GARDNER, INDIV. AND AS EXECUTRIX, GARDNER ESTATE V. MOHN, C.P. Franklin County Branch, E.D. Vol. 7, Page 419

Equity - Partnership - Buy-Sell Agreement - Declaratory Judgement

1. Where the purchase price of a ceceased partner's interest is ambiguous, equity requires the surviving partner to buy out the other's interest at fair market value.

2. Where partners fail to re-evaluate a business each year as contemplated by an agreement, the Court looks at all language of the agreement to conclude the business shall be valued at date of death value.

Edward W. Rothman, Esqurie, counsel for the plaintiffs
Wayne F. Shade, Esquire, counsel for the defendant

OPINION AND DECREE NISI

WALKER, J., August 1, 1986:

On September 18, 1985, James E. Gardner, decedent, died leaving his wife, Betty J. Gardner, plaintiff, one-half interest in a partnership known as "The Treat". The decedent and George B. Mohn, defendant, had formed the partnership in September, 1966, by executing a partnership agreement that established their respective rights, duties, and interests. At that time, they also entered into a purchase and sale agreement whereby if one of the two parties died, the surviving partner was obligated to purchase the deceased party's partnership interest.

Both of these documents, the "Amended Partnership Agreement" and "Revised Buy-Sell agreement," were amended and reinstated in their entirety in April, 1979. The amended partnership agreement requires the surviving partner to purchase the decedent's interests "as set forth and at a valuation as computed in the purchase and sale agreement" entered into in April, 1979. *See Amended Partnership Agreement,* Paragraph 18. The present controversy centers around the terms of valuation as outlined in the Revised Buy-Sell Agreement.

The Revised Buy-Sell Agreement obligates the surviving partner to purchase the deceased partner's interest at a price determined by annual valuations of the partnership to be conducted jointly by the partners. These annual valuations were to be adjusted from the date of the last valuation until the date of death to reflect capital transactions that occurred in that period.

RESOLUTION ON DEATH OF HARVEY C. BRIDGERS, JR.
THE FRANKLIN COUNTY BAR ASSOCIATION

On July 1, 1987, the earthly life of Harvey C. Bridgers, Jr. terminated. He was 56 years of age and for 28 of those years had been an attorney at law practicing in Waynesboro, Pennsylvania. He was a member of the Franklin County Bar Association since 1959 when he was admitted to practice before the Supreme Court of Pennsylvania and the Courts of Franklin County, Pennsylvania.

He served this association well and faithfully, and willingly performed various committee assignments, including that of membership on the Committee for the consolidation, revision and codification of the Orphans' Court Division Rules for the Court of Common Pleas of the 39th Judicial District in 1973. He was also a long-time law member of the Board of Viewers serving Franklin and Fulton Counties.

After graduation from Grove City College in 1953, he served in the U.S. Marine Corps for two years and was a veteran of the Korean War. Following his graduation from George Washington University Law School in 1958, he entered into the general practice of law in Franklin County, Pennsylvania, and held membership in the Franklin County and Pennsylvania Bar Associations and in the Trial Lawyers of America Association at the time of his death. He discontinued active practice in 1986 because of ill health.

His concern for his fellowman was well demonstrated by his involvement in community affairs: He was a past president of the Waynesboro Chapter of the American Red Cross, the Rotary Club of Waynesboro, the Waynesboro Chamber of Commerce and the George H. Neal Memorial Home, Inc., being a retirement home known as Hearthstone; he also served as an elder at the Hawley Memorial Presbyterian Church at Blue Ridge Summit, Pa.

His presence among us will be greatly missed and to that end and for that purpose, and with sadness, we desire to record a minute to honor the memory of our departed member, Harvey C. Bridgers, Jr.

THEREFORE, BE IT RESOLVED, that the Franklin County Bar Association, in special meeting assembled this third day of July, 1987, does hereby adopt this resolution on the death of Harvey C. Bridgers, Jr., and directs that a copy thereof be delivered to his wife, Eunice G. Bridgers.

Thomas M. Painter
Kenneth E. Hankins, Jr.
LeRoy S. Maxwell
Resolutions Committee

Each partner was required to take out life insurance on the other partner in order to facilitate the buy-out. The surviving partner was then obligated to pay the policy's proceeds to the deceased partner's estate within four months of the date of death, along with any cash necessary to make up the differecne between the policy limits and the amount calculated under the Revised Buy-Sell Agreement.

A valuation was made in April, 1979, at the time of the execution of the documents. Though annual valuations were required under the agreement, no subsequent valuations were made. The agreed value of the partnership, as of April, 1979, was $450,000. A number of times after April, 1979, decedent requested the defendant to revalue the partnership, but the defendant refused.

