit apartment building, which also houses the offices for the four businesses. Byron operates the gas stations owned by Byron Properties and Thrifty and is the primary cash generating business. Byron Oil owns and operates the fuel trucks that deliver fuel to the gas stations operated by Byron. Byron Oil purchases its petroleum products from a fuel jobber, which is a company that has the right to purchase fuel from terminals operated by major oil companies. In addition, Byron Oil also distributes petroleum products to several businesses that are not affiliated with any of Mr. Bussa's businesses. Because Byron Oil purchases its fuel from a jobber and then redistributes the fuel to third parties, it is technically a sub-jobber. At trial, the parties presented opposing expert testimony on the proper valuation of these four businesses.

Ms. Bussa's expert, Christine Baker (hereafter "Baker"), testified that she used a "hierarchy" of three levels of evidence to appraise the value of businesses. The first level involved finding the sale of an identical business in the same market. However, she noted that identical sales were very rare. Baker explained that the next best evidence would involve examining sales of similar companies in the same market. Finally, where the first two levels of evidence are unavailable or insufficient, Baker stated she would estimate the value using three valuation techniques: the market approach, the cost approach, and the income approach. Baker stated that the market approach compares the business to all the market inputs that can be found and the cost approach examines the business' assets and debts. Finally, under the income approach, Baker said she determines the value of the business based on the cash flows that it generates. She stated that this approach involved examining the normal profitability of the company. This in turn is determined by examining normal revenues—with adjustments for market fluctuations—and the costs necessary to maintain normal operations. She also noted that it was very important to examine what the company is paying its owners and compare those amounts to industry standards. Baker further clarified that the businesses should be valued as going concerns.

Baker first appraised Byron. She noted that Byron is the primary cash generating business. She explained that it had good cash flow and that the stockholders' equity increased from year to year. Indeed, she noted that Byron's cash flows enabled each of Mr. Bussa's businesses to pay off their debt. She also found that, compared to industry standards, Byron had a significantly better asset to debt ratio and higher than normal officer compensation. Although she originally estimated Byron's value using an income approach, Baker eventually relied primarily on a market approach. Using the market approach, Baker appraised Byron at $1,533,000.

Baker used a combination of all three approaches to value Byron Oil. Indeed, she noted that current financial statements validated her assumptions under the cash flow method and showed that Byron Oil remained profitable, but she also noted that it did not generate a lot of cash and that its primary value was in its assets. Based on this combined approach, Baker appraised Byron Oil's value at $668,821.

Baker appraised Byron Properties and Thrifty using an asset approach. She further stated that she used the state equalized value of the properties multiplied by 2.2 to derive the present value of the real estate holdings. Using this method, she determined that Byron Properties was worth $1,766,215 and Thrifty was worth $1,342,559.

Baker estimated that the total value of these four businesses was $5,310,595 and that Mr. Bussa's one-half interest came to $2,655,297.

James Hines (hereafter "Hines"), who was Mr. Bussa's expert, also testified about the valuation of the four businesses. However, in contrast to Baker's method, Hines did not separately evaluate each business. Instead, he concluded that, because the businesses are so interrelated, they must be viewed as a whole. Hines also differed in terms of the ultimate method used to value the businesses. Hines concluded that the cash flow method was too uncertain given the nature of the petroleum industry and that—as going concerns—it would be inappropriate to value the businesses using liquidation values. For these reasons, Hines concluded that the businesses should be valued using the asset or cost method. Based on this method, Hines initially concluded that Mr. Bussa's one-half interest in the businesses should be valued at $901,821.36. However, after extensive cross-examination, which revealed some computational errors, Hines determined that Mr. Bussa's one-half interest should be valued at $1,102,252.63.

In its opinion, the trial court determined that both Hines' and Baker's appraisals had significant flaws. Nevertheless, the court adopted Baker's value for the businesses as its baseline. It then discounted this value based on several factors identified by Hines as likely affecting the value of the businesses. From this, the trial court found the total value of Mr. Bussa's interest in the four businesses to be $1,991,473. The trial court awarded the interests in the businesses to Mr. Bussa. Because the total assets awarded to Mr. Bussa exceeded the assets awarded to Ms. Bussa by $500,000, the court also awarded Ms. Bussa a note from Mr. Bussa in the amount of $500,000. The trial court secured the note on Mr. Bussa's assets including his business interests. The note was payable in 120 equal installments without interest to begin one year after the entry of the judgment.

