the amended petition was filed. In short, such filing did not affect the court's subject matter jurisdiction.

CONCLUSION

The Douglas County Separate Juvenile Court erred in sustaining Mikalle's motion to dismiss for lack of subject matter jurisdiction. We reverse, and remand the cause to that court for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

KARLA J. SHUCK, APPELLANT, v. DALE C. SHUCK, APPELLEE.

806 N.W.2d 580

Filed January 25, 2011. No. A-10-170.

1. **Divorce: Property Division: Taxes.** In assigning a value to a business for purposes of dividing the property in an action for dissolution of marriage, a trial court should not consider the tax consequences of the sale of the business unless there is a finding by the court that the sale of the business is reasonably certain to occur in the near future. However, the court may consider such tax consequences if it finds that the property division award will, in effect, force a party to sell his or her business in order to meet the obligations imposed by the court.
2. **Property Division.** An appropriate division of marital property turns on reasonableness as determined by the circumstances of each particular case.
3. **Corporations: Valuation.** To determine the value of a closely held corporation, the trial court may consider the nature of the business, the corporation's fixed and liquid assets at the actual or book value, the corporation's net worth, marketability of the shares, past earnings or losses, and future earning capacity.
4. ____: ____. The method of valuation used for a closely held corporation must have an acceptable basis in fact and principle.
5. **Divorce: Property Division: Valuation: Taxes.** Even if it is theoretically true that a potential purchaser of a business would consider "embedded" income tax consequences as a result of capital gains in arriving at a purchase price, discounting for such in the course of business valuation in the context of a marriage dissolution is appropriate only if there is first a finding that the sale of the business is reasonably certain to occur in the near future or that the property division award will, in effect, force a party to sell his or her business in order to meet the obligations imposed by the court.
6. **Valuation: Taxes.** When using an asset-based valuation method, a reduction in value for the taxable gain on a business when a sale or liquidation to pay court-imposed obligations is not reasonably certain in the near future is speculative and improper.

7. **Property Division: Valuation: Taxes.** It is an abuse of discretion for a trial court to make a reduction in the value of a business for tax liability for embedded depreciation recapture or capital gains where there is no finding by the court that the sale of the business is reasonably certain to occur in the near future or that the property division award will, in effect, force a party to sell his or her business in order to meet the obligations imposed by the court.
8. **Divorce: Property Division: Valuation.** A court may use its discretion in considering valuation reductions for lack of control and lack of marketability in the context of determining whether to make an award under *Grace v. Grace*, 221 Neb. 695, 380 N.W.2d 280 (1986), and if so, the amount thereof.
9. **Divorce: Property Division: Agriculture.** Pursuant to *Grace v. Grace*, 221 Neb. 695, 380 N.W.2d 280 (1986), a "*Grace* award" is a device to fairly and reasonably divide marital estates where the prime asset in contention is one spouse's gifted or inherited stock or property in a family agriculture organization.
10. ____: ____: ____. In the division of marital property, awards under *Grace v. Grace*, 221 Neb. 695, 380 N.W.2d 280 (1986), are not strictly limited to agriculture situations, although such would be the most common.
11. **Divorce: Property Division.** The purpose of property division is to equitably distribute the marital assets between the parties, and the polestar for such distribution is fairness and reasonableness as determined by the facts of each case.

Appeal from the District Court for Adams County: STEPHEN R. ILLINGWORTH, Judge. Affirmed in part, and in part reversed and remanded with directions.

Richard L. Alexander for appellant.

Robert J. Parker, Jr., and Lisa D. Stava, of Seiler & Parker, P.C., L.L.O., for appellee.

SIEVERS, MOORE, and CASSEL, Judges.

SIEVERS, Judge.

Karla J. Shuck appeals from a decree entered by the district court for Adams County dissolving her 35-year marriage to Dale C. Shuck and awarding her alimony in the amount of $2,500 per month for not more than 9 years, property valued at $425,045.72, and attorney fees in the amount of $48,816. Karla's assignments of error stem from the district court's valuation of four Shuck family-owned businesses for purposes of the parties' property settlement. The district court discounted the value of such businesses for taxes, lack of control, and lack of marketability. Karla assigns error to such reductions and alleges that Dale should be required to purchase her shares of stock in two of the businesses at their unadjusted values. She also assigns error to the district court's failure to make a "*Grace* award" to her. See *Grace v. Grace*, 221 Neb. 695, 380 N.W.2d 280 (1986).

We conclude that under the asset-based valuation method applied to three of the four Shuck business entities, it was an abuse of discretion to reduce the value of the businesses by a 40-percent "assumed" rate of built-in capital gains tax, because there was no evidence of an imminent sale of the businesses. As a result, we reverse that aspect of the trial court's valuation of the marital estate and modify the property division as outlined below. In all other aspects, we affirm the decision of the district court.

