Executor Under the Will of Florence M. Stout, late of Greene Township, Franklin County, Pennsylvania, deceased.
/s/ Rhonda King
William E. Vandrew, Clerk
Rhonda King, Deputy Clerk
Orphans Court Division
Franklin County, Pennsylvania
02/23,03/01/96

LEGAL NOTICES con't

MARVIN D. HISSONG; JERE D. HISSONG; JERE D. HISSONG, JR.; SHAWN P. HISSONG; and SPENCER R. HISSONG,Plaintiffs/Petitioners vs. HISSONG FARMSTEAD, INC,; LARRY W. HISSONG; DENNIS R. HISSONG; GREGORY A. HISSONG; and ANDREW R. HISSONG, Defendants/Respondents Franklin County branch, Civil Action - Law A.D. 1995 - 109

Hissong, et al. v. Hissong Farmstead et al.

Corporations - Involuntary Dissolution - Appointment of Receiver Pendente Lite

1. The appointment of a receiver pendente lite under the Business Corporations Law rest on equitable principles, and is similar to an injunction.

2. A receiver pendente lite will only be appointed where the right is free from doubt, unless granted the shareholders will suffer irreparable loss, the moving party has no adequate remedy at law, and the relief is necessary to preserve assets and maintain the status quo, under extraordinary circumstances.

3. Etraordinary circumstances may include illegal behavior, waste of corporate assets, or the oppression of minority shareholders.

4. There is no waste of corporate assets shown in a dairy farm corporation where no decline in herd health attributable to majority practices has been shown, and the corporation has the right to use funds to defend the action.

5. Oppression of minority shareholders requiring the dissolution of the corporation under Pennsylvania law may include a case where the majority defeats the reasonable expectations of the minority, and those expectations formed the basis for the minority's agreement to commit their capital to the enterprise.

6. The minority cannot claim they had reasonable expectations of expansion where there is no evidence of a settled corporate purpose to expand prior to July 1993.

7. The expectation that the corporation will be governed as if it were a partnership is not reasonable as a matter of Pennsylvania law where the corporation's articles of incorporation and its by-laws do not provide for it, and the corporation is not organized as a statutory close corporation.

8. While freedom from intimidation and violence is a reasonable expectation, the evidence must be clearly tied to the majority acting within the corporation's organization.

9. An expectation of continued employment by a shareholder is not reasonable where a shareholder/ employee fails to follow legitimate managerial directives of the corporation's officers with regard to work assignments; termination of a shareholder's employment for failure to abide by management decisions is as appropriate for such an employee as for any other.

10. The existence of buy/ sell agreement, unanimously entered into by all parties undercuts the alleged need for a receiver or for dissolution of the corporation.

Stephen E. Patterson, Esquire, Attorney for Plaintiffs
J. McDowell Sharpe, Esquire, Attorney for Defendants

OPINION AND ORDER

John R. Walker, P.J., February 6, 1996:

Procedural Background

The parties are before the court on a request for the appointment of a receiver pendente lite in a corporate dissolution action under the Business Corporation Law.

The petitioners are Marvin D. Hissong, founder of the corporation, Jere Hissong, Sr., Marvin's son, and Jere, Sr.'s sons, Jere Hissong, Jr., Shawn Hissong and Spencer Hissong.

The respondents are 1) the corporation, Hissong Farmstead Inc., 2) the majority of the board of directors, comprised of Dennis Hissong, president, Larry Hissong, and Gregory Hissong, and 3) Dennis, son, Andrew R. Hissong, who is also a majority shareholder, but Andrew does not serve on the board.

All of the individual parties are shareholders in the corporation. All but Jere, Jr. are employees as well. (Jere, Jr. was terminated in September 1995, as discussed below).

The court held several days of hearings in this matter, and has had the benefit of counsels briefs and argument.

Findings of Fact

The court's findings of fact will be grouped according to the factual issues to which they relate.

Corporation's Business to be Carried on by Shareholders as Partners.