The trial court also concluded that Mr. Bussa had the ability to pay alimony. It noted that he claimed to only make somewhat more than $70,000 per year, but determined that the evidence revealed a substantially higher income. Indeed, the court cited his accountant's testimony that Mr. Bussa reported earnings in excess of $150,000 in both 2002 and 2003. In contrast, the trial court found that Ms. Bussa's actual income will be just over $1,000 per month. From this, the trial court determined that Ms. Bussa would not have sufficient income—even when considering potential income from her award of assets—to meet her needs. For that reason, the trial court ordered Mr. Bussa to pay spousal support in the amount of $3,000 per month for the next three years and $2,000 per month thereafter until Ms. Bussa turns 65. Although the trial court set the spousal support for a specified period of time, it noted that the support order could be modified based on changed circumstances. Finally, the trial court also ordered Mr. Bussa to pay $70,200 of Ms. Bussa's attorney fees based on Mr. Bussa's unreasonable conduct during the course of the divorce proceedings.

The trial court entered its judgment of divorce on July 28, 2006.

This appeal followed.

II. Jurisdiction

We shall first address Ms. Bussa's argument that this Court lacks jurisdiction to consider Mr. Bussa's appeal because he failed to properly file his appeal within 21 days of the August 28, 2006 judgment of divorce.

This Court has jurisdiction over appeals as of right from a final judgment or order. MCR 7.203(A)(1). A final judgment or order is "the first judgment or order that disposes of all claims and adjudicates the rights and liabilities of all the parties . . . ." MCR 7.202(6)(a)(i). An appeal as of right must be filed within 21 days after entry of the judgment or order. MCR 7.204(A)(1)(a).

In the present case, the trial court issued its opinion on July 12, 2006. However, before the trial court issued its opinion, Ms. Bussa moved for reimbursement of certain medical expenses and initially scheduled the hearing on this motion for July 14, 2006. In light of the trial court's opinion, Ms. Bussa adjourned the hearing date and scheduled the hearing for July 28, 2006, which was the date she had scheduled for a hearing on her motion for entry of the divorce judgment. On July 28, 2006, the trial court entered the judgment of divorce and ruled on Ms. Bussa's motion for reimbursement. Although the July 28, 2006, judgment indicated that it resolved the last pending claims and closed the case, the trial court did not enter an order regarding reimbursement and resolving other issues until August 14, 2006. Because the August 14 order amending the judgment of divorce disposed of the last remaining issues affecting the rights and liabilities of the parties, it was the final order that disposed of "all claims and adjudicate[d] the rights and liabilities of all the parties." MCR 7.202(6)(a)(i); cf. *Konal v Forlini*, 235 Mich App 69, 74; 596 NW2d 630 (1999) (noting that where the rights and liabilities of the parties were unaffected by an amended judgment, the original judgment constituted the final judgment). Because Mr. Bussa filed his appeal within 21 days of the date of the August 14, 2006 order amending the judgment, his appeal was timely.

III. The Trial Court's Valuation of Mr. Bussa's Businesses

Mr. Bussa first argues that the trial court clearly erred when it relied on Baker's values for the businesses. Specifically, he argues that Baker's values were so thoroughly undermined by flaws that the trial court should have disregarded them entirely and instead relied on Hine's values alone. Because the trial court could not properly rely on Baker's values, Mr. Bussa concludes, the trial court's findings based on Baker's values are clearly erroneous. And these erroneous valuations render the division of the marital estate inequitable. We disagree.[1]

[1] Mr. Bussa also alleges that the trial court "clearly made a mistake" by awarding a promissory note to Ms. Bussa, which was secured by his interests in the four businesses, without analyzing the applicable stock restrictions. However, the trial court did not require the note to be secured by Mr. Bussa's interests in the businesses. Rather, it stated that the note may be secured by any of his assets—including his interests in the businesses. Further, Mr. Bussa does not support this claim of error with an appropriate legal argument or citations. Therefore, he abandoned any objection to the trial court's decision to permit this note to be secured by his interests in the businesses. See *Hamade v Sunoco, Inc (R&M)*, 271 Mich App 145, 173; 721 NW2d 233 (2006).