FACTUAL BACKGROUND

At the time of trial, Dale and Karla had been married for 35 years and were 60 and 56 years old, respectively. The couple met in Fairmont, Minnesota, during the summer of 1973 at their place of employment—Dale was an electrical engineer, and Karla worked for him. The two were married on June 15, 1974, in Minnesota. In 1975, Dale moved to Edgar, Nebraska, to serve as vice president of one of his family's companies, Shuck Drilling Co. (Shuck Drilling), a closely held "C" corporation incorporated by Dale's parents in 1956 and engaged in the business of drilling irrigation wells and selling irrigation equipment. Meanwhile, Karla remained in Minnesota to complete her bachelor's degree in nursing, which she received in 1975. After graduation, Karla joined Dale in Edgar, where housing and other benefits described below were provided for the couple by Shuck Drilling.

After moving to Edgar in 1975, Karla was employed part time at a hospital in Hastings, Nebraska, until she became pregnant with the couple's first child, who was born in 1977; a second child was born in 1979. Karla testified that she did some volunteer nursing between the births of the two children and "did work part-time on and off" after their second child was born, but that she and Dale agreed that her primary responsibility would be taking care of the children and the home. Karla testified that she handled 95 percent of the household duties whether she was working outside of the home or not.

In 1981, Dale and Karla moved to Hastings and bought a house in which Dale currently resides. From 1981 to 1988, Karla worked 25 to 30 hours per week at a Hastings family planning clinic, while Dale continued his work at Shuck Drilling in Edgar. In 1993, Karla also started a business as an independent consultant for a cosmetics company, which she quit a year or two before the parties' separation in 2006. Between 2003 and 2004, Karla also worked for a women's health care program at the Hastings YMCA, earning wages of $18 per hour.

Since 2006, and continuing to the time of trial in June 2009, Karla was working from 18 to 24 hours per week at the hospital in Hastings as a lifestyles management coach, earning $13.32 per hour. Karla testified that she also works on occasion as a registered nurse at the hospital, administering flu shots, earning $18.82 per hour. The trial court's decree provides that Karla will no longer be covered under Dale's health insurance plan after 6 months. Karla testified that she would be eligible for health insurance at the hospital if she worked at least 24 hours per week every week. She further testified that she is unable to work full time there because such full-time status requires additional training which would take her 1 year to complete and that, in any event, the hospital is under a hiring freeze. Karla also testified that she has not explored other better paying or full-time positions and that she would "rather not" work full time at this point in her life. Karla had no known health issues at the time of trial.

Dale, on the other hand, had quadruple bypass surgery in October 2005 and was diagnosed with lupus in 1996. Nevertheless, at the time of trial, Dale was working full time as the vice president of Shuck Drilling, as he had since 1975. Dale testified that the benefits he receives as a result of his position at Shuck Drilling include a vehicle, as well as fuel, maintenance, and insurance for the vehicle, several company credit cards, 3 percent of his annual salary contributed to his IRA, health insurance, disability insurance, and life insurance. Dale's gross earned income at Shuck Drilling in 2007 was

$161,557, compared to Karla's total earnings of $21,210 in that same year. Dale testified that he is in charge of running Shuck Drilling and that his two brothers each run one of the other two family-owned businesses: Lazy T Milliron, Inc. (Lazy T), and Diamond Seven Corporation (Diamond Seven), which were both incorporated by Dale's parents in 1968. One of Dale's brothers runs Lazy T, an "S" corporation engaged primarily in the business of leasing farmland. Dale's other brother runs Diamond Seven, a "C" corporation chiefly involved in farming the land that it owns, as well as leasing and farming land owned by others. In addition, Dale was a partner in Quatros Hombres, also known as Cuatros Hombres Farms (CH Farms), a general partnership originally formed by Dale and his two brothers in 1972 which was mainly engaged in the business of farming others' land. We note that CH Farms merged into Diamond Seven in 1984.

Throughout the course of Dale and Karla's marriage, Dale's parents gave both parties shares of stock in the four Shuck family businesses. Karla testified at trial that if the court made an award in this case, she would prefer that any stock she owned be "set over" to Dale, because she was not aware of the daily operations of the businesses, she had no control over them, and "[t]he stock wouldn't be of value to [her]." The trial court's determination regarding the marital or nonmarital nature of each party's shares of stock is not in dispute and will be discussed in conjunction with the "Trial Court Decree" section below.

In order to determine the value of each of the family-owned businesses for purposes of the property division, the trial court appointed a property evaluator, Bryan Robertson, of a business valuation firm. In order for Robertson to complete his valuations, an additional expert was also court appointed to appraise the farmland and operational real estate associated with each business entity. And, a third appraiser was appointed by the trial court to assess the value of the companies' machinery. Robertson integrated these additional assessments into his valuation report, which is in evidence as exhibit 8. Robertson's report was the sole evidence offered at trial regarding the value of the four Shuck family businesses.

VALUATION EVIDENCE

Robertson's report explains that his valuations applied the "fair market value standard of value" of the separate and combined ownership interests of Lazy T, Diamond Seven, Shuck Drilling, and CH Farms as of September 1, 2007. The report describes "fair market value" as

> the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm[']s length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts.

