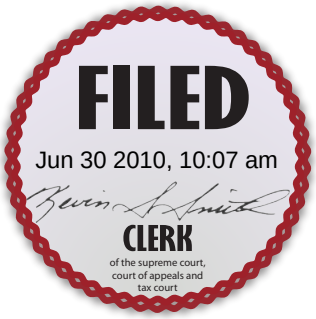

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IN THE
COURT OF APPEALS OF INDIANA

CAROL E. MASON, Individually, CARMEN KELLEHER and VON MASON,	)	
Appellants-Defendants,	)	
vs.	)	No. 45A03-0912-CV-598
CAROL E. MASON, as Personal Representative of the Estate of Donald W. Mason,	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Diane Kavadias Schneider, Judge
Cause No. 45D01-0801-PL-14

June 30, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Carmen Kelleher (Carmen) and Von Mason (Von) appeal from the trial court's order in a declaratory judgment action brought by Carol Mason (Carol) as personal representative of her husband's, Donald Mason (Don), estate seeking a determination of the number of shares of Mason Corporation owned by Don's estate for purposes of administration of the estate and payment of taxes. Carmen, Von, and Don were siblings and shareholders of Mason Corporation. The following issues are presented for our review:

1. Did the trial court abuse its discretion by entering a declaratory judgment in favor of Don's estate?

2. Did the trial court abuse its discretion by admitting into evidence exhibits allegedly containing inadmissible hearsay?

We affirm.

Maynard Metals, Inc., the predecessor to Mason Corporation, was incorporated on August 1, 1950. The founders of the corporation were Ralph Mason and Clyde Teegarden. The original articles of incorporation authorized fifty shares of stock. Von and Carmen each owned ten shares, Don owned five shares, and Teegarden owned the remaining twenty-five shares. The minutes of a special meeting of directors on August 26, 1974 showed that Von, Carmen, and Don each owned 8 1/3 shares and 25 shares were transferred from Robert Teegarden to Ralph Mason. On October 2, 1974, Ralph Mason drafted a handwritten letter in which he made a lifetime gift of twenty shares to Don.

On December 27, 1976, the articles of incorporation were amended to change the name of the corporation to Mason Metals Company, Inc. The shareholders identified were Ralph Mason, Don, Von, and Carmen. The number of authorized shares remained at fifty, and the amendment does not show the vote of the shares by any individual shareholder. The

articles of incorporation, however, were amended further on December 31, 1987, changing the corporation name to Mason Corporation and showing there were one hundred outstanding shares of Mason Corporation. The articles of incorporation were amended in December 1989 and reflected that there were one hundred outstanding shares of Mason Corporation. Minutes from the special meetings held on December 31, 1987 and December 6, 1989 show that one hundred outstanding shares were entitled to vote, but do not show the number of shares voted at the meetings.

Don died on October 31, 2007, and his will was admitted to probate on November 7, 2007. On January 31, 2008, Carol filed a complaint for declaratory judgment to determine the number of shares of Mason Corporation owned by Don's estate. In the complaint, Carol requested that the trial court declare that 28 1/3 shares of capital stock of Mason Corporation were owned by Don's estate.

The bench trial on this matter was held on April 29, 2009. The trial court made specific findings of fact and conclusions thereon entering its final order on October 19, 2009 declaring that Don's estate owned 28 1/3 shares of stock of Mason Corporation. Von and Carmen now appeal.

1.

"Pursuant to the Uniform Declaratory Judgment Act, declaratory orders, judgments and decrees have the force and effect of final judgments and are reviewed as any other order, judgment or decree." *Ember v. Ember*, 720 N.E.2d 436, 438 (Ind. Ct. App. 1999). Carmen and Von are appealing from a decision in which the trial court entered findings of fact and conclusions of law. In this situation, we first determine whether the evidence supports the

findings and then assess whether the findings support the judgment. *Truelove v. Truelove*, 855 N.E.2d 311 (Ind. Ct. App. 2006). We will set aside the findings or the judgment only if they are clearly erroneous. *Id*. Findings of fact are clearly erroneous if the record lacks any evidence or reasonable inferences to support them. *Id*. The trial court's judgment is clearly erroneous when it is unsupported by the findings of fact and the conclusions relying on those findings. *Id*. We will consider only the evidence most favorable to the judgment and all reasonable inferences flowing therefrom. *Ember v. Ember*, 720 N.E.2d 436. We will not reweigh the evidence or assess the credibility of witnesses. *Id*.