A. Standards of Review

The value of an asset in a marital estate is a factual determination. *Kowalesky v Kowalesky*, 148 Mich App 151, 155; 384 NW2d 112 (1986). And this Court reviews factual findings for clear error. *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990). A factual finding is not clearly erroneous simply because this Court is convinced that it would have weighed the evidence differently. *Id.* at 803. Rather, "[a] finding is clearly erroneous if the appellate court, on all the evidence, is left with a definite and firm conviction that a mistake has been committed." *Id.* at 805. Hence, where the trial court's "valuation of a marital asset is within the range established by the proofs, no clear error is present." *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994).

B. Analysis

In the present case, the trial court heard extensive expert testimony concerning the valuation of Mr. Bussa's businesses. Although the experts agreed on the valuation of certain aspects of the businesses, such as the real property, they vigorously disagreed about the proper valuation of much of the businesses. Further, the attorneys for the parties spent a considerable amount of trial time exposing problems in the methodologies and calculations employed by the opposing expert. Indeed, based on this evidence, the trial court concluded that both experts' appraisals were "flawed in some significant aspect." Hence, the trial court had the difficult and unenviable task of sorting through voluminous evidence and conflicting expert testimony.

In its opinion, the court noted a series of flaws in the methodology employed by Baker in her valuation of the businesses. The court explained that Baker's use of comparable sales did not involve businesses in the same market and did not clarify whether the businesses had differences in operations that may have affected sales. The court also noted that Baker did not discount the value of the businesses to reflect certain limitations on the marketability of the businesses. Nevertheless, the trial court found that Baker's opinion was "reasonable and supported by company financial reports." In contrast, the court noted that Hines "appeared confused when asked to support his opinions with data" and stated that it was "left with the impression that he was more the advocate of Mr. Bussa . . . than a business evaluator utilizing neutral valuation principles." The court further explained that Hines failed to support much of his criticism of Baker's appraisal with citations to testimony or record evidence. For these reasons, the trial court rejected Hines' appraisal.

Although the trial court rejected Hines' appraisal, it did not outright adopt Baker's value for the businesses. Instead, it concluded that Baker's value for the businesses should serve only as the starting point for a proper valuation. The court then reduced this value by 5% to reflect the fact that Mr. Bussa did not have a controlling interest in the businesses and by 10% based on Hines' key man theory. Finally, the trial court expressed concern about the lack of information about the comparables employed by Baker, which the court concluded undermined the reliability of her valuation. As a result, the trial court decided to reduce the value of the businesses by a further 10%. Thus, the trial court relied primarily on Baker's appraisal, but discounted her valuation based on some flaws in Baker's methodology, which were noted by Hines. Using this method the trial court found the total value of Mr. Bussa's interest in the businesses to be $1,991,473.

On appeal Mr. Bussa contends that, because Baker's appraisal had several serious flaws, the trial court should not have relied on Baker's opinion at all. Instead, he further contends, the trial court should have done its own asset based valuation or adopted Hines' valuation. However, the trial court clearly rejected Hines' valuation on credibility grounds. And, although the trial court noted flaws in Baker's approach, it also found that her overall valuation was reasonable. Hence, the trial court's decision to reject Hines' valuation and utilize Baker's valuation as a base for its own findings was—in significant part—based on determinations of credibility. A trial court sitting as the finder of fact may properly adopt findings based in whole or in part on those portions of competing experts' opinions that the court finds credible. See, e.g., *Michigan Citizens for Water Conservation v Nestlé Waters North America, Inc*, 269 Mich App 25, 47-48; 709 NW2d 174 (2005) (noting that the trial court could draw conclusions based on those portions of various expert opinions that the trial court found credible), rev'd in part on other grounds 479 Mich 280 (2007). And this Court will not second-guess the trial court's credibility determinations. See *Stallworth v Stallworth*, 275 Mich App 282, 286; 738 NW2d 264 (2007).

