



April 24, 2009

Recent cases involving valuation matters for review:

Estate Cases:

In *In re Buonamici*, 2008 WL 3522429 (Del. Ch. Aug. 11, 2008), the Delaware Chancery Court determined that a guardian did not breach her fiduciary duty to her ward where both the guardian and the ward held interests in the closely held family businesses, which the guardian sold to fund the ward's living expenses. The court held that the guardian did not breach her fiduciary duty when she relied upon the corporate accountant (who was also her personal accountant and the accountant of her sibling-shareholders) to determine the value of the businesses and who six years later was found to have undervalued the businesses. Notwithstanding its finding of no breach of fiduciary duty, the court held the guardian liable under an unjust enrichment theory for the *pro rata* share of the businesses' undervaluation.

In *Gross v CIR*, 2008 WL 4388277 (U.S. Tax Ct. Sept. 29, 2008), the U.S. Tax Court decided issues relating to indirect gifts and valuation of limited partnership interests, where the limited partnership primarily held marketable securities. The court determined that despite the fact that the gifts and the limited partnership agreement were executed on the same day, a general partnership was formed six months earlier between the same parties and having essentially the same terms as those listed in the limited partnership agreement. Further, the court found that a combined 35 percent discount for lack of marketability and minority interest was appropriate, where the parties stipulated that 35 percent was the appropriate discount to be applied to a 22.25 percent interest in the limited partnership.

Divorce Valuation Cases:

In *In re the Marriage of Zhou*, 2008 WL 4697020 (Cal. App. 1 Dist. Oct. 27, 2008), unpublished, the California Court of Appeals, First District, affirmed the trial court's valuation of a closely held business operated by the husband as of the date of separation, rather than the date of trial. The court noted that business should generally be valued as of the time of trial, but be valued on an alternative valuation date upon a showing of good cause. The court noted that good cause included setting the valuation date as of the date of separation where the business relied upon the skill and reputation of the spouse who operated it. Since the husband retained and operated the business after the date of separation, the court affirmed the use of the date of separation as the valuation date.



In *Clemente v. Clemente*, 2008 WL 5025010 (N.J. Super. A.D. Sept. 2008), the New Jersey Superior Court, Appellate Division, affirmed the valuation of a multi-doctor cardiology practice as a going concern using a capitalization of earnings method, inclusive of a cap rate of three. The court rejected the husband-doctor's contention that the practice should be valued at its liquidation value because his expert was provided incomplete records, relied solely on unverified information from husband, and had never previously valued a medical practice. Comparatively, the wife's expert was initially retained as a joint expert and had significant appraisal experience.

In *In re Marriage of Thornhill*, 2008 WL 3877223 (Colo. App. Aug. 21, 2008), the Colorado Court of Appeals concluded that a trial court has the discretion to apply a discount for lack of marketability. It rejected the wife's position that a discount was inappropriate as a matter of law and rejected the analogy of the divorce situation to that of dissenting shareholders. It noted that the divorce statute did not contain the language "fair value" and the failure to apply a discount in certain circumstances could penalize the business spouse.

#### Lost Profits Case:

In *Trugreen Companies, LLC v. Mower Brothers, Inc.*, 2008 WL 4977320 (Utah Nov. 25, 2008), the Supreme Court of Utah answered two certified questions from the U.S. District Court for the District of Utah. It concluded that the remedy for breach of an employee's non-compete agreement is the employer's lost profits, not the defendant's profits, but employee's profits may be considered if shown to correspond to the employer's profits. Similarly, the court concluded that unjust enrichment was not the proper remedy for intentional interference with contractual relations, but plaintiff's lost profits were the proper remedy. In assessing the second question, the court noted that it limited its answer to pecuniary losses, and made no ruling regarding injuries to reputation or mental anguish.