1. No provision was made in the formal corporate documents memorializing any such provisions.

2. No plaintiff testified that he joined the corporation expecting such an arrangement.

3. Defendants presented evidence showing that prior to December 1994 the corporation had lacked any decision making capability outside of shareholders, meetings. Individual decisions

were made by employees in their own areas. The evidence further showed this lack of structure was hurting the corporation.

Expansion and Modernization.

4. The plaintiffs presented no evidence showing any concrete evidence of a corporate purpose to expand prior to July 1993, but beginning then the corporation explored the possibility of expansion.

Expectation of Continued Employment and the Termination of Jere D. Hissong, Jr.

5. No member of the minority besides Jere, Jr. has been terminated, nor has their level of compensation been changed.

6. Jere, Jr. approached the board in early summer 1995 (after the commencement of this litigation) and asked for changes in the night milking personnel.

7. Night milking personnel had been Ivan, son of Dennis, and Andrew and Kirby, sons of Larry.

8. Night milkers received a bonus for working that time shift.

9. The board assigned Jere, Jr. to night milking, and removed Ivan.

10. Jere, Jr. did not appear for his first shift.

11. Dennis Hissong, president of the corporation, gave Jere, Jr. a warning that he would be suspended, or terminated if he did not appear.

12. Jere, Jr. milked for approximately a month, and then he approached Greg Hissong, a member of the majority, and told him that he would no longer milk at night. Greg told him to wait for the meeting of September 5, 1995. Jere, Jr. did not show up for milking on September 1, 1995.

13. Jere, Jr.'s failure to milk left the night shift short-handed.

14. The board terminated Jere, Jr.'s employment.

Fear of Intimidation and violence.

15. Both sides alleged that the other engaged in threats of violence and harassing acts. No connection has been shown between the allegations of threats of violence and harassment and the corporation's performance.

Denial of Access to Information.

16. The majority did take certain records out of general circulation among employees. The records necessary for milking were posted in the milking parlors.

17. No connection has been shown between the failure to open certain corporate records to the inspection of the minority and a consequent degradation in either corporate, performance or the ability of any Hissong Farmstead employee to perform his assigned duties.

Decreased Milk Production and Herd Health.

18. The herd at Hissong Farmstead is in at least as good a shape as any other local farm, as testified to by Dr. Jerome Harness, the farm's veterinarian. The testimony of Mr. Glenn Flickinger, the contract nutritionist, is not as credible in this regard as the testimony of Dr. Harness. The court notes that Mr. Flickinger presented a letter to the court dated November 1, 1995, supporting the minority's assertions, and thus cast himself as an advocate and not as a disinterested witness.

a. The use of 3x milking (three times a day) and BST (an approved drug for increasing milk production) has not hurt herd health;

b. The above milk production increase policy is a viable current strategy;

c. A single herd ration (TMR) is perfectly normal;

d. Free choice supplements of minerals are not necessary to herd health.

e. There are no problems with the springing pen.

19. No decrease in milk production due to majority decisions has been shown.

20. The herd remains profitable, as testified to by Wayne Brubaker, the accountant for the farm, from the Pennsylvania Farm Bureau.

Waste of Corporate Assets.

21. No waste of corporate assets has been demonstrated because:

a. There is evidence that Marvin and Romaine did actually intend a gift to their sons, and improperly gifted stock in a local company to the corporation by mistake;

b. There is no evidence in the record showing a current valuation of the corporate swimming pool higher than $1,700, the amount paid by Gregory Hissong, so that his purchase of that asset appears proper.

c. The corporation is entitled to representation, and therefore payment for representation is an appropriate corporate expenditure.

Economic oppression of Shareholders

22. All of the individual parties to this lawsuit participated in a meeting held in February 1995, which set the value of Hissong Farmstead stock at $1400 per share. Wayne Brubaker, Farm Bureau accountant, was present at the meeting and testified that the vote was unanimous. The purpose of the share price vote was to give a value to the stock for a buyout agreement covering all the parties.

