

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

DONNA WILSON,

Petitioner/Appellee,

v.

Case No. 05-D-486

LEON HUNTER WILSON,

Respondent/Appellant.

BERKELEY COUNTY
CIRCUIT CLERK
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VIRGINIA STATE COURT

OPINION AND ORDER

This matter arises from a November 21, 2008 Final Order of the Family Court which granted a divorce and resolved the equitable distribution of marital property between the parties. The primary issues raised in Mr. Wilson's Petition for Appeal are that the Family Court Judge erred in his valuation of the manager fees component of the parties' real estate development company, in his failure to exercise continuing jurisdiction over two (2) ongoing development projects where the manager fees were contingent and uncertain, and in his characterization of the valued manager fees as enterprise goodwill. After considering the briefs, the record below, and the applicable legal authorities, this Court reverses the Final Order of the Family Court in part and remands the case for further proceedings.

Factual and Procedural History

The parties were married in 1990 and had no children. Both parties were involved in aspects of real estate development prior to and during the marriage. In 1993, they formed Hunter Company of West Virginia ("HCWV") to conduct real estate development, each party owning one half of the stock. Beginning in 1995, HCWV began a contractual relationship first with Red Creek Ranch, Inc. and then with National Land Partners ("NLP") for HCWV to manage its real estate projects, which was accomplished through successive Management

Agreements. NLP is involved in large tract real estate development and does business in eleven (11) states. In West Virginia, NLP owns and has financial responsibility for its projects under WV Hunter LLC. The parties have no interest in WV Hunter LLC, and HCWV owns no real estate.

Under the Management Agreement, HCWV's duties are to identify property that would qualify for development, put it under contract, and complete due diligence and feasibility studies to determine if NLP should purchase the property. If that occurs, HCWV is to conduct engineering and design work, obtain all permits and subdivision approval, and oversee the construction of the infrastructure. When the roads and utilities are complete, HCWV is to hire a sales force, conduct advertising, marketing, and other promotions and sell all of the lots. Under the Management Agreement, typically at the end of the project, HCWV is paid a manager fee which is defined as any "net profit" remaining after 12.5 percent of the gross sales are paid to NLP and all other expenses are paid. If NLP's preferential payment exceeds the "net profit," HCWV receives no compensation.

At the time of the parties' separation on June 1, 2005, HCWV was the manager of six (6) real estate development projects for NLP at various stages of completion. Ms. Wilson was no longer involved in HCWV's business. On June 1, 2005, Ms. Wilson filed for divorce. Prior to the May 8-9 and September 11, 2008, evidentiary hearings, as reflected in a series of May 2008 Orders, the parties divided their personal property and identified and stipulated to the value and distribution of all of their marital assets and debts, except for the calculation and valuation of HCWV's manager fees for equitable distribution, which was litigated before the Family Court. The stipulated net marital estate was \$9,536,682.00,¹ and Mr. Wilson had advanced Ms. Wilson \$4,317,438.00 towards her share of the marital estate. The parties

¹ Excluding the contested value of the HCWV manager fees, the parties agreed that the marital assets were valued at \$11,587,324.00, less \$2,050,642.00 in marital debts, for a net total of \$9,536,682.00.

contemplated that Mr. Wilson would retain the marital assets, including the stock of HCWV in exchange for a cash payment to Ms. Wilson.

During the proceeding before the Family Court, Ms. Wilson presented expert testimony on the valuation of the HCWV manager fees. Ms. Wilson's expert projected the manager fees at \$8,927,959.00 as of the date of separation and opined that the value was entirely enterprise goodwill. Mr. Wilson offered no trial expert but, through numerous NLP financial records and the testimony of NLP's chief financial officer and Mr. Wilson's certified public accountant, determined that because of premature payments and overpayments of manager fees by NLP, as of the date of separation, manager fees had a negative value of \$(2,680,672.00), and that two of the six real estate development projects had not been completed.

By Order entered November 21, 2008, the Family Court adopted the valuation of the manager fees adopted by Ms. Wilson's expert and found that the entire value was enterprise goodwill. To equalize the distribution of marital assets, the Family Court ordered Mr. Wilson to pay Petitioner the sum of \$4,914,582.50 and awarded judgment in that amount. On December 23, 2008, the Family Court denied Respondent's Motion for Reconsideration. From these rulings, Mr. Wilson filed a Petition for Appeal to this Court.

Standard of Review

Pursuant to statute, in reviewing a final order of a family court judge that is appealed to circuit court, findings of fact by a family court judge are reviewed under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. Questions of law are reviewed *de novo*. W.Va. Code § 51-2A-14(b) (2003); Syl. Pt. 1, *May v. May*, 214 W.Va. 394 (2003).

