IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 10, 2007 Session

CHRISTINA JO BERTUCA v. THEODORE JOSEPH BERTUCA

Appeal from the Circuit Court for Wilson County
No. 4720-DVC Clara Byrd, Circuit Judge

No. M2006-00852-COA-R3-CV - Filed November 14, 2007

This is an appeal from a divorce action filed by Christina Jo Bertuca against her husband, Theodore Joseph Bertuca. The divorce was granted on June 23, 2005, but the trial court reserved the issue of a division of marital assets. That matter was tried in February, 2006. While the hearing related to a variety of assets, most of the evidence presented related to the value of the husband's ninety percent ownership in Capital Food Services, a Tennessee general partnership that was engaged in the ownership and operation of seven McDonald's franchises located in Wilson County, Tennessee. The trial court determined the value of Capital Food Services had increased by $1,000,000 above the amount paid for the restaurants. The value of Mr. Bertuca's interest had, therefore, increased by $900,000 and half that amount was awarded to Ms. Bertuca. Mr. Bertuca has appealed challenging the conclusions reached by the trial court. Ms. Bertuca has appealed from the judgment of the trial court allowing Mr. Bertuca to pay the sum awarded in eighty-four equal monthly installments without interest and asserting she is entitled to her attorneys' fees on appeal. Having carefully reviewed the record, we affirm the judgment of the trial but modify the increase in value of Capital Food Services to $780,768 and Ms. Bertuca's award to $350,345.50, payable as ordered by the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed as Modified

DONALD P. HARRIS, SR.J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, J., and FRANK G. CLEMENT, JR., J.,, joined.

Michael D. Sontag, Stephen J. Jasper, Nashville, Tennessee, for the appellant, Theodore Joseph Bertuca.

Julie Robinson Rowland, Jere N. McCullough, Lebanon, Tennessee for the appellee, Christina Jo Bertuca.

OPINION

This matter is before the court upon the Petition to Rehear filed by appellant, Theodore Joseph Bertuca. In that we granted the Petition to Rehear and have fully addressed the issues in the following opinion, we withdraw our previous opinion which was filed on November 14, 2007.

I. FACTUAL BACKGROUND

Capital Food Services was formed on December 29, 2000, as a partnership between Mr. Bertuca and his father, Theodore F. Bertuca (elder Mr. Bertuca). The purpose of the partnership was to acquire and operate McDonald's franchises in the Middle Tennessee area. The partnership agreement provided that Mr. Bertuca owned a ninety percent general partnership interest and the elder Mr. Bertuca owned a ten percent partnership interest. The partners had equal rights, however, in the management of the partnership business. Neither of the partners could buy, sell or hypothecate any of the assets of the partnership without the consent of the other partner, other that the type of property bought and sold in the regular course of its business.

The partnership agreement also contained a buy-sell provision that provided that:

> If either partner shall desire to retire from the partnership, each shall provide the remaining partner with written notice of said intention. The remaining partner shall purchase the retiring partner's interest at the book value of the retiring partner's interest on the books of the partnership as of the end of the previous fiscal year of the partnership or, in the alternative liquidate the partnership.

The agreement contained a similar provision in the event of death of either partner. The buy-sell provision, thus, had a limiting effect on the resale value of Mr. Bertuca's ninety percent general partnership interest.

Capital Food Services initially acquired three McDonald's franchises in Nashville and Brentwood, Tennessee. At the request of McDonald's Corporation, these three restaurants were sold about a year later to a minority owner. In February 2004, Capital Food Services was offered the opportunity to purchase certain McDonald's restaurant franchises in Mt. Juliet and Lebanon, Tennessee. Two Mt. Juliet franchises and a restaurant located in a BP Convenience Store were acquired February 1, 2004, for $1,038.000.00. Two franchises in Lebanon, one located in the Lebanon Wal-Mart store, were acquired on July 1, 2004, for a consideration of $867,000.00. Two additional Lebanon franchises were bought on November 1, 2004, for $440,000.00. The total consideration for all seven franchises was $2,345,000.00.

