2017 IL App (5th) 160192-U

NO. 5-16-0192

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

MARK R. SCHEWE, DIANE M. KELLY, and MARSHA S. MEYER, Plaintiffs and Counterdefendants-Appellants and Cross-Appellees, v. SCHEWE FARMS, L.L.C., VIRGINIA L. SCHEWE, WILLIAM M. SCHEWE, and LORA M. KENNEDY, Defendants and Counterplaintiffs-Appellees and Cross-Appellants.	)	Appeal from the Circuit Court of Bond County. No. 12-CH-38 Honorable John Knight, Judge, presiding.

JUSTICE OVERSTREET delivered the judgment of the court.
Presiding Justice Moore and Justice Welch concurred in the judgment.

ORDER

¶ 1 *Held*: In an action brought to determine the fair value of distributional interests in a limited liability company, the circuit court incorrectly held that the dissociating members of the company wrongfully dissociated from the company; the trial court's findings concerning the fair value of the dissociating members' distributional interest in the company were not against the manifest weight of the evidence; the trial court's terms for the company's statutory obligation to purchase the distributional interests were not an abuse of discretion; the circuit court incorrectly *sua sponte* took judicial notice of interest rates after the close of the evidence; and the record supports the trial court's finding that the actions of the remaining members of the company were not arbitrary, vexatious, or in bad faith.

¶ 2 This case involves the voluntary dissociation by three members from a family owned and managed limited liability company, Schewe Farms, L.L.C. (Schewe Farms). The members of the company who voluntarily dissociated from the company are the plaintiffs, Mark R. Schewe, Diane M. Kelly, and Marsha S. Meyer (collectively referred to as the Dissociating Members). The remaining members of the company after the dissociation are the defendants, Virginia L. Schewe, William M. Schewe, and Lora M. Kennedy (collectively referred as the Remaining Members). The Dissociating Members brought an action for the circuit court to determine, among other issues, the fair value of their distributional interests in the company.

¶ 3 After a bench trial, the circuit court entered a judgment that resolved the parties' disputed issues, including: (1) a determination that the dissociation was "wrongful," which entitled Schewe Farms and the Remaining Members to collect damages against the Dissociating Members caused by their wrongful dissociation; (2) a determination of the fair value of the Dissociating Members' interests in the company at which the company must buy the Dissociating Members' interests; (3) a determination of the terms of the company's purchase of their interest, including a prejudgment interest rate; and (4) a determination that the Dissociating Members were not entitled to an award for attorney fees and expenses because the actions of Schewe Farms and the Remaining Members were not arbitrary, vexations, or in bad faith.

¶ 4 The Dissociating Members appeal the circuit court's judgment and take issue with all of these determinations made by the circuit court. Schewe Farms and the Remaining Members cross-appeal and take issue with the circuit court's calculation of the fair value

of the Dissociating Members' interests and the circuit court's award for damages stemming from its finding that the dissociation was wrongful. For the following reasons, we affirm in part, reverse in part, and remand for further proceedings consistent with this decision.

¶ 5 BACKGROUND

¶ 6 Virginia and her late husband, Maurice, organized Schewe Farms in December 1999. The initial assets of the company were 750 to 800 acres of real estate that Virginia and Maurice acquired and farmed during their marriage. Sometime after they organized Schewe Farms, the company acquired four additional parcels of farmland. At the time of the trial, it owned approximately 1200 acres of farmland; approximately 1100 acres were tillable.

¶ 7 Virginia testified that the company did not acquire any farmland to sell for a profit. She and her husband organized Schewe Farms "so that the property could be unified, that various farms could be unified as a whole and not split up. It could be held as one entity and farmed for the benefit of−to make a living." She explained: "It was to provide a living for me as long as I lived and to−for a way to make a living. It was never intended that we would sell the property." Schewe Farms did not own any farm equipment, did not employ any employees, and did not do any "custom farming." It owned farmland and received income by renting the land to others to farm.

¶ 8 Schewe Farms' operating agreement states that the purpose of the company is "[t]o purchase, own, manage, lease and otherwise deal with real estate in the conduct of farming and other agricultural businesses and activities related thereto" and "[t]o engage

in any lawful enterprise or undertaking, excepting banking and insurance." The operating agreement also states that its organizers intended for the company to continue beyond their death, disability, or incapacity. The agreement further provides that the company "will continue for a term ending November 30, 2029, unless terminated sooner." Virginia testified that, although the operating agreement contained a termination date of 2029, that termination date was included on the suggestion of the attorney who prepared the agreement. She testified that she intended for the company to continue indefinitely.

¶ 9 Maurice passed away in 2000. When he died, his 50% interest in Schewe Farms passed equally to his and Virginia's children, Mark R. Schewe, Diane M. Kelly, and Marsha S. Meyer (who are the Dissociating Members) and William M. Schewe and Lora M. Kennedy (who, along with Virginia, are the Remaining Members). Each of the children received a 10% interest in the company. In 2006, William and Mark each purchased 2.5% of Marsha's interest in the company, each paying Marsha $56,151.37 for an additional 2.5% interest. After the transfer, Mark and William's ownership interest increased to 12.5% each, and Marsha's interest decreased to 5%. Therefore, at the time of the trial, Mark and William each held 12.5% interests in Schewe Farms, Diane and Lora each held 10% interests, Marsha held a 5% interest, and Virginia held a 50% interest. Collectively, the Dissociating Members owned 27.5% of the company.

¶ 10 In the spring of 2000, William and Mark formed a partnership and began farming Schewe Farms' tillable acreage. William testified that the partnership's leases with Schewe Farms initially provided for "a third and two-third," meaning Schewe Farms received one-third of the crop yield on the rented property and the partnership received

two-thirds of the crop yield. William testified that in 2009, the partnership's rental agreement with Schewe Farms switched to $100 dollars per tillable acre cash rent. He explained that the cash rent lease made it easier to manage the partnership's farming because it had grain production attributable to multiple landowners, and it was difficult to keep the grain separated.

¶ 11 William testified that in 2010, the partnership leased Schewe Farms' land for $100 per tillable acre as base rent, but also added a bonus to Schewe Farms that depended on the year's crop yield. He explained that once the crop yields on the properties for the year were determined and the partnership received cash for the crops, the partnership determined how much Schewe Farms would have received if the lease had been a one-third, two-third lease. The partnership paid Schewe Farms a bonus for any amount above $100 per acre it would have received under a one-third, two-third lease. William testified that in 2010, the partnership paid a bonus to Schewe Farms under this arrangement.

¶ 12 Virginia testified that she assumed that William and Mark would always be partners and continue to farm the company's land together. However, in the fall of 2011, William and Mark's partnership dissolved. Mark testified that part of the break up was due to his desire to farm less property and to reduce his debt. Mark and William agreed to split up the partnership's farm equipment with William taking most of the equipment encumbered with debt.

¶ 13 At a January 22, 2012, regular meeting of Schewe Farms, the issue of who would farm the company's real estate for the 2012 crop year was on the agenda. William wanted to farm all of Schewe Farms' real estate. He stated that he needed to farm all of it in order

to make payments on the debt he assumed because of the partnership dissolution. Mark, however, wanted to farm a portion of Schewe Farms' real estate. Virginia decided that she wanted William to farm all of the property as the sole farmer because she wanted all of Schewe Farms' land to be rented to a single tenant. At the January 22, 2012, meeting, the Remaining Members voted to rent all of the company's land to William for the 2012 crop year.

¶ 14 On February 3, 2012, William and Schewe Farms executed a lease in which the company rented the tillable portion of its real estate to William at the rate of $100 per acre. The lease covered 1,224.32 total acres, of which approximately 1100 acres were tillable. The lease stated that it "automatically renews year-to-year unless the lessor gives notice of 30 days." Although the lease did not expressly provide for a bonus to the company, William testified that this agreement with the company included a bonus as it did in 2010 and 2011.

¶ 15 Mark testified that he believed that Schewe Farms rented its land too cheaply to William at $100 per acre. He testified that he had offered to rent at a higher rate. After the January 22, 2012, meeting, the Dissociating Members quit attending company meetings because, according to Mark, that was the only way they could stop Schewe Farms from doing anything that they did not what it to do. Mark believed that if the Dissociating Members did not attend the company's meetings, a quorum would not be present and the Remaining Members could not conduct any company business.

