

FIRST DISTRICT COURT OF APPEAL  
STATE OF FLORIDA

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No. 1D19-3280

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MALCOLM C. KING JR.,

Appellant,

v.

KELSI KING,

Appellee.

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On appeal from the Circuit Court for Alachua County.  
Susanne Wilson Bullard, Judge.

March 4, 2021

ROWE, J.

Malcolm C. King Jr. appeals a final judgment dissolving his marriage to Kelsi King. He asserts that the trial court erred in equitably distributing the parties' assets. He contends that the court overvalued the worth of the insurance company owned by the parties and undervalued his personal goodwill in the company. He also argues that the trial court erred in determining the alimony award and ordering him to maintain a life insurance policy to secure that award (along with the child support award). We affirm in part and reverse in part.

*I. Background*

The parties were married for fourteen years and had three children together. When their first child was born, they decided that Former Wife would stay home to care for the children while

Former Husband worked outside the home. Five years before the dissolution proceedings, the parties bought King Insurance Agency (KIA) from Former Husband's parents. Since then, Former Husband has served as KIA's CEO, managed the company's operations, and sold insurance as one of KIA's largest revenue producers. And Former Wife returned to the work force to work as KIA's bookkeeper.

When the parties bought KIA from Former Husband's parents, they paid \$1,500,000, while also assuming KIA's outstanding corporate debt. The monthly payments on the debt were around \$8,400 at the time of the dissolution. KIA also owed significant debt to Westfield Bank. In 2018, Former Husband negotiated the purchase of several books of business from other insurance agencies, funding the purchases with loans from Westfield Bank. At the time of the dissolution, two loans from Westfield remained unsatisfied, with monthly payments of \$3,842 and \$3,862.

While KIA had significant corporate debt, its gross revenue nearly doubled, and the parties' personal income nearly tripled from the time they bought the company until the dissolution proceedings. When it came time to discuss the equitable distribution, the parties agreed that KIA was marital property. But they disagreed on KIA's fair market value and the amount of Former Husband's personal goodwill in KIA. To assess the market value and determine Former Husband's goodwill, the parties presented the testimony of competing CPA experts. Former Husband presented Gary Trugman, and Former Wife presented Richard Gray.

Trugman assessed KIA's fair market value to be \$2,065,000. He reached that valuation by assigning percentage weights to two approaches for establishing the value of a business: the market approach and the income approach. Trugman searched a database called DealStats, which compiles information about acquisitions of insurance agencies. Trugman looked at acquisitions of Florida-based companies that took place between 2012 and 2018. Trugman assigned a 75% weight to the valuation drawn from the market approach (\$3,223,083) and a 25% weight to the valuation drawn from the income approach (\$1,489,769). Trugman then deducted

\$724,833 for the company's nonoperating liabilities and debts to arrive at the amount of \$2,065,000 as KIA's fair market value.

But Gray determined that KIA's fair market value was significantly higher. Based on his exclusive reliance on the income approach and review of company data from the years 2017 and 2018, Gray calculated KIA's fair market value at \$4,061,000.

The experts also disagreed on how much personal goodwill Former Husband had in KIA. Trugman testified on his approach to valuing Former Husband's personal goodwill. He analyzed KIA's revenues and determined how much each employee or producer of income brought into the business. He then considered the amount of business that Former Husband could take with him if KIA were sold and Former Husband were not restricted by a covenant not to compete with KIA. Based on his analysis, Trugman found that Former Husband's personal goodwill in KIA was \$1,600,554 or 68% of the company's value.

But Gray found that Former Husband's personal goodwill in KIA was much lower. Gray calculated goodwill by analyzing thirty insurance company transactions in the DealStats database. The transactions Gray considered were not limited to Florida insurance companies and the dates the transactions closed went back as far as 1997. In several transactions, part of the purchase price included the value of a covenant not to compete from the seller. Gray examined each of the transactions and found that in twenty-eight of them, the companies assigned a value to the noncompete agreement at an amount less than 10% of the purchase price. Gray then used the value of the noncompete agreements as a proxy for establishing the amount of Former Husband's goodwill in KIA and arrived at the 7.3% figure.

Besides their disagreements over the valuation of KIA and the amount of Former Husband's goodwill, the parties also disagreed on alimony. The parties agreed Former Wife was entitled to alimony, but they did not agree on the amount she needed, or the amount Former Husband had an ability to pay. The parties introduced their financial affidavits and competing experts testified about Former Wife's future anticipated salary.