In order to determine the fair market values of the entities, Robertson considered each of three "widely recognized business valuation methodologies"—the asset-, market-, and income-based approaches. When asked during trial to explain the three methodologies in layman's terms, Robertson testified as follows:

> [T]he asset-based method says that in certain situations, . . . the best representation of the value of the assemblage of assets in this entity, is the net asset value or the asset value less the liabilities of that entity. The balance sheet is the truest and best representation of the value of that entity. In a nutshell, that's what the asset method does.
>
> The market method says that . . . [t]here's external evidence of value in terms of trades of comparably-situated companies. And you go to, for example, . . . the public markets.
>
> And you'd say . . . whatever the company . . . so similarly situated [is] a proxy or representative of the values of your company.
>
> There's also a series of proprietary data bases which tend to have a lot more relevance to smaller, closely-held companies. But there are probably four or five solid proprietary data bases that track transactions in the companies. That is the market method.

> The income method . . . is a technique that says tax-affected cash flow is important for purposes of determining the value of the subject business; and you may manipulate or normalize the cash flows of the company and say, "This is the best — this benefit stream is representative of the value of this company."
>
> You capitalize it at some discount rate. And the result is a proxy for value. And . . . I've done that in this report, both from capitalizing five years of historical performance [and] by . . . building a projection, if you will, and discounting those cash flows back to the valuation date.

Robertson explained that he is obliged to consider each of these three methodologies and that, in his opinion, after doing so, the market method, because of a lack of solid, comparable data, was not directly applicable to any of the four Shuck businesses. Robertson thus calculated values for each entity under the asset-based and income-based methods. Under the income-based method, he actually calculated two different values by utilizing two distinct approaches: (1) capitalized equity cashflow and (2) discounted invested cashflow. Robertson selected between the figures he calculated under the asset-based and income-based methods in order to assign one final value to each entity that, in his opinion, was the most accurate representation of that entity's fair market value.

Robertson's report recites that, for the asset-based method, due to the lack of any indication that the companies or the companies' assets will be liquidated, he applied a "going concern premise of value." The report further states that, "for purposes of applying [this] methodology, the valuation must reflect a conclusion relative to the appropriateness of certain income tax adjustments." Robertson's report explains:

> Accordingly, tax should generally be reflected to the extent of the difference between the adjusted value of the assets and their income tax bases. This is particularly appropriate, we believe, if the underlying premise of value is a liquidation based premise. Where, however, the premise is an ongoing operational "value in use" premise,

> and there is no indication of liquidation, the appropriateness of a tax adjustment is less clear.

Robertson testified at trial that the asset-based valuation method he employed "absolutely" contemplates the sale of the businesses. That a pending sale was a component of Robertson's asset valuation is readily evident from his lengthy report that is in our record. But, as will be discussed below, there was no evidence of the imminent sale of any of the Shuck family businesses or individual business assets—a fact of considerable import.

Nevertheless, Robertson applied a uniform combined 40-percent tax rate for purposes of quantifying the "built-in taxable gain adjustment" for the assets (assessed by the other two appraisers) of the "C" corporations (Diamond Seven and Shuck Drilling) and the "S" corporation (Lazy T). We read Robertson's term "built-in taxable gain adjustment" to be synonymous with a reduction for depreciation recapture or capital gains that would be realized upon the liquidation of the entity's assets. As for CH Farms, Robertson elected not to apply the adjustment for such taxes, because a willing purchaser would be permitted to "'step up'" the basis of the assets inside the partnership without tax, so long as the partnership made a timely election to do so.

With regard to the income-based approach, we begin by emphasizing that the only entity Robertson chose to value using this method is Shuck Drilling. For the other three entities, he utilized the values calculated exclusively under the asset-based method. Robertson's report states that under the income-based method, "the valuation must reflect a conclusion relative to the appropriateness of certain income tax adjustments. For example, the report must consider whether income taxes should be accrued with respect to the earnings and cash flow benefit streams." Indeed, Robertson elected to apply a "Tax Affect [sic] at Corporate Rates" to the "benefit streams" of Shuck Drilling. Without digressing further into the minutiae of Robertson's calculations under this methodology, we read his report to say that the income tax adjustment applied to the value of Shuck Drilling under this approach was with respect to the ordinary annual income tax that would be paid by the corporation in the normal course of business—a different situation than a liquidation of the business.

Moreover, after selecting a value for each entity from the two valuation methods just described, Robertson discounted the value of all four businesses for minority interest and lack of marketability. Robertson testified that a minority discount is a

> discount for lack of control . . . . What that discount attempts to measure is the discount that a buyer of a minority interest in a company will demand for purposes of acquiring an interest that has no independent control . . . .
>
> . . . .
>
> And as a result, you'd be foolish to pay a pro rata share of the underlying assets of the company in order to get in because that's not what it's worth. And that's what that discount attempts to measure and demonstrate.

Robertson thus applied a minority discount in the amount of 25 percent to his valuations of each of the four entities, because Dale and Karla are minority interest holders in all of the entities.

