

FILED: May 16, 2012

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Marriage of

DALE ANDREW GAY,
Petitioner-Respondent,

and

TRACI ANNE GAY,
Respondent-Appellant.

Benton County Circuit Court
0830321

A144993

David B. Connell, Judge.

Argued and submitted on January 17, 2012.

Mark Johnson Roberts argued the cause and filed the briefs for appellant.

John L. Barlow argued the cause for respondent. With him on the brief was Barnhisel Willis Barlow & Stephens, PC.

Before Schuman, Presiding Judge, and Wollheim, Judge, and Nakamoto, Judge.

SCHUMAN, P. J.

Affirmed.

Nakamoto, J., dissenting.

1 SCHUMAN, P. J.

2 In this appeal from a judgment dissolving the parties' marriage, wife assigns
3 error to the trial court's distribution of property. In particular, she contends that, instead
4 of distributing to each party its own minority shares in a closely held corporation, the
5 court should have assigned a value to the shares, distributed all of them to husband, and
6 imposed an equalizing judgment. We conclude that, in determining that a just and proper
7 property division would be achieved by having the parties retain their shares, the trial
8 court did not abuse its discretion. We therefore affirm.

9 Wife requests that we exercise our discretion to review the trial court's
10 finding regarding the value of the shares *de novo*. We decline to do so because such
11 requests are disfavored except in "exceptional" cases, and we do not find this case to
12 meet that criterion. ORS 19.415(3); ORAP 5.40(8)(c).¹

13 At the time of their divorce, the parties had been married for 14 years.
14 Husband was 50 years old and wife was 39. The trial court awarded wife custody of the
15 parties' 13-year-old son, with reasonable parenting time for husband. Wife has been
16 working full time and has an imputed gross monthly income of \$3,750, or approximately
17 \$45,000 per year. Husband has been employed by Middleton Heating & Sheet Metal,

¹ ORAP 5.40(8)(c) provides:

"The Court of Appeals will exercise its discretion to try the cause anew on the record or to make one or more factual findings anew on the record only in exceptional cases. Consistently with that presumption against the exercise of discretion, requests under paragraph (a) or (b) of this section are disfavored."

1 Inc., of Corvallis, Oregon (Middleton Heating), for over 30 years. He is now the vice-
2 president and general manager, and his average gross monthly income is \$7,911.
3 Husband was ordered to pay child support of \$627 per month and monthly spousal
4 support of \$300, to continue until the child reaches age 19.

5 The parties were able to agree on most of the issues relating to the division
6 of property. The only dispute on appeal concerns the valuation and division of the
7 parties' interest in Middleton Heating, husband's employer. Middleton Heating is a
8 closely held corporation that has been in business since 1949. In 1973, the current
9 owners, Judy and Glenn DeFord, purchased the business from Ms. DeFord's parents, the
10 Middletons. Husband has worked for the company since he graduated from high school
11 in 1977. Until 2000, the DeFords owned all of the corporation's outstanding 81 shares.

12 Mr. DeFord saw husband as a potential successor to the business. In 2000,
13 the two began to discuss possible buy-out strategies. They reached a tentative agreement
14 that was reduced to writing but never signed. Mr. DeFord estimated that, as of 2000,
15 Middleton Heating had a value of approximately \$1.3 million. The plan was that
16 husband would purchase the shares of the business over a period of approximately 20
17 years. For tax reasons, Mr. DeFord and husband decided that it would be best if the
18 initial transfer of shares could be made by gift rather than sale so that the DeFords could
19 take advantage of the annual federal gift tax exclusion of \$10,000. For that purpose, the
20 shares were estimated to have a value of approximately \$10,000 each. Loosely
21 described, the agreement called for Mr. DeFord to begin transitioning to retirement and

1 for the DeFords to transfer by gift approximately 1.25 shares of the corporation to both
2 husband and wife annually, for a period of approximately ten years, or until husband and
3 wife together owned a 51 percent interest in the corporation. At that time, Mr. DeFord
4 would retire completely from the business, and husband would begin paying the DeFords
5 for their remaining interest in the corporation with monthly payments of \$5,000 for ten
6 years plus a lump sum payment at closing, at which time husband would own 100 percent
7 of the corporation.

8 As noted, the agreement was never signed. However, consistent with the
9 agreement, beginning in 2000, the DeFords began to "gift" 1.25 corporate shares per year
10 to each party and did so until 2008 when this dissolution was filed. The transfers were
11 approved by shareholder resolutions and noted on the corporation's ledger. By 2008,
12 when the DeFords ceased transferring shares, the parties each owned 10 shares, or a
13 12.35 percent interest in the corporation.