Declaratory judgments are governed by Indiana's Uniform Declaratory Judgment Act (UDJA), which in relevant part provides:

> Any person . . . whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

Ind. Code Ann. § 34-14-1-2 (West, Westlaw through 2009 1st Special Sess.).

The UDJA provides that its purpose "is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and is to be liberally construed and administered." I.C. § 34-14-1-12 (West, Westlaw through 2009 1st Special Sess.). Thus, the purpose of a declaratory judgment action is to quiet and stabilize legal relations and thereby provide a remedy in a case or controversy when there is still an opportunity for peaceable judicial settlement. *Volkswagenwerk, A.G. v. Watson*, 181 Ind.App. 155, 390 N.E.2d 1082 (1979). The declaratory judgment statute was not intended to eliminate well-known causes of action or to substitute an appellate court for a tribunal of

original jurisdiction, where the issues are ripe for litigation through the usual processes. *Ember v. Ember*, 720 N.E.2d 436. Rather, the statute was intended to furnish an adequate and complete remedy where none before had existed, and it should not be used where there is no necessity for such a judgment. *Id*. The use of a declaratory judgment is discretionary with the trial court and is usually unnecessary where a full and adequate remedy is already provided by another form of action. *Volkswagenwerk, A.G. v. Watson*, 390 N.E.2d 1082. According to Indiana Trial Rule 57, however, the existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. *Id.*

The test to determine whether declaratory relief is appropriate is: (1) whether the issuance of a declaratory judgment will effectively solve the problem involved; (2) whether it will serve a useful purpose; and (3) whether or not another remedy is more effective or efficient. *Ember v. Ember*, 720 N.E.2d 436. The determinative factor is whether the declaratory judgment will result in a just and more expeditious and economical determination of the entire controversy. *Id*.

Von and Carmen argue that the trial court abused its discretion by entering declaratory judgment in favor of Don's estate because Carol failed to request the appropriate relief or name the necessary parties. More specifically, they claim that Carol "failed to request a determination as to the number of available stocks in the Corporation" and "failed to name Mason Corporation as a party." *Appellant's Brief* at 11. Yet, Von and Carmen also argue that the trial court erred by exceeding the request in the complaint by determining the total number of authorized shares of Mason Corporation. Carmen and Von objected to consideration of the total number of shares below, but argue that Carol erred by failing to

request that the trial court make that determination. We conclude that the trial court did not abuse its discretion by engaging in a just and expeditious determination of the entire controversy, recognizing that in order to rule on the relief requested, a determination of the total number of shares had to be made.

We likewise find that the failure to name Mason Corporation as a party is not fatal to this action. It is true that when declaratory relief is sought all persons shall be made parties who have or claim any interest that would be affected by the declaration. Ind. Code Ann. § 34-14-1-11 (West, Westlaw current through 2009 1st Special Sess.). We note that shareholders in a closely held corporation stand in a fiduciary relationship to each other. *Barth v. Barth*, 659 N.E.2d 559 (Ind. 1995). That is, the shareholders have an obligation to deal fairly, honestly, and openly with the corporation as well as their fellow shareholders.

A direct action has been defined by the Supreme Court as an action initiated by a shareholder on his own behalf to vindicate rights belonging to the shareholders themselves. *G & N Aircraft, Inc. v. Boehm*, 743 N.E.2d 227 (Ind. 2001). A direct action may be brought when "it is based upon a primary or personal right belonging to the plaintiff-stockholder." *Id*. at 235. Direct actions are typically initiated to enforce a right to vote, compel dividends, prevent oppression or fraud against minority shareholders, inspect corporate books, and to compel shareholder meetings. *Marcuccilli v. Ken Corp.*, 766 N.E.2d 444 (Ind. Ct. App. 2002).

In *W & W Equip. Co. v. Mink*, 568 N.E.2d 564, 571 (Ind. Ct. App. 1991), we noted the following:

> The well-established general rule is that shareholders of a corporation cannot maintain actions in their own name to redress an injury to the corporation. A single derivative action is generally required in order to further sound policy considerations, one of which is the avoidance of multiple shareholder lawsuits. It is recognized that authorization of shareholder actions [in their own names] would constitute authorization of multitudinous litigation and disregard for the corporate entity.