In order to purchase the seven restaurants, Capital Food Services borrowed $2,230,000 from AmSouth Bank. Under the terms of this loan, Capital Food Services would make interest-only payments until May 2, 2005, and monthly principal payments thereafter in the amount of $42,520.12 beginning in June 2005 and continuing for 84 consecutive months. Payment of this loan was guaranteed by the elder Mr. Bertuca. Additionally, the owners of Capital Food Services contributed

$150,000 to the partnership. In order to raise his ninety percent contribution, Ted Bertuca borrowed $124,200 from his father. This debt remained outstanding at the time of the divorce between the parties.

The elder Mr. Bertuca owned fourteen additional McDonald's franchises which he operated through a management company owned by him known as McDonald's Management Company. The management company provided management and supervisory services, general administrative services, human resource services, information technology services as well as security, accounting, janitorial and maintenance services. Each franchise paid the management company a fee for these services averaging 4.76% of total sales. The elder Mr. Bertuca provided these services to Capital Food Services for a time without charge so that the partnership could establish a sound financial footing.

According to the evidence presented at trial, a McDonald's Corporation franchise is different from most other franchises in that the franchisee does not own the real estate on which the restaurant is located. Typically, that real estate is owned by McDonald's Corporation and the franchisee is obligated to pay rent. The franchisee is responsible for the maintenance and upkeep of the building and may, according to the franchise agreement, be required by McDonald's Corporation to rebuild a restaurant in its entirety. At the time the franchises were acquired, McDonald's Corporation notified Capital Food Services that one of the Lebanon restaurants would have to be rebuilt. At the time of the hearing, Capital Food Services had contracted to have the restaurant rebuilt at a cost of $950,000.

A McDonald's Corporation franchise agreement also contains a provision that prohibits a franchisee from transferring or assigning its interest in the franchise without prior written consent of McDonald's. The hearing testimony revealed McDonald's imposes strict guidelines on the sale of its franchises. McDonald's frequently required significant down payment for purchase of the franchise and required any financing be repaid over a period not greater than seven years. Additionally, McDonald's required the franchisee to be able to service the financing with monies generated from franchise operations. These requirements tended to place a ceiling on the resale value of a McDonald's franchise.

At the hearing before the trial court, Mr. Ted Bertuca presented his valuation expert, Burt Landers. Mr. Landers is a certified public accountant who represented fourteen McDonald's franchisees, including Capital Food Services. He had been involved in the purchase or sale of 125 McDonald's franchises.

Mr. Landers testified that as of June 25, 2005, the McDonald's restaurants owned by Capital Food Services were worth no more than the price that had been paid for them the preceding year. Mr. Landers first determined the gross value of each franchise by using a multiple of free cash flow which he testified was standard valuation practice for McDonald's franchises. The cash flow was determined by taking the net income of each franchise during the previous twelve months and reducing that amount by interest expense, depreciation, amortization and the general and administrative expenses.[1] He then multiplied the result by a factor of five to determine the gross value of each franchise. According to Mr. Landers, the standard in valuing a McDonald's franchise was to use a factor of 4.5 to 5. Having arrived at a gross value, he then added current assets and deducted current liabilities and notes payable to arrive at a net value of each franchise. Using this method, Mr. Landers determined the net value of the seven stores to be $484,734.41. He testified Mr. Ted Bertuca's interest in the franchises actually had a negative value because of the obligation to rebuild one of the restaurants and his obligation to the elder Mr. Bertuca in the amount of $124,200.

