

Consider the following scenario. In the context of a divorce case, the central asset is a small business owned and operated by the husband. The husband, though testifying truthfully, woefully underestimates the value of the business in his testimony. Because of this, the wife is concerned the asset may be undervalued, causing a windfall to the husband. Given the relatively small amounts involved, her attorney recommends that she not hire an expert to calculate the value of the business. How can the wife ensure the court hears more than her husband's deflated version of value?

This article will consider whether the wife of a business owner can, in the context of valuation of marital assets, provide lay testimony as to the value of the business on the basis of specialized information. Under FRE 701 the owner of a business can do so without being qualified as an expert. However, given the competing interests in a divorce proceeding, unless the amount in question is sufficient to justify the use of an expert, a spouse may be left with an owner's decreased value judgment and be without recourse to present evidence to the court. Is there a way in which she could testify?

#### A. Opinion Testimony by a Business Owner

Opinion testimony, as contrasted with expert testimony, is limited to opinions or inferences which are rationally based on the perception of the witness, helpful to a clear understanding of the testimony or determination of a fact at issue, and not based on scientific or technical knowledge. Fed. R. Evid. 701. Where a witness has personal knowledge to support the testimony, the modern trend favors admission without qualification as an expert. *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1163 (3d Cir. 1993) (quoting *Teen-Ed, Inc. v. Kimball Int'l, Inc.*, 620 F.2d 399, 403 (3d Cir. 1980)).

In the context of business valuation, opinion testimony of a business owner is frequently admissible on the basis that a party has particularized knowledge by virtue of the position with the business. Fed. R. Evid. 701 (advisory committee notes to the 2000 amends.); *Lightning Lube*, 4 F.3d at 1175. Because an owner is familiar with the details of the business, he or she may have sufficient knowledge to make rationally-based inferences regarding the overall value. *Id.* This particularized knowledge exception is distinct from "specialized knowledge" which requires qualification as an expert under Fed. R. Evid. 702. Courts have not extensively considered the distinction between particularized and specialized knowledge, and therefore, it may be difficult to predict whether, in a given scenario, a court would allow a lay witness to testify. 3 Handbook of Fed. Evid. § 701.1 n.6 (6th ed. 2010) ("No explanation is provided as to how "particularized knowledge" differs from "specialized knowledge" which Rule 701(c) requires be presented solely by a properly qualified expert witness.").

If an owner is permitted to testify regarding the value or profits of a business, because it is testimony as a lay witness, the subject matter is still limited to those matters the witness has personal knowledge of. *See, e.g., Laymon v. Bombardier Trans. (Holdings) USA, Inc.*, 656 F. Supp. 2d 540, 546 (W.D. Pa. 2009) (limiting the testimony of a corporate officer to the particular program he was in charge of monitoring). If an owner cannot substantiate a factual basis for his or her opinion, the testimony is not likely to be allowed. "While it is true that an owner without further qualification may testify as to value, the owner must have a basis for his valuation." *Rich v. Eastman Kodak Co.*, 443 F. Supp. 32, 39 (E.D. Mo. 1977), *aff'd*, 583 F.2d 435 (8th Cir. 1978) (citing *Klapmeier v. Telecheck Int'l, Inc.*, 482 F.2d 247 (8th Cir. 1973)).

In justifying the admission of opinion testimony, courts have focused on the personal participation of a witness in the day-to-day affairs of the business. *Autoforge, Inc. v. Am. Axle & Mfg., Inc.*, No. 02-01265, 2008 WL 65603, at \*6 (W.D. Pa. Jan. 4, 2008). One court, applying the particularized knowledge basis for testimony in the context a witness assessing damages, stated that “a lay damages witness may offer a damages report only if he has personal knowledge of the components and materials of the report; and either (1) he helped prepare the report based on personal knowledge; or (2) the contents of the report are admissible themselves.” *Autoforge*, 2008 WL 65603, at \*7 (quoting *K.W. Plastics v. U.S. Can Co.*, 131 F. Supp. 2d 1265, 1273 (M.D. Ala. 2001)). Under *Autoforge*, business owners may present opinion testimony to the extent they are based on facts within the particularized knowledge gained from that position

#### B. Testimony by Owner in Context of Divorce Proceeding

Frequently courts applying FRE 701 have allowed opinion testimony regarding the valuation of a business in divorce proceedings where both parties are owners of the business, resulting in an evaluation of the competing values. See *In re Marriage of Wood*, 262 S.W.3d 267, 275 (Mo. Ct. App. 2008) (valuing a shared business at amount equal to wife’s testimony where both parties had not hired experts and given conflicting opinion testimony as to its value). Where only one party is an owner of the business, courts have not prohibited the owner from giving opinion testimony. See, e.g., *Foley v. Foley*, 537 N.E.2d 158 (Mass. App. Ct. 1989). In *Foley*, the court allowed a husband to give opinion testimony, along with testimony of an expert witness. In the context of a divorce case, it is apparent that a business owner’s ability to testify remains consistent, so long as the requirements of FRE 701 are met.

