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# Commonwealth of Kentucky

# Court of Appeals

NO. 2003-CA-000203-MR
AND NO.2003-CA-000807-MR

RICHARD A. SWEET — APPELLANT

APPEALS FROM JEFFERSON FAMILY COURT
v. HONORABLE ELEANORE GARBER, JUDGE
ACTION NO. 01-FC-002891

JANET M. SWEET — APPELLEE

AND: NO. 2003-CA-000239-MR

JANET M. SWEET;
VICKI L. BUBA; AND
STONE, PEGLIASCO, HAYNES, BUBA, LLP — CROSS-APPELLANTS

CROSS-APPEAL FROM JEFFERSON FAMILY COURT
v. HONORABLE ELEANORE GARBER, JUDGE
ACTION NO. 01-FC-002891

RICHARD A. SWEET — CROSS-APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** ** ** ** ** ** **

BEFORE: MINTON, SCHRODER, AND TAYLOR, JUDGES.

SCHRODER, JUDGE: Richard A. Sweet filed two appeals and Janet M. Sweet filed a cross-appeal from findings of fact and conclusions of law entered by the Jefferson Family Court which, among other things, established child support and maintenance payments and distributed marital property. Our Court consolidated said appeals. For the reasons stated below, we affirm in part, reverse in part, and remand for proceedings consistent with this opinion. The issue remanded is limited to the character of a $50,000.00 payment made by Richard to Janet in December 2001.

The parties were married on February 15, 1980. The parties had two children during the marriage, Richard Alexander, born July 23, 1985, and Samantha Alexander, born October 23, 1989. On April 19, 2001, Richard filed a petition for dissolution of marriage in Jefferson Family Court.

On January 15, 2002, the family court entered a final decree of dissolution of marriage. On November 13, 2002, following a hearing on the contested issues, the family court entered its findings of fact, conclusions of law, and supplemental decree awarding each of the parties fifty percent of the value of the marital assets, including the value of Richard’s medical practice, Richard’s retirement account, the marital residence, investment accounts, closely-held business

interests, and the parties' marital personal property. The family court also awarded maintenance to Janet in the amount of $7,500.00 per month for a period of five years and $5,000.00 per month for an additional five years. In addition, the family court awarded Janet child support of $3,000.00 per month less 25% of the agreed upon private school tuition for the children.

Subsequently, Richard and Janet each filed motions to alter, amend, or vacate pursuant to CR[1] 59. On December 30, 2002, the trial court entered an order setting forth minor modifications to its original decision. Richard and Janet each filed appeals from the November 13, 2002 and December 30, 2002, orders (No. 2003-CA-000203-MR and No. 2003-CA-000239-MR, respectively). In the meantime, Richard filed a motion to alter, vacate or amend the family court's December 30, 2002, order. On March 12, 2003, the family court entered an order modifying Richard's equalization payment. Richard subsequently appealed that order as well. (No. 2003-CA-000807-MR).

APPEAL NO. 2003-CA-000203-MR AND APPEAL NO. 2003-CA-000807-MR

We first address the issues raised by Richard in his appeals in No. 2003-CA-000203-MR and No. 2003-CA-000807-MR.

The family court awarded maintenance to Janet in the amount of $7,500.00 per month for a period of five years and $5,000.00 per month for an additional five years. Richard

[1] Kentucky Rules of Civil Procedure.

argues that the family court erred in determining the amount and duration of maintenance. KRS[2] 403.200(1) permits an award to the spouse seeking maintenance if he or she:

> (a) Lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and
>
> (b) Is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

KRS 403.200(2) sets forth the factors the family court must consider in setting the amount and duration of a maintenance award:

> (2) [Maintenance] shall be in such amounts and for such periods of time as the court deems just, and after considering all relevant factors including:
>
> (a) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;
>
> (b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;
>
> (c) The standard of living established during the marriage;
>
> (d) The duration of the marriage;

[2] Kentucky Revised Statutes.