Ms. Bertuca presented David E. Mensel, a certified public accountant, as her valuation expert. Mr. Mensel primarily limits his practice to forensic accounting and business valuation. He is a certified valuation analyst, and has written and taught a course called Normalizing Projected Earnings for the National Association of Certified Valuation Analysts. He used a capitalization of income method for valuating Capital Food Services. Using the information that had been supplied him, he initially valued the business at $3,078,042 net of the indebtedness using a twelve percent capitalization rate. The attorneys for Mr. Bertuca raised at trial as they have on this appeal that his opinion was based upon doubling the trailing six month period of income rather than using a twelve month period, contained only six months of debt service, failed to account for general and administrative costs and failed to consider Capital Food Services' obligation to rebuild one of the restaurants. Mr. Mensel conceded his opinion was based upon his understanding of the information that had been supplied him. He then testified as to the value of Capital Food Services using the cash flow figures supplied by Mr. Landers. He also used the 4.76 percent of sales for general and administrative expenses except he made downward adjustments for unnecessary expenditures and what he considered excess profits contained in the financial statements of McDonald's Management Company. Based upon these numbers, Mr. Mensel testified the value of Mr. Ted Bertuca's ninety percent interest in Capital Food Services was $1,671,000.

In rebuttal to Mr. Mensel's testimony, Mr. Ted Bertuca presented Ms. Claudia Straw. Ms. Straw is a certified public accountant and a managing partner in the firm, Foelgner, Ronz & Straw of St. Petersburg, Florida, that provides valuation and litigation support services. Ms. Straw specializes in McDonald's franchises and is Chairman of the National Franchise Consultants Alliance, a group of nine certified public accountant firms throughout the United States that predominantly represent McDonald's franchisees.

According to Ms. Straw, when valuating a McDonald's franchise, the income approach is preferred, specifically the discounted cash flow method. Using this method, one projects future income a restaurant is expected to generate and discount that income to the present day. Applying this method, Ms. Straw concluded the restaurants had not increased in value from what Capital Food Services had paid for them in the preceding year. However, because Capital Food Services had accumulated some cash in excess of its current liabilities, she determined there was a $493,000 capital equity in the business as of the date of divorce. She then reduced Mr. Bertuca's ninety

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[1] The general and administrative expenses were based upon 4.76% of sales, the amount McDonald's Management Company averaged charging the franchises to which it provided services.

percent interest in that amount by a twenty percdent marketability discount and deducted the $124,200 indebtedness of Mr. Ted Bertuca to his father. Making these computations, she determined Mr. Ted Bertuca's interest in Capital Food Services to have a value of $231,000.

Ms. Straw also testified regarding the testimony of Mr. Mensel. The twelve percent capitalization rate he used resulted in a cash flow multiple of 8.33. In Ms. Straw's opinion, this multiple was too high and she testified that she had never seen a sale of a McDonald's franchise at such a high multiple.

Based upon the testimony presented, the trial court found as follows:

> The Court is going to find that the value of the business, the fair market value of the increase during the marriage is one million dollars, thereby making $900.000 the interest of the Bertucas. . . . And the court has found this to be marital property and would award Ms. Bertuca, as her interest therein, $450,000.

Accordingly, by order of the trial court dated April 3, 2006, this portion of the marital estate was divided as follows:

> THAT Wife is awarded the sum of Four Hundred Fifty Thousand Dollars ($450,000) for her interest in and to the McDonald's franchise in which the parties own a ninety (90%) percent interest. This sum shall be paid to wife over a seven (7) year period in eighty-four (84) equal installments with no interest for a payment of Five Thousand Three Hundred Fifty-Seven Dollars and Fourteen Cents ($5,357.14) per month, beginning thirty (30) days from entry of this Order and continuing each month thereafter until paid in full.

From this ruling, Mr. Ted Bertuca has appealed alleging the trial court's valuation of Capital Food Services was contrary to the weight of the evidence and that the trial court erred by failing to consider a marketability deduction, the impact of the buy-sell agreement contained in the partnership agreement between Mr. Ted Bertuca and his father and by failing to deduct the obligation of $124,200 that Mr. Bertuca owed his father. Ms. Bertuca has appealed alleging the trial court erred by failing to award her interest on the judgment and, further, asks she be awarded her attorneys' fees.