Discussion

The motion pending before the court in this action to liquidate a corporation is to appoint a receiver pendente lite under 15 Pa.C.S.A. § 1984. The moving party contends that a receiver is

necessary to preserve the assets of the corporation during the course of this action. Section 1984 provides that:

> Upon the filing of an application under this subchapter, the court may issue injunctions, appoint a receiver pendente lite with such powers and duties as the court from time to time may direct and proceed as may be requisite to preserve the corporate assets wherever situated and to carry on the business until a full hearing can be had.

The court notes as a primary matter that appointment of a receiver pendente lite is listed with other equitable devices, and the court therefore follows traditional equitable standards in determining whether to grant the receivership. In an early Pennsylvania Supreme Court case, the court likened the receivership to an injunction. *McDougall v. Huntingdon & Broad Top Rwy. & Coal Co.* , 294 Pa. 108, 116, 143 A. 574, 577 (1928). The standards for granting a motion for appointing a receiver are that the moving party's right to the remedy is free from doubt, that the potential loss if the current management retains control will be irreparable to the shareholders, that the moving party has no adequate remedy at law, and that the relief sought is necessary. *Tate v. Philadelphia Transp. Co.* , 410 Pa. 490, 500 - 501 190 A. 2d 316, 321 (1963) ; 15 Std. Pa. Practice 2d 84:6. In addition, where the appointment sought is pendente lite, the court should step in to make such appointment only in a case of necessity, to preserve assets and maintain the status quo. *Tate*, supra. The court's action would be inappropriate where no emergency situation exists, *Northampton Nat. Bank*, 475 Pa. 57, 379 A.2d 870 (1977) ; or where no change in the status quo is likely, *Pennsylvania Turnipike Comm'n v. Evans*, 13 D. &C. 2d, aff'd 3 92 Pa. 110, 139 A.2d 530. This remedy is particularly inappropriate where it serves as a subterfuge to achieve other aims of the moving party. *Tate v. PhiladelphiaTransp. Co.*, 410 Pa. at 499, 190 A.2d at 321.

The appointment of a receiver is an extraordinary remedy because it removes control and day to day management of the corporation's operation from those who, under the BCL would normally have that responsibility, namely the board of directors of

the corporation, as elected by the shareholders, and the board's agents, such as the president, general manager and the like. To justify such a radical interference with the corporation's structure, the court must find some extraordinary circumstances, such as illegal behavior, the waste of corporate assets, or the real oppression of the minority shareholders. *McDougall* at 118 - 119, 578-579.

Illegal behavior has not been alleged in this case. The moving party would characterize the course of the current board and its agents as encompassing the second and the third reasons for intervention. The non-moving party states that instead the current suit, and the pending motion, are products of a family quarrel, and a difference in management philosophy.

The corporation at issue is Hissong Family Farmstead, Inc. The company runs a dairy farming operation in the Greencastle area of Franklin County, Pennsylvania. The dairy operation is one of the largest in the area, but is not considered overly large in national terms. The dairy herd consists of approximately 420 to 440 cows actually milking at any one time, and about double that number of animals are present to maintain the amount of production.

The waste of corporate assets is alleged with regard to the replacement of Jere Hissong, Jr. as herdsman, followed by a decline in herd quality as a direct result of his replacement and other management policies, and the use of corporate funds to defend the action. The last of these contentions has been considered adequately for the present in the context of a motion to enjoin attorneys' fees. The court will not consider such payment as waste of corporate assets until some wrongdoing is shown.

Herd health has been the focus of much of the testimony this court has heard over the course of three and one-half days of testimony so far. The plaintiffs in this case rely most heavily on the testimony of Jere, Jr. and Glenn Flickinger, the nutritional consultant hired by Hissong Farmstead. The major contentions are that the herd emerged from the summer heat in far worse condition than necessary due to the management practices of the majority, and that this condition is bad enough to warrant the appointment of a receiver.