After hearing testimony and considering the parties' arguments, the trial court entered a final judgment dissolving the marriage. As to KIA's fair market value, the court applied part of Trugman's valuation approach and found that the company was worth \$3,223,083. As to the Former Husband's personal goodwill in KIA, the court applied Gray's approach and found the goodwill amount to be 7.3% of KIA's market value. As to alimony, after imputing \$3,000 per month in income to the Former Wife, the court determined that she needed \$12,000 per month in alimony and Former Husband had an ability to pay that amount. The court ordered Former Husband to maintain his existing life insurance policy designating Former Wife as beneficiary to secure his obligations to pay alimony and child support.

Former Husband moved for rehearing, challenging the trial court's valuation of KIA, the calculation of Former Husband's personal goodwill in KIA, the amount of the alimony award, and the requirement that he maintain the life insurance policy. The trial court denied the motion for rehearing. Former Husband timely appeals from the final judgment.

## *II. Analysis*

Former Husband raises four issues on appeal. We address each issue in turn.

### *A. KIA's Fair Market Value*

First, Former Husband argues that the trial court erred in equitably distributing the parties' assets because it determined KIA's market value without considering KIA's corporate debt. We review a trial court's valuation of marital assets in an equitable distribution to determine whether it is supported by competent, substantial evidence. *Soria v. Soria*, 237 So. 3d 454, 458 (Fla. 2d DCA 2018). We conclude that the trial court's valuation was not supported by such evidence.

"The valuation of a business is calculated by determining the fair market value of the business, which is the amount [for which] a willing buyer and a willing seller would exchange assets[,] absent duress." *Christians v. Christians*, 732 So. 2d 47, 47 (Fla. 4th DCA 1999). In determining a company's fair market value, a trial court

making an equitable distribution must consider all the company's assets and all its liabilities. *Bair v. Bair*, 214 So. 3d 750, 754 (Fla. 2d DCA 2017). It is error to exclude either one. *Id.* (citing *Randolph v. Randolph*, 626 So. 2d 342, 343 (Fla. 5th DCA 1993)). Here, the trial court adopted Trugman's calculation of the value of KIA's assets at \$3,223,083—based on the market approach. But the trial court rejected the rest of Trugman's approach—where the expert assigned percentage weights to the income approach and the market approach to value KIA's assets **and** then deducted KIA's corporate liabilities to arrive at a final fair market value.

When the trial court adopted only part of Trugman's valuation of KIA—the valuation of the assets—the trial court excluded from its calculation any of KIA's liabilities. Trugman calculated KIA's liabilities (or corporate debt) to be \$724,833. The trial court's exclusion of KIA's liabilities in its determination of KIA's fair market value led to a significant overvaluation of the company in the court's equitable distribution plan. This was error because no competent, substantial evidence in the record supports the trial court's valuation of KIA. *See Bair*, 214 So. 3d at 754. And so, we reverse as to this issue.

### *B. Former Husband's Personal Goodwill in KIA*

Second, Former Husband challenges the trial court's determination that Former Husband's personal goodwill was only 7.3% of KIA's value. He argues that the goodwill percentage found by the trial court is not supported by competent, substantial evidence. We review the trial court's goodwill determination for an abuse of discretion, and we examine the court's valuation to determine whether it is supported by competent, substantial evidence. *Soria*, 237 So. 3d at 458.

When making an equitable distribution, a trial court should exclude from its valuation of a business the amount of a party's personal goodwill. *See Thompson v. Thompson*, 576 So. 2d 267, 270 (Fla. 1991) (explaining that personal goodwill represents a person's probable future earning capacity and should not be in the value of a professional practice for purposes of equitable distribution). This is because personal goodwill attributable to the skill, reputation, and continued participation of an individual is not a marital asset. *Soria*, 237 So. 3d at 458.

To determine the amount of a party's personal goodwill that should be excluded from the valuation of a business, "the evidence should show recent actual sales of a similarly situated practice, or expert testimony as to the existence of goodwill in a similar practice in the relevant market." *See Williams v. Williams*, 667 So. 2d 915, 916 (Fla. 2d DCA 1996). Here, the trial court adopted the goodwill valuation from Former Wife's expert, Gray. Gray estimated that Former Husband's personal goodwill was 7.3% of KIA's fair market value.