14 Beyond the agreement to transfer a majority of the shares by gift, the record
15 shows that Mr. DeFord and husband had not fully agreed to the details of the sale of the
16 corporation. For example, it was inconclusive as to what husband would owe the
17 DeFords for the purchase of their remaining interest in the corporation and whether the
18 purchase would include the corporation's real property, or whether that property would be
19 withdrawn by the DeFords and leased back to the corporation.

20 After the DeFords learned of this dissolution proceeding, they stopped
21 transferring further shares to the parties. However, at trial, both Mr. DeFord and husband

1 affirmed their intention to pursue husband's buyout of the DeFords' interest in Middleton
2 Heating so that Mr. DeFord could retire.

3 The primary issue at trial concerned the valuation and division of the
4 parties' shares of Middleton Heating. Each party's expert offered testimony concerning
5 the value of the shares. Husband's witness, Olsen, the corporation's CPA, offered an
6 estimate of value under what he referred to as the "net tangible asset approach." Olsen
7 applied what he described as a "minority discount" of 35 percent to adjust for the fact that
8 the parties owned less than 51 percent of Middleton Heating's shares. In Olsen's view,
9 the value of each party's shares also depended in part on whether husband would acquire
10 the real property currently owned by the corporation. Olsen estimated that if the real
11 property was a part of the acquisition, wife's ten shares had a value of \$137,228. If the
12 corporation was acquired without the real property, then Olsen estimated that the ten
13 shares were worth \$61,057.

14 Wife's expert, Mason, was an accredited business appraiser. After
15 considering three valuation methods and applying a marketability discount, and working
16 under the assumption that husband would have control of the corporation within 15
17 months from the valuation date, Mason estimated that wife's ten shares had a value of
18 approximately \$123,000.

19 Mr. DeFord and husband also each expressed an opinion of the
20 corporation's value. In Mr. DeFord's view, the corporation had been worth \$1.3 million
21 in 2000, and at the time of the hearing it was worth \$3.9 million. Husband admitted that,

1 at one time, he told wife that he believed that the business was worth \$3 million.

2 The trial court concluded that the appraisals were "not overly helpful to the
3 court" and that the valuation of the shares "calls for too much speculation for the court to
4 have sufficient certainty to place a fair market value on the shares." In light of the lack of
5 marketability of the parties' minority interests in the closely held corporation, the trial
6 court stated, "there is no true market value for these shares," and it was unlikely that any
7 value could be ascertained until husband liquidated his interest at the time of his
8 retirement. Even that eventuality was speculative, the trial court reasoned, in light of the
9 court's finding that the agreement for husband's acquisition of the corporation was
10 unenforceable. In its judgment, the court repeated that "there is no true market value for"
11 the shares. The court determined that a just and proper division of the property required
12 that each party retain his or her shares.²

² In its opinion letter, the trial court said:

"The shares held by both [husband and wife] are assets acquired during the marriage and are subject to the presumption of equal contribution. [Husband] has not rebutted that presumption as to his shares. Both parties in this litigation presented evidence regarding the value of this minority interest in the corporation. * * * The Court finds that the evaluations presented by the witnesses in this case are not overly helpful to the Court in determining this matter. It is clear from the testimony that the current majority owners of [Middleton Heating] have no plans to liquidate this corporation and also have no enforceable agreement to sell the remaining shares of the corporation. Valuing the minority interest held by [husband and wife] in this case calls for too much speculation for the court to have sufficient certainty to place a fair market value on these shares. It is clear from the testimony of the witnesses in this case that there is no true fair market value for these shares. [Wife's] expert witness Mr. Mason testified that there would be no third party that would be willing to

1 On appeal, wife seeks to have this court place a valuation of \$300,000 on
2 her shares and, in the interest of disentangling the parties' financial affairs, require wife to
3 transfer her shares to husband in exchange for an equalizing money judgment of
4 \$300,000, payable in equal installments over a ten-year period, with interest of nine
5 percent.

6 ORS 107.105(1)(f) requires that a division of marital property be "just and
7 proper in all the circumstances." The parties do not dispute on appeal that the Middleton
8 Heating shares constitute marital property and a marital asset. As noted, the court
9 determined that a just and proper division of the assets simply required that the parties

purchase [wife's] minority interest in this corporation. If this corporation was to liquidate this minority interest potentially could have a very large value. Anyone that would acquire the remaining shares of the DeFord's stock in this corporation would not need to purchase either [husband's] or [wife's] minority interest in this corporation to control the corporation. That person or entity acquiring the majority interest would not need to pay anything in the future to [husband or wife] unless the corporation was liquidated. Based on the testimony that was presented in this case the Court believes that a 'just and proper' division of the shares is simply to award to [husband] his ten shares in this corporation and to award [wife] her ten shares in the corporation."