II. STANDARD OF REVIEW

The standard of review of a trial court sitting without a jury is de novo upon the record. Wright v. City of Knoxville, 898 S.W.2d 177, 181 (Tenn. 1995). The trial court's findings of fact are presumed correct and will not be overturned on appeal unless the evidence preponderates against them. Tenn. R. App. P. 13(d); Kirkpatrick v. O'Neal, 197 S.W.3d 674, 678 (Tenn. 2006); Bogan v. Bogan, 60 S.W.3d 721, 727 (Tenn. 2001). The value of marital property is a fact question. Wallace v. Wallace, 733 S.W.2d 102, 107 (Tenn. Ct. App. 1987). In valuing a marital asset, a trial court should consider all competent and relevant evidence pertaining to the valuation of that asset. The burden rests upon the parties to present competent evidence upon which a proper valuation can be based and the trial court is free to place a value on a marital asset that is within the range of evidence submitted. Id.

III. ANALYSIS

There are a number of acceptable methods available to determine the value of a corporation or business entity. Blasingame v. American Materials Inc., 654 S.W.2d 659, 666 (Tenn.1983) recognized three of these methods: (1) the market value method, (2) the asset value method, and (3) the earnings value or capitalization of earnings method. The choice of the proper method or combination of methods depends upon the unique circumstances of each business entity.

A public corporation's value is most reliably determined using the market value method. There is an established market for the corporation's stock which will enable the court to arrive at the price a willing buyer would pay for the stock. The stock in closely held corporations is rarely traded. The same is true of partnership interests. Thus, it may be improper to attempt to place a value of a closely held corporation or partnership interest using the method generally used to place a value on a public corporation. See, Anderson v. Anderson, No. E2005-02110-COA-R3-CV, 2006 WL 2535393, at*3 (Tenn.Ct.App. Sept. 5, 2006) (App. Perm. App. Denied Jan. 29, 2007).

As stated in Wallace, fair market value is typically only one of the methods employed in calculating value, and is more typically used in the valuation of a public corporation, where there is an established market for the stock. Wallace, 733 S.W.2d at 107. As further explained in that case, fair market value is typically not a reasonable method for valuing a closely held corporation, because the stock is rarely traded and there is no "market". Id. The same is true for a partnership interest.

Valuation in this case was complicated by several factors. The restaurants had recently been acquired and there was not a lengthy earnings history. What earnings history existed was skewed because, in order to give the partnership a sound financial basis, the elder Mr. Bertuca was not charging management fees. The partnership had an obligation to rebuild one of the Lebanon restaurants which had an effect on the value of the partnership but that rebuild had not occurred at the time of the divorce. As a result, each valuation expert made some attempt to normalize income and expenses in order to more accurately reflect the partnership's future financial situation.

Mr. Burt Landers testified, based upon information given him by Capital Food Services, that the partnership had recognized a net cash flow of $412,663 during the trailing twelve month period. Two of the restaurants had only been owned by the partnership for eight months. Mr. Landers normalized the income for these two restaurants by dividing their income during the time they were owned by the partnership by eight to arrive at an average monthly income, and then multiplying that amount by twelve to determine the income for the prior year. In addition, Mr. Landers included as an expense an amount for general and administrative expenses even though the partnership was not being charged for these services. The amount he included equaled 4.76% of sales which is the average amount charged by McDonald's Management Company to the other franchises that it provided management services. Mr. Landers was of the opinion the restaurants owned by Capital Food Services had a gross value of five times the annual cash flow.

Mr. David Menzel preferred the capitalization of income method for valuing Capital Food Services. Because much of his testimony was based upon the incomplete data provided him and faulty interpretation of that data, his testimony is subject to the objections raised by Mr. Bertuca as outlined above. Perhaps his most important testimony was that, based upon the income figures presented by Mr. Landers with some adjustment of the general and administrative expense, the value of Capital Food Services was $1,671,000. This value was based upon the capitalization of income method using a twelve percent capitalization rate. Mr. Menzel's opinion fails to include, however, a consideration of the impact of the obligation to rebuild the Lebanon restaurant.