> (e) The age, and the physical and emotional condition of the spouse seeking maintenance; and
>
> (f) The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

In its November 13, 2002, order the family court set forth detailed findings of fact and conclusions of law in support of its maintenance award:[3]

> Janet Sweet is 50 years old. She was employed as a registered nurse during the first two years of the marriage. She would need at least 6 months training in order to reactivate her nursing degree. However, she may well be unable to return to the nursing profession as a result of the herniated disc in her spine. Janet was interviewed by Dr. Edward Berla' an expert in vocational assessments. Dr. Berla' initially opined that Janet was capable of earning $25,000.00 annually in the public work force including the cost of benefits paid on her behalf. At his deposition, he indicated that her earning powers were between $25,000-$40,000 depending on whether she would be physically able to return to nursing. Janet has stated that she does not want to return to employment at least until both children have graduated from high school. She may exercise that choice. In considering her claim for maintenance, however, the Court will impute to Janet the ability to earn $25,000.00 annually or gross wages amounting to $2,083.00 per month. Janet will also receive an estimated $2,244,324.41 as her share of the marital estate in this action to be set forth more specifically below. Assuming Janet is able to purchase a new

[3] These factual findings were also, in part, relevant to the family court's awarding of child support which will be addressed later in the opinion.

residence outright without a mortgage while smaller than the family residence on Greten Lane but still very nice, the Court estimates that she will have a net estate remaining of at least $1.5-2 million. Without consuming principal, the Court estimates that at 4% per year per annum, Janet will additionally receive interest and/or dividend interest of approximately $4,250.00 per month. Accordingly, she will have over $6,250.00 per month in gross income.

Janet has claimed living expenses for herself and the parties' children in the amount of $42,000.00 per month. This amount exceeds by a considerable amount [Richard's] total net monthly income. Additionally, Janet has claimed certain expenses such as $5,000.00 per month in Country Club expenses and all expenses relating to the Florida condominium and numerous expenses related to the home on Greten Lane which will be eliminated and/or significantly reduced. She will not be responsible for more than her proportionate share of the children's private educational expenses with [Richard] remaining responsible for approximately 75% of these expenses assuming the parties agreed to continue to incur them.

[Richard] has claimed living expenses of nearly $31,000.00 per month which the Court also finds to be unreasonable. He has included property taxes on the Greten Lane home, the cost of furnishing and remodeling for the Locust Lane home and significant other expenses which are no longer existent or non-recurring. The Court notes that while the parties have enjoyed an upscale lifestyle during the marriage, it is unrealistic for either party to expect that two separate households with the same income between them will be able to enjoy exactly the same lifestyle as the family previously enjoyed as one unit, particularly if Richard Sweet's income decreases in spite of his

maintaining his present work schedule and efficiency of his practice.

. . . .

Income at this level, considered together with a paid for residence and significant retirement investments places Janet in a relatively comfortable position, by comparison with most middle to upper-middle income families. However, the appellate courts have tended to define a claimant's "reasonable needs" in terms of the standard of living established during the marriage. In Drake vs. Drake, Ky. App., 721 S.W.2d 728 [(1986)] the wife was a beautician married to Mr. Drake, a CPA. At dissolution, she received an interest in his CPA practice and one-half of the marital estate. Notwithstanding, the Court opined, ". . . that even though Rebecca was able to support herself, . . . it would nevertheless award appellee maintenance in order to allow her to *maintain the standard of living established during the marriage*.[" Id. at 730.] (Emphasis added). The Court of Appeals affirmed the award giving further support by stating ". . . [t]here is substantial evidence in the record to support the Court's finding that Mrs. Drake's salary as a beautician, even when combined with an equal proportion of the marital assets, is not sufficient to provide for her in the manner to which the parties had become accustomed.["] Drake [at 730] citing McGowan vs. McGowan, Ky. App., 663 S.W.2d 219 (1983) and Casper vs. Casper, Ky., 510 S.W.2d 253 (1974).

Based upon this line of Kentucky decisions, the Court finds that Janet Sweet is entitled to maintenance in that she lacks sufficient property to support herself and cannot earn adequate income to support herself considering the standard of living established during the marriage. However, the Court cannot fashion an appropriate

> award of maintenance and child support to permit two households to flourish at exactly the same standard of living with all of the same amenities that this family was able to enjoy while living under one roof and pooling their resources. . . .
>
> . . . .
>
> At trial, Janet reduced her claimed need to $25,000.00 per month, or $300,000 annually to support herself and the children. This would amount to 80% to 90% of [Richard] Sweet's net income. The Court begins with the assumption that Janet can generate at least $75,000 worth of income with her own imputed income plus interest and dividends while still having a significant amount available to invest in retirement accounts and a lovely residence. Janet does have nursing skills which could be updated or if she chooses she could build on her horse training and show skills or return to college and receive additional training in a field of her own choosing. The Court takes into consideration that by agreement of the parties Janet has been absent from the regular work force for approximately 20 years and she is 50 years old. Dr. [Richard] Sweet does not have the earnings he had in prior years but he is still a highly compensated and respected physician in this community who can afford substantial maintenance and support.
>
> The Court orders [Richard] Sweet to pay monthly maintenance to Janet in the amount of $7,500 for a period of five years and $5,000 a month for an additional five years. The amounts and duration of this maintenance award shall be modifiable pursuant to the provisions of KRS 403.250(1) and (2).