¶ 16 On July 12, 2012, the Dissociating Members initiated the present litigation by filing a complaint against Schewe Farms and the Remaining Members alleging that

management of Schewe Farms was hopelessly deadlocked. They alleged that the company was unable to operate or carry out its purpose because they would not attend any member meetings, making it impossible to have a quorum at any such meetings. Count I of the complaint requested the court to appoint a receiver to take possession of and manage Schewe Farms' assets, count II requested the court to dissolve the company and liquidate its assets, count III requested an accounting, and count IV requested a judgment against the Remaining Members due to an alleged breach of fiduciary duties. Mark testified that he filed the lawsuit in order to compel the company to pay "fair market value rent." The claims alleged in counts I through IV of the complaint are not at issue in this appeal.

¶ 17 After the filing of the complaint, the parties engaged in significant pretrial discovery and other pretrial litigation that included, among other things, extensive discovery, discovery disputes, requests for injunctions/restraining orders, and disputes over Schewe Farms' operations while the litigation was pending.

¶ 18 Finally, on June 27, 2013, while the parties were still actively litigating the dissolution of the company, the Dissociating Members sent a notice to Schewe Farms stating that they had "chosen to exercise their right to dissociate from Schewe Farms, LLC effective immediately." This notice of dissociation lies at the heart of this appeal.

¶ 19 The dissociation notice included an appraised value of the company's real estate holdings of $10,924,324 and a statement that the company's total assets, including cash and rents due, were worth $11,508,848.02. The notice requested an offer from the company for the purchase of the Dissociating Members' interest based on this valuation.

On August 1, 2013, the Dissociating Members sent a letter to Schewe Farms again requesting a purchase offer from the company. On August 19, 2013, the Dissociating Members filed a motion to compel the purchase of their distributional interests in the company.

¶ 20 On September 13, 2013, Schewe Farms and the Remaining Members responded to the motion to compel the purchase, noting that the company was in dissolution litigation and was prohibited from expending company money without agreement or a court order. They stated that they needed company funds to obtain an appraisal prior to discussing an offer to purchase the Dissociating Members' interests. According to the response, the Dissociating Members refused to consent to Schewe Farms expending money on an appraiser or a business valuation. Schewe Farms and the Remaining Members also objected to the company being compelled to purchase the interests, citing a provision in the company's operating agreement that prohibited the transfer of a member's interests in the company. On September 17, 2013, the circuit court denied the Dissociating Members' motion to compel, without prejudice, and discovery and pretrial litigation between the parties continued.

¶ 21 On April 21, 2014, Schewe Farms and the Remaining Members filed a motion for leave to file a counterclaim against the Dissociating Members, alleging that their dissociation was wrongful. In their counterclaim, they requested a judgment for damages they sustained because of the wrongful dissociation. On May 8, 2014, the Dissociating Members filed a motion for leave to add count V to their complaint. Count V asked the court to determine the issues stemming from their dissociation notice, including a

determination of the fair value of their distributional interest in the company. On May 13, 2014, the court granted the motions to file the counterclaim and to amend the complaint adding count V. At the hearing, the Dissociating Members acknowledged that because of their notice of dissociation, they no longer had a right to participate in the management of the company as of the date of their dissociation, and the court entered an agreed order lifting all restrictions on Schewe Farms with respect to the use of its funds.

¶ 22 At a hearing held on July 29, 2014, the circuit court gave Schewe Farms "until the close of business October 7, 2014, to tender a purchase proposal" to the Dissociating Members. On October 7, 2014, Schewe Farms sent an offer to the Dissociating Members to purchase their 27.5% interest for $237,000. The Dissociating Members did not accept the offer.

¶ 23 One year later, on July 28, 2015, the circuit court began a bench trial on the contested issues stemming from the notice of dissociation. At the trial, the parties disputed a number of issues, the central issue being the fair value of the Dissociating Members' distributional interest in the company. The testimony relevant to this issue came primarily from expert witness testimony.

¶ 24 Each party presented testimony from a real estate appraiser who opined concerning the value of the company's real estate assets. The Dissociating Members' real estate appraiser, Edward Aumann, testified that Schewe Farms' real estate holdings were worth $10,924,324, as of the date of dissociation. Schewe Farms and the Remaining Members' real estate appraiser, Steve Clausen, testified that the value of Schewe Farms'

real estate holdings on the date of dissociation was $9,706,000. Each expert explained the basis for his opinions.

¶ 25 The trial court found that Clausen's testimony was more persuasive and that his appraisal "more accurately established the appropriate value." The Dissociating Members do not challenge this finding on appeal. Accordingly, it is now undisputed that Schewe Farms' underlying real estate holdings were worth $9,706,000, as of the day of the notice of dissociation. The parties' dispute on appeal centers not on real estate appraisals but on the circuit court's findings relating to the "fair value" of the Dissociating Members' 27.5% distributional interest in the company.

¶ 26 On the issue of fair value, the Dissociating Members presented the testimony of Luke Waller, who is a business valuation consultant. Waller opined that the fair value of the Dissociating Members' 27.5% interest in Schewe Farms was as follows: Mark's 12.5% interest in Schewe Farms was worth $1,358,572.23; Diane's 10% interest was worth $1,086,857.78; and Marsha's 5% interest was worth $543,428.89. Waller explained that he valued the entire company and then determined the value of the Dissociating Members' interests on a pro rata basis. He described it as "simple math."

¶ 27 Waller believed that the only information he needed to determine the fair value of their interests was a balance sheet or information concerning the assets and liabilities of the company. The Dissociating Members' attorney provided him with information concerning the company's assets and liabilities. He did not personally do any investigation into the assets or liabilities of the company or speak with any of the members of the company.

¶ 28 Waller utilized an "adjusted net asset value method" to determine the value of the company. He looked "at the values of the assets and adjust[ed] them in certain cases for fair market value or fair value of the assets." He also added in other assets, including rents William owed to the company and fees wrongfully paid by the company on William's behalf. He subtracted the company's liabilities. He testified that the company's "total adjusted net or total adjusted assets came to a market value" of $11,501,572.84. He testified that he also considered the prior sale of 5% of Marsha's interest to Mark and William, although he believed it was a "dated transaction."

¶ 29 During his testimony, Waller described the concept of "marketability discounts." He explained that marketability was the ability of a member of a company to turn his or her investment in the company into cash. He testified that a company's restriction on the transferability of a member's interest affects the marketability of the interest, which, in turn, could affect the value of the interest. He testified that he was aware that Schewe Farms' operating agreement had a restriction on the transfer of members' interests in the company, but he did not utilize a marketability discount in his analysis. He agreed that it would not be improper if the court used a marketability discount in its fair value analysis.

¶ 30 Waller also described the concept of "minority interest discounts." He explained that minority interests in a company lack the ability to control decisions of the company and that there could be a discount warranted in the fair market value for minority interests due to this lack of control. He acknowledged that the Dissociating Members' interests in the company were minority interests, but he did not believe minority interest discounts

were applicable. Under his net asset valuation, he determined the value of Schewe Farms as a whole "as if someone were buying the whole thing."

¶ 31 Waller opined that the "net asset" procedure that he used was the appropriate way of determining the value of Schewe Farms because it "operates as a real estate holding company." He testified that there were other methods of valuing holding companies, but he chose to utilize only the net asset value because he felt that this method was the most appropriate for Schewe Farms.

¶ 32 Waller defined a "holding company" as "a business that could either be an investment holding company or a real estate holding company whose assets are held or managed for capital appreciation and not to maximize earnings." He explained, "[A] holding company buys a piece of real estate, holds it and then sells it later for appreciation value potential." In contrast, he defined an "operating business" as "a business [that] operates primarily by either selling a service or selling a product to generate a profit." He agreed that if Schewe Farms were an operating company then net asset value alone would not be a proper determination of its value. He testified that he relied on Revenue Ruling 59-60 in concluding that the "net asset value or the net worth method was the most appropriate method for valuing holding companies." He stated that, according to Revenue Ruling 59-60, the value of stock in "holding companies is closely related to the value of the underlying assets."

¶ 33 On cross-examination, Waller admitted that he did not ask anyone about the purpose of Schewe Farms. The intent of the organizers of Schewe Farms did not influence his valuation. In determining that Schewe Farms was a holding company, he

looked at its tax returns and saw that "there were no sales of services or sales of product" which indicated to him that it "may not be an operating company." He also noted that the assets of the company were primarily real estate, which are commonly held in "holding companies for capital appreciation purposes." He testified, "That may not be their intent but that's how I interpret holding companies."