Discussion

Mr. Wilson assigns five (5) errors for review by this Court, each of which shall be addressed, though the main issues surround the valuation of manager fees, continuing jurisdiction over projects where manager fees are contingent, and the assignment of enterprise goodwill to the manager fee valuation. Mr. Wilson also maintains that the Family Court's reliance on two (2) financial statements, one signed and the other unsigned, in its valuation of the manager fees, was clearly erroneous, as was that Court's later refusal of Respondent's Motion for Reconsideration.

Manager Fees

At the time of the parties' separation, HCWV was involved in the management of six (6) real estate projects: Ashton Woods, Crossings, Overlook at Greenbrier, The Springs at Shepherdstown, WestVaco, and The Point. Four (4) of those projects – Overlook, The Springs, Crossings, and Ashton Woods – were completed after separation but before trial. The remaining two (2) projects, WestVaco and The Point, have not completed construction and lot sales. To track the progress of each of its projects, NLP generates a number of internal financial reports. A Schedule A Project Evaluation Schedule is created for each project setting out the project budget and showing the expected gross profit. If changes are needed, a "re-costing" of the Schedule A is prepared. For each project, a cumulative and monthly project-to-date income statement is generated which tracks the gross profits and selling, operating, and interest expenses. On the project-to-date income statements, HCWV's earned manager fee is shown as an operating expense; the "net income" shown on the statement is NLP/WV Hunter, LLC's 12.5% guaranteed return on gross sales.²

² For example, Respondent's Exhibit 8 is a project-to-date income statement for Overlook at Greenbrier, an NLP project that was pending at the time of the parties' separation but which was completed before trial. The

Using documents showing the percentage of construction spending generated by HCWV as of the date of the parties' separation, evidence was presented by Mr. Wilson on the amount of manager fees earned based upon HCWV's work on each of the four (4) projects which were completed after separation and before trial – Overlook, The Springs, Crossings, and Ashton Woods. Since Ms. Wilson was no longer involved in HCWV after separation, there was no dispute that these manager fees earned had a marital and a non-marital component based upon the percentage of construction spending both before and after the date of separation.³

This analysis is consistent with the Supreme Court's charge that the net value of marital property be determined within the requirements of the West Virginia Code. *Tankersley v. Tankersley*, 182 W.Va. 627 (1990); W.Va. Code § 48-7-104(1) (2001). The statute states *in para materia*:

Where the value of the marital property portion of a spouse's entitlement to future payments can be determined at the time of entering a final order in a domestic relations action, the court may include it in reckoning the worth of the marital property assigned to each spouse.

While NLP's financial reports which monitor project progress by percentage of construction spending have nothing to do with the calculation of manager fees under the Management Agreement, percentage of construction spending is a reliable tool to separate the marital and non-marital shares of earned manager fees at the time of separation.

document reflects that after NLP received its preferential 12.5% of gross sales, which was \$1,665,277, and all expenses were paid, HCWV was paid a manager fee (the "net profit" as defined in the Management Agreement) of \$2,760,219. NLP also produces monthly reports on construction spending as a percentage of each project's budget. According to NLP, construction spending best measures the progress of a project and the work performed by HCWV. This method of measuring profits earned as a project develops is consistent with Generally Accepted Accounting Principles ("GAAP"). The accounting system and reports generated by NLP have been in place since 1995.

³ For example, Respondent's Exhibit 23 and supporting testimony showed that \$156,181 of the total manager fee paid of \$1,148,389 on The Springs project was based on 13.6% of total construction spending, that is, work generated by HCWV, occurring as of the date of separation, making that the marital share of the total manager fees earned.

Respondent summarized the marital shares of the manager fees from the Overlook, The Springs, Crossings, and Ashton Woods projects, as of the time of separation as follows:

Overlook	\$ 212,537	(manager fees earned but not received)
The Springs	<u>\$ 156,181</u>	(manager fees earned but not received)
Total	\$ 368,718	
Crossings	\$ (692)	(manager fees received but not earned)
Ashton Woods	<u>\$ (2,681,364)</u>	(manager fees received but not earned)
Gross Total	\$ (2,312,646)	(net manager fees)

These numbers are better placed in context with HCWV's ordinary income reported on its 2004 and 2005 tax returns of \$11.8 million and \$4.6 million, respectively. The unrebutted evidence showed that NLP prematurely paid and overpaid manager fees on the Ashton Woods project to HCWV and that post-separation, HCWV absorbed unanticipated project road expenses and repaid the overpaid manager fees from other projects. The marital share of the Ashton Woods manager fees thus required downward adjustment. The evidence also reflected other downward adjustments to the marital portion of the manager fees revising the total to \$(2,650,378).⁴

Petitioner has argued that the manager fee calculations are unreliable because NLP's internal accounting does not conform to GAAP.⁵ However, Petitioner's expert conceded this criticism of NLP's projected income statements would correct itself at the end of a project when all expenses were paid and the "net profits" could be calculated.