#### C. Testimony by Spouse Regarding Value of Business

A more difficult question of valuation is how a non-owning spouse can contest proffered testimony regarding the valuation of a business for purposes of division of assets, without utilizing a costly expert to provide testimony. Some courts have found that in this instance, a spouse may be able to provide opinion testimony regarding the value of the business, if he or she meets the requirements of Fed. R. Evid. 701. In *Laprade v. Laprade*, 784 S.W.2d 490 (Ct. App. Tex. 1990), a court allowed a wife to testify regarding the value of the business despite the fact that she did not have an ownership interest in the business. In doing so, the court relied upon the extent of the wife’s involvement in both the day-to-day operations, and the long-term dealings.

[W]e note that the evidence shows appellee had knowledge of the business accounts receivable; she ran the business for five years; she knew what was paid for each of their trucks; and she knew the value of other smaller, similar businesses for sale. If a witness has personal knowledge of facts from which an opinion is derived, a rational connection exists between the opinion and the facts, and such is helpful, then it is within the court’s discretion to allow the lay person to express an opinion on the value.... Furthermore, it is largely discretionary with the judge as to whether a witness is qualified to testify as to market value, and the admission of such testimony should not be disturbed on appeal unless a clear abuse of discretion is shown.

*Id.* at 492 (citing *Soden v. Freightliner Corp.*, 714 F.2d 498, 511 (5th Cir.1983)). The central point of the court’s reasoning in *Laprade* was that if a spouse was able to testify regarding a business, the basis was not her status as wife of the owner, but rather, the particularized knowledge she had developed during her involvement with the business. This reasoning is consistent with Rule 701’s basis for allowing business owner testimony.

Other courts have come to similar conclusions where a spouse has had prior involvement in a business. In *Lathrop v. Lathrop*, 509 P.2d 34 (Ct. App. Or. 1973), a court allowed an owner's wife to testify regarding the value of a business in a divorce case because of her prior experience with the business.

Plaintiff testified that this business was worth at least \$30,500, the purchase price paid by the parties in 1968. Defendant, at trial and on appeal, objected to this testimony contending that plaintiff was not competent to give a valuation for the business. Defendant asserted that the business had a net worth of only \$4,396. Defendant's objection to plaintiff's valuation is not well taken. Plaintiff worked in the contracting business from 1968 until June 1971. During this time she worked on the company books. Although defendant claimed major losses to the business, these had occurred before plaintiff left the company. Plaintiff was competent to give her opinion of the worth of the business.

*Id.* at 35. Thus while a spouse may not benefit from the presumption of FRE 701; substantively, there may still be a basis for opinion testimony. If, however, the spouse has not been involved in the day-to-day operations of the business, a court is not likely to admit opinion testimony regarding the value of the business.

Admissibility may turn on the characterization of the spouse's participation, or lack thereof, in the business activities. Regardless, the broad nature of FRE 701 may lend itself to arguments that a spouse's knowledge of the business, even when through her husband, may be sufficient to provide a basis for opinion testimony. Owners who rely on the prepared statements or reports of others with regard to the activities of a business, have been allowed to testify regarding the value, even when it is directly based off of those reports. *See, e.g., Lightning Lube*, 4 F.3d at 1175 (“[G]iven Venuto’s knowledge and participation in the day-to-day affairs of his business, his partial reliance on the report, even if prepared by an outsider, does not render his testimony beyond the scope of Rule 701.”). While learning about details of the business secondhand may not alone be sufficient to support opinion testimony by an owner's spouse; should a spouse have a relatively minor involvement in the business, such facts may be persuasive. The more involvement a party has, and the more informed they are about the ongoing business activities, the more likely a court is to interpret FRE 701 as allowing the party's opinion testimony regarding value.

### Conclusion

While the Federal Rules of Evidence make particular exception for owners of businesses, no such presumption is extended to a non-owner spouse. However, because the exception is based on the general principles of FRE 701, if a party can demonstrate sufficient personal knowledge to support opinion testimony, there is no absolute barrier to prevent testimony. Parties seeking such admission will be best served by carefully considering all types of involvement, and limiting the scope of their testimony such that it provides the best chance of admission and diminishing the likelihood of an adverse windfall.

**JAMES WELCH**  
McNees Summer Associate - 2011