The judgment of dissolution provides:

"There is no true fair market value for the shares in Middleton Heating & Sheet Metal, Inc., owned by Husband and Wife. No third party would be willing to purchase Wife's minority interest in the corporation. Any entity seeking to acquire majority control of the corporation would not need to acquire the shares owned by the parties to do so, nor would it be required to pay anything in the future to either party unless the corporation was liquid. Based on these findings, it is just and proper to award Husband his ten (10) shares in the corporation and to award Wife her ten (10) shares in the corporation."

1 retain their respective shares. Also as noted, we have declined to review this matter *de*
2 *novo*; thus, we will make no new findings of fact.

3 We may nonetheless consider whether the trial court abused its discretion
4 in determining what is a just and proper division of property. *Cook and Cook*, 240 Or
5 App 1, 248 P3d 420 (2010) (whether trial court's property division was "just and proper"
6 is reviewed for abuse of discretion). Our review for abuse of discretion means that we
7 will not disturb the trial court's ruling if, given the facts found by the court, it chose one
8 among a variety of legally correct outcomes. *Berg and Berg*, ___ Or App ___, ___, ___
9 P3d ___ (May 16, 2012) (slip op at 1); see *Kunze and Kunze*, 337 Or 122, 136, 92 P3d
10 100 (2004); *Githens and Githens*, 227 Or App 73, 90, 204 P3d 835, *rev den*, 347 Or 42
11 (2009) ("In evaluating the trial court's determination about what is a just and proper
12 distribution of marital property, we are instructed not to disturb that decision unless we
13 conclude that the court abused its discretion and misapplied applicable statutory and
14 equitable considerations." (citing *Kunze*)).

15 Thus, the issue on appeal is whether, in light of the trial court's findings that
16 are supported by constitutionally adequate evidence in the record, the trial court's
17 decision not to distribute wife's shares to husband in exchange for an equalizing judgment
18 was legally permissible. We conclude that it was. It is clear that *the corporation* has
19 value. However, both experts made clear that *wife's ten shares* are not currently
20 marketable separately from the corporation; thus, the evidence supports the trial court's
21 finding that, in and of themselves, wife's shares carry no market value, discounted or

1 otherwise, see [Branscomb and Branscomb](#), 201 Or App 188, 117 P3d 1051, *rev den*, 339
2 Or 544 (2005), independent of the value of the corporation as a whole. In light of that
3 finding, the trial court did not err in determining that assigning a value to the shares
4 would be speculative.

5 The trial court also found that the owners of the corporation have no plans
6 to liquidate its assets and no enforceable agreement to sell the remaining shares to
7 husband. Those findings are also supported by the record. In light of the trial court's
8 determination that any value assigned to wife's shares would be speculative, and the trial
9 court's findings concerning uncertainties of husband's future acquisition of the
10 corporation, we conclude that the trial court's determination that it is just and proper for
11 the parties to retain their respective shares is legally permissible and that the court
12 therefore did not abuse its discretion.

13 Wife cites this court's opinion in *Madden and Madden*, 114 Or App 319,
14 836 P2d 1349 (1992), as an example of a better outcome. In that case, we determined
15 that, despite the speculative nature of the value of shares that the parties owned in a
16 closely held corporation that employed the husband, it was best to divide the interest by
17 awarding all of the shares to the husband and requiring the husband to pay the wife a
18 money judgment. There are a multitude of reasons why *Madden* is distinguishable from
19 this case and does not guide us here, not the least of which is that, in *Madden*, we
20 reviewed the trial court's findings *de novo*. *Id.* at 323. More importantly, however, the
21 fact that we approved an outcome in *Madden* that differs from the trial court's disposition

1 of property in this case does not mean that either of the outcomes was beyond either
2 court's discretion.

3 Finally, although wife is correct that it is generally preferable to create a
4 property division that separates the parties' finances as much as possible, *see Haguewood*
5 *and Haguewood*, 292 Or 197, 206-07, 638 P2d 1135 (1981), this is not a case in which
6 the assignment of wife's shares to husband is compelled in order to avoid an
7 entanglement of the parties' financial affairs. At the present time, neither husband nor
8 wife derives any financial benefit from the shares or has any control over the financial
9 affairs of the corporation by virtue of a majority ownership interest. *Cf. id.* at 207 (it was
10 appropriate to award the husband the wife's share in closely held corporation over which
11 the husband exercised control).