The Family Court did not accept Mr. Wilson's data, analysis, and calculation of the marital share of post-separation earned manager fees based upon the percentage of

⁴ In summary, HCWV received \$16.4 million in manager fees in 2004-05 up to the date of separation, of which \$2.6 million was either separately prematurely paid or represented overpayments which were offset post separation by other development costs and adjustments. This was determined by measuring HCWV's work on projects up to the time of separation by the percentage of construction spending against the total spent.

⁵ The Management Agreement requires HCWV's compensation to be determined using Generally Accepted Accounting Principles.

construction spending and instead adopted the opinions of Petitioner's expert, Kenneth Apple, who valued future manager fees at the date of separation based upon projections. Ms. Wilson argues that the Family Court was correct because Mr. Wilson did not present any expert testimony on the issue of valuation, relying on *Signorelli v. Signorelli*, 189 W.Va. 70 (1993) at Syl. pt. 4, that a family court "is not free to reject competent expert testimony which has not been rebutted." This Court rejects offhand the notion that an expert's testimony can only be rebutted by another expert. Competent factual evidence can rebut the unsupported or flawed opinions of an expert. As the Supreme Court held in *Webb v. Chesapeake & Ohio Ry. Co.*, 105 W.Va. 555(1928), Syl. pt. 2, "[t]he testimony of expert witnesses on an issue is not exclusive, and does not necessarily destroy the force or credibility of other testimony. [The trier of fact] has a right to weigh the testimony of all witnesses, experts and otherwise; and the same rule applies as to the weight and credibility of such testimony." In the instant case, this Court finds that the Family Court's valuation of manager fees based upon the opinion testimony of Mr. Apple was clearly erroneous and that Mr. Apple's opinions were outweighed by actual end-of-project calculations of manager fees. The Supreme Court has long cautioned trial courts to maintain a preference for actual proof of value over estimates or opinions. *Webb v. Chesapeake and O. Ry. Co.*, 144 S.E. 100, 103 (W.Va. 1928); *Underwood v. Raleigh Transp. Equip. & Constr. Co.*, 135 S.E. 4, 4 (W.Va. 1926).

Mr. Apple's opinions of value were fundamentally flawed and unreliable for several reasons: His discounted net value of projected manager fees at the time of separation of \$8,927,957 was based upon an analysis of only three (3) of the six (6) pending projects - Overlook, The Springs, and WestVaco. Mr. Apple did not consider Ashton Woods, in which a significant amount of manager fees had been prepaid and overpaid to HCWV, nor did he examine the Crossings project or a still unfinished project, The Point. Mr. Apple conceded that

his information was incomplete. Moreover, his opinions relied on projected lot sales revenue from 2007 business plans for Overlook and The Springs and a 2007 budget for WestVaco.⁶ Though Mr. Apple conceded that final accountings or end-of-project information would be the best way to determine "net profits" received by HCWV, and were more reliable than projections, he did not utilize that data. Further, Mr. Apple did not identify or segregate the marital portion of the \$8,927,957 valuation of future manager fees, even though the evidence was uncontested that HCWV's work on the three (3) projects examined by the expert continued after the parties' separation. Finally, Mr. Apple's deduction of a substitute manager's salary of \$360,000 as a cost of management in discounting his gross projections to present value was unsupported and speculative.

This Court accordingly vacates the Family Court's adoption of the opinion testimony of Petitioner's expert on the valuation of HCWV manager fees and reverses the Family Court's equitable distribution award and judgment. This Court finds and concludes that the marital portion of HCWV's manager fees at the time of separation was a negative \$(2,196,915) in accordance with the evidence and that the net marital estate at separation is therefore \$6,886,304. Based upon the stipulated distribution of assets and advances towards equitable distribution made to Ms. Wilson in the sum of \$4,317,438, it appearing that Mr. Wilson has received marital assets and has assumed marital debt of the net value of \$2,548,866, to equalize the equitable distribution of marital property so that each party receives a net estate of \$3,443,152, Donna F. Wilson, now Donna F. Miller, shall pay Leon Hunter Wilson the sum of \$894,286,00, and Mr. Wilson is awarded judgment in that amount against Ms. Wilson with interest to accrue at the statutory rate of 7.00%. It is so ORDERED.

⁶ Petitioner's Exhibits 7, 8, 9.