Richard argues that the family court understated the income Janet would be able to earn from her share of the marital

estate; failed to consider that Janet had not pursued employment opportunities; failed to consider that Janet has no health problems which would prevent her from returning to the work force; imputed only the minimum end of Janet's earnings range; failed to consider Janet's lack of effort and interest in working; failed to consider that Janet remained voluntarily unemployed; over-emphasized the parties' standard of living during the marriage; failed to consider that maintenance is to be rehabilitative and is only to be awarded for a period of time that will enable the recipient to acquire skills that will permit self-support; and made no findings as to the amount of time that would be required to enable Janet to meet her reasonable needs for support through appropriate employment and investment income.

A maintenance award will not be upheld if the findings of fact upon which the award is based are clearly erroneous. Powell v. Powell, Ky., 107 S.W.3d 222, 224 (2003). If however, the trial court's findings of fact are not clearly erroneous, the amount and duration of maintenance is within the sound discretion of the trial court. Russell v. Russell, Ky. App., 878 S.W.2d 24, 26 (1994). Hence, "we cannot disturb [the maintenance determinations] of the trial judge unless the discretion is absolutely abused." Platt v. Platt, Ky. App., 728 S.W.2d 542, 543 (1987).

KRS 403.200 seeks to enable the unemployable spouse to acquire the skills necessary to support himself or herself in the current workforce so that he or she does not rely upon the maintenance of the working spouse indefinitely. Clark v. Clark, Ky. App., 782 S.W.2d 56, 61 (1990). However, "in situations where the marriage was long term, the dependent spouse is near retirement age, the discrepancy in incomes is great, or the prospects for self-sufficiency appears dismal," our courts have declined to follow that policy and have instead awarded maintenance for a longer period or in greater amounts. Id. Further, KRS 403.200 specifically states that the trial court should consider the standard of living to which the parties are accustomed in determining the amount and duration of the award. "It is especially acceptable for the trial court to consider the impact of the divorce on the nonprofessional's standard of living and award an appropriate amount that the professional spouse can afford." Clark, 782 S.W.2d at 61; Powell, 107 S.W.3d at 224.

In this case, the marriage was long-term, 21 years, and the discrepancy in income is great. Janet has not participated in the work force in twenty-years, and instead has focused on maintaining the home and raising the parties' children. Her current earning capability is in the $25,000.00 to $40,000.00 range. On the other hand, Richard's earning

capacity is exceptional. In recent years, from his orthopaedic practice alone, Richard has averaged well in excess of $500,000.00 per year. In 1999, 2000, and 2001, Richard earned $481,460.00, $539,061.00, and $560,107.25, respectively from his orthopaedic practice.

We conclude that the family court properly considered the factors set forth in KRS 403.200(2), and, based upon the length of the marriage, the discrepancy in income, and the quality of life enjoyed by the parties during the marriage, the family court did not abuse its discretion in its maintenance award.

Next, Richard contends that the family court erred in the valuation of Richard's interest in Louisville Orthopaedic Clinic, PSC.

Louisville Orthopaedic Clinic is a professional service corporation engaged in the practice of general orthopedic surgery. The Clinic consists of seven physician/partners, including Richard Sweet, each with different specialty areas. Each of the partners has a percentage ownership of 14.2857%. The value of Richard's interest in the practice was the central dispute at trial, and the parties' experts differed greatly as to the proper valuation approach to the practice and their "bottom line" opinions as to the value of the practice. Ultimately, the family court valued Richard's

interest in the practice at $332,171.00. The family court's discussion of this issue in its November 13, 2002, order stated, in part, as follows:

> Dr. Sweet's expert was Bonnie Ciresi, CPA. Ms. Ciresi opines that the value of [Richard] Sweet's medical practice is the amount he would receive if he left the practice as of December 31, 2001, pursuant to the buy/sell agreement among the surgeons in his practice, approximately $123,202.00. The agreement provides that upon retirement or termination from the practice, the departing shareholder is entitled to receive an account [sic] equal to his accounts receivable multiplied by his actual collection rate. Dr. McAllister testified that this is the formula which will be used at the end of this year when he retires.
>
> Ray Strothman, Janet Sweet's expert, calculates the value of Dr. Sweet's interest in the Louisville Orthopaedic Clinic at $810,000.00 as amended. He initially calculated the value of Dr. Sweet's interest at $981,000.00. He employed the capitalization of excess earnings method, described below, to arrive at his opinion.
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> . . . .
>
> The primary difference between the parties respecting the valuation of the medical practice is whether good will exists as a marital asset and its value if it does exist. Ms. Ciresi maintains that the restrictive buy/sell agreement between the parties which does not contemplate any value for good will is conclusive as to Dr. Sweet's interest in the practice. Mr. Strothman contends that various valuation approaches must be considered and he opined that the most appropriate valuation approach involves calculating the capitalization of excess earnings in Dr. Sweet's practice,

> basically, the intangible asset defined as good will. Mr. Strothman explains that the "capitalization of Excess Earnings" method is an income-oriented approach used to value the interests of a physician in a medical practice based on future estimated earnings of the physician. Excess earnings are those available after a fair return on tangibles and are attributable to intangible assets or good will." [sic]
>
> . . . .
>
> Janet Sweet's expert, Raymond Strothman, used the capitalization of excess earnings method to arrive at a value of $810,000.00. While he stated initially that the value purports to be the "fair market value" of [Richard's] interest in the practice, he acknowledged that Dr. Sweet has no current intention to sell his practice and further acknowledges that if he did leave the business he could not sell his interest for $810,000.00. Mr. Strothman further acknowledges that while he utilizes "boiler plate" Internal Revenue Service terminology defining fair market value, he is in reality using a standard of value often referred to as "intrinsic value" which refers to the value as a going concern to the owner, regardless of whether or not his interest could be sold. Although Mr. Strothman looked at Dr. Sweet's income for the past five years, he used only his wage earnings for the year 2001 to perform his evaluation. Mr. Strothman notes that the value of a medical practice within the context of a dissolution proceeding is the value of the overall investment to the shareholder rather than what, if any amount, the practice could be sold for.

It is axiomatic that the findings of fact of the lower court shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to

judge the credibility of the witnesses. CR 52.01; Calloway v. Calloway, Ky. App., 832 S.W.2d 890, 893 (1992). Findings of fact are not clearly erroneous if supported by substantial evidence. Janakakis-Kostun v. Janakakis, Ky. App., 6 S.W.3d 843, 852 (1999), cert. denied, 531 U.S. 811, 121 S. Ct. 32, 148 L. Ed. 2d 13 (2000). The test for substantiality of evidence is whether when taken alone, or in the light of all the evidence, it has sufficient probative value to induce conviction in the minds of reasonable men. Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298, 308 (1972).

It has been the general principle in both Kentucky and other jurisdictions that the trial court's judgment and valuations in an action for divorce will not be disturbed on appeal unless it was clearly contrary to the weight of evidence. Heller v. Heller, Ky. App., 672 S.W.2d 945 (1984); Carpenter v. Carpenter, 657 P.2d 646 (Okla. 1983); Poore v. Poore, 75 N.C.App. 414, 331 S.E.2d 266 (1985). Thus, it is the duty of this Court to examine the methods utilized by the trial court to see if it clearly erred in valuing the corporation's assets. Clark v. Clark, Ky. App., 782 S.W.2d 56, 58-59 (1990).

There is no single best method to value the business interest of a spouse. The task of the appellate court is to determine whether the trial court's approach reasonably approximated the net value of the partnership interest. Id. at

59 (citing Weaver v. Weaver, 72 N.C.App. 409, 324 S.E.2d 915 (1985) and Stern v. Stern, 66 N.J. 340, 331 A.2d 257 (1975)).

Richard's principal objections to the trial court's valuation of his interest in Louisville Orthopaedic Clinic are that the trial court failed to consider the buy-sell agreement as a factor in arriving at the fair market value of his interest and that a good will component should not have been included in the valuation because his practice is a referral-based practice and he cannot expect his patients to return to him or to gain additional patients through patient recommendations.

Though binding against the parties to the business, a buy-sell agreement for a husband's closely held medical corporation, which establishes a method for valuing shares for purposes of distribution, is not binding on his wife in a dissolution proceeding, but is merely a factor to be weighed with other factors in determining value. Drake v. Drake, Ky. App., 809 S.W.2d 710, 713 (1991). Further, in general, good will of a closely held medical corporation should be assigned value in a dissolution proceeding. Clark v. Clark, Ky. App., 782 S.W.2d 56 (1990); Heller v. Heller, Ky. App., 672 S.W.2d 945 (1984); Drake, 809 S.W.2d at 713.