The major practices complained of involve the long-term use of a milk production enhancement drug, BST, coupled with the long-term use of three-times-a-day milking (3x milking), and the discontinuance of free choice minerals as a dietary supplement. These are all decisions which are not unusual in dairy production in the United States, and the defendants produced far more credible testimony concerning the effect on the herd's health and profitability through the farm's longtime veterinarian, Dr. Harness, and the accountant from the Pennsylvania Farm Bureau, Wayne Brubaker. As a result, the court finds that the plaintiffs have not demonstrated a waste of corporate assets at the present time.

The final contention is oppression. Because the court must find at the least that plaintiff will probably prevail on the merits of the dissolution claim in order to appoint a receiver, the court must examine in some detail whether the evidence so far justifies a finding of a prima facie case on the oppression claim.

The usual examples of oppression involve the economic oppression of shareholders as shareholders. This can involve changing the manner of compensation from dividends based on stock ownership to some other basis, keeping shareholders from any meaningful participation in the corporation's activities, and forcing them out of employment while freezing their investment in the corporation. *See e.g. ARC Mfg. Co., Inc. v. Konrad*, 321 Pa.Super. 72, 467 A.2d 1133 (1983). The plaintiffs have alleged some activities on the part of the majority which arguably fit this definition, such as the termination of Jere, Jr.'s employment, and the contention that their participation in management is limited. However, the major thrust of their case so far is a departure from this line of cases.

The plaintiffs argue that in the main, they are oppressed as shareholders because the majority's conduct has substantially defeated their reasonable expectations. The base of this argument rests on *Gee v. Blue Stone Heights Hunting Club, Inc.*, 145 Pa.Commw. 658, 604 A.2d 1141 (1992) . In that case, the Commonwealth Court examined the claim of the Gees that they were oppressed as shareholders because they did not receive the fair market value for their memberships in a nonprofit hunting

and fishing camp, but instead they received $200 as provided for in the corporation's by-laws.

The Commonwealth Court ruled against the relief requested, but in the course of doing so stated,

> This issue of "oppressive conduct" appears to be one of first impression in the Commonwealth. Our research indicates, however, that this issue, insofar as it relates to for-profit corporations, has been extensively dealt with in the appellate courts of New York State. Therefore, we shall adopt New York's definition of oppressive actions which states that: "Oppressive actions refer to conduct that substantially defeats the reasonable expectations, held by minority shareholders in committing their capital to the particular enterprise." *In the Matter of the Judicial Dissolution of Kemp & Beatley, Inc., Seymore Gardstein et* al., . . ., 473 N.E.2d 1173 (N.Y.1984) [footnote omitted] [hereinafter matter *of Kemip & Beatley]* .

Gee at 665, 604 A.2d at 1144-45.[1]

Plaintiffs argue that on the basis of this paragraph Pennsylvania courts have adopted all of the New York law relating to the oppression of shareholders, and in particular the doctrines of Professor F. Hodge O'Neal, the author of numerous

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[1] The court notes that the facts of Mater of Kemp & Beatley, and the New York couts' handling of them are instructive in the present case. In the New York case, two former employees who left the corporation after many years of employment found themselves frozen out of all participation in the company, especially in the area of profit-sharing. The New york Courts found that after a long period in which the company's profits were distributed on the basis of share holdings (there wer eight total stockholders in Kemp & Beatley, Inc.,), the company's majority changed the policy, and left the two petitioners with no method of recouping their investment. The courts found the petitioners to be oppressed, and ordered dissolution.

We note, however, that the New York court's order was subject to the majority buying out the minority. Much of the court's reasoning rested on the petitioner's having no alternative to seeking dissolution if they wanted any econmic use of their investmen.