Continuing Jurisdiction

HCWV managed two other real estate projects – WestVaco and The Point – for NLP at the time of separation which were not complete by trial. The evidence showed that WestVaco, a substantial project in Hampshire and Mineral Counties, was only 8.2% along at the time of the parties' separation, but that by trial, construction spending was at 99%. However, the sluggish economy had slowed lot sales and increased expenses, and 80 lots critical to the project's budget remained to be sold. Based upon NLP's project-to-date income statement through July 2008, to pay expenses and to guarantee NLP its 12.5% of gross sales, had the project ended at that time, HCWV would receive no manager fee and could be required to pay into the project the sum of \$1,326,901.⁷ Similarly, at The Point project, none of the lots there had been sold for many months because of defects in road construction, a problem being corrected by the responsible contractor. With nearly 25% of construction spending remaining and 35 of 45 lots unsold, the outcome of the project is uncertain and whether HCWV could earn any "net profits" (manager fees) is unknown. Had the project ended prior to trial, HCWV would have had to pay in \$947,787 in order to cover project expenses and protect NLP its guaranteed profit under the Management Agreement.⁸

The Family Court declined to retain jurisdiction over these unfinished projects pending their completion because it had adopted Mr. Apple's projections and wanted the parties to move on with their lives without being dependent upon future business outcomes. While severing the parties' interests in their marital property is the objective of the Family Court in making an equitable distribution, the parties' long involvement in their business, the contingent nature of these projects, and the uncertainty in valuing the marital share of any future manager

⁷ Respondent's Exhibit 31.

⁸ Respondent's Exhibit 35.

fees makes the exercise of continuing jurisdiction over both of these projects mandatory. Moreover, the Family Court compounded its error in adopting the estimated value of the manager fees promulgated by Ms. Wilson's expert and abused its discretion in failing to exercise continuing jurisdiction over the WestVaco and The Point projects based upon the following analysis:

Ms. Wilson's expert opined that manager fees of \$6,175,250 were projected to be earned by HCWV on the WestVaco project, which is 69% of the \$8,927,957 total value adopted by the Family Court. Mr. Apple's projection for WestVaco was based upon NLP's project budget, originally dated September 27, 2004 and revised or "recoosted" October 2, 2007.⁹ Mr. Apple ignored actual data for the WestVaco project, which shows the project operating at a loss at the time of trial. Further, Mr. Apple's total value of manager fees, as noted *supra*, did not even consider The Point project or any budget or accounting data from it. The Family Court's adoption of the expert's valuation of manager fees creates an enormous and grossly unfair windfall to Ms. Wilson in the equitable distribution award because it is based on budget projections and not reality.

Where either or both parties have an entitlement to future payments which are contingent or uncertain at the time of the final order, W.Va. Code § 48-7-104(1) allows the exercise of continuing jurisdiction:

[W]hen the value of the future payments is not known at the time of entering a final order in a domestic relations action, if their receipt is contingent on future events or not reasonably assured, or if for other reasons it is not equitable under the circumstances to include their value in the property assigned at the time of dissolution, the court may decline to do so; and (A) Fix the spouse's respective shares and such future payments if and when received; or (B) If it is not possible and practical to fix their share at the time of entering a final order in a domestic relations action,

⁹ Petitioner's Exhibit 10.

reserve jurisdiction to make an appropriate order at the earliest practical date.

Ms. Wilson argues that failing to adopt the "wait and see" approach is not clear error because the Supreme Court has only applied that rule to attorney contingent fee contracts in divorce proceedings, that Mr. Wilson has not cited any case where the rule is applied to these facts, and that allowing this approach would create opportunity for misconduct. However, though the parties have only cited cases where the relevant statutory language was applied to attorney contingent fee contracts, Mr. Wilson's receipt of a manager fee is contingent and is dependent on his knowledge and skill and the uncertainties of the real estate development market, of which the parties agree is extremely risky. This is similar to an attorney's contingent fee contract, in which an attorney must use his skill to obtain an award for his client, often in the face of unfavorable facts or law or an unsympathetic jury. The retention of continuing jurisdiction in such situations is clear and intended:

Contingent and other future earned fees...pending at the time of a divorce should be treated as marital property for purposes of equitable distribution. However, only that portion of the fee that represents compensation for work done during the marriage is actually "marital property" as defined by our statute. Because the ultimate value of a contingent fee case remains uncertain until the case is resolved, a court must retain continuing jurisdiction over the matter in order to determine how to effectuate an equitable distribution of this property. Syl. pt. 5, *Metzner v. Metzner* 191 W.Va. 378 (1994) (emphasis added).

The Management Agreement allows a "net profit" to be paid to HCWV only after all lots are sold, all project expenses are paid, and NLP receives a "preferential profit participation" of 12.5% of gross lot sales. The Agreement states that if NLP's mandatory profit payment exceeds the "net profit" (HCWV's manager fee), HCWV receives no compensation.¹⁰

¹⁰ Petitioner's Exhibit 1 at § 6.2.

Though no case analogous to the instant facts has been cited by either party, nevertheless, the facts fall within the statute's requirements for the exercise of continuing jurisdiction. W.Va. Code § 48-7-104(1). As for the assertion by Ms. Wilson that exercising continuing jurisdiction over the two projects could create opportunities for misconduct, no facts are cited in support of this contention. These are NLP's projects, and Mr. Wilson must answer to it.

