

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1320**

In re the Marriage of:
Bruce John Prevost, petitioner,
Appellant,

vs.

Darla Kay Prevost,
Respondent.

**Filed April 7, 2014
Affirmed
Hudson, Judge**

Wright County District Court
File No. 86-FA-12-597

John Robinson Hill, Larkin, Hoffman, Daly & Lindgren, Bloomington, Minnesota (for appellant)

Darla Kay Prevost, Annandale, Minnesota (pro se respondent)

Considered and decided by Hudson, Presiding Judge; Peterson, Judge; and Stauber, Judge.

UNPUBLISHED OPINION

HUDSON, Judge

In this marital-dissolution appeal, appellant argues that the district court improperly valued two business interests owned by the parties. We affirm.

FACTS

Appellant Bruce John Prevost (husband) and respondent Darla Kay Prevost (wife) were divorced in 2013, after more than 28 years of marriage. Although the parties stipulated to many of the dissolution issues, a trial was held on the valuation of two closely held businesses: Bruce Prevost Construction, Inc. (the construction company) and B & L Utility Maintenance, LLC (the maintenance company).

Husband is the sole owner of the construction company, which he started in 1984, and a 51% owner of the maintenance company, which he started in 2010 with his brother. The parties agreed that husband should be awarded the entire interest in both companies but disagreed as to their values.

Husband presented the report and testimony of Richard C. Berning, a CPA and an expert in business valuations. Wife presented the report and testimony of Leonard Washko of Sunbelt Business Brokers, who had more than 20 years of experience in valuing businesses and who was engaged in the business of selling and appraising businesses. Both experts examined the same business financial records but came to different conclusions as to the values of the businesses.

Washko performed a “market valuation assessment,” from which he estimated the probable sale price of the construction company as \$288,000. He concluded that husband’s share of the maintenance company was worth \$11,000. He relied on a calculation of the Seller’s Discretionary Earnings (SDE), which he described as a measure of cash flow reflecting the sums of money that a business owner controls. Washko reviewed tax returns from 2010 and 2011, and internal profit and loss statements

for 2010 to 2012. He examined sales of other comparable businesses and used industry rules for measuring sale values of contracting services.

Berning used a cost approach, an income approach, and a market approach to arrive at a proposed valuation of the construction company. For the cost approach, Berning determined the value of assets and found that the business had a negative book value of \$82,712. After adjustments, he determined that the cost value of the business was \$4,214. For the income approach, he used the “capitalization of earnings method.” This is an estimate of the earning capacity of the company; the net adjusted income is capitalized at an “appropriate rate of return.” Berning noted that there was no record of compensation to husband and adjusted the earnings to reflect an “appropriate market officer compensation” of \$120,302 per year. He deducted this from the company earnings, resulting in negative income. Thus, under this method, there were no earnings to capitalize. Finally, Berning stated that he was unable to use a market approach because the construction company was a start-up. This was inaccurate, because husband started the business in 1984.

Berning used the same methods to value the maintenance company. Berning testified that, using the asset approach, the maintenance company had a negative value. He also used the income approach, concluding that the maintenance company had a negative value for the years 2010 to 2012, if estimated market wages for husband were deducted. He was unable to do a market evaluation because the maintenance company had only been in existence for three years.

The district court found that Washko's valuation was more credible, but reduced the value of the maintenance company by another half to \$5,500 because the divided ownership made sale of the company more difficult. The district court concluded that Berning's valuations were not credible because both businesses showed increasing ordinary business income between 2010 and 2012.

Husband moved for amended findings or a new trial, asserting that Washko did not "follow established methods of valuing a business," but rather, "put[] together a marketing proposal." The district court denied husband's motion. This appeal follows.

DECISION

We review the district court's division of marital property for an abuse of discretion. *Maurer v. Maurer*, 623 N.W.2d 604, 606 (Minn. 2001). The district court's determination of the value of an asset is a finding of fact, which we review for clear error. *Id.* A finding of fact is clearly erroneous when it is "manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." *McConnell v. McConnell*, 710 N.W.2d 583, 585 (Minn. App. 2006) (quotation omitted). Because "valuation is necessarily an approximation in many cases," we give broad deference to the district court; the value the district court assigns to an asset must only "fall within a reasonable range of figures." *Maurer*, 623 N.W.2d at 606 (quotation omitted).