With regard to the marketability adjustment, Robertson testified that marketability is the capacity to liquidate. In that regard, Robertson's report recites:

> We agree with leading commentators that discounts for lack of marketability may be appropriate for purposes of determining fair market value within the framework of the income and asset based approaches. Within the context of the subject interest and the selected approaches, we believe that the marketability adjustment should reflect the lack of liquidity represented by the subject interest and any company specific risk considerations inherent in the subject stock that have not otherwise been reflected in the derivation of pre-discount values. Because we believe a potential purchaser would do so, we have quantified this discount

> within the framework of certain empirical studies and certain qualitative issues.
>
> . . . .
>
> . . . Accordingly, we believe a discount of twenty percent is appropriate to reflect the quantitative and qualitative marketability issues . . . .

Robertson testified that he applied the 25-percent minority and 20-percent marketability adjustments fairly and objectively in this case to each of the four entities and, further, that such discounts are quantitatively appropriate. He also testified that his overall valuation results were consistent, independent, and well reasoned.

We summarize the ultimate valuations from Robertson's report, which were wholly adopted by the trial court in its dissolution decree, as follows:

Business Entity	**Total Shares Outstanding**	**Shares Owned by Karla**	**Shares Owned by Dale**	**Valuation Method Used**	**Final Valuation ($)**	**Value Per Share of Stock ($)**
Shuck Drilling	150	6	25	Income-based	4,424,000	17,697.51
Lazy T	28,900	200	3,627	Asset-based	5,671,000	117.73
Diamond Seven	22,070	0	6,206	Asset-based	3,404,000	92.54
CH Farms	3	0	1	Asset-based	399,000	79,869.60

In order to simplify matters for the reader, we emphasize that the only challenge raised by Karla to the data in our above table is that the final valuations include deductions by Robertson for lack of control, lack of marketability, and "embedded capital gains taxes." Because this is the fundamental posture of the appeal, we can focus on such deductions, without burying the reader in the extensive details of Robertson's valuations found in his nearly 200-page, single-spaced report—including footnotes and appendices.

TRIAL COURT DECREE

Karla petitioned the district court for Adams County for dissolution of her marriage to Dale in a complaint filed on July 10, 2006. After a trial dealing with alimony and property division, the court entered a decree on January 21, 2010. In its decree, the trial court determined that alimony of $2,500 per month to Karla for no more than 9 years was appropriate, due to the economic disparity of the parties and relatively long duration of the marriage. The trial court reasoned:

> In nine years [Karla] can go on Social Security and her need for an alimony award, considering her other assets, will not be necessary. The $2,500.00 award takes into consideration [Karla's] expenses of $3,800.00 per month and $1,000.00 per month in part time income. [Karla] could easily make up the difference by working a forty hour week. She also has several investment accounts she is awarded in this Decree.

Neither party contests the amount or duration of Karla's alimony award on appeal, but the award is relevant for the property division made by the trial court.

The trial court found that Robertson's valuations of the Shuck family businesses were fair and reasonable and based on sound logic. The court thus used the valuations from Robertson's report in determining the property division, without deviation, and no other valuation evidence was offered. The trial court's findings with regard to the valuation of the Shuck family businesses and Dale's and Karla's individual shares of stock, as well as the marital-versus-nonmarital nature of the stock, are as follows:

Shuck Drilling.

At the time of trial, Dale owned 25 shares of Shuck Drilling stock, 14 of which he owned before marrying Karla and 11 of which were given to him during the marriage. Karla owned six shares of Shuck Drilling stock that were given to her during the marriage. The court thus ordered Dale's 25 shares of Shuck Drilling stock to be set aside as nonmarital property, and ordered Dale to purchase Karla's 6 nonmarital shares for $17,697.51 per share—the value calculated by Robertson—for a total amount of $106,185.

CH Farms.

Next, the trial court discussed Dale's interest in CH Farms, a general partnership in which Dale and his two brothers each own a one-third interest. Although CH Farms merged with Diamond Seven on January 1, 1984, it still maintained some assets at the time of trial, which is why Robertson calculated the value of each share of CH Farms stock (under the asset-based approach) at $79,869.60. The court found that Dale acquired his interest in CH Farms before his marriage to Karla and that no marital funds were contributed to the partnership. Thus, the court set aside Dale's ownership interest in CH Farms as nonmarital property, a finding that Karla does not contest.

Diamond Seven.

Dale received a total of 3,320 shares of Diamond Seven stock as a gift from his parents prior to marrying Karla. After their marriage, Dale's parents also gave Dale and Karla 500 shares apiece. Then, on December 12, 1976, Dale was given an additional 616 shares and Karla was given an additional 300 shares. The trial court additionally found that on August 25, 1983, Karla transferred her 800 shares to Dale, and those shares were thus set aside as nonmarital property, a result that Karla does not dispute.

On May 15, 1985, Dale's uncle sold 187 shares of Diamond Seven stock to Dale for $12,452.33, and Dale admitted that he used marital funds to make that purchase. The trial court thus found that 187 shares of Diamond Seven stock were a marital asset worth $17,305, as set forth in Robertson's report, and awarded them to Dale as marital property in the property division, as Karla requested.

Lazy T.

