

RENDERED: JULY 2, 2004; 2:00 p.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2001-CA-002140-MR

HAROLD TATUM, JR.

APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT  
HONORABLE ELEANORE M. GARBER, JUDGE  
ACTION NO. 99-FC-008085

PATRICIA L. TATUM

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, Chief Judge; DYCHE, Judge; and EMBERTON, Senior Judge.<sup>1</sup>

COMBS, CHIEF JUDGE. Harold Tatum, Jr., appeals from the portion of a supplemental decree dissolving his marriage to Patricia L. Tatum that divided the parties' property and from an order awarding Patricia a common-law judgment in the amount of \$526,207.00. After reviewing the record in light of Harold's arguments, we find no basis for disturbing the decisions of the

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<sup>1</sup> Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Family Court. We affirm the judgment and order entered in this action.

The parties married in June 1977 and separated in September 1999.<sup>2</sup> Harold filed his petition for divorce one month later. On March 12, 2001, the court entered its decree dissolving the marriage but reserving all other issues for later disposition. In separate findings entered June 7, 2001, the court noted that the parties had reached an agreement on some of the reserved issues, including Patricia's claim for permanent maintenance, her claim for attorney's fees, and Harold's claim to the checking and savings accounts. They also agreed that the court's equal division of their marital property would be a fair and equitable division. Among the issues remaining for resolution by the Family Court were the valuation and disposition of the couple's closely-held corporation, Tatum Machinery Company.

The valuation of the company was the primary issue in dispute. In addition to the testimony of the parties and experts presented by each side, an expert retained before the parties' separation testified as to his opinion concerning the value of the machinery company. Bryan Livingston, an American Express Financial Advisor, averaged the results of four different approaches to valuation, arriving at a final value for

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<sup>2</sup> By the time of separation, the children born of the marriage were emancipated.

the company of \$401,949.00. Steve Kerrick, a certified public account retained by Harold, used a combination of two methods of valuation. His analysis produced a value of \$206,492.00. Jim King, an account retained by Patricia, utilized a single method to arrive at a total value of \$531,500.00.

The Family Court ultimately awarded to Harold the business, the marital residence, and other personal property. The value of the assets distributed to Harold totaled \$577,302.00. In an effort to equalize the division of property, Harold was ordered to pay to Patricia the sum of \$526,207.00. This award represented Patricia's share of the couple's marital residence and personal property as well as her share of the company. Patricia was to receive her share of the marital estate in a lump sum from the proceeds of the parties' Merrill Lynch investment account. This account was valued by the parties at \$645,210.00 as of February 1, 2001.

On appeal, Harold argues that the court erred by assigning to Tatum Machinery Company a value of \$380,440.00. Harold contends that the trial court reached this valuation "despite overwhelming evidence that the business would not yield near that amount if sold, and without factoring in the depreciated value of the business due to market conditions which followed the trial." Appellant's brief at 4. (Emphasis original.)

With regard to the value of the company, the trial court carefully reasoned as follows:

Both parties have employed well-qualified experts and, not surprisingly, each party's expert has arrived at a value of this business which favors his client's position. What is somewhat surprising to the Court is the degree of disparity in the expert's conclusions. Steve Kerrick contends that Tatum Machinery Co. has a value of \$206,000 while Jim King contends that the business has more than twice that value, setting his own figure at \$532,000.

Steve Kerrick gave 50% weight to the so-called "adjusted book value" which values a business basically by determining the market value of assets less liabilities and giving no value to the cash or earnings stream. Mr. Kerrick adds his calculation of the adjusted book value and his calculation of the capitalized earnings valuation and then divides the total by two. He then takes the average of the two calculations and applies a 30% discount figure to the averaged amount. He arrives at a final evaluation which amounts to scarcely more than the adjusted book value. With all due respect to Mr. Kerrick's approach, the Court has difficulty adopting as a real value, a figure which effectively allows for goodwill only \$517.00. (\$206,492 - Year 2000 Book Value \$205,975). This business has generated all of the parties' joint estate which totals well more than \$1,000,000. While the Kentucky courts give little guidance to trial courts in determining value of closely held businesses, several Kentucky courts have indicated that corporations should be valued at their market or going concern value which considers both physical or tangible assets as well as intangible assets such as goodwill, income producing capacity, and risk factors associated with the business.

