

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2004-0360, In the Matter of Lisa M. Martin and James A. Martin, the court on May 23, 2006, issued the following order:

The respondent, James A. Martin, appeals the final decree in his divorce from the petitioner, Lisa M. Martin. In a prior order, we ruled that the respondent's appeal was timely filed and affirmed the trial court's denial of the respondent's second motion for reconsideration on the ground that it was untimely.

In this order, we address the respondent's contention that the trial court erroneously added \$50,000 to the valuation of his plumbing business and erroneously added \$21,389.75 to the amount of his withdrawals from the business. We also address the petitioner's assertion in her cross-appeal that the trial court erred when it determined that the respondent's gross income for child support and alimony purposes was \$120,000. We affirm in part, vacate in part and remand.

I. Valuation of Business

To determine an appropriate division of marital property, courts generally look to the fair market value of the assets. Rattee v. Rattee, 146 N.H. 44, 50 (2001). "Fair market value is defined as 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." In the Matter of Watterworth & Watterworth, 149 N.H. 442, 447 (2003) (quotation omitted).

The valuation of a business is a question of fact, not of law. See id. at 450. There is no single best approach to valuing a business. See id. Valuation of each individual business depends upon its particular facts and circumstances. See id. It is within the trial court's discretion to accept or reject such portions of evidence as it finds proper, including that of expert witnesses. Tennessee Gas Pipeline Co. v. Town of Hudson, 145 N.H. 598, 602 (2000). We will not disturb the trial court's findings in this regard unless they are unsustainable on the record. See Watterworth, 149 N.H. at 450.

In its order granting the petitioner's motion for reconsideration, the court explained that it was adding \$50,000 to the valuation of the respondent's business because "[b]oth experts testified that on a sale the seller would keep any

cash that was in the business account.” This is incorrect. While the petitioner’s expert testified to this effect, the respondent’s expert, Ernest R. Tyler, testified as follows:

Q. You agree with Mr. Gordon, as I understand it, that, typically, in a sale of this type, it’s an asset sale?

A. In closing out businesses, typically, they’re all – not all, but the majority are asset sales.

Q. And the seller retains the cash, the accounts receivables, and pays the payables?

A. Not necessarily.

Q. Generally?

A. The only – the only local comparative I have would – would discredit that, completely. The one comparative I have of a local heating and air conditioning company this – this sale was total assets, cash, receivables, less total liabilities, and came up with a selling price. And that’s what the company sold for.

Given the court’s initial order, we are unable to assess whether or to what extent this error may have affected the court’s decision on reconsideration. In its initial order, the trial court accepted the valuation of the business by Tyler, who valued the business at \$233,000 as of year-end 2002. This value, Tyler testified, included the value of the \$76,000 that the business had as cash-on-hand as of the end of December 2002. Tyler testified that he would not add the value of the cash-on-hand to the value of the business unless the cash-on-hand was excessive. As he explained, when assessing the value of a business using income methods, “you never add back all assets.” In such assessment methods, “you add back either excess or non-working assets.” Excess or non-working assets are assets that are in excess of what “the company need[s] to stay in its operations.” All “ordinary assets are used in the trade of business. They’re producing the income, which you’re capitalizing, or the cash flow that you’re capitalizing,” so these assets are taken into account through the use of a multiplier. In Tyler’s view, the \$76,000 was the amount of cash that the respondent would need to cover between thirty and forty-five days of normal business operations. As Tyler expects a business to have sufficient cash to cover between thirty and ninety days of normal operations, he did not view the \$76,000 as excessive and, thus, did not add this sum to the ultimate value of the business after he calculated that value.

The trial court also appeared to have accepted Tyler's methodology for computing this value. For instance, the court found that Tyler's valuation "more closely approximates the value" of the business. Further, the court observed that the salary Tyler used "more closely resembles what in fact is occurring within this business." While the court did not "totally agree" with Tyler that there was an added risk because the respondent was a key person in the business, the court recognized that part of the intangible value of the business is the goodwill associated with the respondent, as opposed to the goodwill associated with the business. The court approved taking the respondent's goodwill into consideration by using Tyler's key person risk factor.

If the court accepted Tyler's valuation and methodology in its original order, and in its order on reconsideration assumed, incorrectly, that Tyler agreed that a seller in an asset sale would necessarily retain all cash-on-hand, then it is possible that the court added \$50,000 to Tyler's valuation in error.

Moreover, the trial court's order on reconsideration appears to assume that the value of a business changes, depending upon whether, in a hypothetical sale, the seller retains certain assets and liabilities. The court has not sufficiently explained this assumption.