We conclude that the family court properly considered the buy-sell agreement and good will in its valuation of Richard's interest in the practice. In this regard we adopt the

family court's discussion in its November 13, 2002, judgment, wherein it thoroughly addressed these issues:

> On several occasions . . . Kentucky appellate courts have addressed valuations, for purposes of dissolution of marriage, of a professional association such as a medical practice and have rejected arguments that value is determined solely by or limited to a so called "book-value" or the terms of a buy-sell agreement between partners. In Drake v. Drake, Ky. App., 809 S.W.2d 710, 713 (1991) the Court of Appeals considered a physician-shareholder's interest in a women's clinic and held that buy-sell agreements are not binding on the non-shareholder spouse, although they are a factor to be weighed with other factors. The Court of Appeals had previously concluded, in 1984, that physical assets and accounts receivable are not the only assets to be considered in valuation but that the intangible factor of good will is also a factor to be considered. It is stated as follows in Heller v. Heller, Ky. App., 672 S.W.2d 945, 947-948 (1984) [quoting In re Marriage of Nichols, 606 P.2d 1314, 1315 (Colo.Ct.App. 1979)]:
>
> > Professional practices that can be sold for more than the value of their fixtures and their accounts receivable have saleable goodwill. A professional, like any entrepreneur who has established a reputation for skill and expertise, can expect his patrons to return to him, to speak well of him, and upon selling his practice, can expect that many will accept the buyer and will utilize his professional expertise. These expectations are a part of good will, and they have pecuniary value. . . . This limited market ability distinguishes professional good will from advanced educational degree, which because it is

> personal to its holder and non-transferable, was held not to be property in [In re Marriage of Graham, 194 Colo. 429, 574 P.2d 75 (1978)]. [. . .]

In Clark v. Clark, Ky. App. 782 S.W.2d 56 (1990) the Court of Appeals concluded that the trial court had been correct in rejecting a book value approach and in adopting a "fair market value" approach including the value of good will in an OB-GYN medical practice and using the capitalization of excess earnings method to determine fair market value. Kentucky, in short, has consistently approved consideration of good will as a marital asset.

Kentucky has not specifically made a distinction between so-called "professional good will" or "practice" or enterprise good will as some jurisdictions have (and as [Richard] Sweet requests the Court to do here) nor has it approved a specific standard of value, e.g., "fair market value" or "intrinsic" or "investment" value. . . .

In Yoon v. Yoon, Ind. 711 N.E.2d 1265, 1269 (1999), the Supreme Court of Indiana held as follows:

> Enterprise good will is an asset of the business and accordingly is property that is divisible in a dissolution to the extent that it inheres in the business independent of any single individual's personal efforts and will outlast any person's involvement in the business.

The Indiana Court differentiates enterprise or practice good will from personal, or professional good will. The Court opines as follows:

> ". . . the good will that depends on the continued presence of a particular individual is a personal asset, and any value that attaches to the business of [sic] a result at [sic] this personal goodwill. . . ." is not divisible. Id.

This dichomy [sic] between practice good will and "professional" or personal good will is followed by the Supreme Court of Florida, Thompson vs. Thompson, Fla., 576 So.2d 267 (1991) and the Court of Appeals of Virginia in Howell vs. Howell, Va.App., 523 S.E.2d 514 (2000). On the other hand, the highest courts of other jurisdictions hold that professional or personal good will can be divisible. In New Jersey, a practitioner's "reputation is at the core of goodwill as property subject to equitable distribution," Dugan vs. Dugan, N.J., 452 A.2d 1, 13 (1983). In that case, the New Jersey Supreme Court states as follows with respect to evaluation of good will in a law practice:

> Future earning capacity per se is not good will. However, when that future earning capacity has been enhanced because reputation leads to probable future patronage from existing and potential clients, good will may exist and have value. When that occurs the resulting good will is property subject to equitable distribution.
>
> . . . Good will is to be differentiated from earning capacity. It reflects not simply a possibility of future earnings, but a probability based on existing circumstances. Enhanced earnings reflected in good will are to be distinguished from a license to practice a profession and an educational degree. In that situation, the enhanced future earnings are so remote and speculative that the license

> and degree have not been deemed to be property. . . .
>
> After divorce, the law practice will continue to benefit from that good will as it had during the marriage. Much of the economic value produced during an attorney's marriage will inhere in the good will of the law practice. It would be inequitable to ignore the contribution of the non-attorney/spouse to the development of that economic resource. An individual practitioner's inability to sell a law practice does not eliminate existence of good will and its value as an asset to be considered inequitable distribution. Obviously, equitable distribution does not require conveyance or transfer of any particular asset. The other spouse, in this case the wife, is entitled to have that asset considered as any other property acquired during the marriage partnership. Id.

