

Chicago Daily Law Bulletin®

Volume 162, No. 35

Serving Chicago's legal community for 161 years

Divorce law changes makes it easier on all to determine asset value

Several of the recent amendments to the Illinois Marriage and Dissolution of Marriage Act, brought about by Public Act 99-90 and effective as of Jan. 1, clarify the procedures to be used when valuing assets in a divorce.

These provisions are included as part of Section 503 in the act, which is titled "Disposition of Property and Debts." The General Assembly added a new subsection (k) to Section 503, which sets forth two new rules.

First, the statute now provides flexibility with respect to the date of valuation. Prior to the change, the court was required to value the property "as of the date of trial or some other date as close to the date of trial as practicable."

Now, the date of valuation "shall be the date of trial or such other date as agreed by the parties or ordered by the court, within its discretion." This change is intended to remedy some of the problems which arose under the prior rule, especially where the valuation was of an asset, such as a business.

Parties were often forced to repeatedly update values due to trial delays, thereby incurring additional expenses. Now, the statute allows the parties and/or the court to set the date of valuation at the optimal time in light of the specific facts and circumstances of the case.

Second, the statute now makes it clear that in determining the value of assets or property under this section, "the court shall employ a fair market value standard." With this addition, the legislature codified the long-established rule used by our courts in valuing property: That the "fair market value" is the benchmark to be employed. Although the statute does not itself define the term "fair market value," that definition is found in the very same case law which contains the codified rule.

"Fair market value" has long been defined as "the price which a willing purchaser will pay to a willing seller in a voluntary

transaction." See e.g., *In re Estate of Voss*, 55 Ill. 2d 313, 315 (1973).

Where the valuation is of the stock of a business entity, our courts have also traditionally relied upon IRS Revenue Ruling 59-60, which sets forth the "approach, methods and factors to be considered" in such valuation.

The definition of "fair market value" contained in Revenue Ruling 59-60 largely mirrors the definition in the case law, but with more specificity: "fair market value" is "the price at which the property would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, both parties having reasonable knowledge of relevant facts." Rev. Rul. 59-60, Section 2.02.

One question which often arises during the course of the valuation of a business entity is what is the impact — if any — upon the entity's fair market value where a shareholder "buy-sell" agreement exists?

As a bit of background, the purpose of shareholder agreements is to formally establish plans and procedures to be implemented upon certain triggering circumstances, which often include an interest-holder being involved in a divorce.

With specific reference to the

First, the statute now provides flexibility with respect to the date of valuation. Prior to the change, the court was required to value the property "as of the date of trial or some other date as close to the date of trial as practicable."

possible future divorce of one of the owners, the agreement can spell out the procedures for buying and/or selling ownership interests in the entity, can specify voting procedures that owners must follow and may impose restrictions on an owner's right to sell or transfer his or her interest.

Because ownership interests in



Michele M. Jochner is a partner at Schiller, DuCanto & Fleck LLP, after previously serving as a judicial law clerk to Illinois Supreme Court Justices Charles E. Freeman and the late Mary Ann G. McMorrow. She serves in leadership positions with a number of bar associations and community organizations, is a frequent lecturer and author on a variety of legal issues, and has been an adjunct professor at DePaul University College of Law and The John Marshall Law School. She can be reached at mjochner@sdfllaw.com.

closely held businesses often are not liquid, the buy-sell agreement generally establishes a market for the sale and/or purchase of those interests by implementing a procedure to determine the price and terms for its sale or purchase.

In determining the fair market value of a business entity which has a buy-sell agreement, Illinois courts have generally held that although such an agreement may not be dispositive by itself, it is one of several factors a court may consider in ascertaining value.

For example, in the leading case of *In re Marriage of Gunn*, 233 Ill. App. 3d 165 (5th Dist. 1992), the appellate court affirmed the trial court's value of the husband's stock in his law firm at \$5,000 per share, assigning the shares a value greater than the \$3,000 per share they were valued at under the buy-sell agreement.

In that case, the appellate court noted that the agreement was the means whereby a shareholder's interest was acquired in the event of "death, disability, retirement or termination" and provided a formula which was to be used to value the shares if one of those four events took place.

In other words, that specific agreement was not for purposes of selling the shares for fair market value. The *Gunn* court held that in valuing marital property under IMDMA's Section 503, that agreement was not conclusive evidence of value, as it "may, or may not, be what a willing buyer would pay to a willing seller." Explaining that "[p]lacing a fair market value on the professional corporation is an art, not a science," *Gunn* held that "the court must rely on expert witnesses to assist it in this difficult task."

Precisely because there is "no exact formula that can be applied," a trial court is likely to be faced with experts who may differ significantly in both methodology and valuation. Accordingly, in determining fair market value, *Gunn* instructed trial courts to consider the relevant evidence and to determine the credibility of the experts, the reasonableness of their testimony, the weight given to each of them and their expertise in the particular area of valuation.

In *Gunn*, the wife's expert had presented ample evidence upon which the trial court could arrive at an informed opinion as to fair market value.

As a result of the legislature also adding a new Subsection (l) to the act's Section 503, trial courts now have additional means to accomplish this goal.

Section 503(l) allows the court to "seek the advice of financial experts or other professionals, whether or not employed by the court on a regular basis." It is very likely that a trial court may invoke this new rule to consult with an independent expert to allow it to resolve financial issues such as the fair market value of the parties' assets.