Dale owned 4,667 shares of Lazy T stock prior to marrying Karla. In 1978, Dale and Karla each received a gift from Dale's father of 200 shares of Lazy T stock. The court found that Karla's 200 nonmarital shares were worth $117.73 per share, as calculated by Robertson in his report. All of Dale's shares were found to be nonmarital because they were given to him before or during the marriage. Dale was thus ordered to purchase Karla's 200 Lazy T shares of stock for a total value of $23,546. Before proceeding further, we emphasize that in this appeal, there is no claim that the trial court incorrectly determined what was marital property and what was nonmarital property.

Grace *Award.*

The trial court's decree recites that "[t]he parties are worlds apart on the value of the marital estate"—Karla valued the estate at $2,767,893.27, and Dale valued it at $582,067. Because the majority of Dale's shares of stock in the Shuck family businesses were found to be gifts and thus not part of the marital estate, the court valued the marital estate at $590,629.44. The decree states that "[Karla], anticipating this [final valuation], argues that this is a perfect case for a Grace award." The court went on to compare the present facts to those in *Grace v. Grace*, 221 Neb. 695, 380 N.W.2d 280 (1986), and determined that what has come to be commonly referenced as a "*Grace* award" was not required. In so finding, the trial court's decree explains:

> A Grace award is basically a cash award as compensation for the inadequacy of the mar[it]al estate. The Court of Appeals has described a Grace award "as a device to fairly and reasonably divide marital estates where the prime asset in contention is one spouse's gifted or inherited stock or property in a family agriculture organization." Walker v Walker, 9 Neb. App. 839, 843 (2001). This case does not meet the criteria required for a Grace award. In contrast to Mr. Grace, [Dale] had average income from Shuck Drilling alone for the ten year period 1997 to 2007 of $86,763.00. This was not like Mr. Grace's annual salary of $18,000.00. In Grace the parties had not built much of a marital estate. The parties in this case have built a marital estate of almost $600,000.00. In this case the parties own a debt free home valued at $170,000.00 and have significant investments and IRA accounts. In the typical Grace award the wife was a stay at home mother. In this case [Karla] has an R.N. Degree and basically has worked as she wanted.

The trial court noted that even without a *Grace* award, Karla will be receiving property and cash worth $425,045.72, as well as alimony payments in the amount of $30,000 per year. Moreover, the trial court ordered Dale to pay all of Karla's attorney fees and most of her trial-related expenses. As a result, the court found that a *Grace* award was inappropriate in this case.

Final Decree.

The trial court's final determination with regard to the property division was to award Karla a net marital estate of $273,511.45 and Dale a net marital estate of $317,117.99. The parties stipulated prior to trial that the IRA accounts in evidence as exhibits 126 and 127 are of equal value ($6,521.68) and that each party shall receive an account. The IRA accounts are not included in the above property division. In addition, the court ordered Dale to purchase Karla's nonmarital shares of stock in Shuck Drilling and Lazy T for the following amounts, and to make an equalization payment to her as follows:

Shuck Drilling:	$106,185.00
Lazy T . . . :	$ 23,546.00
Plus Equalization Payment:	$ 21,803.27
Total due [to Karla]:	$151,534.27

Therefore, Karla's net marital estate plus the cash payment from Dale equals $425,045.72. Karla timely appeals.

ASSIGNMENTS OF ERROR

Karla alleges, restated, that the trial court erred in (1) reducing the value of the four Shuck family businesses due to the expectancy of taxes, lack of control, and lack of marketability, because there was no evidence any of the businesses were going to be sold; (2) not requiring Dale to purchase Karla's interest in two of the family-owned businesses at their preadjustment value; and (3) failing to award Karla a *Grace* award.

STANDARD OF REVIEW

The division of property is a matter entrusted to the discretion of the trial judge, which will be reviewed de novo on the record and will be affirmed in the absence of an abuse of discretion. *Schuman v. Schuman*, 265 Neb. 459, 658 N.W.2d 30 (2003).

ANALYSIS

Were Reductions in Value of Businesses for Expectancy of Taxes, Lack of Control, and Lack of Marketability Improper?

[1] As noted earlier, Robertson, a court-appointed expert, provided the only valuation evidence for the Shuck family businesses. Karla, however, disagrees with Robertson's reduction in those values that were wholly adopted by the trial court, by way of discounts for taxes, lack of control, and lack of marketability. Her argument is premised on the fact that there is no evidence the businesses are going to be sold. In support of her contention that the reduction for income taxes was improper, Karla cites *Schuman*, 265 Neb. at 465-66, 658 N.W.2d at 36-37, where the Supreme Court held:

> [I]n assigning a value to a business for purposes of dividing the property in an action for dissolution of marriage, a trial court should not consider the tax consequences of the sale of the business unless there is a finding by the court that the sale of the business is reasonably certain to occur in the near future. However, the court may consider such tax consequences if it finds that the property division award will, in effect, force a party to sell his or her business in order to meet the obligations imposed by the court.