The California courts also consider personal or professional good will to be divisible. In In re Marriage of Lopez, 38 Cal.App.3d 93, 107, 113 Cal.Rptr. 58, 67 (1974), in discussing good will, the court quoted approvingly the following language from Golden v. Golden, 270 Cal.App.2d 401, 405, 75 Cal.Rptr. 735, 738 (1969):

> [I]n a matrimonial matter, the practice of the sole practitioner husband will continue with the same intangible value as it had during the marriage. Under principles of community property law, the wife, by virtue of her position of wife, made to that value the same contribution as does a wife to any of [the] husband's earnings and accumulations during marriage. She is as much entitled to be recompensed for that contribution as if it were represented by the increased value of

> stock in a family business. (Emphasis added.)

In this case, neither party offered specific evidence concerning the value of the good will of Louisville Orthopaedic Clinic as an entity as distinct from Dr. Sweet's professional good will. This may be because Kentucky does not appear to recognize a distinction between enterprise/practice and professional/personal good will.

In Clark, 782 S.W.2d at 59, the Court describes, approvingly, the capitalization of excess earnings method for valuing a medical practice focusing on the past earnings of the individual professional as follows:

> Under this method, the good will value is based in part on the amount that the earnings of the professional spouse exceed those which would have been earned by a professional with similar education, experience, and skill as an employee in the same general area. [Cites omitted.]
>
> Specifically, four steps are involved in the capitalization of excess earnings method. First, the Court must first ascertain what a professional of comparable experience, expertise, education and age would be earning as an employee in the same general locale, determining an average the professional's net income before federal and state income taxes for a period of approximately 5 years, compare the actual average with the employee norm, and multiply the excess by a capitalization factor. (Emphasis added.)

Mr. Strothman, Janet's expert, used these steps in somewhat abbreviated fashion.

He concentrated on a one year period of Dr. Sweet's earnings, the year 2001 and then subtracted from Dr. Sweet's 2001 gross compensation, the median salary as per salary.com for orthopaedic surgeons in the Louisville Metropolitan area. He calculated Dr. Sweet's excess earnings at $252,894.00 less taxes. He selected a capitalization rate of 25% assuming a relatively low risk in future earnings based on competition, costs of practice such as insurance rates. Mr. Strothman did not consider any discounts for minority status or limited marketability opining that as the business was not for sale the concept of limited liquidity was not relevant. Mr. Strothman concluded that Dr. Sweet's, before tax interest in the clinic, is $810,000.00.

The use of the term "fair market value" as the designated standard of value of the clinic has generated considerable confusion in this case. Ray Strothman initially purported to estimate the "fair market value" of Dr. Sweet's interest in the clinic. He defines fair market "the price at which property will change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, both parties having reasonable knowledge of relevant facts." . . . He testified that the "fair market value" of [Richard's] interest in the practice was $810,000. During skillful cross-examination, however, Mr. Strothman acknowledged that [Richard] Sweet could not sell his interest for $810,000 and that his use of the term "fair market value" was "boiler plate" language in his report. He testified that in reality this amount was the value to [Richard] as a going concern or a return on investment.

. . . .

The Court of Appeals decision in Clark vs. Clark, infra, appears to use the term fair market value interchangeably with the concept of intrinsic or ongoing concern. Clark cites with approval the following language in a decision of the Supreme Court of New Mexico, Hurley vs. Hurley, [94 N.M. 641,] 615 P.2d 256, 259 (1980):

> Accordingly, we do not think that a dispositive factor is whether Dr. [Hurley] can sell his good will. His good will has value despite its immarketability, and so long as he maintains his . . . practice . . . he will continue to receive a return on the good will associated with his name. ” [sic] (782 S.W.2d 60.)

*Clark* opines that age, health and professional reputation of the practitioner, the nature of the practice, the length of time the practice has been in existence, past profits, comparative professional success and the value of its other assets are all factors of good will. Id. at 59.

Clark, Heller, and Drake all appear to approve the capitalization of excess earnings approach to the evaluation of good will.