12 Affirmed.

13 NAKAMOTO, J., dissenting.

14 Wife seeks reversal of that portion of the general judgment that awarded
15 her 10 shares--a 12.35 percent interest--in Middleton Heating & Sheet Metal, Inc.
16 (Middleton), a closely held corporation. She instead seeks an award of those shares to
17 husband, who is a valued, longtime employee of Middleton; a minority shareholder
18 aligned with Middleton's majority shareholders, Glenn and Judy DeFord; and the spouse
19 who wants, and whom the DeFords have selected, to become the majority shareholder of
20 Middleton. At the same time, wife seeks entry of an equalizing money judgment payable
21 by husband to her for the value of her shares. Despite the trial court's finding that there is

1 "no true fair market value for the shares" owned by husband and wife, the shares had
2 financial value according to all of the witnesses who provided pertinent testimony.
3 Because the trial court erroneously focused on the inability of wife to show that third
4 parties were willing to buy her shares and then ruled that husband need not take the
5 shares in the property division, wife's half of that portion of the marital property
6 consisting of shares in Middleton likely has been rendered, practically speaking,
7 worthless. Accordingly, I respectfully dissent from the majority's conclusion that the
8 property division in the judgment is "just and proper in all the circumstances," ORS
9 107.105(1)(f).

10 As the majority holds, review is not *de novo*, and so, if the record contains
11 evidence to support the trial court's factual findings, an appellate court will not disturb
12 them. *Ball v. Gladden*, 250 Or 485, 487, 443 P2d 621 (1968). In light of the trial court's
13 express and implicit factual findings supported by the record, we must determine whether
14 the trial court abused its discretion by concluding that the division of property is "just and
15 proper in all the circumstances." *Kunze and Kunze*, 337 Or 122, 136, 92 P3d 100 (2004).
16 In other words, the appellate court affirms unless the trial court "misapplied applicable
17 statutory and equitable considerations" and thereby failed to choose among legally
18 correct outcomes. *Githens and Githens*, 227 Or App 73, 90, 204 P3d 835, *rev den*, 347
19 Or 42 (2009).

20 The findings and conclusion of the trial court regarding the Middleton stock
21 are stated in the judgment of dissolution as follows:

1 "8. Each party owns ten (10) shares of stock in Middleton Heating
2 & Sheet Metal, Inc. These shares have been gifted to them over a period of
3 eight (8) years by Judy and Glenn DeFord. There is no agreement between
4 Husband and the DeFords regarding future gifts of shares in Middleton
5 Heating & Sheet Metal, Inc. or Husband's purchase of said shares.

6 "9. All shares owned by Husband and Wife were acquired during
7 the marriage and thus are marital assets. Husband has not rebutted the
8 presumption that Wife contributed equally to the shares.

9 "10. There is no true fair market value for the shares in Middleton
10 Heating & Sheet Metal, Inc. [o]wned by Husband and Wife. No third party
11 would be willing to purchase Wife's minority interest in the corporation.
12 An entity seeking to acquire majority control of the corporation would not
13 need to acquire the shares owned by the parties to do so, nor would it be
14 required to pay anything in the future to either party unless the corporation
15 was liquidated. Based upon these findings, it is just and proper to award
16 Husband his ten (10) shares in the corporation and to award Wife her ten
17 (10) shares in the corporation."

18 Before entry of judgment, the trial court also provided the parties by letter
19 with a written opinion concerning its decision. Like the judgment, the opinion
20 emphasized the court's decision to focus on "true fair market value" of the shares:

21 "Both parties in this litigation presented evidence regarding the value of
22 this minority interest in the corporation. [Husband's] expert witness Brent
23 Olsen did an evaluation based on an adjusted net asset approach. The
24 summary of this evaluation is found in Petitioner's Exhibit 7 page 2.
25 [Wife's] expert witness William V. Mason II did his own evaluation of the
26 minority interest in this corporation taking several different approaches.
27 His evaluation and conclusions are set forth in [wife's] Exhibit 117. The
28 Court finds that the evaluations presented by the witnesses in this case are
29 not overly helpful to the Court in determining this matter. It is clear from
30 the testimony that the current majority owners of Middleton Heating &
31 Sheet Metal, Inc. have no plans to liquidate this corporation and also have
32 no enforceable agreement to sell the remaining shares of the corporation.
33 Valuing the minority interest held by [husband and wife] in this case calls
34 for too much speculation for the Court to have sufficient certainty to place a
35 fair market value on these shares. It is clear from the testimony of the
36 witnesses in this case that there is no true fair market value for these shares.
37 [Wife's] expert witness Mr. Mason testified that there would be no third