¶ 34 During cross-examination, Waller looked at Schewe Farms' 2008 tax return and noted that it included farm profit from the "sales of livestock, produce, grains and other products raised." Nonetheless, he did not believe that this meant that the purpose of the company was to be an operating business. He testified, "I still hold to the opinion that it's a holding company, not an operating company." Waller agreed that whether or not the company holds assets for appreciation was his standard for determining whether a company was a holding company, not "the standard."

¶ 35 Schewe Farms and the Remaining Members presented the testimony of Paul Osborne, who is certified public accountant and a certified valuation analyst. Osborne testified that he determined the value of a 27.5% interest in Schewe Farms as of June 27, 2013. He opined that the total net value of Schewe Farms on the date of dissociation was $861,575 and that the fair value of the Dissociating Members' 27.5% distributional interest was $237,054.13.

¶ 36 During his testimony, Osborne opined whether Schewe Farms should be valued only by the net asset value method because it was a "holding company." Osborne testified that "[m]any people have different definitions" for a "holding company." He believed that a holding company was "an entity that is holding a number of different ***

businesses, could be properties, could be anything." He explained that a holding company usually holds the assets to generate income from selling them as opposed to generating income off the ownership of the assets themselves. He testified that Schewe Farms' operating agreement indicated that the purpose of the company was to purchase, hold, manage, and lease real estate for farming, not to buy and sell real estate for profits from appreciation.

¶ 37 Osborne testified that the intent of the business was a factor he considered in determining the value of an interest in a business. Members of his "valuation teams" asked Virginia about her opinion concerning the purpose of the formation of Schewe Farms. According to Osborne, she and the other members of Schewe Farms did not intend to liquidate any land in the "near term," but intended to "hold on to the property for the benefit of the descendant farmers to use for many many years." He testified that this information affected his approach toward his method of valuation.

¶ 38 Osborne also testified that Revenue Ruling 59-60, relied on by Waller, was issued by the IRS in 1959 for estate and gift tax purposes. He testified that, at that time, the valuation industry had not evolved. He agreed that Revenue Ruling 59-60 states that, for a holding company, value should be based on the underlying assets more than other methods. However, he explained that this is "only in estate and gift tax situations, not all other valuation engagements." He noted that the valuation industry has adopted a lot of the concepts from Revenue Ruling 59-60, but has not adopted the specific rule for valuation.

¶ 39 Osborne opined that Schewe Farms was "not exactly" a holding company. He testified that by "strict definition" it was a "company that holds farmland." He agreed that he would use the net asset method to value a company if he were purchasing the entire company for purposes of liquidating its underlying assets. He also agreed that Schewe Farms was a "capital intensive enterprise" and that the adjusted net worth method is appropriate when an entity is capital intensive. He agreed that the net asset valuation method incorporated the least amount of his professional judgment.

¶ 40 However, Osborne testified that he did not focus solely on the net asset value of the company in determining its fair value. Instead, he utilized four different methods and assigned a "weight" to each method. One of the methods that he utilized was the net asset value of the company, similar to Waller's method, but he incorporated three other valuation methods into his analysis. In discussing his weighted approach, he explained that valuing a minority interest in a business is a "complex task" in which the analyst might utilize more than one method of valuation. The analyst then uses professional judgment to assign a weight to each approach.

¶ 41 With respect to the net asset method, Osborne testified that he added up the market value of all of the company's assets and subtracted the market value of its liabilities. He said this method was "basically *** assets less liabilities." However, because the owners of Schewe Farms did not intend on selling any assets but intended on holding the real estate for a "long time," he believed that it was not proper to use the net asset method alone to determine the value of the company. Instead, he believed that alternative

methods that valued the company's dividend and income stream should be included in the analysis and weighed more heavily than the company's net assets.

¶ 42 Osborne testified that his net asset calculation resulted in a value of $9,190,482. Because "the intent of selling the underlying assets was virtually nil," he assigned only a 5% weight to this valuation method. He testified that he did not apply a minority interest discount to this method, but an investor looking to invest in the company would consider that he could not dictate the sale of the assets. Therefore, an investor would pay less for the interest.

¶ 43 Osborne explained that the second valuation method he used was the "historical dividend stream" method, which focuses on "the amount of cash flow generated by the entity to the owners." With this method, an analyst looks at dividends actually paid to owners. He looked at the company's dividends and net income from its inception and assumed a 20% tax liability on net income. He explained that the total dividends actually paid to the owners from 2000 to 2012 were $283,743. Assuming a 20% tax liability on the company's net income, the tax liability over this same period was $234,070. Subtracting the tax liability from the total dividends paid resulted in what he called "economic dividends" of $49,673. This equaled an average annual economic dividend of $3,821. He used a 2.9% capitalization rate to determine that the value of the company looking only at its historical dividend stream was $131,758.

¶ 44 According to Osborne, economic dividends represented the money the members received beyond their tax liability. He testified that an investment in the company was fundamentally an investment in an income or dividend stream. Therefore, he opined that

this valuation method determined what someone might consider the company being worth based on "what they may earn or what they may receive in a dividend stream." He testified that he applied a 25% weight to the historical dividend stream method based on his "professional judgment."

¶ 45 The third valuation method Osborne utilized was the "historical capitalization of earnings" method, which looks at prior income and prior expenses to determine historical net cash flow. The difference between dividend stream and earnings is that the dividend stream method focuses on what the company actually paid to the owners, while the capitalization of earnings method focuses on the company's net income regardless of whether the company paid the income to the owners. It represents the dividend-paying potential of the company.

¶ 46 With respect to the capitalization of earnings method, Osborne went back to 2007 to determine the "normalized" profits of the company. He explained that he used "normalization" to adjust for unusual income or expenses for any given year that, if included, would improperly inflate or deflate the expectations of earnings for future years. He calculated average normalized earnings of $91,089, applied a marketability discount of 40% to the earnings, and used a capitalization rate of 17.43% for this method. He calculated a $313,560 value of the company under this method and weighted this value at 35%.

¶ 47 Osborne testified that he determined the 40% marketability discount based on his professional judgment about the time it would take to sell an interest in the company as

well as expenses that would be involved with the sale, including attorney and accounting fees. He did not apply a marketability discount to any of the other valuation methods.

¶ 48 The fourth method Osborne utilized was the 2029 dissolution value method of valuation. In describing this method, he testified that although the owners indicated that they did not intend to sell any real estate, the operating agreement had a termination date of November 2029. Therefore, he concluded that it was proper to look at the future value of the company in 2029 "with a number of assumptions," including an annual increase in the value of the underlying assets and how much of the income stream would be retained by the company. He then discounted the estimated 2029 value into 2013 dollars.

¶ 49 Osborne testified that the present value of a 2029 dissolution was not a method that was widely recognized or used. However, he used this method of valuing Schewe Farms because its operating agreement had the November 2029 termination date. Under this method, he estimated that the liquidation value of the company in 2029 would be $29,421,723. He utilized a 9% rate of return to calculate a present value of $7,410,442.

¶ 50 Based upon his review of the operating agreement and discussions with Virginia, Osborne believed that the likelihood that the company would terminate and liquidate its assets in November 2029 was minimal. Therefore, he used only 10% of the present value of this method in his valuation analysis ($741,044) and gave this reduced value a 35% weight.

¶ 51 After adding the four weighted values together, Osborne opined that the total net value of Schewe Farms was $861,575, and that the fair value of 27.5% interest owned by the Dissociating Members was $237,054.13.

¶ 52 The Dissociating Members' expert, Waller, was critical of Osborne's valuation methods. He explained that the "historical dividend stream" method looks at dividends paid historically and uses some reasonable rate of return to determine the value. He referred to Revenue Ruling 59-60 and opined that historical dividend stream was not an appropriate method for valuing Schewe Farms because, according to Revenue Ruling 59-60, "primary consideration should be given to the dividend paying capacity of the company rather than to dividends actually paid in the past." He also testified, referring to Revenue Ruling 59-60, that "the dividends are less reliable criteria fair market value than any of the other applicable factors." He added that, with respect to Schewe Farms, "in five of the seven most recent years there were no dividends paid and the dividends that were paid were not significant." Therefore, he did not believe that historical dividend stream should be utilized to value the company.

¶ 53 Waller testified that he did not use the "capitalization of earnings" method of valuation because the "primary intent of the assets held by the holding company [is] to maximize *** capital appreciation of the assets rather than maximize the earnings" of the company. He testified that a valuation based on the estimated value of the company in 2029 was flawed because the value "is being projected out sixteen years in the future," which was very difficult to do considering that it was difficult to project economic conditions a mere six months into the future.

