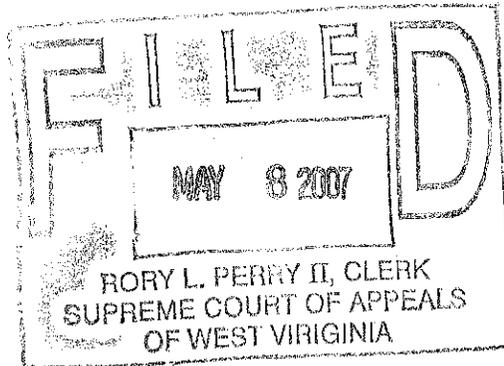


33348

NO. 063354

IN THE
SUPREME COURT OF APPEALS
STATE OF
WEST VIRGINIA



ROBERT J. HELFER,

Plaintiff Below, Appellee,

vs.

CAROL A. HELFER

Respondent Below, Appellant.

BRIEF OF APPELLANT

NATURE OF THE PROCEEDING AND THE RULING BELOW

This petition arises out of a family court action wherein Robert J. Helfer filed an action of divorce on or about July 2, 2002 in Ohio County, West Virginia seeking a divorce from his wife Carol A. Helfer. The parties had several years of litigation on the issues surrounding the divorce and eventually several hearings were conducted to deal with the remaining contested issues. On May 3, 2006 the Family Court issued a final Order dealing with the issues of equitable distribution. Within the Order the Court determined the nature of certain assets as marital assets or debts and distributed the assets and debts between the parties. Additionally, the value of the husband's sole proprietorship Chiropractic business was determined as well as the value of the building in which said practices is

located. After the filing of this Petition, on February 27th, 2007 the Family Court issued a final Order relevant to Spousal Support, Attorney and Expert fees. Said Order contains no issues that would affect the arguments put forth on this one issue from the Appellant's original Petition.

The Appellant takes issues with the courts adoption of the valuation of the Apellee's chiropractic business as it did not take into account or address the issue of enterprise goodwill.

STATEMENT OF FACTS

The Helfers were married on October 16 1982. The parties separated on October 13, 2002. They had four children during the marriage, three of whom were still under eighteen at the time of the filing of the Petition for divorce by Dr. Helfer. Of the three youngest children: Joshua born 9-19-88, Jessica born 11-26-86 and Sara born 2-13-85, only Joshua was under the age of eighteen at the time of the final divorce hearing. At the time of the marriage until August of 1983 Mrs. Helfer worked to support the family until Dr. Helfer graduated from chiropractic school. Thereafter, Mrs. Helfer was a stay at home mom but worked without compensation at her husband's office for ten hours per week from 1987 to 1997 in addition to her homemaker duties. Dr. Helfer operates a sole proprietorship Chiropractic office in Wheeling, West Virginia with annual gross revenue of approximately \$250,000.00. During the term of the marriage the parties purchased land and a building on National Road in Wheeling for the Husband's Chiropractic offices. They made extensive renovations and he began operating his practice out of this building prior to the parties' separation.

B. LEGAL PROCEEDINGS

On July 2, 2002 Robert J. Helfer filed an action of divorce in Ohio County West Virginia seeking a divorce from his wife just shy of their twenty-year anniversary. At the time of filing the Petition, Dr. Helfer was represented by Mark D. Panepinto, Esq. Mrs. Helfer filed a Motion for

temporary relief through her counsel William Ihlenfeld. (Eventually Mrs. Helfer was represented by Holli Massey Smith, Esq.)The hearing was eventually conducted on September 10, 2002, and further telephonic hearing on September 12, 2002 and the Orders entered from said hearings on May 30, 2003.

The September 10, 2002 Order required that Mrs. Helfer retained the 1996 Van and assumed the liabilities thereon. The Dr. Helfer retained the 2000 Jeep Cherokee, 1988 Volvo and 1987 Pickup and assumed all liabilities thereon. He was also to assume all marital debt and payment of all medical for the children.

The September 12, 2002 Order required parenting time to be split 50/50 and required the parties to attempt to devise a plan; child support was payable to Mrs. Helfer in the amount of \$1,298.88 per month and required her to report immediately income above \$500.00 per month to opposing counsel. Mr. Helfer received temporary use and possession of the martial residence and Mrs. Helfer was given 30 days to vacate the marital home. She was granted a sum of \$10,000.00 to relocate and was denied spousal support.

On October 20, 2002, Mr. Helfer terminated Mr. Panepinto and Elgine McArdle, Esq. substituted as counsel by order dated November 5, 2002. On September 16, 2002 the Court held an Emergency hearing filed by the Respondent to prevent the petitioner from depleting martial assets. Certain marital property was sold for \$75,000.00, of those proceeds, \$20,000.00 was paid to the Petitioner's sister by agreement for a debt owed to her for a loan to pay taxes. The Petitioner argued that he paid certain martial debt reducing the remaining proceeds to \$41,000.00. The Court Ordered that the Respondent should receive \$20,500.00, and that the Petitioner should provide an accounting of the martial debt paid by the Respondent that reduced the funds.