1 party that would be willing to purchase [wife's] minority interest in this
2 corporation. If this corporation was to liquidate this minority interest
3 potentially could have a very large value. Anyone that would acquire the
4 remaining shares of the DeFord's stock in this corporation would not need
5 to purchase either [husband's] or [wife's] minority interest in this
6 corporation to control the corporation. That person or entity acquiring the
7 majority interest in this corporation would not need to pay anything in the
8 future to [husband] or [wife] unless the corporation was liquidated. Based
9 on the testimony that was presented in this case the Court believes that a
10 'just and proper' division of the shares is simply to award [husband] his ten
11 shares in this corporation and to [wife] her ten shares in the corporation."

12 Thus, in the judgment, the trial court found that there was no enforceable
13 agreement between the DeFords and husband for husband's acquisition of the DeFords'
14 stock in Middleton. The court also found that neither husband nor wife could realistically
15 put 10 shares on the market and sell them to a third party and, because the DeFords could
16 sell their shares to another buyer without need for the DeFords or the buyer to purchase
17 husband's and wife's shares, the minority shares have "no true fair market value." As a
18 result, the court determined that its decision not to transfer wife's shares in Middleton to
19 husband was just and proper. Although its letter opinion parallels the findings and
20 conclusion in the judgment, the trial court also stated in the opinion that "[v]aluing the
21 minority interest held by [husband] and [wife] in this case calls for too much speculation
22 for the Court to have sufficient certainty to place a fair market value on these shares."

23 To explain how I differ with the majority's conclusion, it is helpful to
24 examine the two bases for the majority's decision that the Middleton stock property
25 division is legally permissible. Those bases are (1) the trial court properly concluded that
26 any value to be assigned to wife's shares would be speculative, and (2) the trial court

1 properly found that it is uncertain whether husband will acquire the majority of shares in
2 Middleton in the future. __ Or App at __ (slip op at 8).

3 As to the conclusion that share valuation would be speculative, the majority
4 decides that the trial court's underlying factual finding--that "in and of themselves, wife's
5 shares carry no market value, discounted or otherwise," that is "independent of the value
6 of the corporation as a whole," __ Or App at __ (slip op at 7-8)--is supported by
7 sufficient evidence in the record. I disagree. Instead, the evidence shows that wife's 10
8 shares had significant value on their own.

9 Each party presented expert reports and testimony as to the value of wife's
10 shares. As noted, Mr. DeFord and husband had an unenforceable agreement for husband
11 to acquire the DeFords' stock in Middleton over a period of time, but they both had
12 proceeded pursuant to their agreement. As the majority notes, both Mr. DeFord and
13 husband testified that husband would continue to acquire Middleton shares from the
14 DeFords. Because Mr. DeFord and husband had a different understanding as to whether
15 their agreement also included the DeFords' purchase of Middleton's real property, likely
16 through partial redemption of the DeFords' shares in Middleton, both experts valued the
17 shares under each understanding. Husband's expert witness, Olsen, Middleton's CPA,
18 provided a report valuing wife's shares using the adjusted net asset approach, one of the
19 three commonly used valuation methodologies. Under the adjusted net asset approach,
20 Olsen applied a 35 percent minority discount to account for the fact that wife had a 12.35
21 percent ownership interest in Middleton. As a result, Olsen opined that wife's shares

1 were worth \$137,228 if Middleton's assets included Middleton's real property and
2 \$61,057 without the real property.

3 Wife's expert, Mason, provided an extensive report in which he reviewed
4 husband and wife's minority ownership interest under all three of the valuation
5 methodologies: cash flow or income approach, the market approach, and the adjusted net
6 asset approach. Mason explained that the adjusted net asset approach, the methodology
7 that husband's expert had relied upon, focuses on the sale value of the assets of the
8 corporation and that a "major assumption of this approach" is that the owners of the
9 shares have "control over the assets and would be able to liquidate them at their
10 discretion." Mason opined that the adjusted net asset approach was inappropriate for
11 valuing the parties' shares because husband and wife have a minority interest in the
12 corporation and the corporation has no plans to liquidate.