¶ 54 At the conclusion of the three-day bench trial, the circuit court first entered a "Partial Judgment Order." In this order, the court held that Osborne's weighted average method of valuation was the proper method for valuing Schewe Farms. The court found

that valuing the company utilizing only the net asset valuation method failed "to consider the purpose and circumstances" of the company, which was to own and lease real estate for farming purposes, not to buy and sell real estate for capital appreciation. The court found that the company "cannot be valued purely as a holding company and that fair value cannot be determined solely by calculating a net asset value at the time of dissociation."

¶ 55 The court also found, however, that although Osborne's general method of valuation was proper, his application of the methodology was flawed due to "overemphasis of dividend (or income) generation, failure to recognize or properly weigh the substantial asset value, and over application of various discounts." The court found that dividends generated by the company are a major factor in valuing the business as an ongoing concern but that the substantial real estate holdings, and their eventual liquidation and distribution to the owners, must also "play a significant role in the calculation of fair value." In its partial judgment order, the court concluded that neither side's valuation adequately addressed, applied, or weighed the factors that the court must consider in valuing Schewe Farms. The court gave the parties the opportunity to present additional valuation evidence.

¶ 56 Also in the partial judgment order, the court found that the Dissociating Members wrongfully dissociated from the company. The court noted that the company's operating agreement expressly restricts transfers to those approved by a majority of the owners. Because of the dissociation, the company was statutorily required to purchase the Dissociating Members' interests in the company. The court, therefore, concluded that the

dissociation requires an unauthorized transfer of interests in the company and was a violation of the express provisions of the company's operating agreement. Therefore, the court concluded, the dissociation was "wrongful." The court held that the damages suffered by Schewe Farms and the Remaining Members as a result of the wrongful dissociation included attorney fees, appraisal fees, expert opinion fees, and other transactional expenses. The partial judgment order denied a request by the Dissociating Members for an award of their expenses, including attorney fees, due to arbitrary, vexatious, and bad faith actions on the part of Schewe Farms and the Remaining Members.

¶ 57 Neither party took the court up on its offered opportunity to present additional valuation evidence. The circuit court subsequently entered a final judgment without any additional evidence on the issue of fair value. In its final judgment, the court determined fair value by utilizing Osborne's methodology, but it adjusted some of the discounts in some of the methods and adjusted the weighted average of all four methods. Under its approach, the court determined that the fair value of Schewe Farms was $4,227,452, and the fair value of the Dissociating Members' 27.5% was $1,162,549.

¶ 58 The circuit court also provided in the judgment that any distribution to the Dissociating Members "made by cash may be completed by payment of one-half of the amount due within six months and the balance due within 12 months." The court awarded the Dissociating Members interest at the rate of 1% per annum from June 27, 2013, to the complete of the transfer. The court also awarded Schewe Farms and the Remaining

Members damages of $116,121 for the wrongful dissociation, which includes attorney fees and expert fees.

¶ 59 The Dissociating Members now appeal the circuit court's judgment, and Schewe Farms and the Remaining Members cross-appeal.

¶ 60 ANALYSIS

¶ 61 The issues in the present case arise in an action to determine the fair value of the distributional interests of the Dissociating Members. Schewe Farms is a limited liability company organized under the Illinois Limited Liability Company Act (Act) (805 ILCS 180/1-1 *et seq*. (West 2012)), and it has an operating agreement, which is the contract that regulates the company's business and the relations among its members and the company. Therefore, the framework of our analysis is based on the language of the Act and the contractual relationship of the parties as established by the operating agreement.

¶ 62 Generally, the provisions of the Act serve as default provisions that govern an Illinois limited liability company in the absence of controlling provisions in a written operating agreement. Specifically, section 15-5(a) of the Act provides that the "members of a limited liability company may enter into an operating agreement to regulate the affairs of the company and the conduct of its business and to govern the relations among the members, managers, and company." 805 ILCS 180/15-5(a) (West 2012). With some exceptions, the Act generally governs relations among the members, managers, and company only "[t]o the extent the operating agreement does not otherwise provide." 805 ILCS 180/15-5(a) (West 2012).

¶ 63 A limited liability company may be either member-managed or manager-managed. 805 ILCS 180/15-1 (West 2012). Schewe Farms is a member-managed limited liability company. Section 35-50(a) of the Act empowers members of a member-managed limited liability company to "dissociate from a company at any time, rightfully or wrongfully." 805 ILCS 180/35-50(a) (West 2012). A limited liability company's operating agreement cannot "restrict the power of a member to dissociate under Section 35-50, although an operating agreement may determine whether a dissociation is wrongful under Section 35-50." 805 ILCS 180/15-5(b)(5) (West 2012). A member can voluntarily dissociate from a limited liability company by giving the company "notice of the member's express will to withdraw upon the date of notice or on a later date specified by the member." 805 ILCS 180/35-45(1) (West 2012). In the present case, there is no dispute that the Dissociating Members gave notice of their dissociation on June 27, 2013.

¶ 64 Although an operating agreement cannot take away a member's power to dissociate, it may define when dissociation is wrongful. The language of section 35-50(c) of the Act equates a "wrongful" dissociation with breach of contract and provides for damages to the company and the other members for a wrongful dissociation. 805 ILCS 180/35-50(c) (West 2012). "[D]amages sustained by the company for the wrongful dissociation must be offset against distributions otherwise due the member after the dissociation." 805 ILCS 180/35-50(d) (West 2012).

¶ 65 I

¶ 66 Whether the Dissociating Members
"Wrongfully" Dissociated From the Company

¶ 67 In the present case, the Dissociating Members challenge the circuit court's conclusion that they wrongfully dissociated from Schewe Farms. Under the Act, dissociation is "wrongful" only "if it is in breach of an express provision of the [operating] agreement." 805 ILCS 180/35-50(b) (West 2012). Accordingly, on review, we must interpret the language of Schewe Farms' operating agreement and determine whether the dissociation at issue violated an express provision of the operating agreement. This involves the interpretation of a contract, which is a question of law that we review *de novo*. *Carr v. Gateway, Inc.*, 241 Ill. 2d 15, 20 (2011). We also note that the construction of a statute is also a question of law that is reviewed under the *de novo* standard. *Murphy-Hylton v. Lieberman Management Services, Inc.*, 2016 IL 120394, ¶ 17.

¶ 68 In the present case, the circuit court based its conclusion that the dissociation was wrongful on a provision in Schewe Farms' operating agreement that limits the ability of a member to transfer his or her interest in the company. The court concluded that the dissociation violated this express provision in the agreement because, as explained below, upon dissociation, the company was statutorily obligated to purchase the "distributional interest" of the Dissociating Members. The court concluded that the statutorily mandated purchase violated the operating agreement's limitations on the transfer of a member's interest, which makes the dissociation wrongful.

¶ 69 Under the Act, a member of a limited liability company is not a co-owner of the company's property and has no transferrable interest in its property. 805 ILCS 180/30-1(a) (West 2012). A member owns a "distributional interest" that the Act defines as "all of a member's interest in distributions by the limited liability company." 805 ILCS 180/1-5 (West 2012). Under section 35-60(a) of the Act, upon dissociation, "[a] limited liability company *shall* purchase a distributional interest of a member for its fair value determined as of the date of the member's dissociation." (Emphasis added.) 805 ILCS 180/35-60(a) (West 2012).

¶ 70 The circuit court concluded that the dissociation in the present case violated the operating agreement's "transfer" limitation, which reads as follows:

> "**14.01 INTEREST TRANSFERS.** Except as provided herein, a Member's interest in the company is not subject to transfer. Any Member who desires to sell or otherwise transfer the Member's share and interest in the company shall obtain the consent of all other Members in writing prior to such transfer. When a transfer of shares is previously authorized as required hereby, the transferee shall be entitled only to the transferring Member's proportionate share of the capital and profits of the company, but shall have no rights, including the right to appoint directors, unless the transferee is later elected to be a Member by the then existing Member."

¶ 71 In holding that the dissociation was wrongful, the circuit court reasoned as follows:

> "Paragraph 14.01 of the Operating Agreement is the sole provision addressing transfers. That provision expressly restricts transfers to the method and procedures set forth in the section. Transfers must be requested and approved by a majority of the owners. Nothing in that section provides for the unapproved transfer of an ownership interest by forcing a proportional purchase by the Remaining Members. This interpretation of the transfer section of the Operating Agreement is in accord with all other express provisions of the Agreement that consistently envision long-term commitment and continued ownership by a narrowly defined class of owners with no provisions to allow transfer or withdrawal without majority approval. *** The legally forced transfer of the Dissociating Members' ownership interests to the Remaining Members is a violation of the express provisions of the LLC's Operating Statement and is found to be wrongful."