On October 17, 2002 the Court held a hearing on an Emergency Motion for Modification filed by the Petitioner and argued by telephonic conference on October 4, 2002. There being no change in

circumstances warranting a modification, counsel for the Petitioner proceeded on a reconsideration based on his perceived misrepresentations by the Respondent. The Court extensively discussed his decision for the 50/50 parenting time and the review of the proffers of the parties and affidavits of the children and denied the motion to Modify, upholding the 50/50 parenting time ruling.

During the discovery process, Mrs. Helfer sought certain documents by subpoena. Motions to quash were filed by Mr. Helfer and after a hearing on April 3, 2003, Mr. Helfer was ordered to turn over financial information regarding the parties' taxes and the chiropractic business. Other troubles were encountered in receiving information for Mrs. Helfer's expert to complete their valuations.

On September 4, 2003 the Court ruled that Mrs. Helfer was to pay \$8,110.44 of the parties tax liability from the \$20,500.00 awarded to her by the September 12, 2002 Order. The Court reconsidered and altered that ruling, but then reasserted by Order dated October 13, 2003 that she must pay said sum toward the tax deficiency. The Court credited the Respondent with payments on the mortgage, credit cards, a car payment, and quarterly estimated taxes.

Ultimately the Court heard several days of testimony over several months on the remaining contested issues surrounding the divorce. The Order subject to this appeal deals with the equitable distribution hearing held February 23, 2006. The courts findings regarding alimony, payment of attorney's fees, and expert fees have not been rendered as of the date of this appeal. The Court by Order entered May 3, 2006 valued the chiropractic business at \$41,000; the building on national road at \$325,000.00; awarded the martial home to the husband along with the associated debt, designated the 1997 income tax refund as martial asset subject to equitable distribution and allocated it in its entirety to the Wife; and designated the 2002 income tax penalties and interest as martial debt and equally distributed the responsibility for payment, but allocated the debt in its entirety to the husband, thus crediting him with the wife's portion of the payment in equitable distribution.

Mrs. Helfer assigns error to each of the above decisions by the family court.

ASSIGNMENT OF ERROR

1. The Court erred in adopting the Petitioner's/Appellee valuation for the Chiropractic Business as it did not include any consideration for the intangible of enterprise goodwill.

POINTS AND AUTHORITIES

May v. May, 214 W.Va. 394, 589 S.E.2d 536 (2003) Syl. Pt. 2, "Enterprise goodwill" is an asset of the business and may be attributed to a business by virtue of its existing arrangements with suppliers, customers or others, and its anticipated future customer base due to factors attributable to the business.

Staton v. Staton, 218 W.Va. 201, 624 S.E.2d 548 (2005) Sly. Pt. 1, In reviewing a final order entered by a circuit judge upon a review of, or upon a refusal to review, a final order of a family court judge, the Supreme Court of Appeals review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard, and reviews questions of law de novo.

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ARGUMENT

I.

The Court erred in adopting the Petitioner's/Appellee valuation for the Chiropractic Business as it did not include any consideration for the intangible of enterprise goodwill.

In reviewing a final order entered by a circuit judge upon a review of, or upon a refusal to review, a final order of a family court judge, the Supreme Court of Appeals review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard, and reviews questions of law de novo. Syllabus point 1, Staton v. Staton, 218 W.Va. 201, 624 S.E.2d 548 (2005). The issue of the determination of goodwill is a question of fact and not of law. See May v. May, 214 W.Va. 394, 402 589 S.E.2d 536, 544 (2003). If it appears that the trial court reasonably approximated the net value of spouse's professional practice and its goodwill, if any, based on competent evidence and on a sound valuation method or methods, the valuation will not be disturbed.

Two business evaluations were presented to the court for consideration at the final hearing herein. The Husband's expert valued the business using the income approach, capitalized earnings method. (TR 4-1-05 pg 57, ln2; pg 28 ln7). No testimony was presented, nor does the valuation indicate enterprise goodwill was part of the total value opined by said expert. Said expert evaluated the value of the chiropractic business at \$41,000.00. (TR 4-1-05 pg 12 ln 18). The Respondent/Appellant presented testimony of an expert who valued the business at \$388,000.00. (TR 4-1-05 pg 39 ln 6) Said expert used the cost based approach, capitalization of excess earnings method to determine the value. (TR 4-1-05 pg 28 ln 13(sic)). A portion of his value was the intangible of enterprise goodwill. (TR 4-1-05 pg 35 ln 10). The Court erred in failing to consider a valuation that included enterprise goodwill.

Enterprise goodwill is based on the intangible but generally marketable existence in a business of established relations with employees, customers, and suppliers. Goodwill is excess earning power: once the normal rate of return for identifiable tangible and intangible assets is determined, any rate of return in excess of a normal return is attributable to unidentifiable intangible assets-goodwill” Alicia Brokars Kelly, “Sharing a Piece of the Future Post-Divorce: Toward a More Equitable Distribution of Professional Goodwill,” 51 Rutgers L.Rev. 569, 610 (1999). (cited in fn 18, May, 214 W.Va. pg 406; 589 S.E.2d 536 at 548. Factors affecting this goodwill may include a business's location, its name recognition, its business reputation, or a variety of other factors depending on the business. This Court has recognized that there is no set rule for determining the value of the goodwill of a professional practice; rather, each case must be determined in light of its own particular facts. Several factors which may affect the value of goodwill and which therefore are relevant in valuing it are the age, health, and professional reputation of the practitioner, the nature of the practice, the length of time the practice has been in existence, its past profits, its comparative professional success, and the value of its other assets. May, at 402, citing Poore v. Poore, 75 N.C.App. 414, 331 S.E.2d 266 (1985).