The same cannot be said for this case. the petitioners here and the defendants unanimously agreed in February 1995 on a pershare value for the Hissong Farnstad stcijm at a neetubg wgere Wayne Brubaker, the Farm Bureau accountant, was present. He testified not only to unanimity of the meeting but also to the reasonableness of the amount agreed upon.

articles and two treatises. As eminent an authority as Professor O'Neal is, this court feels itself bound not only by the precedent of the Commonwealth Court in *Gee*, but also by the long line of cases governing receivers in Pennsylvania.

Because this court finds that the *Gee* definition binds this court, we will examine the reasonableness of plaintiff's expectations in the following areas, as highlighted by counsel; the expansion of Hissong Farmstead, the meaningful participation in corporate management through the use of partnership-like forms, the freedom from violence and intimidation, and the expectation of employment.

In examining these expectations, this court will be guided by the New York standards insofar as they are not contrary to established Pennsylvania law. As set forth in *Kemp & Beatley*, the standards are summarized as follows:

> Majority conduct should not be deemed oppressive simply because the petitioner's subjective hopes and desires in joining the venture are not fulfilled. Disappointment alone should not necessarily be equated with oppression.
>
> Rather, oppression should be deemed to arise only when the majority conduct substantially defeats expectations that, objectively viewed, were both reasonable under the circumstances and were central to the petitioner's decision to join the venture.

Matter of Kemp & Beatley at 1179.

Perhaps the core precipitating factor in this litigation, around which all the other incidents and allegations apparently revolve, concerns whether the corporation should expand. Marvin Hissong, the founder, testified that it was his vision that any member of the Hissong family who wished to participate in the corporation, could. The problem with the vision is clear - ordinary, arithmetic expansion of any dairy herd is only possible up to a certain size, and then whole new approaches must be employed.

More telling is the evidence that no actual corporate decisions concerning expansion were made until July 1993, when a notation was made in the corporate records that the corporation would work with Agway to develop plans for a 1,000 cow herd. This July 1993 plan for expansion is clearly different from Marvin's ill-defined vision, and therefore this particular method of expansion cannot be said to have been formally contemplated at time of organization of Hissong Farmstead, Inc. However reasonable the goal of including all of Marvin's grandsons in the operation of the farm may seem, at some point in the future unlimited expansion, particularly of a single dairy herd, becomes unreasonable.

The next expectation which plaintiffs press is that the corporation would be run as a partnership, without the formal trappings of a traditional corporation. The court finds this expectation unreasonable as a matter of law because the court was unable to find any Pennsylvania case which advances this notion. Instead, the court finds that the legislature has undertaken to provide a vehicle for those who wish such an arrangement, through enacting the statutory close corporation. 15 Pa.C.S. §§ 2301 to 2337 (see esp. § 2332, providing for management directly by shareholders).

Were the court to uphold the plaintiffs' view, the courts might well be flooded with applications by disgruntled minority shareholders, all seeking to dissolve corporations because of the failure of the majority to achieve consensus. Allowing dissolution for this reason would undercut one of the very bases of the corporate form, allowing a majority to run a corporation despite opposition which in an actual partnership would result in dissolution. By taking advantage of the corporate form, all of the parties must accept the limitations as well.

The case might well be different were the corporation organized as a statutory close corporation, or where the majority decisions were clearly aimed at precluding all minority participation, including economic participation, in the corporation. In the latter case, the situation would be logically analogous to the facts in *Matter of Kemp & Beatley* as analyzed above (see n.1). Instead, the petitioners have all testified that after

the change in management, no minority member's compensation was changed.

In any case, the failure of the majority to honor the plaintiffs, wishes and run the corporation as a partnership has not resulted in identifiable damage to the corporation such that the appointment of a receiver is warranted. To the contrary, had the majority acquiesced to the wishes of the minority in this regard the corporation would have been destroyed. Board of directors, meetings are regularly held, and they are open on all occasions to all directors, which include plaintiffs Jere, Sr. and Marvin D. Hissong. The board has also scheduled shareholders, and employees, meetings to consider corporate problems, such as the night milking. The fact that plaintiffs have refused to participate in these forums does not negate their existence.