With respect to her assertion that the lack of control and lack of marketability reductions were also improper without evidence of an imminent sale of the businesses, Karla's brief highlights the following language from *Walker v. Walker*, 9 Neb. App. 834, 849, 622 N.W.2d 410, 420 (2001):

> [F]or purposes of the *Grace* award here, we do not apply the 25-percent discount applied by the trial judge. Instead, we follow the teachings of *Grace* that minority ownership interest and lack of control [are] simply a consideration. We have considered the evidence from the certified public accountants that a discount is appropriate in valuation, but on the other hand, the evidence is clear that the [appellant

> and his three] brothers are committed to the continuation of the business and that control is not a problem as they manage by agreement. In short, [the brothers' farming operation] is a viable business run by knowledgeable people who are family, and there is no evidence that the operation will not continue.

[2-4] Under Nebraska jurisprudence, an appropriate division of marital property turns on reasonableness as determined by the circumstances of each particular case. *Else v. Else*, 5 Neb. App. 319, 558 N.W.2d 594 (1997). To determine the value of a closely held corporation, the trial court may consider the nature of the business, the corporation's fixed and liquid assets at the actual or book value, the corporation's net worth, marketability of the shares, past earnings or losses, and future earning capacity. *Id*. The method of valuation used for a closely held corporation must have an acceptable basis in fact and principle. *Id.* Clearly, Robertson's valuations of the four Shuck family businesses incorporate these basic guiding principles.

We begin by discussing the reduction in the Shuck family business entities for expectancy of taxes. Significantly, there was no finding by the trial court, and no evidence in the record, that a sale of any of such entities was "reasonably certain to occur in the near future." See *Schuman v. Schuman*, 265 Neb. 459, 466, 658 N.W.2d 30, 36-37 (2003). Nonetheless, Robertson testified that sale is "absolutely" contemplated under his asset-based valuation method. When Dale was asked on direct examination whether he had any intention in his lifetime of actively selling his businesses, he testified that he would consider selling Shuck Drilling if he could find a buyer, but that "[i]t's just not the kind of business you can sell . . . ." When asked on cross-examination whether he planned on "selling anything" in Lazy T, Diamond Seven, Shuck Drilling, or CH Farms, Dale testified that he is "[n]ot planning on it."

[5] Robertson's report states that income tax deductions were applied under both the asset-based and income-based methods. For the asset-based method, Robertson applied a uniform combined 40-percent "assumed" tax rate for purposes of quantifying the "built-in taxable gain adjustment," i.e.,

the depreciation recapture or capital gains to be recognized upon the sale of the assets of the entity, as described above. In his brief, Dale argues in support of the discount for capital gains:

> [T]his is not [the] same type of tax consequence that the Nebraska Supreme Court has prohibited courts from considering when valuing assets in a divorce, because it is not a tax consequence that Dale would incur upon sale of his ownership interest—rather, it is a tax liability the <u>purchaser</u> of the entity would acquire, and thus it affects the price a purchaser would pay for shares of the entity.

Brief for appellee at 35. Even if it is theoretically true that a potential purchaser would consider "embedded" income tax consequences as a result of capital gains in arriving at a purchase price to offer for any of the businesses, discounting for such in the course of business valuation in the context of a marriage dissolution is appropriate only in limited circumstances, as we discuss shortly.

[6,7] We understand Robertson's report and trial testimony to say that the 40-percent "assumed" tax rate that he used under the asset-based valuation method contemplates depreciation recapture or capital gains "embedded" in the assets of each entity, which would be realized upon the sale of such assets. We agree that a purchaser of any or all of the Shuck family businesses would succeed to the Shuck family's basis in the entity's assets, and the purchaser would thereby have a potential future depreciation recapture or capital gains, which logically would affect what a purchaser would pay to acquire the business. However, these notions are relevant only in the context of this dissolution action in the two circumstances delineated by the decision in *Schuman, supra*: a reasonably certain sale of the business in the near future or a need to liquidate to pay Dale's obligations to Karla under the decree. However, Dale testified that he is not planning on selling anything in Lazy T, Diamond Seven, Shuck Drilling, or CH Farms, and Karla introduced no contrary evidence. Moreover, Dale's financial position after the divorce is not such that he will need to liquidate in order to pay the approximately $150,000 that the trial court ordered that he pay to

Karla. Therefore, after our de novo review, we conclude that a discount in value for such potential capital gains taxation is not appropriate under the facts of this case, given the clear directive of *Schuman v. Schuman*, 265 Neb. 459, 658 N.W.2d 30 (2003), as to when such consequences are appropriate in setting the value of businesses in the context of property division in a dissolution action. In short, when using an asset-based valuation method, a reduction in value for the taxable gain on a business when a sale or liquidation to pay court-imposed obligations is not reasonably certain in the near future is speculative and improper. See, *id.*; *Mathew v. Palmer*, 8 Neb. App. 128, 589 N.W.2d 343 (1999). Consequently, the trial court abused its discretion in reducing the values of the Shuck family businesses for "embedded" depreciation recapture or capital gains, absent evidence of an imminent sale of the entities or the entities' assets.