After decedent's death, the plaintiffs have also requested that the value of the partnership be redetermined. Though the defendant has collected the proceeds of the life insurance, and over four months have passed since decedent's death, the defendant refuses to revalue the interest, offering instead to tender one-half of the 1979 valuation figure.

The plaintiffs initiated this action by filing a complaint with this court, asking for a declaratory judgment to construe the agreements mentioned above. The plaintiffs request: (1) that the defendant tender one-half the value of the partnership as of the date of the decedent's death; (2) an injunction to restrict the defendant's use of the policy proceeds; and (3) damages that she may suffer if she is forced to liquidate assets pending this action. The defendant filed various preliminary objections; both sides subsequently briefed and argued the matter.

Both parties agree that the Revised Buy-Sell Agreement contemplates that when one partner dies, the surviving partner is to buy out the decedent's half interest from the estate. The question, then, is whether the half interest is to be calculated based on the 1979 evaluation of the partnership or whether it is to be computed to reflect the true value of the partnership as of the date of death. This court is inexorably led to conclude that the parties intended for the buy-out to be based on the value as of the date of death.

Looking at the express language of the agreement, the recital clause states that the decedent's interest is to be purchased "at a price deemed by the partners to be just and fair to all concerned." *Revised Buy and Sell Agreement, 4th Recital Clause.* The method for determining a fair price, as outlined in the agreement, was to perform a yearly re-evaluation of the partnership's worth, referred to as "basic value." In the event of a partner's death, the most recent basic value was to be fine-tuned to reflect the partnership's

worth at the date of death. The agreement provides for this by stating.

> "The value of the deceased partner's interests duly entered in Schedule A, as aforesaid, which bears the most recent effective date at the time of his death is hereinafter referred to as the 'basic value' of his interest in the partnership business. To determine the purchase price of the partnership interest of the deceased partner as of the date of death, there shall be added to the basic value all contributions of capital made by the deceased partner, less any capital indebtedness, after the effective date of the 'basic value," plus the deceased partner's share of profits or less the deceased partner's share of partnership losses in the period running from the effective date of the basic value to and including the date of his death, less all withdrawals made by the deceased partner since the effective date of the 'basic value." *Revised Buy-Sell Agreement,* Section 3.

The provision for revaluing is couched in mandatory terms, i.e., "shall place a value." In spite of this, the parties inserted a "savings clause" in the agreement, to wit:

> "The failure of the partners, regardless of cause, to revalue their interests in the business at least one in each year as above provided, shall not operate to terminate this Agreement." *Id.*

This prophylactic measure insured that the partnership did not dissolve merely because a yearly reassessment had not been conducted.

Nonetheless, the defendant contends that the decedent must have been satisfied with the 1979 basic value or else he would have terminated the partnership to force a new valuation. This position is unsupported by reality. By the defendant's own admission, the decedent made repeated requests to revalue the partnership shortly before his death. The defendant ignored these requests and, now that the decedent cannot speak, the defendant interprets this as acquiescence to the 1979 valuation. This argument is as perfidious as it is illusory.

If the above considerations do not fully expose the defendant's canard, then one need only examine the method of valuation the defendant now proposes. He urges the court to use the 1979 assessment, subject to all of the adjustments outlined in Section 3 of the Revised Buy-Sell Agreement. This would require a determination of decedent's capital contributions, his capital indebtedness, share of profits, share of losses and his withdrawals for a six year period. According to the defendant, these are then to be

applied to the 1979 figure to bring it up to a 1985 value. Even assuming that such a computation is possible, it would be pure coincidence if the final amount bore any relation to the partnership's true value as of the date of the decedent's death. For these reasons, the defendant shall instead be instructed to tender to the plaintiff one-half of the fair market value of the partnership as of the date of the decedent's death.

The plaintiff posits that if the purchase price under the agreement is found to be ambiguous, the buy-out interest should be calculated according to Section 42 of the Pennsylvania Uniform Partnership Act, 59 Pa. C.S.A. §364, which reads:

> "When any partner retires or dies, and the business is continued . . . without any settlement of accounts as between him or his estate and the person or partnership continuing the business unless otherwise agreed, he or his legal representative as against such persons or partnership may have the value of his interest at the date of dissolution ascertained, and shall receive as an ordinary credit an amount equal to the value of his interest in the dissolved partnership with interest." 59 Pa. C.S.A. §364.

This section of the Uniform Partnership Act codifies the policy that, in the absence of an express agreement otherwise, it is presumed that a partner would not sell his interest for a price less than its true value. The question, then, is whether the parties have "otherwise agreed" when the purchase price under the agreement is ambiguous.