In reaching the 7.3% figure, Gray relied on data from the DealStats database. In some of the transactions, the database allowed the parties to the transaction to report the value of a covenant not to compete from selling an insurance company. Because the reporting parties valued most of the non-compete covenants at less than 10% of the business transaction, Gray took the average values from the transactions to come up with the 7.3% he assigned to Former Husband's personal goodwill in KIA. But Gray did not provide any specific knowledge about the particulars of the insurance businesses that reported transactions in the DealStats database. Gray did not disclose whether the owners of those businesses also sold insurance (as Former Husband did), how involved the owners of those businesses had been with the companies, or anything about the day-to-day operations of those businesses. And the record showed that many transactions Gray analyzed took place outside Florida, with some dating back almost twenty years.

For these reasons, Gray's analysis of the selected DealStats transactions and the reported values of the related noncompete clauses do not provide competent evidence to support the trial court's determination of the amount of Former Husband's personal goodwill in KIA. This is particularly true where the record shows that Former Husband is the CEO of KIA, its largest producer of revenue, and remains involved in all aspects of the business. *See Weinstock v. Weinstock*, 634 So. 2d 775, 778 (Fla. 5th DCA 1994) (finding no competent evidence when none of the expert's comparables included a situation in which a selling professional did not remain with the buyer in the conduct of the professional practice for a period after the sale); *see also Held v. Held*, 912 So. 2d 637, 640–41 (Fla. 4th DCA 2005) (finding that former husband's

personal relationship with his clients allowed him to obtain their repeat business, and that the court erred in adopting a value that ignored personal relationships). Because the trial court's goodwill determination is not supported by competent evidence, we reverse on this issue, too.

### *C. Alimony*

Third, Former Husband argues that the trial court erred in awarding alimony by finding that Former Wife needed \$12,000 per month (after deducting imputed income) and Former Husband had an ability to pay that amount. We review an alimony determination for an abuse of discretion. *Helling v. Bartok*, 987 So. 2d 713, 715 (Fla. 1st DCA 2008).

We find no error in the trial court's findings on Former Wife's need for alimony. But we conclude that the trial court erred in determining that Former Husband had the ability to pay the amount of alimony awarded. This is because when it determined the amount of Former Husband's monthly gross income, the trial court erroneously included undistributed pass-through income from KIA.

KIA is an S corporation. Although S corporation income is taxed directly to a shareholder (here, the Former Husband), that does not mean that the shareholder will "receive distributions in an amount equivalent to what is taxed." *See Bair*, 204 So. 3d at 760 (quotations omitted). In fact, an S corporation may not make distributions to shareholders if the corporation would be unable to pay debts as they become due. *See Zold v. Zold*, 911 So. 2d 1222, 1231 (Fla. 2005).

In the context of an alimony determination, undistributed pass-through income that an S corporation has retained for corporate purposes does not constitute income to the shareholder spouse. *See id.* Even so, the shareholder spouse has the burden to prove that the corporation's retention of undistributed pass-through income is for corporate purposes and not for the purpose of avoiding alimony, child support, or attorney's fees obligations by reducing the shareholder spouse's amount of available income. *Id.* at 1233.

Former Husband met his burden to prove that much of KIA's pass-through income was retained for the corporate purpose of paying corporate debt or liabilities. From the pass-through income amounts, Former Husband made monthly payments of \$3,841.83 and \$3,862.16 in corporate debt owed by KIA to Westfield Bank. Former Husband listed the monthly payments for the Westfield Bank loans in his financial affidavit. But in computing Former Husband's income for alimony purposes, the trial court included all of the pass-through income Former Husband received from KIA—it did not deduct the monthly payments for corporate debt Former Husband made for KIA from that pass-through income. This was error, leading to a significant miscalculation of Former Husband's monthly income and his ability to pay alimony. And so we reverse on this issue, too.

#### *D. Insurance Policy*

Finally, Former Husband argues that the court erred by requiring him to secure the alimony award by maintaining his existing life insurance policy with Former Wife as beneficiary. Finding no error by the trial court, we affirm this issue without further discussion.

### *III. Conclusion*

We reverse the final judgment and remand for further proceedings as to the trial court's determination of the value of KIA, its determination of Former Husband's personal goodwill in KIA, and its award of alimony based on its erroneous calculation of Former Husband's income. We otherwise affirm.

AFFIRMED in part, REVERSED in part, and REMANDED.

B.L. THOMAS and M.K. THOMAS, JJ., concur.



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*Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.*

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