

Marmer Penner Newsletter

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The Pros and Cons of Joint Valuations

Family law practitioners are more frequently retaining business valuers jointly in an effort to minimize professional costs and conflicts and to create a conducive climate for settlement of troubling financial issues. Joint valuations can be of great assistance in settling family law disputes as long as both lawyers and clients clearly understand the limitations inherent in joint retainers.

Interestingly, some practitioners are resistant

to joint valuations because they feel they can maximize their client's position with their own valuation.

The advantages of a joint valuation are these:

1. the clients costs will necessarily be reduced as only one valuation report is required and the valuator's costs may be shared equally or in some other appropriate proportion;

2. the valuation process involves both litigants and the result is more likely to be accepted by both parties, in other words, the process is less adversarial; and

3. generally, the matter can be dealt with on a more timely basis with much less possibility for conflict about disclosure and relevance issues.

The disadvantage is self-evident: from the lawyer's perspective, a

joint valuation does not afford counsel the opportunity to attempt to negotiate a more favourable settlement; from the valuator's perspective, he or she is vulnerable to challenge by both parties.

In theory, joint valuations should work in every case, especially for clients justifiably concerned about cost. Still, as has often been said, "valuation is an art, not a science" and in complicated situations that call more for the exercise of a valuator's "art", a joint valuation may not be appropriate.

Nevertheless, to ensure that the joint valuation is cost-effective and meaningful, these issues should be carefully explored and agreed in advance:

1. the type and extent of services the valuator is to provide;
2. an estimate of the cost of the services to be

provided and an acknowledgement of who is to be responsible for payment;

3. the timing of the report, especially if an interim report is to be provided;
4. the type of report to be issued; and
5. an agreement as to the binding nature of the report.

Only when these issues have been fully canvassed and agreed upon should the joint valuation proceed.

From everyone's perspective, it is the binding nature of the report that is most essential. For a joint valuation to have any efficacy, in terms of everything from cost to settlement utility, the conclusions reached by the valuator should be binding on the parties. Otherwise the process can spiral out of control with

new reports being commissioned to discredit the joint valuation. Alternatively, the parties could agree on a joint valuation with a limited right to "critique" the report. At that juncture, the valuator could maintain his or her original stand or modify the report if either party's critique has merit, much like an arbitral reconsideration.

To look at it another way, a joint valuation done by a competent and respected business valuator will likely find more favour with a judge than two reports done subsequently, each attempting to undermine the reliability of the joint report.

If the joint valuation is to be binding, then, counsel should take particular care to ensure that their advice is fully informed, canvassing both the positive and negative features, and the client's instructions fully and

specifically expressed. Preferably, all of this should be in writing.

In certain limited circumstances and for greater predictability as to result, however, the parties might agree in advance on the valuation constructs. For example, if the valuator is to base his or her report on a "liquidation" approach instead of "going concern", this should be agreed by the parties in advance. Further, if the parties do not want the valuator to consider certain types of applicable discounts, they could advert to this in the joint retainer letter.

Clearly, issues outside of the valuator's expertise are not appropriate for investigation. For instance, if, in addition to valuing a business, the parties want the valuator to canvass a more "legal" issue, such as excluded property, the valuator may provide the factual underpinnings by way of accounting evidence but

leave the legal conclusion to be asserted later by the lawyers.

On the whole, if the valuator is simply to provide a value for a spouse's business interests, there are no other corollary issues to be considered, the parties' counsel repose confidence in the valuator chosen and there are no fraudulent dealings alleged by one of the parties, a joint valuation will be useful in the majority of family law cases.

In turn, business valutors should be reticent about accepting joint retainers to conduct a valuation if either party has made allegations of misrepresentation such as unreported income or material personal use of corporate assets. Allegations of this kind affect the conduct of the valuator's inquiry and production of the valuation report, and the terms of the joint retainer may not provide the

prudent valuator with sufficient latitude to explore the allegations of impropriety fully. The results of a joint valuation are presented to both lawyers simultaneously and, accordingly, the confirming or dismissing of such an allegation may adversely affect the lawyer's ability to present the case in the manner most favourable to the client.

Increasingly, in addition to business valuations, family lawyers and their clients are jointly retaining valutors in situations calling for a determination of a spouse's income for Child Support Guideline purposes. This, too, can greatly assist resolution of many family law disputes, especially where the spouse owns his or her business, that is, has self-employment "earnings", or has a corporate position of some seniority with attendant perquisites such as incentive plans, "top-hat" or other pensions,

bonuses, stock options and the like.