Though no Pennsylvania court has addressed this issue, the plaintiff cites precedent in other jurisdictions that is directly on point. In *Anderson v. Wadena Silo Co.,* 310 Minn. 288, 246 N.W.2d 45 (1976) and *Bohn v. Bohn Implement Co.,* 325 N.W.2d 281 (N.D. 1982), the purchase price of the partners' interests, as outlined in the Buy-Sell Agreements, were found to be ambiguous. Both courts concluded that, under these circumstances, equity requires the surviving partner to buy out the other's interest at fair market value, per the Uniform Partnership Act. The language in both the Minnesota and the North Dakota Acts is identical to that of 59 Pa. C.S.A. §364.

The courts' reasoning in *Wadena* and *Bohn* is much more compelling than the defendant's simplistic counter-assertion that the parties here have "otherwise agreed." This court, though concurring with the results of *Wadena* and *Bohn,* need not rely on their holdings, however, because the purchase price in the instant agreement is not ambiguous.

The defendant neither briefed nor argued his objection to the plaintiffs' bringing this action as a declaratory judgment. This is

not surprising; as an actual justiciable controversy with no factual dispute, this case is the proper subject matter for a declaratory judgment under 42 Pa. C.S.A. §7311 *et seq.*

The plaintiff requested an injunction to prevent the defendant from utilizing the insurance proceeds in question. This point has been made moot by the court order entered on June 25, 1986, granting such relief.

Finally, the plaintiff has not pleaded that she has actually liquidated assets as a result of the defendant's refusal to pay her for the decedent's interest. As such, she shall not be compensated for these speculative damages.

ORDER OF COURT

August 1, 1986, the plaintiffs' request for a declaratory judgment construing the 1979 "Amended Partnership Agreement" and "Revised Buy-Sell Agreement" is granted.

The plaintiffs and the defendant are ordered to retain an independent accountant, mutually agreeable to both parties, to ascertain the value of the partnership as of September 18, 1985, the date of James E. Gardner's death. The cost of this appraisal shall be borne equally by both parties.

Within fifteen (15) days of completion of the accounting, the defendant shall tender one-half of the final valuation figure to the plaintiffs. Additionally, the defendant shall pay the plaintiff six (6%) percent interest on the above-mentioned figure computed from January 18, 1986, until the date of payment. The plaintiffs shall tender decedent's stock in the partnership concurrent with the defendant's payment therefor.

The defendant shall maintain the insurance proceeds in a VIMMA account at the Valley Bank until the date of execution of the abovementioned transfer.

JONES V. JONES, C.P. Franklin County Branch, No. F.R. 1984-2

Defective Service - Divorce Complaint - Request for Extension of Time

1. The mere filing by counsel for defendant for an extension of time to evaluate the merits of a case does not subject defendant to the court's jurisdiction.

Kenneth F. Lee, Esquire, Counsel for Plaintiff
William C. Cramer, Esquire, Counsel for Defendant

WALKER, J., December 22, 1986:

Plaintiff, Dennis G. Jones, filed for divorce on January 4, 1984. Counsel for plaintiff mailed a copy of the complaint to defendant, Sabine Jones, by certified mail to her home in Badenhard, West Germany. The complaint was returned unclaimed. Defendant wrote to plaintiff's counsel on September 4, 1984, stating that she wished to contest the divorce and that she wanted to retain local counsel. In her letter, defendant referred to a complaint that she had received in August, 1984. There is no record that a true and correct copy of the complaint was mailed to her at that time.

On March 13, 1985, a local attorney filed for an extension on behalf of the defendant. A Master's hearing was subsequently held on August 6, 1985. Plaintiff and his attorney appeared, but neither defendant nor any counsel for defendant attended. A Master's report was filed on December 31, 1985, finding that plaintiff had suffered such indignities as to justify granting him a divorce. The Master recommended that no divorce be granted, however, because there was no record that defendant had been served with a true and correct copy of the complaint within ninety (90) days of its filing date, pursuant to Rule 404 of the Pennsylvania Rules of Civil Procedure. Plaintiff filed exceptions to the report, arguing that plaintiff waived any objection to defective service by entering an appearance in the action.

It is true that defective service may be waived by the parties. *See, Crown Constr. Co. v. Newfoundland Am. Ins. Co.,* 429 Pa. 119 (1968) (objection to defective service waived by filing answer on merits); *Glove v. S. Klein on the Square,* 430 Pa. 93 (1968). (objection to defective service waived by defendant's entry of a general appearance). The issue presented here is as follows: when the alleged service of the complaint is deficient and the record does not indicate that an out of state defendant received a true and correct copy of the complaint, within 90 days of filing, does the mere filing of an extension of time by local counsel constitute a general appearance sufficient to constitute a waiver of defective service? The answer is, in short, no.

Counsel for plaintiff cites *Commonwealth v. Haines,* 55 D&C 2d 204 (1972), for the proposition that a motion for a continuance is sufficient to constitute a general appearance. In that case, defendant filed a preliminary objection to the complaint, asserting that service on him was defective. Subsequent to making this objection,