(internal citations and quotations omitted). We further observed that the reasons for requiring derivative actions were not present as there were only two shareholders, and Mink was the sole injured shareholder. Thus, there was no potential for a multiplicity of shareholder suits. Although the claim here is not a derivative claim, *i.e.*, one brought to redress an injury to the corporation, we find the reasoning above helpful. We do not find that the trial court abused its discretion by allowing the matter to proceed without Mason Corporation being named as a party where the shareholders[1] were named and actively participated in the trial of the claim. There was no disregard for the corporate entity and there should not be multitudinous litigation as a result of the trial court's decision.

Von and Carmen also claim that "the evidence regarding the number of shares does not conclusively support the court's finding that only fifty (50) shares existed." *Appellant's Brief* at 13. They concede that the trial court based its decision on existing law, *i.e.*, the requirements of Ind. Code Ann. § 23-1-25-1 (West, Westlaw through 2009 1st Special Sess.), but claim that the trial court failed to consider additional evidence of how the corporation conducted its business.

[1] The trial court determined the number of shares of Mason Corporation owned by Von, Carmen, and Don totaling 49 of the 50 shares. It is apparent from the record that Ralph Mason retained ownership of the other share.

The statute provides that "[t]he articles of incorporation must prescribe the number of shares that the corporation is authorized to issue." I.C. § 23-1-25-1. Further, in the absence of statutory authority, a corporation has no right to increase the amount of its capital stock unless such increase is authorized by its charter. *Star Pub. Co. v. Ball*, 192 Ind. 158, 134 N.E. 285 (1922). The original articles of incorporation filed with the secretary of state establish that there are 50 shares of capital stock with a par value of $100.00 each. *Appellant's Appendix* at 318. Another reference to the fifty authorized shares of stock is made in the minutes of a special meeting of directors held on August 26, 1974. The record reflects that while the articles of incorporation were amended to reflect changes in the corporate name, there is no evidence that the corporate officers authorized the issuance of additional shares of stock beyond the fifty shares of stock originally authorized. Evidence was introduced at trial by way of minutes of shareholder meetings and certificates of stock reflecting the number "100" as the number of authorized shares. There was no evidence presented to show authorization to increase the number of shares of capital stock. The evidence supports the trial court's findings and conclusion that there were fifty authorized shares of capital stock of Mason Corporation.

The evidence in the record also establishes that the trial court correctly determined that Don owned 28 1/3 shares of Mason Corporation. The record reflects that in August 1974, ownership of the stock was equalized among Don, Von, and Carmen so that each owned 8 1/3 shares of the stock, with Ralph Mason owning the other 25 shares. Later in October 1974, Ralph Mason gifted 24 of his 25 shares of stock to his children giving 20 shares to Don, and giving Von and Carmen 2 shares each.

Von and Carmen argued to the trial court that because stock certificates issued to them were not surrendered, replaced, or redeemed, there must have been one hundred authorized shares of capital stock. In making this argument on appeal, Von and Carmen are asking this court to reweigh the evidence, a task we are forbidden from doing. We will not reweigh the evidence or assess the credibility of witnesses. *Ember v. Ember*, 720 N.E.2d 436. It is for the trier of fact to determine all inferences arising from the evidence, and to decide which witnesses to believe. *Holeton v. State*, 853 N.E.2d 539 (Ind. Ct. App. 2006).

2.

Carmen and Von argue that the trial court abused its discretion by admitting Exhibits 7a and 8a over their hearsay objections. Exhibit 7a is a gift letter written by Ralph Mason, and Exhibit 8a is a letter from Don to Carol and their son, Tim.

Generally, the admission or exclusion of evidence is a determination entrusted to the discretion of the trial court. *Apter v. Ross*, 781 N.E.2d 744 (Ind. Ct. App. 2003). We will reverse a trial court's decision only for an abuse of discretion, that is, when the trial court's decision is clearly erroneous and against the logic and effect of the facts and circumstances before the court. *Id*.