In addition, the trial court specifically addressed—and rejected—many of the criticisms of Baker's valuation that Mr. Bussa now raises on appeal.[2] Mr. Bussa argues that Baker's opinion was fatally undermined by the fact that she projected growth without considering market forces that negatively affected the value of his businesses. Specifically, he notes that Baker's valuation failed to consider that Byron Oil is a sub-jobber, that gasoline is subject to below-cost pricing, and that gasoline sales have decreased. Mr. Bussa characterized these market forces as essentially placing his businesses in "liquidation mode."

Although Mr. Bussa faults Baker's valuation on these bases, the trial court did not agree that these concerns rendered her opinion inapposite. The trial court noted that the businesses were going concerns and that there was no evidence that Mr. Bussa intended to discontinue his partnership. Hence, the court flatly rejected the notion that a "liquidation" analysis should govern the value of Mr. Bussa's businesses. Further, the court noted that Mr. Bussa's witnesses did not present any evidence of the effect that below cost pricing might have on the overall value of the businesses and cited Baker's evidence that, despite being the last sub-jobber in the region, the businesses continued to be profitable and had significant cash reserves. The trial court also acknowledged that Baker admitted that her valuation did not consider volume of sales, but concluded that this did not adversely affect her appraisal. The court explained that, "[a]s long as

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[2] Mr. Bussa raised several of these alleged flaws in his summary of the facts, but did not integrate them into his analysis of the issue. Therefore, we shall limit our analysis accordingly. Nevertheless, we note that the trial court specifically rejected many of these additional flaws—such as the contention that the value must be discounted for environmental concerns and Davis Oil's ability to veto the sale of the gas stations—on the grounds that Mr. Bussa failed to produce sufficient evidence of their effect on the value of the business. In addition, the trial court took under consideration other factors raised by Mr. Bussa and discounted Baker's appraisal accordingly. Given the evidence at trial, we are not left with a definite and firm conviction that the trial court made a mistake with regard to how it handled these alleged flaws in the valuation of the businesses. *Beason*, *supra* at 805.

the price of gasoline produces increased revenues," which were verified by the businesses' financial documents, "then the discounted cash flow method[] utilized by Mrs. Baker is both reasonable and an appropriate industry valuation standard." Because there was record evidence to support the conclusion that these factors were not actually adversely affecting the operations of the businesses, the trial court did not clearly err in refusing to reject or discount Baker's valuation on these bases. *Beason*, *supra* at 805.

Mr. Bussa also argues on appeal that the trial court made a "mistake of incredible proportion" when it reduced the total value of Baker's appraisal by 10% based on her lack of proper comparables rather than rejecting her appraisal outright. In its opinion, the trial court specifically acknowledged the limitations inherent in Baker's use of comparables. But it also found it noteworthy that Hines "furnished no comparables either." For that reason, it elected to utilize Baker's appraisal—albeit with a discount to reflect the lack of reliability in the comparables. Given that Mr. Bussa failed to present comparables capable of demonstrating the degree to which Baker's own use of dissimilar comparables may have skewed her results, the trial court could properly accept her appraisal based on those comparables with a discount to reflect the court's determination that the appraisal was less reliable. And we are not left with the definite and firm conviction that the trial court's findings in this regard were mistaken. *Id.*

C. Conclusion

Although there was testimony from which one might conclude that Baker overvalued Mr. Bussa's interests in the businesses at issue, there was sufficient evidence to support Baker's valuation. And the trial court could properly rely on that valuation in whole or in part in finding the value of the businesses. Because the trial court's finding as to the value of Mr. Bussa's interests in the businesses was "within the range established by the proofs," we cannot conclude that it was clearly erroneous. *Jansen*, *supra* at 171.