Many courts have noted that any long-standing business such as solo businesses has a going-concern value that is, a value related to the business's enhanced power to earn future revenues based on the fact that the business is already organized, rather than being a start-up. Such a business also may have a separate goodwill value attributable to its reputation and preexisting relationship with its customers; this value may be subdivided into professional goodwill and enterprise goodwill.

This Court has stated that “Enterprise goodwill” is an asset of the business and may be attributed to a business by virtue of its existing arrangements with suppliers, customers or others, and its anticipated future customer base due to factors attributable to the business. May v. May, Syl.

Pt. 2, 214 W.Va. 394, 589 S.E.2d 536 (2003). Further, the court opined that “enterprise goodwill may exist in a sole proprietorship” May, 214 W.Va. at 407 (citing Gaydos v. Gaydos, 693 A.2d 1368, 1373 (Pa.Super. 1997)).

The May case is strikingly similar to the case at hand. The husband operated a dental office that was on property owned by the parties to the marriage. It appears to have been operated as a sole proprietorship just as Dr. Helfer’s practice. Within that decision this Court recognizes that there is no preferred method as a matter of law for the valuation of goodwill in a professional practice. Further, in citing Rutgers Law Review article when discussing the capitalization of excess earnings approach it is said to be the most commonly relied upon approach for valuing goodwill in professional practices. Ultimately, the Supreme Court found that the family court’s adoption of the fair market value of the dental practice, including personal goodwill, was in error. Such holding reserved that the enterprise goodwill that remained in the business should be valued and contained within any fair market valuation of a professional business.

Other courts have also determined that enterprise goodwill is a marital asset subject to division in a solo business. See In re Freedman, 35 Wash. App. 49, 665 P.2d 902 (1983) (solo law practice), Drake v. Drake, 809 S.W.2d 710 (Ky. Ct. App. 1991) (medical practice); Ford v. Ford, 105 Nev. 672, 782 P.2d 1304 (1989) (solo medical practice); Kahn v. Kahn, 42 Ohio App. 3d 61, 536 N.E.2d 678 (1987) (solo medical practice); Hollander v. Hollander, 89 Md. App. 156, 597 A.2d 1012 (1991) (solo dental practice); Porter v. Porter, 526 N.E.2d 219 (Ind. Ct. App. 1988); Yoon v. Yoon, 711 N.E.2d 1265, 1267 (Ind. 1999).

The Plaintiff/Appellee’s expert never discussed goodwill at all in his evaluation. Nor does it appear that any calculation of any type of goodwill was ever calculated. The method that this expert utilized, income approach, capitalized earnings approach was not used to make any calculation of

goodwill. Additionally, Mr. Bodkin, the Plaintiff/Appellee's second expert did not consider goodwill in determining which accounting method was most acceptable. (TR 4-1-05 pg 78 ln 22). No discussion was ever undertaken as to why the Appellants experts determined that goodwill should not be used. The Appellee may argue that the statement by Bodkin "I go to a doctor because of the doctor, not because of location." (TR 4-1-05 page 69 ln 9), justifies the failure to value goodwill, however, the Respondent/Appellant argues that this is not sufficient analysis to justify completely ignoring enterprise goodwill as an asset to be divided and valued. Finally, Mr. Bodkin further states that the capitalization of excess income approach is not an appropriate method to value this professional practice. However, this court has recognized that "The most commonly relied upon approach for valuing professional practices is the capitalization of excess earnings approach.

The Appellant argues that the court was clearly erroneous in adopting the valuation presented by Dr. Helfer as it made no calculation for enterprise goodwill for the chiropractic business, nor justified its absence, and therefore was not an accurate reflection of the fair market value of said business. Further, the Appellant argues that under the May decision the Court must make a determination whether enterprise goodwill exists and secondly if it does, the value of the enterprise goodwill that does exist. The Court failed to make such findings and therefore was clearly erroneous in its adoption of the Appellees expert's valuation.

CONCLUSION AND RELIEF

The Appellant respectfully requests that this Honorable Court accept the petition and award the relief sought herein including but not limited a reversal and remand for further hearing if the court finds such additional findings of fact necessary.

Respectfully submitted,
CAROL HELFER



By: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of May, 2007, that service of the foregoing Brief for Petition for Appeal was made upon the following individuals:

Mailed to: Robert J. Helfer
Address: 57 Barrington Drive, Wheeling, WV 26003
Date Mailed: May 7, 2007

A handwritten signature in cursive script, appearing to read "Marshall Wood".

Of Counsel for Appellant