Though the marital share of the potential manager fees in the WestVaco and The Point projects is a small percentage -- 8.2% based on construction spending on WestVaco at separation and 2.3% at The Point -- both projects are losses at the time of trial and are reliant on future revenues from the sale of the remaining lots for HCWV to earn manager fees. Once those projects are complete and the remaining lots are sold, in accordance with W. Va. Code § 48-7-104(1), the marital share, based on the percentage of construction spending at the time of separation, shall be in the same proportion to the total manager fee earned or, if a loss, the amount of that loss. This shall be the obligation of the Family Court upon remand. It is so ORDERED.

Goodwill

Mr. Wilson also cites as clear error the ruling of the Family Court, which adopted the testimony of Ms. Wilson's expert that the entire discounted value of the projected and future manager fees found by the expert constituted enterprise goodwill. Based upon a careful review of the record and the parties' legal arguments, this Court agrees and vacates this ruling by the Family Court, finding that the goodwill of HCWV was entirely personal goodwill.

Goodwill is the excess earning power of a business above and beyond its tangible assets. It has been defined by our state Supreme Court generally as

[T]he advantage or benefit, which is acquired by an establishment, beyond the mere value of the capital stock, funds, or property employed therein, and consequence of general public patronage and encouragement, which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices.

May v. May, 214 W.Va. 394, at 399 (2003) (citation omitted).

There are two types of goodwill: "Enterprise goodwill" 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. It is wholly attributable to the business and is marital property subject to equitable distribution. Syl. Pt. 2, 4, *May v. May*, 214 W.Va. at 405. On the other hand, "personal goodwill" is intrinsically tied to the attributes and/or skills of an individual and is not a divisible asset subject to equitable distribution. Syl. Pt. 3, 4, *May v. May*, 214 W.Va. at 405. A trial court must look to the precise nature of the goodwill in determining whether goodwill should be valued for purposes of equitable distribution. *Id.*, 214 W.Va. at 405. Courts have recognized that "the burden is on the party who seeks to establish goodwill as a marital asset to produce convincing proof delineating between [enterprise] goodwill on the one hand and personal goodwill on the other." *Id.*, 214 W.Va. at 399, fn. 10 (citations omitted). In valuing goodwill, though no one formula is preferred, five major formulas have been articulated: straight capitalization, capitalization of excess earnings, an IRS variation of capitalization of excess earnings, market value analysis, and application of buy-sell agreement terms. On appeal, so long as the net value of the business and its goodwill, if any, is based on competent evidence and on a sound valuation method or methods, the valuation will not be disturbed. *Id.*, 214 W.Va. at 406-07 (citing to *Conway v. Conway*, 508 S.E.2d 812, 818 (N.C. App. 1988)). In *May*, the Supreme Court affirmed the trial court's conclusion that Mr. May's dental practice had personal goodwill because it was tied to his skill and attributes.

The Family Court's conclusion that the value of the manager fees constitutes enterprise goodwill is tied to one fact - that the Management Agreement provides for a continuing income stream to HCWV if the manager (Mr. Wilson) dies or becomes incapacitated and is replaced.

The Management Agreement¹¹ at Section 3.1 states that it shall "commence on the effective dates and shall continue until a completion of all projects... unless terminated by the parties." Section 3.2.2 provides:

In the event of the death or incapacitation of L. Hunter Wilson, Company will hire a substitute person or entity to manage the project. In the event a substitute is hired, manager shall be entitled to its compensation as determined in Section 6 using Generally Accepted Accounting Principles consistently applied, however, the cost of such substitute manager shall be an expense of the project.

The "compensation" defined in Section 6 refers to the "net profits" formula for paying the manager for its services rendered.

Ms. Wilson has the burden to prove the existence of enterprise goodwill by convincing proof. *Id.*, 214 W.Va. at 399. The provision in the Management Agreement provides nothing more than a method of payment to HCWV for Mr. Wilson's work in progress upon his death or incapacity. This factor alone does not create enterprise goodwill, and Ms. Wilson can point to no other fact in the case at bar that supports the existence of enterprise goodwill, nor does Ms. Wilson cite to any case law that supports this theory, that the existence of an "income stream" contract protecting the value of work performed *ipso facto* creates enterprise goodwill. The existence of Section 3.2.2 necessarily would require further inquiry on whether the circumstances of the business create enterprise or personal goodwill, and if the goodwill is marketable, enterprise goodwill may be created.

¹¹ Petitioner's Exhibit 1.