IV. Spousal Support

Mr. Bussa next argues that the trial court erred when it awarded Ms. Bussa spousal support until age 65. Specifically, he contends that the trial court should have found that Ms. Bussa's assets were capable of producing income sufficient to meet her financial needs. We do not agree that the trial court clearly erred when it determined that Ms. Bussa's assets would not be capable of producing income sufficient to meet her needs.

Trial courts have the discretion to make an award of spousal support. MCL 552.23; *Gates v Gates*, 256 Mich App 420, 432; 664 NW2d 231 (2003). The primary objective of spousal support "is to balance the incomes and needs of the parties in a way that will not impoverish either party." *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). This Court reviews a trial court's findings of fact with regard to an award of spousal support for clear error. *Gates*, *supra* at 432. "If the trial court's findings are not clearly erroneous, this Court must then decide whether the dispositional ruling was fair and equitable in light of the facts." *Moore*, *supra* at 655.

Ron Collins (hereafter "Collins")—a financial advisor—testified on behalf of Mr. Bussa regarding the possible income that Ms. Bussa could derive from the assets that might be awarded to her. Collins initially assumed that Ms. Bussa would have access to the cash value of several insurance policies, investment accounts, and retirement accounts. Based on this assumption, he concluded that she would have a principal amount of $985,006. He opined that she could earn a rate of return of more than 10% on that principal.

However, on cross-examination, Collins had to admit that he was not familiar with the specific terms of the policies and could not say whether Ms. Bussa would actually have access to the cash value of those funds. He also admitted that she could be penalized for withdrawing retirement funds before reaching a certain age and that she might have to pay taxes if she were to withdraw funds in order to reinvest them. Collins also acknowledged that his estimated rate of return was based on a long-term investment strategy that did not reflect Ms. Bussa's actual investment situation.

In its opinion, the trial court rejected Mr. Bussa's contention that Ms. Bussa would receive assets capable of generating significant income. Indeed, the trial court characterized Mr. Bussa's statements in his closing statement as "flippantly" referring to potential income of $100,000 per year from assets. The trial court noted that there was no evidence as to how much of the assets awarded would actually be available to Ms. Bussa for generating current income. The court also pointed out that Mr. Bussa failed to account for the evidence that the actual rate of return for the one liquid asset was 2.22% over the past five years. Based on this evidence, the trial court determined that any accessible income would be "marginal" and found that Ms. Bussa "would have next to nothing available to her for basic living expenses."

Given the evidence presented at trial, we cannot conclude that this finding was clearly erroneous. The primary assets at issue were insurance policies and investment accounts. Yet there was insufficient evidence concerning whether and to what extent these assets could be converted to cash or other investments for the purpose of generating income. Further, there was no evidence concerning how such a conversion might affect the principal amount of these assets. Indeed, given Collins' admissions on cross-examination, it is quite possible that a significant amount of the principal would be depleted by penalties and taxes were Ms. Bussa to convert them to cash or a different form of investment. And she should not be required to deplete her assets in order to meet her immediate support needs. *Hanaway v Hanaway*, 208 Mich App 278, 296; 527 NW2d 792 (1995).

The trial court did not clearly err when it found that the assets awarded to Ms. Bussa would be insufficient to meet her financial needs. *Beason*, *supra* at 805. Further, we do not agree with Mr. Bussa's additional contentions that the trial court erred in failing to analyze Ms. Bussa's stipulated income, social security benefits, and "excess" temporary marital support. On review of the record evidence, we conclude that the trial court properly awarded spousal support and that the amount of the award was fair and equitable. *Moore*, *supra* at 655. Therefore, Mr. Bussa has not established an error warranting relief from the trial court's award of support.

V. Conclusion

The trial court did not clearly err when it found the total value of Mr. Bussa's interest in the four businesses to be $1,991,473. The trial court also did not clearly err when it found that the award of assets to Ms. Bussa would not be able to generate sufficient income to meet her support needs. And, because an award of spousal support was proper and the amount was otherwise fair and equitable, the trial court did not err in its award of spousal support. Therefore, there were no errors warranting relief.

Affirmed.

/s/ Peter D. O'Connell
/s/ Joel P. Hoekstra
/s/ Michael R. Smolenski