Bonnie Ciresi submitted her own revised calculations of the capitalization of excess earnings approach using a capitalization rate of 40%, opining that Dr. Sweet’s future earnings are at significant risk of decline because of reduced insurance reimbursements and escalating costs. She also notes, as Dr. Sweet and Dr. McAllister testified, that their earnings have declined substantially since the early 1990’s. Ms. Ciresi also utilized the Medical Group Management Association (MGMA) data which indicate that the median earnings for hip and joint surgeons nationally but as adjusted for the Louisville area are approximately

$418,275.00 per year as opposed to the figure of $307,213.00 used by Mr. Strothman as the median salary for orthopaedic surgeons generally in the area. General orthopaedic surgeons have a median income of $320,553.00 according to the MGMA calculations.

This Court finds that Mr. Strothman's capitalization of excess earnings approach is appropriate but that he has used a capitalization rate that fails to take into account the current risks in [Richard] Sweet's orthopaedic practice. The Court accepts Ms. Ciresi's opinion that the MGMA data should be used comparing to Dr. Sweet's earnings the median income of a hip and joint replacement specialist, not the median income of a general orthopedist. Also, the Court finds that the weighted average of Dr. Sweet's compensation over the past 5 years should have been employed in this case. In the Clark case, Dr. Macken did average 3 years of Dr. Clark's practice.

The Court has taken Dr. Sweet's weighted average gross earnings over five years, $531,466.00, and subtracted the median salary for hip and joint specialist within the orthopaedic surgery area as adjusted for Louisville of $418,275.00. Dr. Sweet's excess earnings are $113,191.00. His after tax earnings applying total taxes of 40% are $67,915.00. Utilizing a capitalization rate of 32.5%, this yields a sub-total of $208,969.00 which when added to the net accounts receivable attributable to Dr. Sweet of $123,202.00, yield a calculation of $332,171.00. The Court has chosen a capitalization rate which is lower than Bonnie Ciresi's recommended rate but higher than Ray Strothman's. Strothman's optimistic capitalization rate does not adequately consider the risk of even higher costs and declining insurance reimbursement. Ms. Ciresi's rate does not adequately take into account the fact that [Richard's]

> income has not declined over the past five years.
>
> The Court has applied no marketability discount because marketability is not a factor. Also, according to Shannon Pratt, minority discounts are commonly not relevant to small professional practices where each partner exercises considerable decision making regarding his practice even though he does not have a majority interest. The Court finds that the value of Dr. Sweet's interest in Louisville Orthopaedic Clinic, PSC is $332,171.00.

Richard also argues that the family court, in valuing his medical practice, failed to properly consider Richard's health and his ability to continue to generate income at the same level into the future, the changes occurring in medical reimbursement practices, and the impact of the restrictive covenants contained in the buy-sell agreement. We conclude, however, that, to the extent the issues were raised by Richard, the family court gave proper weight to these factors.

To sum up on this issue, we recognize that the trial court heard testimony from two experts -- one who strictly followed the corporation's buy/sell agreement among the surgeons in the practice, and the other who applied the capitalization of excess earnings method. The two methods produced a wide variation in the estimated value of the business, $123,202.00 to $810,000.00. This illustrates that there is no single best mathematical formula for precisely calculating the value of a

closely-held medical practice such as Richard's. The trial court established a value of $332,171.00. This valuation falls squarely within the range of values established by the expert witnesses. Although not calculated with mathematical exactitude, the court's figure clearly falls within the range of competent testimony. Underwood v. Underwood, Ky. App., 836 S.W.2d 439, 444 (1992), overruled in part on other grounds by Neidlinger v. Neidlinger, Ky. 52 S.W.3d 513 (2001). We conclude that the findings of fact made by the family court in its valuation of the practice were not clearly erroneous, and that the method used in arriving at the valuation was not an abuse of discretion.

The last issue raised by Richard is that the family court failed to decide whether a $50,000.00 payment made by Richard to Janet in December 2001 was a maintenance payment or a property distribution.

It is uncontested that the payment was made. In the course of the hearing, the family court held that the treatment of the payment would be determined at the conclusion of the trial. The character of the payment was not addressed in the family court's order of November 13, 2002. Richard raised the issue in both his first and second motions to alter, amend, or vacate. However, in neither the family court's order of December 30, 2002, or March 12, 2003, does the family court

directly address this issue in detail. While in its order of March 12, 2003, the family court does state "[t]he court did consider the payment of $50,000.00 made in 2001," this does not explain whether the distribution was determined to be maintenance, child support, a property distribution, or a combination of the foregoing.