13 The market approach, Mason explained, focuses on share value assuming a
14 sale of the corporation or all of its assets and a review of sales of comparable companies.
15 Mason explained that under the income approach, the valuation in general terms focuses
16 on the net income or cash that will be produced by a company's assets, reduced to present
17 value, with an adjustment for the risk or probability of achieving the cash flow. Mason
18 derived values of the shares owned by husband and wife under both the market and
19 income approaches and then evaluated the extent to which a minority discount of the
20 values should be applied to account for the parties' minority interest in Middleton and a
21 marketability discount should be applied to account for the fact that the Middleton shares

1 are not freely tradable. Mason gave more weight to the income approach relative to the
2 market approach because the financial histories of the comparable companies that he was
3 able to use in his market approach to valuation were not available. That was important in
4 his view because no review of company-specific risk factors that might have had a
5 bearing on price could be undertaken. Under the income approach, Mason arrived at a
6 value of \$263,000 for all of husband's and wife's shares, or approximately \$132,000 for
7 wife's 12.35 percent interest, assuming that the DeFords purchased the real property from
8 Middleton. Alternatively, again using the income approach, Mason valued the minority
9 shares at \$235,000, or approximately \$118,000 for wife's shares only, assuming that the
10 real property remained in Middleton's ownership.³

11 In addition to expert opinions, the unsigned written agreement in 2000
12 valued each share at \$10,000, and the agreement included a provision that allowed the
13 DeFords to repurchase both husband's and wife's shares for no more than \$40,000.
14 Also, Mr. DeFord and husband each testified to his opinion of Middleton's value. Mr.
15 DeFord believed that Middleton was worth three times more than it was worth in 2000, or
16 \$3.9 million. Husband testified that he mentioned to wife that Middleton was worth \$3
17 million. Thus, there was overwhelming evidence, presented by both parties, that wife's
18 shares had some value. Even under the deferential standard of review of the trial court's
19 factual findings, I have to disagree with the majority that the court's finding that wife's

³ Mason's various market approach valuations for husband's and wife's shares were not that different from the income valuations. The market approach valuations ranged from \$221,000 to \$253,000.

1 shares have no fair market value is supported by the evidence. That finding cannot serve
2 as the foundation for the trial court's legal conclusion that any attempt to value wife's
3 shares was speculative.

4 In addition, the trial court concluded that assigning value to wife's shares is
5 speculative without evidence of a willing third-party buyer. That legal conclusion is
6 belied by the expert testimony concerning share valuation, which demonstrated that
7 minority shares in a corporation can be valued without evidence of an *actual* willing
8 buyer of the shares. The trial court's legal conclusion also runs counter to prior decisions
9 of this court. We have acknowledged the three approaches to determining fair value that
10 Mason examined in his valuation of the shares. *See Columbia Management Co. v. Wyss*,
11 94 Or App 195, 199-202, 765 P2d 207 (1988), *rev den*, 307 Or 571 (1989) (examining
12 the three approaches and noting that all three must be considered to determine the fair
13 price of shares held by a dissenting minority shareholder). And in [*Gibbons and Gibbons*](#),
14 194 Or App 257, 263, 94 P3d 879 (2004), we affirmed the trial court's setting of the value
15 of a minority of shares in a close corporation, stating that we were convinced "that is the
16 price that a *hypothetical willing buyer* would likely pay for husband's stock given the
17 combination of the minority interest and the restrictions in the stock transfer agreement."
18 (Emphasis added.) Furthermore, the trial court wrongly assumes that a prerequisite to the
19 ability of a court to determine the value of wife's shares is evidence of a *third-party*
20 buyer. We have not required evidence that a third party is waiting in the wings to buy the
21 shares of a minority shareholder as a prerequisite to valuation of those shares. *See*

1 *Columbia Management Co.*, 94 Or App at 207 (where we determined the fair market
2 value of shares held by a 14 percent minority shareholder who elected to sell his shares to
3 the corporation as a dissenting shareholder based on appraisals, without the existence of
4 an offer to purchase from someone outside the corporation).

5 "[V]aluation is a fact-based analysis necessarily taken on a case-by-case
6 basis." *Tofte and Tofte*, 134 Or App 449, 457 n 5, 895 P2d 1387 (1995). A valuation can
7 be and was undertaken by the parties in this case, and it accounted for the difficulty of
8 marketing a minority ownership interest in Middleton and the risks based on the minority
9 shareholder's lack of control. In their valuations, both wife's expert, Mason, and
10 husband's expert, Olsen, accounted for those risks to a prospective buyer of wife's shares
11 by determining appropriate discounts. Mason analyzed two discounts: a minority
12 discount, to compensate for the risk to a prospective buyer from the lack of control
13 relative to majority shareholders, and a marketability discount, to account for the
14 increased risk to a prospective buyer from Middleton's lack of immediate liquidity. This
15 court has previously held that, to determine the fair market value of minority shares in a
16 corporation, minority and marketability discounts may be an appropriate way to adjust
17 the price of shares to a prospective buyer. See [Branscomb and Branscomb](#), 201 Or App
18 188, 196, 117 P3d 1051, *rev den*, 339 Or 544 (2005) (noting that a minority discount can
19 "adjust[] for risks to the third-party buyer that accompany his or her minority status
20 within the enterprise" and a marketability discount "offsets an interest's impaired
21 transferability"). Thus, both the trial court and the majority have incorrectly concluded

1 that, because wife's shares are not readily marketable to third parties, they have no fair
2 market value and it would be pure speculation to assign a value to them.