Ms. Straw also valued Capital Food Services using a capitalization of income method known as the discounted cash flow method. She performed her valuation by projecting the income of each restaurant over a period of seven years and discounting the projected amounts at a twenty percent discount rate. She normalized insurance expense and general and administrative expense to amounts she felt more appropriate than Capital Food Services had historically experienced. She also based the projected amount of profit after controllable expenses for some of the restaurants upon the average of other McDonald's restaurants in Tennessee, rather than what had historically been achieved at that particular restaurant. Ms. Straw determined a terminal value of each store using a formula referred to as the "Gordon Model[2]" and likewise applied the twenty percent discount rate to that amount. After making her adjustments and projections, she determined that the restaurants were worth no more than Capital Food Services paid for them and the value of the partnership was the excess of cash on hand less current liabilities or $493,000. The validity of Ms. Straw's opinion is based upon the appropriateness of the methods and assumptions she used.

The trial court based its opinion upon the "fair market value" of Capital Food Services. In our view, the primary value of Capital Food Services was the income it produced. Thus, the preferred method of valuation would be to determine its earnings value using a capitalization of income approach. We are uncertain how the trial court arrived at the determination that Capital Food Services had increased in value by $1,000,000. Because the parties are entitled in this court to a trial *de novo* upon the issues presented, T. R. A. P. Rule 13, we have made our own determination as to its value based upon a capitalization of income approach and all the relevant evidence. In arriving at a determination of value, we began with Mr. Lander's net cash flow which totaled $412,663. Additionally, the partnership was about to borrow $950,000 to rebuild the Lebanon restaurant.

That amount of income capitalized at the twelve percent rate Mr. Mensel found appropriate, indicates a value of $3,438,358. This amount was increased by the cash on hand ($1,016,829) and reduced by current liabilities ($525,891), the amount of the notes payable on June 30, 2005 ($2,199,028), and by the amount of the note to rebuild ($950,000). In our opinion, based upon all relevant evidence, Capital Food Services had a value of $780,768 at the time of the divorce between these parties. Since this value differs significantly from that of the trial court, we believe the trial court's finding of value should be modified to reflect this amount and Ms. Bertuca's award should be adjusted to $351,345.50..

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[2]This model calculates the restaurant's value based upon the final year's projected earnings divided by the discount rate less the growth rate.

Cash Flow (Landers)	$412,663
Capitalized at 12%	$3,438,858
Add: Current Assets	$1,016,829
Less: Current Liabilities	($525,891)
Less: Notes Payable 6/30/2005	($2,199,028)
Less: Lebanon Rebuild Note	($950,000)
VALUE	$780,768

Mr. Bertuca next complains that the trial court failed to consider the non-marketability of his interest in Capital Food Services. Since our determination as to value is based upon the earnings value of the partnership, that value would not be impacted by the lack of marketability of Mr. Bertuca's interest unless it appeared from the record that his needs or situation were such that a sale of his interest would be necessary or desirable. The trial court very carefully drafted its ruling in the case allowing Mr. Bertuca to pay the amount awarded over time so that he would not have to sell his partnership interest in order to satisfy the award. Since the partnership indebtedness is serviced by the income derived from the business and will be paid in seven years, the value of the business significantly increases with time and we are satisfied it is in Mr. Bertuca's best interest to maintain his interest in the partnership. There is no indication in the record that Mr. Bertuca has any intention of selling his interest in Capital Food Services. Thus the value of the business is not affected by the lack of marketability and discounting the value for non-marketability in such a situation would be improper. Anderson, 2006 WL 2535393, at*4.

Mr. Bertuca makes a similar argument with regard to the trial court's failure to reduce the value due to the buy-sell agreement applicable to his ninety percent partnership interest. He correctly points out that a trial court should consider such an agreement when determining the value of a business. See, Harmon v. Harmon, No. W1998-00841-COA-R3-CV, 2000 WL 286718, at *9-10 (Tenn.Ct.App. March 2, 2000). As with Mr. Bertuca's lack of marketability argument, such a provision only affects the value if he plans to sell his interest in the partnership and the record is devoid of any suggestion that he intends to do so. The buy-sell provision, therefore, does not affect the value of his interest in the partnership determined on a value of earnings basis.