¶ 72 We disagree with the circuit court's analysis. We do not believe that the dissociation in the present case violates an "express" provision in the operating agreement.

¶ 73 In determining whether the dissociation was wrongful, we must construe paragraph 14.01 of Schewe Farms' operating agreement and determine whether the dissociation violates this paragraph. When construing a contract, our primary focus is to ascertain and give effect to the intent of the parties. *Highland Supply Corp. v. Illinois Power Co.*, 2012 IL App (5th) 110014, ¶ 26. When the contractual language is clear, the court must determine the parties' intent solely from the plain language of the contract. *Guarantee Trust Life Insurance Co. v. Platinum Supplemental Insurance, Inc.*, 2016 IL

App (1st) 161612, ¶ 30. If the contract's words are clear and unambiguous, we will give them their plain, ordinary, and popular meaning. *Keefe v. Allied Home Mortgage Corp.*, 2016 IL App (5th) 150360, ¶ 10. Also, we must construe the contract as a whole, viewing each provision in light of the other provisions, rather than in isolation. *Id*.

¶ 74 As noted above, the power to dissociate is granted to members by the language of the Act. Paragraph 14.01 of the operating agreement does not expressly refer to a member's power to "dissociate" or expressly define when a member's exercise of the power of dissociation is "wrongful." Instead, paragraph 14.01, by its express terms, prohibits a "transfer" of a member's interest except with "the consent of all other Members in writing prior to such transfer." Also, when a "transfer" is approved under paragraph 14.01, the paragraph's express language limits the rights of the "transferee" to only a transferring member's "proportionate share of the capital and profits of the company." The "transferee" "shall have no rights, including the right to appoint directors, unless the transferee is later elected to be a Member by then existing Member."

¶ 75 Accordingly, a potential "transfer" governed by language of paragraph 14.01, as a whole, encompasses transfers that involve a "transferee" who acquires rights to the capital and profits and potentially could become a member if "elected." The language of paragraph 14.01 is similar to the language of sections 30-1, 30-5, and 30-10 of the Act (805 ILCS 180/30-1, 30-5, 30-10 (West 2012)), which would have controlled the transfer of a member's distributional interest in Schewe Farms had it not included paragraph 14.01 in its operating agreement. 805 ILCS 180/15-5(a) (West 2012) ("not otherwise provide"). Sections 30-1, 30-5, and 30-10 collectively provide that a member's

distributional interest in a limited liability company is personal property which may be transferred and that a transfer of a distributional interest entitles the transferee to receive only the distribution of the transferor, and does not entitle the transferee to become a member except in accordance with the operating agreement or all other members consent. 805 ILCS 180/30-1, 30-5, 30-10 (West 2012).

¶ 76 Under the Act, the statutory obligation of a company to purchase a dissociating member's distributional interest is set out in section 35-60. That section states, "A limited liability company shall purchase a distributional interest of a member for its fair value determined as of the date of the member's dissociation if the member's dissociation does not result in a dissolution and winding up of the company's business under Section 35-1." 805 ILCS 180/35-60(a) (West 2012). When a company purchases a dissociating member's interest under section 35-60, there is no "transferee" as described in paragraph 14.01 of Schewe Farms' operating agreement or in the alternative "transfer" language in sections 30-1, 30-5, and 30-10 of the Act. Upon dissociation, the company itself purchases the interest, not a third-party "transferee" who would acquire only distributional interests but later may be elected a member and acquire a member's rights, including the right to appoint directors under paragraph 14.01.

¶ 77 In order to conclude that the Dissociating Members' dissociation was "wrongful," the court has to construe paragraph 14.01 as applying to a statutorily mandated purchase by the company, in addition to a transfer to a transferee, and then, as a second step in the analysis, infer from this language that any member's exercise of the statutory power to dissociate is "wrongful" because it requires the company to purchase the distributional

interests of the dissociating members. When the plain language of paragraph 14.01 is read as a whole, it does not support a construction that includes "dissociation" as a prohibited transfer. That conclusion is not "express" in the paragraph's language.

¶ 78 Under the Act, dissociation is wrongful only if it "is in breach of an *express* provision of the [operating] agreement." (Emphasis added.) 805 ILCS 180/35-50(b) (West 2012). "The word 'express' is defined as '[c]learly and unmistakably communicated; directly stated.' " *Quintas v. Asset Management Group, Inc.*, 395 Ill. App. 3d 324, 333 (2009) (quoting Black's Law Dictionary 620 (8th ed. 2004)). Nothing within paragraph 14.01 is express with respect to dissociations. At best, wrongful dissociation can only be *implied* when the consequences of a dissociation are considered in conjunction with paragraph 14.01's use of the term "transfer." Therefore, the dissociation in the present case does not violate an "express" provision in Schewe Farms' operating agreement. See, *e.g.*, *Saint Alphonsus Diversified Care, Inc. v. MRI Associates, LLP*, 224 P.3d 1068, 1077 (Idaho 2009) (interpreting the Idaho Revised Uniform Partnership Act, "Because the provision limiting the right to withdraw rightfully must be an express provision, any doubt as to the meaning of the provision at issue must be resolved in favor of not limiting the right to withdraw.").

¶ 79 Accordingly, the circuit court improperly held that the Dissociating Members wrongfully dissociated. We reverse that portion of the circuit court's final judgment that concludes that the Dissociating Members wrongfully dissociated from the company. We also reverse that portion of the final judgment that awarded Schewe Farms and the

Remaining Members $116,121 in damages stemming from the dissociation, which includes attorney, appraisal, and expert opinion fees and other transactional expenses.

¶ 80 Because we reverse the circuit court's conclusion that the dissociation was wrongful, we need not decide the parties' arguments concerning the proper measure of damages caused by a wrongful dissociation that are recoverable under section 35-50(c) of the Act. In addition, we reject Schewe Farms and the Remaining Members' alternative argument that the circuit court's award of attorney fees and expenses was allowable under section 35-65(b) of the Act (805 ILCS 180/35-65(b) (West 2012)) as a sanction for an arbitrary, vexatious, and bad faith dissociation.

¶ 81 II

¶ 82 Determining the "Fair Value" of Dissociating Members' Distributional Interests in Schewe Farms

¶ 83 Next, both parties challenge the circuit court's findings with respect to the fair value of the Dissociating Members' interest in the company. They argue that the court's findings are against the manifest weight of the evidence. We disagree.

¶ 84 The Act required Schewe Farms to purchase the Dissociating Members' "distributional interest[s]" for their "fair value." 805 ILCS 180/35-60(a) (West 2012). We will not overturn the lower court's findings concerning fair value unless they are against the manifest weight of the evidence. See, *e.g.*, *Callier v. Callier*, 142 Ill. App. 3d 407, 417 (1986); *Weigel Broadcasting Co. v. Smith*, 289 Ill. App. 3d 602, 606 (1996). Also, at the bench trial, the parties presented the testimony of experts who gave differing opinions concerning the "fair value." The circuit court based its findings on its evaluation of this

expert opinion testimony. Because the circuit court was in the best position to weigh the expert testimony and supporting evidence, we will not second-guess the circuit court's assessment of the credibility of the expert witnesses. *Stanton v. Republic Bank of South Chicago*, 144 Ill. 2d 472, 479 (1991).

¶ 85 In *Ash v. Sunshine Broadcasting Corp.*, 90 Ill. App. 3d 97, 101 (1980), the court stated, "When dealing with the stock of a close corporation, which has no ascertainable market value, *** it is proper for a court to consider all the circumstances of the corporation and attempt to fix the value of the stock in some rational way from such elements as are attainable." There is no "precise method" for valuing the stock of a closely held corporation; all "relevant" factors may be considered. *Weigel Broadcasting Co.*, 289 Ill. App. 3d at 607. The process is not an exact science; it involves many subjective and complex determinations. *Callier*, 142 Ill. App. 3d at 416. "A list of factors that may be relevant to the determination of *fair value* of stock includes: earning capacity, investment value, history and nature of the business, economic outlook, book value, dividend paying capacity, and market price of stock of similar businesses." (Emphasis added.) *Weigel Broadcasting Co.*, 289 Ill. App. 3d at 607. The trial court determines the weight to give the various factors. *Id.*

¶ 86 The same is true with respect to determining the "fair value" of the "distributional interest" of a limited liability company. The Act does not define the term "fair value." Section 35-65(a) of the Act provides only that the court must determine the fair value of the interest by considering "among other relevant evidence the *going concern value* of the company." (Emphasis added.) 805 ILCS 180/35-65(a)(1) (West 2012). Courts have

described a company's "going concern value" as "something other than what results from the mere appraisal value of its assets"; it involves an "expectation of income from" the assets. *Campbell v. American Fabrics Co.*, 168 F.2d 959, 962 (2d Cir. 1948).