Minnesota courts have relied on a number of different methods to calculate the value of a closely held corporation. Because the facts and circumstances of each business vary, courts have applied different factors. In *Nardini v. Nardini*, the supreme court considered the factors set forth in IRS Revenue Ruling 59-60, 1959-1 C.B. 237. 414

N.W.2d 184, 190 (Minn. 1987). These eight factors include (1) the nature and history of the business; (2) general economic conditions and conditions specific to the industry; (3) the book value and financial condition of the business; (4) earning capacity; (5) dividend-paying capacity; (6) goodwill or other intangible value; (7) sales of stock and the ownership percentage; and (8) market price of stocks in similar corporations. *Id.* While these factors are helpful, they are not exclusive. *Id.* “[A] sound valuation requires not only the consideration of all relevant facts but also the application of common sense, sound and informed judgment, and reasonableness to the process of weighing those facts and determining their aggregate significance.” *Id.* (quotation omitted). For example, the supreme court in *Nardini* noted that “[t]he value of a family business as marital property cannot be less than a sum equal to the net proceeds which could be realized from the forced sale of the tangible [and intangible] assets . . . after payment of all liabilities.” *Id.* at 189.

In *Nelson v. Nelson*, this court analyzed three methods to value a professional, service-based business: (1) adjusted book value; (2) capitalization of income; and (3) a buy-sell agreement. 411 N.W.2d 868, 872 (Minn. App. 1987). Capitalized income cannot include the value of personal services provided by the owner. *Id.* at 873 (citations omitted). Further, while an expert should consider the effect of a buy-sell agreement, it is not determinative, particularly when a sole or majority owner retains the ability to amend the agreement. *Rogers v. Rogers*, 296 N.W.2d 849, 852 (Minn. 1980). In short, no single method is approved for all circumstances and each involves recognition of factors that make a valuation more or less accurate.

A treatise on valuation of a closely held corporation for marital property purposes lists four different approaches for establishing the fair market value: (1) book value; (2) capitalization of earnings; (3) dividend paying; and (4) liquidation value. 14 Martin L. Swaden & Linda A. Olup, *Minnesota Practice* § 9:7 (3d ed. 2008). These are essentially the same approaches outlined in the caselaw. The authors define “fair market value” as “the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell, and both having reasonable knowledge of relevant facts.” *Id.* This definition is drawn from Revenue Ruling 59-60. *Id.*

Husband argues that Washko was unfamiliar with the revenue ruling and with *Nardini*, casting doubt on the reliability of Washko’s estimation. But if the purpose of valuation is to establish a fair market value, Washko’s approach of determining the probable sale price of the corporations reflects the definition set forth in Revenue Ruling 59-60: Washko determined the price at which the companies could be sold to a willing buyer. Washko used four different valuation approaches: a percentage of average annual sales, a percentage of gross sales of the most recent full year, a percentage of the gross profits, and a multiple of the average annualized SDE. His use of SDE, which he defined as “a measure of cash flow of the combined businesses, [reflecting] the total amount of cash flow that the owner of the business has control over,” allows a purchaser to estimate the true cash flow “that will allow them to pay themselves a salary, make payments of interest and principal on any debt financing and have some earnings retained in the event of contingencies.”

Husband also argues that Washko's approach does not comply with the directives of the various Minnesota cases dealing with valuation of a closely held corporation. But without naming Revenue Ruling 59-60 or *Nardini*, Washko considered the type of business and the economic conditions that weighed down the construction industry during the recent economic downturn, noted the increasing sales trend between years 2010 and 2012, and compared husband's businesses with others that had been sold as reported in national databases, all factors cited in the Revenue Ruling. Washko also recognized that some of the assets of the business retain more value than is reflected in the corporate books because of depreciation.

Although Berning complied closely with Minnesota caselaw, his conclusion that the companies essentially have no value was found not to be credible by the district court. The district court rejected the notion that a business that showed increasing ordinary business income from 2009 through 2011 could credibly be valued at only \$4,214 in 2012, "when the market is improving and there are no demonstrated, significant changes to the business." The construction company's balance sheet shows more than \$223,000 in fixed assets, reduced by \$189,053 in depreciation. The authors of *Minnesota Practice* note that "book value has . . . been held to be a totally inaccurate approach to the value of a closely-held corporation, because it is subject to manipulation and inaccuracies." 14 Martin L. Swaden & Linda A. Olup, *Minnesota Practice* § 9:7 (citing *Thomas v. Thomas*, 407 N.W.2d 124, 126 (Minn. App. 1987)). Washko's methodology addresses some of these inaccuracies. The district court did not blindly accept Washko's valuation; it

decreased the valuation for the maintenance business because husband was not the sole owner.

On review, we must determine if the district court's valuation findings are clearly erroneous and unsupported by record evidence. *Maurer*, 623 N.W.2d at 606. Even though Washko's methods are not the only ones that may be used to value a closely held business under Minnesota law, credible evidence supports the district court's findings and ultimate valuation decision. We conclude that the district court's valuation determination was not an abuse of discretion.

Affirmed.