Beyond this contractual provision, the weight of the evidence supports the conclusion that HCWV has only personal goodwill for which no value is assigned. The Management Agreement, though a contract between two legal entities, relies upon the personal services of Mr. Wilson to manage NLP's real estate projects. Section 3.2.2 gives NLP the right to hire a substitute manager if Mr. Wilson dies or becomes incapacitated. HCWV does not have the right to name Mr. Wilson's successor. In addition, the Family Court was clearly wrong when it found that HCWV "has a qualified and highly compensated work force...." The evidence was not in dispute that this "work force" is composed entirely of employees of Inland Management Co., an NLP subsidiary. HCWV has only one employee, Mr. Wilson, and if he left HCWV, it would collapse entirely. Section 10.4 of the Agreement refers to the "services and performances" to be rendered as "unique and personal," prohibiting both parties from assigning or delegating the duties or obligations under the Agreement. It thus can be legitimately inferred from the Management Agreement that NLP sought the experience and services of Mr. Wilson to manage its real estate projects, not HCWV.

The record further supports the conclusion that it is Mr. Wilson's personal services that are the basis of the Agreement with NLP. According to NLP's Chief Financial Officer, the duties that are required of a manager are in the nature of personal services and involve a wide ranging skill set: the identification of suitable property for development, the direction and oversight of a feasibility study for the property, the engineering, surveying, planning, and permitting for subdivision approval, the construction of the roads, utilities, and infrastructure, the employment of the sales force, and the marketing and sale of the finished lots. Mr. Wilson was chosen for this task, according to NLP's CFO, because of his "long record of performance." Mr. Wilson was further described as "quite good at what he does" and is the "real strength of the Manager Agreement." It would be difficult to replace Mr. Wilson, according to

the CFO, because he is "not sure there's another person in the state of West Virginia that has the skill sets that are required to manage our business." Even Ms. Wilson agreed with that assessment, stating that HCWV's success in 2004 in which the company earned \$11.8 million in manager fees was due to her husband's efforts. Any goodwill HCWV has thus belongs to Mr. Wilson, and he takes that goodwill wherever he goes. These facts show clearly that the success or failure of HCWV's management of NLP's real estate projects is intrinsically tied to Mr. Wilson's skills and is uniquely personal to him. HCWV has no customers or suppliers or ongoing relationships with anyone but NLP and thus is not an "enterprise." HCWV's business is purely the services that Mr. Wilson provides for which manager fees are earned. There is only personal goodwill.

Apart from professional practices such as the dental practice in *May*, other courts have found the existence of personal goodwill and the lack of enterprise goodwill where a spouse's business was dependent on the spouse's personal services and ability. In *Lanksford v. Lanksford*, 79 Or. App. 742, 720 P.2d 407 (1986), the husband was the sole owner of a logging business, and the success or failure of the business was dependent upon his special expertise and ability to negotiate contracts. The Oregon Court found that there was no goodwill for value to be assigned. In *In re Marriage of Foley*, 516 N.E.2d 455 (Ill. App. 1987), the appellate court sustained the lower court's finding that the goodwill of the husband's automobile parts business rested entirely with him and was personal because of his relationship with his customers. Similarly, in *Bertholet v. Bertholet*, 725 N.E.2d 487 (Ind. App. 2000), a husband's bail bonds business was found to have personal goodwill; the Indiana court remanded the case for determination of the value of the business excluding personal goodwill. These cases confirm the principle that where a business depends upon the continued presence of a particular individual

and is attributed to the individual's personal skill, training or reputation, personal goodwill exists and is not subject to equitable distribution. *May, supra*, syl. pt. 4.

Finally, the valuation of goodwill in this case was flawed and unreliable, and the Family Court's adoption of that valuation is also reversible error. Ms. Wilson's expert did not identify, nor did he rely upon, any of the acceptable, recognized formulas for valuing goodwill explained in *May*, 214 W.Va. at 406-07. Instead, Mr. Apple merely calculated the present value of a future cash flow based upon budget estimates and characterized that number as enterprise goodwill. Because this Court finds that HCWV has only personal goodwill not subject to equitable distribution, no further valuation is necessary.

Financial Statements

Mr. Wilson assigns as clearly erroneous the Family Court's reliance upon two personal financial statements as corroborating the value opinions of Ms. Wilson's expert. The Court herein has vacated the Family Court's adoption of the expert's value opinion and found that it was clearly erroneous. Likewise, the conclusions drawn by the Family Court from the two financial statements (Ms. Wilson's Exhibits 19 and 20) are speculative and clearly erroneous.

The signed August 2004 statement (Exhibit 19) was prepared at First United Bank as a requirement for the Wilsons to serve as guarantors to NLP's \$14.6 million loan for the acquisition of the WestVaco property, not for a loan to Mr. Wilson or his company as the Family Court found. The statement lists total personal assets of \$20,311,641. Mr. Wilson testified that "accounts and loans receivable" of \$5,292,208 were manager fees owing to HCWV and that the handwritten entry "inventory held by WV Hunter LLC" of \$4,140,720 referred to land owned by NLP's subsidiary, not by HCWV. Since there was no clear segregation of HCWV's assets from

personal assets, commingling of assets with WV Hunter LLC, and no testimony from the bank loan officer who prepared the document to explain the figures, the Family Court's conclusion that the numbers support Mr. Apple's conclusion is conjectural.