3 According to the majority, the uncertainty that husband will become the
4 majority shareholder in Middleton is the other key trial court finding that supports the
5 conclusion that the valuation of wife's shares is speculation. The finding of uncertainty is
6 supported by the evidence. Yet the possibility that husband will not become the majority
7 shareholder does not render the value of the shares speculative and is not determinative of
8 the overall propriety of the trial court's property division ruling, for several reasons.

9 The first reason follows from the discussion concerning share valuation.
10 The shares of the minority shareholders have value. The two experts' valuations of the
11 shares do not assume that husband must be a majority shareholder at the time of his
12 purchase of wife's shares. Despite the possibility that husband for some reason will not
13 become the majority shareholder, requiring husband to purchase the shares would not
14 result in making husband pay for something that is worthless.

15 Second, although wife's minority interest may be undesirable to a
16 prospective buyer who is not involved with Middleton now,⁴ wife's shares were certainly
17 valuable to husband while he was a minority shareholder, despite the possibility that the
18 DeFords could change their minds about transferring their shares in Middleton to him and

⁴ The trial court noted that Mason stated in his testimony that there would be no third party interested in wife's minority interest. But Mason later testified, "I think that there may well be a market out there. If I didn't think there was a market I would have told you I thought the value of this hypothetical transaction was zero."

1 take back the shares they had already transferred for \$40,000, before the divorce.
2 Husband planned on using wife's shares to become the majority owner of Middleton on a
3 certain timetable. Post-divorce, husband still intends to gain a majority ownership
4 interest in Middleton. He will not consider selling his own shares for fair market value,
5 and his purchase of wife's shares will allow husband to gain a greater interest in
6 Middleton now.

7 Third, despite husband's current status as a 12.35 percent shareholder and
8 the possibility that husband may not become the majority shareholder, the parties remain
9 financially entangled in contravention of an important equitable principle for a property
10 division. In a variety of dissolution cases, this court has repeatedly adhered to the view
11 that courts should seek to disentangle the parties' financial affairs. In *Branscomb and*
12 *Branscomb*, 201 Or App at 199, this court recognized that,

13 "[i]n a long-term marriage in which the parties' properties were acquired
14 during the marriage, the parties should separate on as equal basis as
15 possible,' *Stice and Stice*, 308 Or 316, 327, 779 P2d 1020 (1989), and, in
16 accomplishing that result, courts work to '*disentangle the finances in a*
17 *dissolution proceeding to the greatest extent possible.*' *Madden and*
18 *Madden*, 114 Or App 319, 323, 836 P2d 1349 (1992)."

19 (Emphasis added; brackets in original.) See also *Boyd and Boyd*, 226 Or App 292, 299,
20 203 P3d 312 (2009) (noting that courts should disentangle the parties' finances to the
21 greatest extent possible); *Short and Short*, 155 Or App 5, 14, 964 P2d 1033 (1998)
22 (same). Indeed, we have repeatedly reasoned that

23 "in dividing the property the dissolution decree should seek to disentangle
24 the parties' financial affairs and make them free from each other's
25 interference. The friction resulting from the unsuccessful marriage

1 partnership almost inevitably makes continued business association
2 untenable."

3 *Slauson and Slauson*, 29 Or App 177, 183-84, 562 P2d 604 (1977). The admonition to
4 disentangle the parties' financial interests has been repeatedly articulated by this court for
5 over 30 years.

6 The majority reasons that the trial court's decision does not contravene the
7 guiding equitable principle to create a property division that disentangles the financial
8 interests of the parties by concluding that husband does not have "any control over the
9 financial affairs of the corporation by virtue of a majority ownership interest." ___ Or
10 App at ___ (slip op at 9). The trial court did not make findings regarding husband's
11 control over Middleton's business activities. Although it is correct that husband does not
12 have a majority ownership interest himself, the majority appears to take for granted that
13 husband lacks control over corporate affairs without reference to his actual control over
14 day-to-day business and his uncontroverted alignment with the majority shareholders in
15 the control of corporate financial decisions.