With respect to the income-based method of valuation, Robertson elected to apply a corporate rate of tax to the "benefit streams" (income) of Shuck Drilling. Under this method, the resulting reduction in value relates to the business' required payment of annual ordinary income taxes, not the built-in depreciation recapture or capital gains that would be realized and taxed upon the sale of the business' assets that we found to be an inappropriate valuation consideration above. Thus, the deduction for annual income taxes under the income-based method—applied only to the valuation of Shuck Drilling—was not a "tax consequence . . . of the sale of the business" and was proper. See *Schuman*, 265 Neb. at 465, 658 N.W.2d at 36.

[8] We now address the additional reductions in the value of the Shuck business entities for lack of control and lack of marketability. We have quoted the portion of *Walker v. Walker*, 9 Neb. App. 834, 622 N.W.2d 410 (2001), that Karla relies on in arguing that such reductions were improper in this case. Although we found that the 25-percent discount applied by the trial court was incorrect in *Walker*, in that case, we were engaged in valuing the husband's nonmarital property for purposes of determining the extent of a *Grace* award. In this case, we are reviewing the district court's valuation of the

marital estate, and the extent to which discounts are supportable in valuing family businesses—portions of which were marital property and portions of which were Dale's and Karla's separate nonmarital property. In addition to this distinction, in *Walker*, we "considered the evidence from the certified public accountants that a discount is appropriate in valuation"; however, "for purposes of the *Grace* award . . . we [did] not apply the 25-percent discount applied by the trial judge. Instead, we follow[ed] the teachings of *Grace* that minority ownership interest and lack of control [are] simply a consideration." 9 Neb. App. at 849, 622 N.W.2d at 420. Therefore, the holding of *Walker* is not that reductions for lack of control and marketability are always improper absent evidence of the imminent sale of a business, as Karla suggests. Rather, a court may use its discretion in considering such reductions in the context of determining whether to make a *Grace* award, and if so, the amount thereof.

Turning to the present facts, we find that the reduction for lack of control was acceptable in determining the fair market value of Dale's and Karla's ownership interests in the entities, because it is undisputed that neither is a majority shareholder in any of the Shuck family businesses. And, with regard to the lack of marketability adjustment, such was also appropriate in calculating fair market value, because the stock in each of the entities is not publicly traded and the other stock is held by other Shuck family members—making the stock less appealing to an outsider purchaser. As a result, Dale and Karla have severely limited ability to liquidate their shares—or to sell assets of the businesses.

Therefore, on our de novo review, we find that the 40-percent "assumed" income taxes deducted from the value of the entities under the asset-based method were an abuse of discretion by the trial court. However, under the income-based method, we find that the reduction in the to-be-capitalized income stream for annual ordinary income taxes was not speculative and thus correctly applied to the value of Shuck Drilling—because that entity was the only one for which the income-based valuation method was utilized. As for the reductions in the overall value of each entity for lack of control and lack of marketability, we find such adjustments were not an abuse of the trial court's discretion.

Should Dale Have Been Required to Purchase Karla's Ownership Interest at Preadjustment Value?

Next, Karla alleges that Dale should have been ordered to purchase her shares of stock in Shuck Drilling and Lazy T at their unadjusted values. As explained above, the trial court did not abuse its discretion in applying Robertson's income-based valuation of Shuck Drilling, which includes the discounts for lack of control and lack of marketability. With regard to the valuation of Lazy T, we find the trial court did abuse its discretion in making a reduction in value for tax liability for embedded depreciation recapture or capital gains. Thus, we reverse that portion of the trial court's ruling.

As a result, we find that Dale must purchase Karla's shares of stock in Lazy T, not at their unadjusted value, but, rather, at their value without the 40-percent income tax reduction. In order to determine the effect of such modification, we look to Robertson's report, exhibit 8, and add the "real and personal property adjustment" and "growing crops adjustment," described above, back into Lazy T's "balance sheet." After doing so, we find that Lazy T's total "indicated shareholder net equity" is $8,168,173, with each individual share of stock (after a discount for lack of control and lack of marketability) worth $169.60 (rounded). Karla's 200 shares of Lazy T stock, which the trial court ordered Dale to purchase for $23,546, are thus worth $33,920. As a result, Dale is ordered to purchase Karla's 200 shares of Lazy T stock for $33,920.

And, because 187 shares of Diamond Seven stock were deemed marital property by the trial court and assigned to Dale in the property division, it is necessary for us to revalue those shares after taking out the improper reduction for embedded income tax. We find that the overall value of Diamond Seven without the improper tax deduction is $5,411,688—each individual share of Diamond Seven stock is thus worth $147.12 (rounded). As a result, Dale and Karla's 187 marital shares are worth a total of $27,511.44, not $17,305, as determined by Robertson and adopted and used by the trial court. The difference in those values is $10,206.44, and an equal division of that additional value results in an increase in Dale's equalization payment to Karla—from $21,803.27 to $26,906 (rounded).