Likewise, the August 2005 statement (Exhibit 20) which is unsigned, lists 100 shares of HCWV stock valued at \$10 million. Again, the loan officer who prepared the document was not called to explain the entry, how it was derived, and what it represented. Mr. Wilson had refused to sign the statement because of that and other inaccuracies. The evidence as to how the document and the total were created and linkage of that number to Mr. Apple's opinion are speculative and coincidental, and, illustrating that conclusion, Mr. Apple made no reference to the financial statements in his testimony. The Family Court's finding that Mr. Wilson had unclean hands is also without merit and factual support. Mr. Wilson refused to sign this financial statement because it contained inaccuracies and attempted to explain entries on an earlier statement. No bank official was called to explain either statement.

Motion for Reconsideration

Following the Family Court's finding that HCWV manager fees were valued at \$8,927,957 at separation, Mr. Wilson filed a Motion for Reconsideration, stating that he did not desire to be awarded the HCWV stock at that value and requested that the Court award the stock to Ms. Wilson, since it represented enterprise goodwill or, per W.Va. Code § 48-7-105, that it be sold or transferred to a third party in accordance with W.Va. Code § 48-7-104(7)(E) (2001). The Family Court denied the relief by its December 23, 2008 Order, finding that prior to trial, the parties requested that the HCWV stock be awarded to Mr. Wilson and that Mr. Wilson had had

the opportunity to offer alternative proposals to the Court as to the distribution of the stock or business assets.

Mr. Wilson contends that the Family Court's ruling was clearly erroneous and must be set aside. The Court finds, however, that whether or not the Family Court followed the mandatory procedures of W.Va. Code § 48-7-104(2)-(7) and § 48-7-105 is moot. The Court has vacated the equitable distribution award and need not address the Family Court's denial of the Motion for Reconsideration.

Conclusion

Based upon the Court's analysis, findings, conclusions, and rulings, it is accordingly ORDERED AND ADJUDGED as follows:

1. Mr. Wilson's Petition for Appeal is GRANTED.
2. The Family Court's finding that the HCWV manager fees are valued at \$8,927,957 at the time of separation is REVERSED AND VACATED. The Court FINDS AND CONCLUDES that the marital portion of the HCWV manager fees at the time of separation is a negative \$(2,196,915) and that the net marital estate at the time of separation is therefore \$6,886,304, based upon the following chart:

<u>Marital Assets</u>	<u>Amount</u>
HCWV ¹²	\$ (2,196,915.00)
Susquehanna #2702269201	\$ 1,671.00
Susquehanna #2701098801	\$ 7,200.00
Susquehanna #60000476931	\$ 100,006.00
Susquehanna #60000410511	\$ 2,720,609.00
Susquehanna #2701103801	\$ 5,968.00
Susquehanna #2701098802	\$ 215,601.00

¹² The value of HCWV includes the two Susquehanna accounts, #7609 and #7601, the physical assets, and the negative value of the manager fees.

First United Bank #024011353	\$	1,037,909.00
First United Bank #2500003431	\$	6,500.00
First United Bank #023000433	\$	108,740.00
First United Bank #023005384 (Farm)	\$	24,716.00
American Funds #157286163-03	\$	3,713.00
HSBC #25606 IRA	\$	96,557.00
HSBC #9394	\$	483,266.00
HSBC #9394A	\$	363,623.00
HSBC #9394B	\$	1,120,959.00
Primevest Stock	\$	2,133.00
DirecTV Stock	\$	1,529.00
Dennis Lupton Note	\$	100,000.00
Former Marital Domicile	\$	2,586,161.00
471 B&O Overpass Road, Hedgesville (Cast Hill LLC)	\$	2,127,000.00
Education Fund	\$	<u>20,000.00</u>

Total Assets: \$ 8,936,946.00

Marital Debts

92% of Federal Income Tax on HCWV	\$	1,754,458.00
92% of West Virginia Income Tax on HCWV	\$	<u>296,184.00</u>

Total Debts: \$ 2,050,642.00

Net Estate (assets less debts): \$ 6,886,304.00

3. The Family Court's conclusion that HCWV has enterprise goodwill is REVERSED. The Court FINDS AND CONCLUDES that HCWV has only personal goodwill.

4. The Family Court's equitable distribution award and judgment are REVERSED and to effect an equitable distribution based upon this Court's Order:

A) Mr. Wilson shall have in equitable distribution the exclusive ownership of these marital assets: the shares of stock of HCWV,

the Susquehanna Bank accounts, the First United Bank accounts, the American Funds account, the HSBC accounts, the Primevest and DirecTV stock, the Dennis Lupton note, the former marital domicile, and the business property at 471 B&O Overpass Road, Hedgesville, and that Ms. Wilson shall execute all necessary documents to effect the transfer of her right, title, and interest in said property to Mr. Wilson within thirty (30) days;

B) Ms. Wilson shall receive exclusive ownership of the Education Fund of \$20,000, based upon the prior agreement of the parties, and that Mr. Wilson shall execute all necessary documents to effect the transfer of his right, title, and interest in said property to Ms. Wilson within thirty (30) days.