The plaintiffs present as another ground for reasonable expectations the freedom from intimidation and violence. This argument raises an issue the court finds most troubling from a human standpoint, the continuing hostility exhibited by the individuals in this case. The court does find that both sides are hardly blameless. The court will not attempt to justify the actions of either side, nor can it determine the credibility of the various charges. It can only agree with the witnesses who observed that the most important issue facing Hissong Farmstead is improving communication among the individuals.

The court does not minimize the effect a continual state of tension might have on individual workers, especially if they are working side by side. Nevertheless, the incidents brought to the court's attention either cannot be reliably attributed to one side or the other, such as the manure in the free choice bins, or else the action taken might be attributed to one person but is clearly a personal wrong, and not one attributable to that person's corporate role, such as the letter allegedly sent by a member of the majority group to Jere, Jr.'s wife's supervisor. This type of evidence is not justification for a receiver, no matter how painful the court may find the incidents.

The next contention is that Jere Hissong, Jr. was oppressed through the termination of his employment during the pendency of

these proceedings. Initially, this argument is appealing, but on examination of the facts, as set forth above, it loses its luster.

The right of management to make job assignments is undoubted. Here, Jere, Jr. was removed as herdsman, and reassigned to other duties. He approached the board for a Change in night milking, alleging that his family never had a chance to share in the bonus offered night milkers, and the board gave him the opportunity to do so.

He wished all of his siblings to be reassigned to this duty, but the board did not concur, as is their right. Jere, Jr. had to be threatened with termination before he took up the duties he had requested, and then he stopped performing them after a month, alleging harassment as his reason. The court is unaware of any case where an employee, even as a shareholder, has the right to veto management decisions of this type. where an employee/shareholder has performed unsatisfactorily, it is not oppression for the management to fire him for that reason. *Exadaktilos v. Cinnaminson Realty Co.*, 400 A.2d 554 (N.J.Super. 1979).

Furthermore, the court notes that up until his termination, his compensation was never reduced, and he received, though .he did not accept, the night milking differential. No other member of the minority has been terminated, and no member has had his compensation reduced. With the exception of the night milking differential, no member of the majority appears to have earned more than the minority, in salary or bonuses. It is impossible for the court to discern oppression here.

Finally, the court must note that there is in effect between the parties a buy-sell agreement which allows the plaintiffs in this case to receive their investments back. There is uncontradicted testimony on the record that each February, including February 1995, following the election of the current majority to the board of directors, the whole group of shareholders of Hissong Farmstead, Inc. would meet to decide on a price for their shares.

Wayne Brubaker, the Farm Bureau accountant, testified that he was present at the February 1995 meeting, where he explained the various methods for valuing such stock and where he also

served to tally the votes. Also as in past years, the vote at the February 1995 meeting was unanimous. The stock's value was set at $1400 per share.

Thus, this is not a case where the court must attempt to fashion some way for the plaintiffs to receive full value for their investment. Indeed, in a number of cases, courts have responded to oppression by fashioning a judicially enforced buy-out. *See Orchard v. Covelli*, 590 F.Supp. 1548 (W.D. Pa. 1984) . By voting to set the value as they have, the plaintiffs have provided themselves with a way out.

In sum, the court does not find a clear case of either deadlock, which would render a corporation unable to manage its own affairs, or of such wrongdoing by the current management that the corporation is in imminent danger of ruin and failure. However distressing the court may find the feud between the two factions of the Hissong family, the corporation which bears the family name remains profitable. Corporate policy and management decisions are made by proper use of traditional corporate policy and management decisions are made by proper use of traditional corporate government processes, and there is no unequivocal evidence that either of these bedrock signposts of corporate health point to danger. without such evidence squarely before it, this court will not take the drastic step of replacing management with a receiver pendente lite.

ORDER OF COURT

February 6, 1996, the plaintiffs' request for the appointment of a receiver pendente lite is denied.