In Clark v. Clark, Ky. App., 782 S.W.2d 56 (1990), the court viewed favorably an approach to valuation of a medical practice which gave significant weight to so-called goodwill. In that case, one of the court's experts, Mr. Michael Mackin, with whom this Court is familiar, puts significant weight on the capitalization of excess earnings method of establishing the value of goodwill. Petitioner submits that Tatum Machinery Co., an enterprise with rather specialized products cannot be evaluated in the same way as a professional, medical or legal corporation where data is [*sic*]readily available concerning comparable professional earnings. In this case, however, Jim King focused not on the capitalization of excess earnings approach, but on the straight capitalization method similar to one of the approaches used by Bryan Livingston employed by Petitioner before the initiation of this action. In part because Mr. Livingston has "no dog in this fight," the Court has given serious attention to and has in fact adopted Mr. Livingston's adjustment of 1997 ordinary income downward by \$47,000 implying that a replacement manager for Tatum Machinery Co. would be paid approximately \$85,000 per year. Jim King adjusted ordinary income downward by \$37,000 indicating that a replacement manager would be paid \$75,000.00 per year while Steve Kerrick adjusted income downward by \$62,000, asserting that a replacement manager would earn \$100,000 a year. Neither of the parties' trial experts presented any detailed or substantial testimony as to why they arrived at the figures they did for replacement managers and the Court goes with Mr. Livingston's prediction primarily as he had no reason for bias.

The Court adopts Mr. Livingston's 20% rate of return or capitalization rate of earnings which is 3 percentage points higher than Mr. King's and 5% lower than Mr. Kerrick's. The Court has taken into account the ordinary

income as adjusted for the years 1997 through 2000 as Mr. Kerrick did. The Court adopted Jim King's 20% marketability discount to its calculation of the capitalized returns method and arrives at a fair market value of \$380,044 which is far closer to Mr. Livingston's bottom line value of \$401,000 than to either of the parties' trial experts. The Court notes that there has been some fluctuation up and down in the ordinary income of Tatum Machinery Co. between 1997 and 2000 and finds that the fluctuating earnings for all 4 years should be considered.

The Court agrees with petitioner that the balances of the bank accounts maintained by Tatum Machinery Co., the PNC Money Market account with a balance of \$48,106.08 and the National City \$20,000 account remain assets of Tatum Machinery Co.[a]nd have been included in the experts' business evaluations. Hence, they are not separate marital assets subject to division. (Opinion of the Court, pp. 110-12)

In Clark v. Clark, Ky. App., 782 S.W.2d 56, 59 (1990), this Court observed that "[t]here is no single best method" for valuing a business in a divorce proceeding and that the "task of the appellate court is to determine whether the trial court's approach reasonably approximated the net value of the [business] interest." A trial court's valuation in a divorce action will not be disturbed on appeal unless it is clearly contrary to the weight of the evidence. Heller v. Heller, Ky. App., 672 S.W.2d 945 (1984).

The analysis of the Family Court in this matter was based directly on testimony contained in the record. The resulting valuation clearly fell within the range of testimony provided by the several experts. We are convinced that the approach adopted by the court has resulted in a figure that "reasonably approximates" the actual value of the parties' business. Consequently, the determination of the Family Court on this issue cannot be disturbed.

Next, Harold contends that the Family Court erred by failing "to account for the significant depreciation of the Merrill Lynch account" due to market conditions prevailing after the trial. Appellant's brief at 4. As we mentioned above, Harold was ordered to pay Patricia the sum of \$526,207.00 in order to balance the court's distribution to Harold of the company, family residence, and other property.

In his motion for reconsideration of June 19, 2001, Harold indicated that the value of the Merrill Lynch investment account had fallen from \$645,210.00 in February 2001 to \$544,613.72 as of May 31, 2001. He argued that he would face a significant shortfall if he were required to comply with the court's order to liquidate the account in order to equalize the distribution of the marital estate.

In its order denying Harold's motion for relief, the Family Court found that the value of the account had not

declined solely due to market conditions but in part because of Harold's withdrawal and personal use of the funds. No evidence was offered to refute this finding. Consequently, we are not persuaded that the Family Court erred by refusing to reconsider its order awarding the sum of \$526,207.00 to Patricia.

Nor did the court err by determining that Patricia was entitled to a common-law judgment in that amount. After a twenty-two-year marriage, Patricia waived her claim to permanent maintenance during the trial of this action. She did so based in part upon the value of the parties' marital estate and her reasonable expectation that she would be awarded sufficient funds to enable her to support herself without an award of maintenance.

However, before entry of the court's decision in this case and the distribution of the marital estate, Harold was held in contempt for failing to abide by *pendente lite* orders requiring him to share marital funds with Patricia. Because she had not received these funds in a timely fashion, Patricia was forced to borrow money in order to purchase medication that she needed as part of her ongoing treatment for cancer. By August 2001, Patricia had not yet received from Harold any part of the marital estate - in disregard of the court's orders *pendente lite*. The Family Court then ordered that she was entitled to a common-law judgment against Harold in an amount reflecting her



share of the couple's marital property. Our review of the course of these proceedings convinces us that the court's decision was more than justified. We find no abuse of discretion.

The judgment of the Jefferson Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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