Carmen and Von argued to the trial court that Exhibit 7a was inadmissible hearsay, while Carol argued that it was admissible under two different exceptions to the hearsay rule, Ind. Evidence Rules 803(15) and 803(16). Carmen and Von also attacked the authenticity of the gift letter.

Evidence Rule 901(b) provides a non-exclusive list of methods by which evidence may be authenticated. *Rice ex rel. Lopez v. Harper*, 892 N.E.2d 209 (Ind. Ct. App. 2008).

Among those methods of authentication is testimony of a witness with knowledge. Evid. R. 901(b)(1).

> Absolute proof of authenticity is not required. Evidence that establishes a reasonable probability that the document is what it is claimed to be constitutes sufficient authentication or identification. Once this reasonable probability is shown, any inconclusiveness of the exhibit's connection with the events at issue affects on the exhibit's evidential weight.

Fry v. State, 885 N.E.2d 742, 748 (Ind. Ct. App. 2008) (internal citations omitted).

Carol, who had been married to Don for thirty-two years, testified that Ralph Mason, her father-in-law, regularly corresponded with Don via facsimile at Don's home. She identified the letterhead as that of Maynard Metals, a predecessor to Mason Corporation, and she identified Ralph Mason's handwriting. Based on the record before us, the trial court did not err by finding that Exhibit 7a had been sufficiently authenticated.

Evidence Rule 803(16) provides the following exception to the hearsay rule:

> **Statements in Ancient Documents**. Statements in a document in existence thirty years or more, the authenticity of which is established.

Exhibit 7a was dated October 2, 1974, more than thirty years prior to trial. It therefore falls within the ancient document exception to the hearsay rule.

Von and Carmen also attack its authenticity under Evid. R. 901(b)(8), which provides as follows:

> b. Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule.
>
> * * *
>
> (8) *Ancient documents or data compilation.* Evidence that a document or data compilation, in any form, (i) is in such condition as to create no suspicion concerning its authenticity, (ii) was in a place where it, if

> authentic, would likely be, and (iii) has been in existence 30 years or more at the time it is offered.

The record reveals that Carol identified the letterhead, the signature, and the handwriting. The letter was found in a manila folder containing corporate stock certificates that was delivered to corporate counsel in the summer of 2007 for the purpose of organizing the corporate record books. Any attack Carmen and Von made as to the authenticity of Exhibit 7a went to the weight of the evidence and not the admissibility. The trial court did not err.

Carol argued that the exhibit was also admissible under Evid. R. 803(15). That rule provides the following exception to the hearsay rule.

> **Statements in Documents Affecting an Interest in Property.** A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purposes of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

Here, Ralph Mason transferred twenty of his twenty-five shares of stock to Don and gave two shares each of that twenty-five shares to Von and Carmen. The letter reflected a lifetime gift to Don of twenty shares of Mason Corporation stock. Although Carmen and Von claim that the dealings with the shares since the letter was written are inconsistent with Don's ownership of the additional twenty shares of stock, the evidence on the issue was conflicting, and the trier of fact was in the best position to resolve those conflicts. As there is evidence in the record to support the trial court's decision to admit the evidence, we will not reweigh that evidence or reassess the credibility of witnesses.

Von and Carmen argue that the trial court erred by admitting Exhibit 8a, a letter from Don to his wife, Carol, and their son, Tim. The letter was found at the time of his death in

Don's safe deposit box along with the twenty single-share stock certificates transferred from Ralph Mason to Don, and Mason Corporation articles of incorporation. At trial, Tim identified his father's signature on the letter dated October 11, 2007. The letter, Exhibit 8a, reads in relevant part as follows:

> My Dad gifted 20 shares of stock to me. He paid tax on capital gain at that time. He realized that when push comes to shove, one person must call the shots. He made me promise that I would share equally with Von and Carmen. I have 28 and on[e] third shares out of a total of 50 shares total [sic]. Don

Appellant's Appendix at 688. Under Evid. R. 803(15) the exhibit was admissible as a statement in a document affecting an interest in property.

We conclude that even if admission of the exhibits was erroneous, there was sufficient other evidence in the record to establish that Don owned 28 1/3 shares of capital stock in Mason Corporation at the time of his death. The trial court did not err.

Judgment affirmed.

KIRSCH, J., and ROBB, J., concur.