Further, while the trial court, in its original order, appears to have valued the business as of year-end 2002, it appears to have changed the valuation date to the end of the first quarter of 2003 in its order on reconsideration. While trial courts are free to exercise their sound discretion to establish a valuation date for the equitable distribution of marital assets, it would appear that there was no evidence before the court of the value of the business as of the first quarter of 2003. See Watterworth, 149 N.H. at 451. Both experts valued the business as of the year-end of 2002.

For all of these reasons, we vacate the trial court's addition of \$50,000 to the year-end 2002 value of the respondent's business and remand for further proceedings. For similar reasons, we also vacate the trial court's decision to add \$21,389.75 to the respondent's withdrawals. As the respondent explains in his brief, when the trial court accepted Tyler's valuation of the business, and awarded the petitioner one-half of that value as her equal share of the business, it fixed the petitioner's interest in that business as of December 2002. The respondent's withdrawals from the business in the first quarter of 2003 did not affect the value of the business as of December 2002, or the value of the petitioner's share of the business as of that date. By awarding the petitioner one-half of the respondent's withdrawals from the business in the first quarter of 2003, the court reduced the respondent's share of the business and increased the petitioner's share of the business. This would appear to contradict the trial court's determination that "an equal division of property would be an equitable division of property."

II. Gross Income for Child Support Purposes

In her cross-appeal, the petitioner argues that the trial court erred when it found \$120,000 to be the respondent's gross income for child support purposes. She asserts that the trial court should have used, instead, the income the respondent's expert estimated would be reported on Schedule C of the 2002 tax return for the business (\$179,320). In rejecting the petitioner's argument, the trial court noted that "[b]oth experts testified that the business had not made any capital expenditures for 2000, 2001 and 2002" and that "they both testified that if this practice was [sic] to continue the profitability of the business would suffer." The court further found that "all Schedule C income cannot be taken as salary if the business is to continue to operate profitably." The court, therefore, used the \$120,000 figure because it was "close to the amount of Schedule C income [the respondent] used in [2002]" as reflected in the 2002 financial statement for the business.

By statute, gross income, for child support purposes, includes "all income from any source" including, but not limited to, "wages, salaries, . . . self-employment income, . . . [and] business profits." RSA 458-C:2, IV (2004). "It is up to the trial court to decide what income figures should be used based upon the facts presented at the hearing." In the Matter of Fedderson & Cannon, 149 N.H. 194, 196 (2003) (quotation and ellipsis omitted).

The petitioner asserts that the evidence does not support the trial court's finding that it would be unfair to deem all of the Schedule C income as "gross income" for child support purposes because some of it was needed to operate the business. The petitioner has not provided a sufficient record for our review of this issue.

It is the burden of the appealing party, here the petitioner, to provide this court with a record sufficient to decide her issues on appeal. See Rix v. Kinderworks Corp., 136 N.H. 548, 553 (1992); see also Sup. Ct. R. 13. "Without a sufficient record of the proceedings below, we assume that the evidence supports the result reached by the trial forum, and our review is limited to legal errors apparent on the face of the record." Tiberghein v. B.R. Roofing Co., 151 N.H. 391, 394 (2004).

Here, the petitioner has not provided the parties' joint federal income tax returns from 1995 through 2001, the unaudited financial statement from 2002, the parties' financial affidavits, and the records from the respondent's business. As the trial court observed, the business's financial records were kept on an accrual basis, while its taxes were paid on a cash basis on Schedule C of the parties' joint federal tax return. Without these business records as well as the other evidentiary items mentioned, we are unable to analyze whether there was evidence to support the trial court's finding that some of the Schedule C income

was necessary to operate the respondent's business. Accordingly, absent a more complete record, we must assume that the evidence supported the trial court's finding. As the petitioner has failed to demonstrate the trial court committed legal error when it did not deem all of the Schedule C income as "gross income" for child support purposes, we uphold this determination.

The petitioner also contends that the trial court erred because it did not include the respondent's rental income in the calculation of his gross income. The petitioner has not demonstrated that she raised this issue to the trial court. Accordingly, we decline to review it for the first time on appeal. See Bean v. Red Oak Prop. Mgmt., 151 N.H. 248, 250 (2004).

III. Income for Alimony Purposes

The petitioner asserts that the trial court also erroneously calculated the respondent's income for alimony purposes. We consider her argument on this point insufficiently developed for appellate review and thus do not address it. See Estate of Joshua T. v. State, 150 N.H. 405, 409 (2004).

Affirmed in part; vacated in part; remanded.

DALIANIS, DUGGAN and GALWAY, JJ., concurred.