Suffice to say, in this instance as well, the court will likely place more reliance on a joint valuation than two individual reports, each taking an adversarial position, even though the position might have merit.

Lawyers and their clients should consider on additional factor. The changes to Rule 53, mandating the earlier production and exchange of expert reports, may encourage more parties to consider joint valuations. Essentially, requiring a much greater depth of valuation at an earlier stage of the proceedings so as to comply with the

new 90/60/30 time frame for delivery may make joint valuations that much more appealing if for no other reason than pure cost-effectiveness.

If the parties and counsel can come to terms on a joint valuation, we strongly recommend, from both the valuator's and lawyer's perspective, that the retainer be reduced to writing outlining the nature, scope and limitations, if any, of the engagement to be performed by the valuator, signed by both parties and their lawyers. This will obviously limit the range of subsequent disagreement, if any. We attach a sample joint retainer for your consideration.

To conclude, it is only when the clients and their counsel have weighed the merits of a joint valuation and signed a joint retainer of engagement that everyone--including the valuator--can reasonably be assured that their expectations will be fulfilled

This newsletter is intended to highlight areas where professional assistance may be required. It is not intended to substitute for proper professional advice. The professionals at Marmer Penner will be pleased to assist you with any matters that arise.

SAMPLE JOINT RETAINER**MEMORANDUM OF AGREEMENT****John Smith (“husband”) v. Jane Smith (“wife”)****Date of marriage: September 1, 1984****Date of separation: June 30, 1993**

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1. The parties jointly agree to retain Michael S. Penner of Marmer Penner Inc. (“MPI”) to value the husband’s interests in ABC Stores Ltd. (“ABC”) and 1234567 Ontario Limited (“1234567”) at July 31, 1994. In addition, MPI is to determine all contingent income taxes and notional costs of disposition regarding the husband’s interests in these companies. As well, MPI is to determine the amount of the shareholder advance account and any management bonus or dividend payable as at both July 31, 1993 and July 31, 1994.
 2. The parties agree that the valuations prepared by MPI will be “estimates” only, not “opinions”.
 3. The parties agree that for purposes of this valuation estimate, the two companies are owned this way: 60% by the husband, 30% by the wife and 10% by their children.
 4. The husband will cause ABC to prepare a financial statement as of July 31, 1994.
 5. The husband will also cause 1234567 to prepare a financial statement as of July 31, 1994.
 6. The parties agree that these financial statements will be “Review Engagements” prepared by Chartered Accountants.

7. Before MPI issues the valuation estimates for either of the companies, MPI will arrange to meet with counsel and their respective clients to discuss the findings to date. If both sides agree to the valuation estimate, MPI will do no further work. If not, MPI shall issue a report respecting that company.
8. MPI is empowered to obtain real estate appraisals for all real estate owned by 1234567. Once the real estate appraisals have been obtained, MPI shall release them to each party. The costs of the appraisal shall be paid by MPI as a disbursement and charged to the parties as outlined in paragraph 11 of this agreement.
9. MPI is also to determine the husband's current income, including the income over which he has access and control and the wife's current income.
10. MPI shall deliver the report to counsel simultaneously. Each lawyer may submit particulars of disagreement to MPI within 60 days of their receipt of the report. If MPI receives no submissions, the report will be binding on both parties at that time. If MPI receives a submission, they may consider the point or points raised and revise their report accordingly if they consider it, in their sole discretion, appropriate to do so. If a submission is received by MPI, MPI shall have 30 days to finalize their report from date of receipt of the last submission, at which time, their report will be considered final and binding on the parties.
11. The parties agree to be responsible jointly for MPI's fees, disbursements and GST. MPI requires a retainer of \$_____ before they will begin their review. MPI will provide monthly statements but are not obliged to continue the engagement unless all accounts are in good standing.
12. The parties agree to provide MPI all relevant information they require to undertake this valuation.
13. The parties also agree that MPI is not required to do any forensic investigations of any kind and are entitled to rely on the companies' financial statements as prepared in accordance with paragraphs 4 and 5 of this agreement.
14. The parties will arrange to take out a consent order in Ontario Court (General Division) proceeding #67839--MP--96 confirming the terms of this agreement.

March 15, 1997

John Smith

Counsel

Jane Smith

Counsel

Per: Michael S. Penner, BBA, CA, CBV, ASA, CFE
Marmer Penner Inc.