¶ 87 Because the legislature did not define the term "fair value," we believe that it intended to allow trial courts "freedom to fashion a remedy without limiting them to any single form of valuation." *Weigel Broadcasting Co.*, 289 Ill. App. 3d at 607; see also Uniform Limited Liability Company Act § 702 cmt.[1] (1996) ("Under this broad standard, a court is free to determine the fair value of a distributional interest on a fair market, liquidation, or any other method deemed appropriate under the circumstances.").

¶ 88 The Dissociating Members' valuation expert, Waller, testified that Schewe Farms was a "holding company" and that the value of a holding company is its net asset value, which is calculated by subtracting the value of the company's total liabilities from the value of its total assets. According to Waller, the proper way to determine the fair value of the Dissociating Members' distributional interest in the company is to simply multiply the company's net asset value by the percentage of their ownership interest.

¶ 89 On appeal, the Dissociating Members argue that the evidence supports only one conclusion with respect to Schewe Farms' business type: that it is a holding company. They conclude, therefore, that net asset value is the only legitimate method of valuing the company. They note that the circuit court found that the net asset value of Schewe Farms

[1]Although the comments to the Uniform Limited Liability Company Act are not formally part of the Act, they are persuasive authority in interpreting the Act due to the similar language used. *Dass v. Yale*, 2013 IL App (1st) 122520, ¶ 40.

was $9,255,412, based on Clausen's appraisal, plus other assets, and minus the company's liabilities. Accordingly, they conclude that the fair value of their distributional interest is 27.5% of $9,255,412, or $2,545,238.30. Any deviation from this value, they argue, is against the manifest weight of the evidence. As explained more fully below, we disagree with their analysis. Based on the record before us, under the manifest weight of the evidence standard, we cannot limit the circuit court's fair value analysis to only the net asset value of the company.

¶ 90 Schewe Farms and the Remaining Members' expert, Osborne, opined that net asset valuation alone did not accurately reflect the fair value of the distributional interest of the company. Instead, he believed that the proper method for valuing the company involved four different methods, one of which was the net asset value, and then assigning a weighted percentage to each method, the weighted percentages totaling 100%.

¶ 91 The court found that Osborne's methodology was "both legally appropriate and useful as a framework in determining the fair value as a going concern." As noted above, the four methods included not only the adjusted net asset method, advanced by Waller, but also included the historical dividend stream method, the capitalization of earnings method, and the present value of 2029 dissolution method.

¶ 92 Although the court generally agreed with Osborne's methodology, the circuit court also found that Osborne's specific application of the methodology overemphasized Schewe Farms' dividend or income generation potential and failed to properly weigh the substantial asset value of the company's real estate. The court stated:

> "While the dividends generated by the [company] are a major factor in valuing the [company] as an ongoing concern, other factors cannot be ignored or depreciated to the point of insignificance. The particular circumstances of this [company] include the fact that it has substantial real estate holdings. These holdings, and their eventual liquidation and/or distribution to the owners, must play a significant role in the calculation of fair value."

¶ 93 The court concluded that the "fair value" of the company must balance a reasonable recognition of both income potential and the net asset value along with other relevant factors particular to the history and circumstances of the company. The court considered the evidence, the particular circumstances of the company, and determined that the fair value of Schewe Farms, utilizing the four valuation methods, was as follows:

1. Net asset method: total value $9,255,412; assigned weight 24%; adjusted value $2,221,299;
2. Present value of payout in 2029: total value $7,410,442; assigned weight 24%; adjusted value $1,778,506;
3. Capitalization of earnings: total value $470,339; assigned weight 47%; adjusted value $221,059;
4. Historic Dividend Stream: total value $131,758; assigned weight 5%; adjusted value $6,588.

¶ 94 The court totaled the four adjusted values and concluded that the total "fair value" of the company was $4,227,452 and that the Dissociating Members' 27.5% interest of this fair value was $1,162,549. The court found that this was "an equitable fair value,

based upon and consideration of all the evidence before the court." The circuit court's valuation findings are not against the manifest weight of the evidence.

¶ 95 With respect to the net asset value method, both parties agree that this was a proper method for the circuit court to consider. In addition, neither party challenges the circuit court's calculation of net asset value based on Clausen's appraisal of the underlying real estate assets. Instead, as noted above, the Dissociating Members argue that the manifest weight of the evidence required the circuit court to base its fair value calculation entirely on the net asset value method and should not have included a weighted average of any of the other three valuation methods. We disagree.

¶ 96 The Dissociating Members' argument is based on an assertion that Schewe Farms is a "holding company" and that only the net asset valuation method is appropriate for determining the value a holding company. The circuit court, however, found that Schewe Farms was not a "holding company" and concluded that a valuation based only on the net asset value fails to consider the purpose of the company and all of the other circumstances of the company. The record supports this finding.

¶ 97 The Dissociating Members' valuation expert, Waller, testified that a holding company was a business that holds assets, such as real estate, for capital appreciation and sells the assets later for profit. By contrast, an operating company sells either a service or product for profit. Waller did not speak with Virginia, the only surviving organizer of Schewe Farms, or any of the other members of the company to determine its purpose. He looked at the company's tax returns and determined that it did not sell a product or service and, therefore, was a holding company.

¶ 98 Schewe Farms and the Remaining Members' expert, Osborne, testified that Schewe Farms was not a holding company, noting that its operating agreement stated that the purpose of the business was to purchase, hold, manage, and lease real estate for farming, not to buy and sell real estate to profit from appreciation of assets. In addition, he spoke with Virginia about the purpose of the company and determined that the company was not going to liquidate any land in the near future, but intended to continue renting the land for farming indefinitely.

¶ 99 The circuit court agreed with Osborne and found that the purpose of Schewe Farms is to own, manage, lease, and otherwise deal with real estate for farming and other agricultural businesses, not to sell real estate for profit. The court noted the lack of evidence that the company had ever sold any real estate. Instead, the court noted, the operating statement states that the company is a "long-term" investment and established an initial 30-year term ending in 2029. Also, the court noted Virginia's testimony that the purpose of the company was to ensure continuing operation of a family farming enterprise. The circuit court concluded, "The net value of the [company's] assets in this case is a factor to be considered, but it must be considered in light of the facts and circumstances of the LLC and in conjunction with other relevant factors."

¶ 100 Both experts agreed that there was no universally accepted definition of what constitutes a "holding company." In determining the methods for establishing fair value, the circuit court properly considered "among other relevant evidence the *going concern value* of the company." (Emphasis added.) 805 ILCS 180/35-65(a)(1) (West 2012). The court recognized that the company has "substantial real estate holdings" and that the

value of the real estate "must play a significant role in the calculation of fair value." However, the court also properly recognized that Schewe Farms, as a going concern, did not buy and sell real estate for profit; it earned rental income from its farmland. The circuit court's decision to include historical earnings and dividends as elements of its valuation analysis is supported by the record. Accordingly, we reject the Dissociating Members' argument that the court was obligated to consider only the company's net asset value.

¶ 101 The Dissociating Members cite *Brynwood Co. v. Schweisberger*, 393 Ill. App. 3d 339 (2009), in support of their argument that net asset value is the proper method for valuing the company. However, in *Brynwood*, the court stated, "Ultimately, making a fair value determination is a fact-specific endeavor requiring the trial court to make an independent appraisal of the corporation, taking into account all recognized methods of valuation, whether or not advanced by the parties." *Id.* at 353. *Brynwood* does not support a conclusion that the circuit court's valuation findings are against the manifest weight of the evidence.

¶ 102 The Dissociating Members argue that Osborne's analysis, adopted by the circuit court, incorrectly "assumes the hypothetical buyer would be subject to the whims and decisions of the majority, and that their interests therefore are not worth much." We disagree. At the trial, the experts explained that minority interest discounts involve applying discounts because minority interests in a company lack the ability to control the company's decisions. The experts also explained marketability discounts, which are valuation discounts due to limitations on the transferability of interests in a company.