Finally, Mr. Bertuca alleges the trial court erred by not reducing the value of his interest in the partnership by his related indebtedness. We disagree. In stating its ruling, the trial court found "the fair market value of the increase during the marriage is one million dollars, thereby making $900.000 the interest of the Bertucas. . ." Consequently, the trial court awarded Ms. Bertuca one-half of that amount or $450,000. When counsel for Mr. Bertuca pointed out that the trial court had not considered the indebtedness, the trial court responded:

> Well, I did give it consideration, but this is net after that. . . . The Court just finds it equitable to place the value of the increase at one million and they share 90 percent. No, I'm not saying that – to make myself clear, this is the increase in the value of the marital interest.

At the time Capital Food Services purchased the restaurants, Mr. Bertuca had a $124,200 indebtedness and, presumably, a $124,200 asset. Because the value of the asset increased by $702.691 (90% of $780,768 as we have found the increased value to be), he now has an asset with a value of $826,891 and a $124,200 indebtedness. Subtracting the indebtedness leaves $702,691 net equity, which the trial court indicated should be divided. Ms. Bertuca now has an award of $351,345.50. Mr. Bertuca has property with a value of $475,545.50 and an indebtedness of $124,200 leaving him a net equity of $351,345.50. We find no error in the trial court's refusal to reduce the award to Ms. Bertuca by a portion of the indebtedness.

Ms. Bertuca has appealed and alleges the trial court erred by allowing the husband to pay her award for the interest in Capital Food Services in eighty-four monthly installments without interest. She asserts post-judgment interest is required by Tennessee Code Annotated section 47-14-122. In our view, the trial court, in effect, awarded Ms. Bertuca a judgment we have now modified to total $351,345.75 as alimony *in solido*. Our courts have recognized alimony *in solido* as a form of division of marital property. See, Schmidt v. Schmidt, No. M2004-01350-COA-R3-CV, 2005 WL 2240960, at *3 (Tenn. Ct. App. Sept. 15, 2005); Knowles v. Knowles, 2002 Tenn. App. LEXIS 272, No. M2001-01282-COA-R3-CV, 2002 WL 598551, at *4, *6 (Tenn. Ct. App. Apr. 19, 2002). Alimony *in solido* may be awarded in a lump sum at the time of the final decree, or it may be awarded in the form of periodic payments for a given period of time. Waddey v. Waddey, 6 S.W.3d 230, 232 (Tenn. 1999).

In Price v. Price, 225 Tenn. 539, 472 S.W.2d 732 (Tenn. 1971), the complainant was awarded a judgment as alimony *in solido* in a sum certain payable in installments. The total amount of the installments equaled the total judgment awarded. The Tennessee Supreme Court held the complainant was not entitled to interest on the judgment from the date it was entered because she was not entitled to the use of the money on that date. Accordingly, the Supreme Court held the complainant entitled to interest from the date she became entitled to use the money or the date the installments became due. Id., 225 Tenn. at 544, 472 S.W.2d and 734. Similarly, in the case before us, Ms. Bertuca, pursuant to the trial court's decree, only became entitled to use the money awarded her when the installments became due. In our view, the action of the trial court in the present case was the same, in substance, as the action of the trial court in Price. We do not find the trial court erred by awarding Ms. Bertuca the judgment in the manner that it did.

Finally, Ms. Bertuca asserts she is entitled to her attorneys' fees pursuant to Tennessee Code Annotated section 27-1-122 which allows for recovery of expenses for an appeal that is frivolous. We do not find this appeal to have been frivolous and, accordingly, deny the request that Ms. Bertuca be awarded her attorneys' fees.

IV. CONCLUSION

The judgment of the trial court is affirmed, as modified to award Ms. Bertuca a judgment in the amount of $351,345.50 payable in 84 equal monthly installments without interest. The costs of this appeal are assessed against the appellant, Theodore Joseph Bertuca.

DONALD P. HARRIS, SENIOR JUDGE