Should Karla Have Received Grace *Award?*

[9,10] Karla's final assignment of error is that the trial court should have awarded her a *Grace* award as first set out in *Grace v. Grace*, 221 Neb. 695, 380 N.W.2d 280 (1986). We discussed the concept of a *Grace* award at length in our decision in *Walker v. Walker*, 9 Neb. App. 834, 622 N.W.2d 410 (2001). In *Walker*, we described a *Grace* award as "a device to fairly and reasonably divide marital estates where the prime asset in contention is one spouse's gifted or inherited stock or property in a family agriculture organization." 9 Neb. App. at 843, 622 N.W.2d at 417. However, to the extent that our *Walker* decision implies that *Grace* awards are limited to property division in dissolution cases involving only agricultural entities, we clarify that *Grace* awards are not strictly limited to agriculture situations, although such would be the most common. In that vein, in *Medlock v. Medlock*, 263 Neb. 666, 679, 642 N.W.2d 113, 125-26 (2002), the Supreme Court used the following description of its decision in *Grace, supra*: "[W]e ordered a cash award as compensation for the inadequacy of the marital estate." And, in *Charron v. Charron*, 16 Neb. App. 724, 730, 751 N.W.2d 645, 650 (2008), we further explained:

> The inadequacy of the marital estate in cases of this nature involves a typical factual pattern where the wife devotes herself to running the household and caring for the children and where the husband's labors are devoted to a family farming or ranching corporation in which he owns stock, usually owned prior to the marriage or gifted solely to him during the marriage. Hence, under our cases, the stock is treated as the husband's separate property. Additionally, in the typical situation where the issue arises, the husband receives a rather nominal cash salary in exchange for his labor devoted to his family's farm or ranch but also receives such things as housing,

> utilities, vehicles, fuel, beef, use of the corporation's land for his private livestock herd, et cetera. As a result of the low cash earnings of the husband, the couple often has an inconsequential marital estate. This typical factual backdrop helps explain the Supreme Court's reference in *Medlock, supra*, to a *Grace* award as compensation for the inadequacy of the marital estate.

[11] Here, the trial court found considerable factual dissimilarities from *Grace, supra*, and *Walker, supra*, and thus denied Karla's call for a *Grace* award. The court's decree recites:

> This case does not meet the criteria required for a Grace award. In contrast to Mr. Grace, [Dale] had average income from Shuck Drilling alone for the ten year period 1997 to 2007 of $86,763.00. This was not like Mr. Grace's annual salary of $18,000.00. In Grace the parties had not built much of a marital estate. The parties in this case have built a marital estate of almost $600,000.00. In this case the parties own a debt free home valued at $170,000.00 and have significant investments and IRA accounts. In the typical Grace award the wife was a stay at home mother. In this case [Karla] has an R.N. Degree and basically has worked as she wanted.

We review the trial court's denial of a *Grace* award de novo on the record for an abuse of discretion. In doing so, we note that the purpose of property division is to equitably distribute the marital assets between the parties, and the polestar for such distribution is fairness and reasonableness as determined by the facts of each case. *Charron, supra*. See Neb. Rev. Stat. § 42-365 (Reissue 2008).

We find that this case is distinguishable from *Grace v. Grace*, 221 Neb. 695, 380 N.W.2d 280 (1986), and its progeny in the sense that the parties here have a substantial net marital estate valued by the trial court at $590,629.44. The court equally divided the marital estate; awarded Karla alimony in the amount of $30,000 annually for no more than 9 years, potentially resulting in an additional $270,000 to Karla; plus, awarded her all her attorney fees and most of her expenses. In addition, the court ordered Dale to purchase Karla's shares of stock in Shuck Drilling and Lazy T, resulting in another payment of roughly $130,000 to Karla—which we have increased to $140,105. The overriding concern is whether said division is fair and reasonable. See *Charron v. Charron*, 16 Neb. App. 724, 751 N.W.2d 645 (2008). On de novo review, we find that the trial court's division, as we have modified it, is fair and reasonable, and thus the trial court did not abuse its discretion in declining to make a *Grace* award to Karla.

After revaluing Karla's 200 nonmarital shares of Lazy T stock and the 187 marital shares of Diamond Seven stock, Karla's award is increased and Dale is required to pay her the following amounts:

Shuck Drilling:	$106,185
Lazy T:	33,920
Plus equalization payment:	26,906
Total due to Karla:	$167,011

In sum, the increase in the total amount due to Karla from Dale is $15,476.73. Even without this increase, we do not see this as an appropriate case for a *Grace* award due to the parties' substantial marital estate. Our recalculation of the marital estate at $600,835.88 and the resulting increase in Karla's property settlement only solidify our position that a *Grace* award is not warranted. This assignment of error is thus without merit.

CONCLUSION

Finding merit to the portion of Karla's assignment of error regarding a reduction in the value of the Shuck business entities for embedded income tax liability under the asset-based valuation method despite a complete lack of evidence such assets or entities would be sold in the near future, we reverse that aspect of the district court's decision. As a result, the property settlement between the parties shall be modified in accordance with the findings fully detailed above, and we remand the cause to the district court to make such modification in the decree. In all other respects, we affirm the decision of the district court.

Affirmed in part, and in part reversed and remanded with directions.