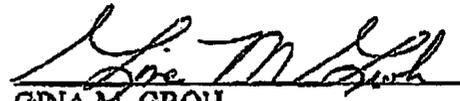
C) That it appearing that Ms. Wilson has received advances towards equitable distribution in the amount of \$4,317,438.00 and the Education Fund of \$20,000.00 for a total of \$4,337,438.00, and it appearing that Mr. Wilson has received marital assets and has assumed marital debt of the net value of \$2,548,866.00, to equalize the equitable distribution of marital property so that each party receives a net estate of \$3,443,152.00, Ms. Wilson shall pay Mr. Wilson within thirty (30) days the sum of \$894,286.00, and Mr. Wilson is awarded judgment in that amount against Ms. Wilson with interest to accrue at the statutory rate of 7.0% per annum.

5. This case is REMANDED to the Family Court, which shall exercise continuing jurisdiction over The Point and WestVaco projects. Mr. Wilson is DIRECTED to advise the Family Court when both projects have been completed, and the Family Court shall effect a supplemental equitable distribution in accordance with W.Va. Code § 48-7-104(1), i.e., the marital share of any manager fees earned or loss taken is based upon the percentage of construction spending for each project at the time of separation, being 8.2% for WestVaco and 2.3% for The Point.

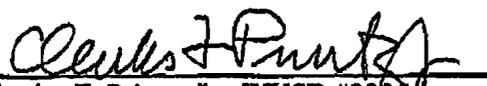
The objections of the parties to adverse rulings herein are preserved.

The Clerk shall provide attested copies of this Order to counsel of record: James P. Campbell, Esq. and Mary Binns-Davis, Esq., Campbell, Miller, Zimmerman, PC, 201 North George Street, Suite 202, Charles Town, West Virginia 25414; Cinda L. Scales, Esq. 112 East King Street, Martinsburg, West Virginia 25401; and Charles F. Printz, Jr., Esq. Bowles Rice McDavid Graff & Love LLP, Post Office Drawer 1419, Martinsburg, West Virginia 25402.

ENTER this 25th day of March, 2009.


GINA M. GROH
CIRCUIT COURT JUDGE

Submitted by:


Charles F. Printz, Jr., WVSB #2983
Counsel for Respondent Leon Hunter Wilson

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

DONNA WILSON,

Petitioner,

v.

LEON HUNTER WILSON,

Respondent.

Case No. 05-D-486
Judge Groh

BERKELEY COUNTY
PROPERTY CLERK
2009 JUN -8 PM 2:30
SANDRA SINE, CLERK

ORDER DENYING RULE 59(e) MOTION

On a previous day, the Petitioner/Appellee filed her Motion Pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure to Alter or Amend This Court's March 25, 2009 Opinion and Order with Memorandum in Support Thereof. The parties subsequently filed their response and reply briefs and, based upon the Court's consideration of the arguments of counsel and the authorities cited, the Motion should be denied.

The Court finds that it properly applied the standard of review to the Family Court's Final Order and reaffirms its vacation and reversal of the Family Court's rulings which were challenged in the pending Motion. The Court also concludes that reserving jurisdiction over the two unfinished real estate development projects was legally correct and justified, where the manager fees from those projects and their marital shares were contingent and uncertain at the time of trial. Accordingly, it is

ORDERED that Petitioner/Appellee's Rule 59(e) Motion is DENIED, and her objection to the Court's ruling is preserved.

6/8/09
J. Campbell
M. Bunns-Davis
C. Scales
C. Prentiss
Judge Westman

The Clerk shall provide attested copies of this Order to counsel of record: James P. Campbell, Esq. and Mary Binns-Davis, Esq., Campbell, Miller, Zimmerman, PC, 201 North George Street, Suite 202, Charles Town, West Virginia 25414; Cinda L. Scales, Esq. 112 East King Street, Martinsburg, West Virginia 25401; and Charles F. Printz, Jr., Esq. Bowles Rice McDavid Graff & Love LLP, Post Office Drawer 1419, Martinsburg, West Virginia 25402.

The Clerk also shall provide an attested copy of this Order and the Court's Opinion and Order entered March 25, 2009 to the Honorable William T. Wertman, Jr., Family Judge.

ENTER: June 4, 2009


Gina M. Groh
CIRCUIT COURT JUDGE

A TRUE COPY
ATTEST

Virginia M. Sine
Clerk Circuit Court
By: Victoria J. Robinson
Deputy Clerk