

Memo

To: A
From: Scot
CC: TB
Date: January 4, 2023
Re: Marriage of Brown

OK, I have analyzed the O-land business (hereinafter "O-land") situation incorporating my legal research based on a potential finding that O-land is the separate property of husband.

Recall that Opposing Counsel's last letter assumes that TB has received \$357,000 of O-land money that husband thinks belongs to him and needs to be paid back in full. My analysis says otherwise. Opposing Counsel did mention the idea of having the business evaluator do a "Moore/Marsden" calculation. This indicated to me right away that she doesn't know what she's talking about on this particular topic. The pivotal case when apportioning interests in a business is Pereira. Moore/Marsden deals with real property only. Same theory – apportionment of interests – but wrong case. Further, her wanting to have a non-lawyer do it tells me she isn't comfortable doing it herself. She probably hasn't had to do this before, it doesn't come up that often.

Analysis:

In the scenario wherein the court does find that husband owns O-land as his separate property¹ we are still ok based on the following:

¹ Two points on our argument that it is community property: 1) Community Property Argument

You and I discussed this at length (which was very helpful). I have added additional arguments.

Our opponent has thus far argued that because O-land was incorporated by changing the name of an existing corporation (NSI), and because NSI was husband's sep. prop., O-land is his sep prop.

The arguments we have that O-land is community property are:

- a. Counter-argument to husband's position is that NSI was a completely different kind of company and was worthless. It is not as if NSI had inventory, property, an office, a staff, professional licenses, or anything else that actually transformed into O-land. All he did was take a worthless company's

1. The business was purchased for \$60,000. I think it would be fair to assume that the business was actually worth \$60,000 at the time of purchase. We should seek a stipulation on this point or be prepared to argue that the court should find the value to have been \$60,000 at the time of purchase. This will become a critical factor in the math below.
2. From the purchase in 2004 through the end of 2006 the business had minimal profits, or showed a loss. (\$14k net profit in 2006)
3. In 2007 TB began working on improving the business. She made all the decisions on how to improve the business and she did all of the leg work. She is putting together a synopsis which I will flush out for use in questioning her if we go to trial.
4. In 2007 & 2008 (year of separation) the business had net profits of \$60k. Arguably, TB kept that money and used it for the payment of various community obligations and for her own living expenses.
5. In 2009 ~ after separation ~, TB continued to work at and improve the business (husband's separate property asset for the purposes of this memo). In 2009 net profits were about \$84k. In 2010, net profits were \$143k.
6. Husband has not contributed any significant time to the business. His efforts would be considered "minimal" and therefore he does not gain any additional interest in the business whereas TB's efforts account for ALL of the increase in value.

Here is what the law says:

- **Gains in value of a separate property asset attributable to a spouse's efforts and labor during marriage are community property.** [Rutter Fam Law 8:118; 120; Pereira v. Pereira (1909) 156 Cal.1, 6-8, 103 P 488, 490-491; Marriage of Dekker (1993) 17 Cal.App.4th 842, 851, 21 Cal.Rptr2d 642, 647; In Re Roosevelt (9th Cir. 2000) 220 F3d 1032, 1038]. We know what the business was worth when it was purchased (\$60k). We need to know what it was worth as of date of separation ~ I'm thinking the end of 2008 based on the tax returns as opposed to trying to get a historical valuation in

corporation number and transfer that to O-land. By doing so he probably saved himself \$1500 or so on just creating a new corporation.

By comparison, TB contributed her retail sales license to O-land which, in my mind, is nearly comparable to husband's contribution of a corporate tax ID number and Sec of State ID number. In fact, TB's contribution of the retail sales license likely saved O-land more money in the long run (through wholesale purchase savings) than the contribution of the corporate shell by husband.

August, 2008 when the parties separated. WE NEED TO SEE IF OPPOSING COUNSEL WILL STIPULATE TO THE SAME PERSON DOING BOTH THE CURRENT VALUATION OF THE BUSINESS AND THE END OF 2008 HISTORICAL VALUATION. This is a critical number, both because it defines what interest the community has in O-land AND because of the following:

- “The fruits of a spouse’s post-separation efforts and skill are his or her separate property” (provided that it was the spouse’s work that increased the value of the asset, as is the case here) [Rutter Fam Law 8:350] throwing out some purely hypothetical figures, if the business increased in value by \$30k during the marriage, TB owns \$15k of its value (1/2 community interest). If it increased another \$50k after separation TB owns all of that \$50k plus her \$15k earned during marriage.
- Lastly, TB is entitled to be paid a fair salary for working, **plus her share of the increase in the value of the business**. This means that we must account for two (2) additional factors: 1) the net profit of the business is actually lower than what is shown on the tax returns because the tax returns do not show TB receiving any wages. [If they were to hire someone else to do TB’s job, they would be getting a salary] AND 2) whatever that salary should have been is not community money, nor is it husband’s separate property money. We get to deduct that off the top of the \$357,000 Opposing Counsel is claiming TB has received. WE NEED TO SEE IF OPPOSING COUNSEL WILL STIPULATE TO HAVING SOMEONE GIVE US A NUMBER THAT WE CAN USE FOR TB’S SALARY. CONNIE HANRETTY-CHURCH IS THE LOCAL VOCATIONAL ASSESSMENT EXPERT. SHE SHOULD BE ABLE TO TELL US WHAT TB’S JOB SHOULD PAY, FOR A RELATIVELY MINIMAL FEE.

So, once we deduct TB’s salary, the amounts she spent on community obligations (unknown as yet) and give her her share of the community’s interest PLUS her separate property interest in O-land, I think that \$357k disappears. The majority of the increase in value occurred **post-separation and belongs to TB**.

Now my question to you, Angel, is how do you want to handle the strategy on explaining all this to Opposing Counsel so she can give her client the bad news and start real negotiations with us? If we lay it all out now, we tip our hand. However, I cannot think of an argument Opposing Counsel could

make that overcomes the facts and law above. So, maybe we don't care if we tip our hand, it's a royal flush anyway.

I would much prefer to stipulate to experts providing the figures we need to plug in to calculate TB's, husband's and the community's interests in O-land, as opposed to paying them to come to court and having to waste time establishing the numbers, instead of crunching them and getting right to the result, agreed?

Thanx, Scot,.....