Minority interest discounts are different than marketability discounts. See, *e.g.*, *Robblee v. Robblee*, 841 P.2d 1289, 1294 (Wash. Ct. App. 1992) ("It is important to note that a minority discount is different from a marketability discount.").

¶ 103 In the present case, none of the four methods included minority interests discounts. The capitalization of earnings method included a discount, but it was a marketability discount of 40%, not a minority interest discount. The circuit court reduced this marketability discount from 40% to 10%. On appeal, neither party challenges the circuit court's application of a 10% marketability discount to the capitalization of earnings method.

¶ 104 With respect to minority interest discounts, in its partial judgment order, the circuit court held that "some minority interest discounting *might* be appropriate, but it should be carefully limited." (Emphasis added.) However, neither Osborne's analysis nor the circuit court's analysis applied a minority interest discount to any of the four valuation methods. Therefore, we disagree with the Dissociating Members' argument that the circuit court incorrectly "assumes the hypothetical buyer would be subject to the whims and decisions of the majority, and that their interests therefore are not worth much."

¶ 105 The Dissociating Members also argue that Osborne's valuation methods that were based on past dividends or earnings were flawed because the company rented its land at $100 per acre cash rent, which was below fair market rents. However, William testified that although his 2012 and 2013 crop year leases with Schewe Farms were for $100 cash rent per acre, they included bonuses to the company based on crop yield and a hypothetical one-third, two-third lease. Testimony at the trial also included evidence that

Schewe Farms' past income included lease bonuses that it received under a similar lease agreement when it rented land to Mark and William's partnership. The trial court was entitled to consider this testimony in determining the weight to be given to the valuation methods that were based on past dividends or income. This testimony does not establish that the circuit court's findings are against the manifest weight of the evidence.

¶ 106 In their cross-appeal, Schewe Farms and the Remaining Members argue that although "the trial court properly adopted the alternative four pronged weighted valuation method," the court's adjustments to the weighted average of the four methods, as well as its adjustment to the present value of payout in 2029 method, were against the manifest weight of the evidence. We disagree.

¶ 107 Osborne's valuation analysis of Schewe Farms was as follows:

1. Net asset method: total value $9,190,482; assigned weight 5%; adjusted value $459,524;
2. Present value of payout in 2029: total value $741,044; assigned weight 35%; adjusted value $259,365;
3. Capitalization of earnings: total value $313,560; assigned weight 35%; adjusted value $109,746;
4. Historic Dividend Stream: total value $131,758; assigned weight 25%; adjusted value $32,940.

¶ 108 Osborne's total net value for Schewe Farms was $861,575, while the circuit court's total net value, using Osborne's methodology, was $4,227,452. Although the circuit court used Osborne's methodology framework, as noted above, it found that

Osborne overemphasized dividend and income generation and failed to properly "weigh the substantial asset value" of the company.

¶ 109 In adjusting the weighted values, the circuit court explained that the particular circumstances of Schewe Farms included "substantial real estate holdings." The court stated, "These holdings, and their eventual liquidation and/or distribution to the owners, must play a significant role in the calculation of fair value." The circuit court, therefore, weighted the net asset method at 24% rather than 5% as weighted by Osborne. For the reasons noted above, the evidence supports this adjustment.

¶ 110 With respect to the present value of a 2029 payout method, Osborne assumed a 90% likelihood that the company would continue operations beyond 2029. Therefore, he discounted the present value of the company, as determined by that method, by 90% due to the unlikelihood of liquidation in 2029. The circuit court disagreed with this discount, stating that it could find "no legal basis to discount the current fair value by so drastic a percentage and the evidence supports a more reliable assumption that a payout should be assumed upon the expiration of the current Operating Agreement." Therefore, the court valued the company under the present value of a 2029 payout method as $7,410,442, rather than Osborne's discounted value of $741,044. The court also weighted the present value of a 2029 payout at 24%, rather than 35% weighted by Osborne.

¶ 111 Schewe Farms and the Remaining Members argue that there is no evidence in the record to support the trial court's presumption that the company could be liquidated in 2029, because "it was indisputably the intent and the desire of [the company's] creators to not distribute its assets." However, as noted above, the weight of various factors in the

valuation analysis is a decision for the trial court to make based on all of the circumstances of the company being considered. *Weigel Broadcasting Co.*, 289 Ill. App. 3d at 607.

¶ 112 Although Virginia testified of her desire that the company continue operating well beyond its original term, the circuit court placed greater weight on the "express statement of a finite term in the Operating Agreement." The court believed that Virginia's stated intentions that were not included in the operating agreement carried less significance than the express terms of the operating agreement. Specifically, the court stated:

> "[T]he established duration of the [company] is for a finite term. Considering the family situation revealed by the evidence received in this ongoing litigation, the Court believes that assuming continued operation of the [company] beyond that date, for purposes originally intended, is not appropriate. The land value of the [company] is substantial now and is reasonably expected to maintain its value, or even appreciate over the remaining term of the [company's] stated duration. The Court finds that the anticipated net value of the [company's] assets in November 2029 must be considered as a major factor in determining the fair value of the [company] on the date of dissolution."

¶ 113 The conflicting evidence with respect to the likelihood of the company continuing to operate after 2029 was a matter for the circuit court to weigh, consider, and resolve. In its final order, the court stated that it could "find little in the evidence presented to support the belief that there is a 90% chance that the [company] will continue beyond 2029." For the reasons outlined above, the record supports this finding.

¶ 114 Based on the record before us, we cannot reverse the circuit court's findings with respect to its fair value analysis. The circuit court was faced with a complex task of determining the fair value of the "distributional interests" of a family owned and managed limited liability company. There are various standards and methods that may apply in performing this task, and there are no precise rules that must be followed. *Stewart v. D.J. Stewart & Co.*, 37 Ill. App. 3d 848, 854-55 (1976). When courts are called upon to determine fair value, each situation presents different elements of value that must be weighed and analyzed.

¶ 115 In the present case, the court had sufficient information upon which to conduct its valuation analysis. It weighed conflicting expert opinions, reviewed documents and exhibits, and its fair value analysis reflected a careful assessment of all the evidence presented. The circuit court's analysis correctly balanced evidence of the value of the company as a going concern with evidence of the substantial value of the company's real estate assets. The court determined the weighted average to apply to the four different valuation methods based on its assessment of the particular circumstances of the company, and its "decision as to the respective weights to be given to the various valuation factors was particularly a matter" for it to resolve. *Institutional Equipment & Interiors, Inc. v. Hughes*, 204 Ill. App. 3d 922, 931 (1990). For these reasons, we affirm that portion of the circuit court's judgment that finds the fair value of Schewe Farms to be $4,227,452 and awards the Dissociating Members $1,162,549 for their 27.5% distributional interest in the company.

¶ 116 III

¶ 117 The Terms of Schewe Farms' Purchase of the Dissociating Members' Distributional Interests

¶ 118 Under section 35-65(a)(2) of the Act, in an action to determine the fair value of a distributional interest, the court shall specify the terms of the purchase, including, if appropriate, terms for installment payments. 805 ILCS 180/35-65(a)(2) (West 2012). In the present case, the court found that Schewe Farms had sufficient assets "to arrange for a reasonably prompt distribution of the Dissociating Members' share." The court also recognized, however, that the distribution is not a normal activity of the business and that the company would be allowed "reasonable time to complete payment." The court gave the company the option to pay all or a portion of the distributive share by an in-kind transfer of land, free and clear of any debt, as valued by Clausen, within 90 days. Alternatively, the court held that any cash distribution "may be completed by payment of one-half of the amount due within six months and the balance within 12 months."

¶ 119 On appeal, the Dissociating Members argue that the circuit court abused its discretion with respect to the purchase timing. We disagree. The language of the statute allows the court broad discretion to specify the terms of the purchase, including installment payments, so that it may safeguard the interests of the company and the dissociated members. An abuse of discretion occurs when the court's ruling is so arbitrary, fanciful, or unreasonable that no reasonable person would take the view it adopted. *Silverberg v. Haji*, 2015 IL App (1st) 141321, ¶ 34.

¶ 120 The circuit court properly recognized that the purchase was not a normal activity and that the company should be allowed reasonable time to complete the purchase. The court exercised its discretion and fashioned the terms of the purchase in light of the financial position of the business. The circuit court's terms of the purchase were not an abuse of discretion. Therefore, we affirm that portion of the circuit court's final judgment order.