16 The fact is that both husband and wife are now shareholders in the same
17 business, with only wife in the role of a minority shareholder given husband's alignment
18 with the majority shareholders. The evidence shows that husband in fact exercises a
19 great deal of control over the activities of the corporation given his positions as an
20 officer, an employee-shareholder, and the DeFords' chosen successor owner of
21 Middleton. At trial, Mr. DeFord testified that Middleton was a family-owned business
22 and, although husband was not family, he chose husband as his successor over his

1 daughter because they are close friends and husband was his longtime employee.
2 According to Olsen, Mr. DeFord and husband, together, would determine the amount of
3 cash reserves that should be retained in the corporation and the amount of bonuses they
4 would give officers each year. The assumption that husband lacks control over financial
5 decisions is flatly contravened by the evidence, so I cannot credit it as an implicit finding
6 of the trial court.

7 Thus, husband's ownership of only 10 shares of stock does not establish
8 that wife's interests in the corporation, with her 10 shares of stock, are actually
9 qualitatively the same as husband's interests and that husband has no ability to act
10 adversely to wife as a minority shareholder. And, consistent with the finding of some
11 uncertainty, it remains quite possible that husband will become the majority shareholder.
12 That is the continuing plan and the intention of the DeFords and husband, as both Mr.
13 DeFord and husband testified--written agreement or not. For her part, wife can insert
14 herself into the affairs of the corporation and assert all of her rights as a shareholder,
15 including questioning why dividends are not being paid to shareholders given high cash
16 reserves in the corporation, about which Mason testified. Although husband received a
17 significant amount in annual bonuses, he admitted that Middleton never paid dividends to
18 its shareholders. In my view, the parties remain financially entangled because of the trial
19 court's property division.

20 In addition, the trial court's decision creates economic harm to wife and
21 fails to maximize the economic benefit of the parties' shares of Middleton stock. We

1 have held that

2 "in awarding resources to each spouse, we must consider 'the limitations of
3 the capabilities and property of the parties.' *Haguewood and Haguewood*,
4 292 Or 197, 207, 638 P2d 1135 (1981). That is, we must pay attention to
5 the entire situation and seek a solution that minimizes economic harm and
6 *maximizes economic benefits to the parties.*"

7 *Howard and Howard*, 103 Or App 342, 352, 798 P2d 683 (1990) (some emphasis added).

8 We also have said that the trial court should keep assets whole

9 "[w]here division of the principal asset of the marriage would unnecessarily
10 dissipate its value and where alternative means can be found for dividing
11 the financial benefit of the asset, the asset should be awarded intact to the
12 spouse best able to manage it and other forms of balancing awards of
13 property or support should be employed."

14 *Haguewood and Haguewood*, 292 Or 197, 208, 638 P2d 1135 (1981).

15 In this case, wife is at a greater economic risk than husband if she retains
16 ownership of her 10 shares. Given husband's position in Middleton, and his working
17 relationship with Mr. DeFord, husband is able to affect financial decisions of the
18 corporation by increasing the amount of salary and bonuses given to its officers. Because
19 husband can continue, with Mr. DeFord, to exert financial control over Middleton, which
20 has never paid dividends to its shareholders, wife, a minority shareholder, is unlikely to
21 realize any financial benefit for her shares until Middleton is dissolved, an outcome that
22 may never occur and that husband does not plan to seek. Furthermore, because
23 Middleton is a closely held corporation, it is unlikely that an outsider would be interested
24 in purchasing her 10 shares. On the other hand, husband testified that he would not be
25 willing to sell his shares for their fair market value. Husband acknowledged that he

1 intends on gaining majority ownership interest in Middleton; thus, receiving wife's 12.35
2 percent interest in the corporation would be to his benefit because it would bring him
3 closer to his goal of becoming the controlling shareholder.

4 In sum, the trial court applied an incorrect legal principle concerning
5 valuation of the shares of Middleton and misapplied an important equitable consideration
6 when it rendered its decision concerning the property division. Accordingly, it did not
7 reach a permissible legal outcome, and its property division was not just and proper under
8 all of the circumstances. Husband should be awarded all of the Middleton shares of
9 stock, with an adjustment in the property division to account for that award. As for a
10 disposition, although this court could make the determination of the value of wife's shares
11 on *de novo* review, I would permit the trial court to make that determination in the first
12 instance and to determine whether an equalizing money judgment or another adjustment
13 of the property division is warranted to account for the award of the shares to husband. I
14 therefore would reverse the judgment and remand for further proceedings.

15 Accordingly, I respectfully dissent.