¶ 121 The terms of the purchase also included interest. Under section 35-65(e) of the Act, "Interest must be paid on the amount awarded from [the date of the member's dissociation] to the date of payment." 805 ILCS 180/35-65(e) (West 2012). The Act does not specify an interest rate. The circuit court took "judicial note of the Consumer Money Rates and the Survey of Bank Prime Lending Rates for the past 52-week period as reported by the Wall Street Journal during the last week of March 2016." It then awarded prejudgment interest of 1% per annum, beginning June 27, 2013, and continuing to the date of the judgment, 2.5% interest on any cash distribution from the date of the judgment to the due date of the payment, and 9% interest per annum thereafter.

¶ 122 On appeal, the Dissociating Members argue that the circuit court improperly took judicial notice of interest rates reported in the Wall Street Journal. At the trial, they requested a prejudgment rate at 5% per annum and argued that they should be awarded interest as they requested. Schewe Farms and the Remaining Members did not suggest an alternative interest rate.

¶ 123 Because the Act does not specify an interest rate, we believe it was within the trial court's discretion to determine the applicable interest rate. See, *e.g.*, *Stanton v. Republic*

Bank of South Chicago, 144 Ill. 2d 472, 480-81 (1991). However, we agree with the Dissociating Members that in the exercise of its discretion, the circuit court improperly *sua sponte* took judicial notice of interest rates published in the Wall Street Journal after the close of the evidence. In *People v. Barham*, 337 Ill. App. 3d 1121, 1129 (2003), the court stated that "[i]n rare instances, a trial judge may take judicial notice, *sua sponte*, of facts, as long as the judge makes clear during the course of the trial and not after the evidence is closed what facts and sources are included in the *sua sponte* notice." The court also noted that "[i]t is well established that concepts of fair play require that all parties to an action be given a fair opportunity to confront and to rebut any evidence which might be damaging to their position." *Id.* In addition, "[a] party has the same right to rebut evidence admitted by *sua sponte* judicial notice as it does to rebut evidence introduced by the opposing party." *Id*.

¶ 124 Accordingly, in determining the interest rate, the circuit court should have first notified the parties sometime during the trial of its intentions to take notice of "the Consumer Money Rates and the Survey of Bank Prime Lending Rates for the past 52-week period as reported by the Wall Street Journal during the last week of March 2016," not after the evidence was closed. The circuit court's judicial notice did not afford the parties an opportunity to confront or rebut this evidence. Therefore, we must reverse the circuit court's interest award and remand for further proceedings on that issue.

¶ 125 IV

¶ 126 Circuit Court's Denial of the Dissociating Members' Request for Fees and Expenses Under Section 35-65(d) of the Act

¶ 127 Finally, the Dissociating Members argue that the trial court's denial of their request for attorney fees and expenses is against the manifest weight of the evidence. Section 35-65(d) of the Act states that the court may award reasonable expenses, including attorney fees and the expenses of appraisers or other experts, incurred in a proceeding to determine the fair value of a distributional interest when the court finds that "a party to the proceeding acted arbitrarily, vexatiously, or not in good faith." 805 ILCS 180/35-65(d) (West 2012).

¶ 128 The Dissociating Members argue that Schewe Farms acted arbitrarily, vexatiously, and not in good faith because it did not send the statutorily mandated offer of purchase until 467 days after the notice of dissociation. In addition, they argue that the offer of purchase that the company did finally deliver was inadequate.

¶ 129 In denying the Dissociating Members' request for attorney fees and expenses, the circuit court stated:

> "An examination of the entire litigation reveals that it has been contentious. The offer eventually tendered was nowhere near what the Dissociating Members were willing to accept. Most of the fees and costs occurred have been incurred as a result of the vast difference in the parties' positions, and not [as] a result of [the] lack of timeliness of response. Viewed in light of all actions, on both sides, the Court cannot find that the particular actions complained of were arbitrary,

vexatious or in bad faith to a degree that extra expense was incurred by the opposing party, or that an award of costs would be appropriate."

¶ 130 The circuit court's finding that there was no arbitrary, vexatious, or bad faith actions on the part of Schewe Farms or the Remaining Members is not against the manifest weight of the evidence. Litigation between the parties started when the Dissociating Members filed their complaint on July 12, 2012, asking the court to appoint a receiver to take possession of and manage Scheme Farms' assets, dissolve the company and liquidate its assets, conduct an accounting, and enter a judgment against the Remaining Members due to alleged breaches of fiduciary duties. After the filing of the complaint, the parties engaged in significant pretrial litigation that included, among other things, discovery disputes and requests for injunctions/restraining orders to limit the actions of the company while the litigation was pending. The trial court entered pretrial orders that prohibited Schewe Farms and the Remaining Members from expending company money without agreement or a court order.

¶ 131 This dissolution litigation was pending for over 11 months before the Dissociating Members sent the dissociation notice to the company on June 27, 2013. The notice demanded that the company make an offer of purchase of their interests. They followed up with a letter dated August 1, 2013, in which they again demanded an offer of purchase. On August 19, 2013, the Dissociating Members filed a motion in the present case, which was then still only a dissolution action, to compel the company to purchase their distributional interests.

¶ 132 Section 35-60(b) of the Act states that the limited liability company must deliver a purchase offer to the dissociating members no later than 30 days of the date of the notice of dissociation. 805 ILCS 180/35-60(b) (West 2012). Schewe Farms and the Remaining Members responded to the motion to compel by explaining that the company was in dissolution litigation and was prohibited from expending company money without agreement or a court order. They stated that they needed company money to obtain an appraisal prior to discussing an offer to purchase the Dissociating Members' interests. According to the response, the Dissociating Members refused to consent to Schewe Farms expending money on an appraiser or a business valuation. Schewe Farms and the Remaining Members also objected to the company purchasing the interests, citing a provision in the operating agreement that prohibited the transfer of a member's interests in the company.

¶ 133 The circuit court denied the Dissociating Members' motion to compel the purchase without prejudice. On May 13, 2014, the Dissociating Members agreed that as of the date of their notice of dissociation, they had no right to participate in the management of the company, and the circuit court entered an agreed order that lifted all restrictions on the company's use of its funds.

¶ 134 Section 35-60(d) of the Act provides that if an agreement to purchase the distributional interests is not made within 120 days after the notice of dissociation, the dissociated members may commence proceedings to enforce the purchase within another 120 days. 805 ILCS 180/35-60(d) (West 2012). In the present case, after the court denied the Dissociating Members' motion to compel the purchase of their interests, litigation

between the parties continued in the dissolution proceeding. Issues stemming from the dissociation were never alleged in a complaint or counterclaim in the present case until May 2014, when the court granted the Dissociating Members' motion to amend the complaint with count V and granted Schewe Farms and the Remaining Members' motion to file a counterclaim.

¶ 135 At a hearing held on July 29, 2014, the circuit court gave Schewe Farms "until the close of business October 7, 2014, to tender a purchase proposal" to the Dissociating Members. On October 7, 2014, Schewe Farms sent an offer to the Dissociating Members to purchase their 27.5% interest for $237,000. The Dissociating Members did not accept the offer, and the circuit court then conducted a bench trial to determine, among other issues, the fair value of their distributional interest. On the last day of the trial, the court observed that "discovery in this case has been complicated, detailed and the subject matter of repeated court hearings."

¶ 136 The record of the protracted litigation between the parties supports the trial court's finding that most of the fees and costs incurred by the parties were the result of the vast differences in their positions and not a result of lack of timeliness or content of responses and offers on the part of Schewe Farms or the Remaining Members. We cannot reverse the circuit court's finding that there was no arbitrary, vexatious, or bad faith conduct that would justify an award of costs under section 35-65(d) of the Act. Accordingly, we affirm that portion of the circuit court's judgment that denied the Dissociating Members' request for fees and expenses.

¶ 137 CONCLUSION

¶ 138 For the foregoing reasons, we affirm that portion of the circuit court's judgment that determined the fair value of the Dissociating Members' distributional interests in Schewe Farms; affirm that portion of the circuit court's judgment that set out the timing of the company's purchase of the distributional interests; and affirm that portion of the circuit court's judgment that denied the Dissociating Members' request for fees and expenses under section 35-65(d) of the Act. We reverse that portion of the circuit court's judgment that concluded that the Dissociating Members wrongfully dissociated from the company; reverse that portion of the circuit court's judgment that awarded Schewe Farms and the Remaining Members damages for a wrongful dissociation; and reverse that portion of the circuit court's judgment that established the interest award under section 35-65(e) of the Act. We remand for further proceedings on the issue of the interest rate to be applied pursuant to section 35-65(e) of the Act.

¶ 139 Affirmed in part and reversed in part; cause remanded.