As the family court has not squarely addressed this issue, and its intended treatment of the payment is not readily apparent from its orders, we remand as to this issue to give the family court an opportunity to clarify its intended treatment of the payment. After its further consideration of the issue, the family court should make any necessary adjustments to reflect the proper treatment of the payment.

APPEAL NO. 2003-CA-000239-MR

Next, we address the issues raised by Janet in her cross-appeal.

First, Janet contends that the circuit court erred in its maintenance calculation because it failed to consider that maintenance paid is taxable income to her and tax deductible to Richard. Maintenance awarded by the trial court was $7,500.00 per month for five years ($90,000.00 per year) and $5,000.00 per month ($60,000.00 per year) for an additional five years. Janet argues that if the tax effects are taken into consideration, Richard actually has $3,000.00 more per month in cash flow

($90,000.00 x 40% ÷ 12) and that proper consideration of this additional cash flow would have resulted in a greater maintenance award.

The living expenses originally tendered by Janet for herself and the children were $42,620.71 per month. At trial, Janet reduced the combined expenses claimed to $25,000.00 per month, or $300,000 per year. In its November 13, 2002, order the family court stated that "[t]his would amount to 80% to 90% of Richard Sweet's net income." Clearly the family court was referring to after tax income, and the 80% to 90% of net income calculations implies a range of after tax income of $333,000.00 (90%) to $375,000.00 (80%). Janet notes that the family court estimated elsewhere in its opinion that if Richard earned $600,000.00, and at an assumed tax rate of 40%, this would produce an after tax income of $365,000.00, which is within the 80% to 90% range (82%) of Janet's claimed annual expenses.

We discussed maintenance issues extensively when we addressed the matter in Richard's appeal earlier in this opinion. Here, as then, we conclude that the trial court did not abuse its discretion in its maintenance award. The family court's illustration that Janet's claimed expenses amounted to 80% to 90% of Richard's net income was intended to simply demonstrate the excessiveness of Janet's claimed monthly expenses. Though tax consequences are relevant in setting

maintenance, the purpose of the illustration was not to demonstrate any tax benefit/deduction for Richard.

Next, Janet contends that the family court erred in its child support calculation. The family court awarded Janet $3,000.00 per month in child support. In its November 14, 2002, order, the family court addressed this issue, in relevant part, as follows:

> Janet claims historical expenses for the children of $11,250.00 per month. Sam rides horses and is a developing equestrian. The parties have spent freely in recent years for these expenses. Alex, the 16 year old son of the parties is an excellent student and avid basketball player and golfer. He drives the parties 1996 Volvo and he attends Kentucky Country Day School. Alex's Kentucky Country Day tuition for the year 2001-2002 school year was $10,000.00. While the parties' maximum legal obligation for child support is not limited to the amount designated for families earning a total combined income of $15,000.00 per month as their income exceeds that amount, the Court declines to find that the children's reasonable needs approximate $11,250.00 monthly or a total of $135,000.00 annually.
>
> . . . .
>
> In this case, based upon the Court's assessment of the children's historic standard of living, including private schools for Alex and perhaps for Samantha in the future, the golfing and other hobbies of Alex and the fairly expensive horseback riding and showing hobby for Alex, the court finds the total monthly obligation for child support excluding health insurance to be approximately $4,000.00 per month. The

> Court notes that this level is more than double the child support guidelines for families earning $15,000.00 per month.
>
> The Court assumes that Janet Sweet's share of the family income is approximately 25% and that [Richard's] share of the family income is approximately 75%. This calculation assumes Dr. Sweet generates gross income of approximately $600,000.00 annually from his wages, interest and dividends and income from his additional partnerships. It assumes that after paying Janet maintenance totaling $90,000.00 annually, he has gross income of approximately $510,000.00 and Janet has gross income of approximately $165,000.00, including $25,000.00 annually of imputed earned income, $50,000.00 in interest and dividends and $90,000.00 approximately in maintenance. The total combined parental income is $675,000.00 of which [Richard's] earnings represent 75%. Accordingly, he shall be required to pay Janet $3,000.00 per month minus 25% of the agreed upon private school tuition for the children. Child support shall be paid from [Richard] to Janet at this level until Alex becomes 18 years old or graduates from high school whichever is later. If Alex is still in high school at the time of his 18th birthday, child support shall continue until Alex graduates from high school but shall terminate no later than the end of the school year after Alex reaches his 19th birthday. At that point, child support shall be calculated for Samantha. Both parties shall be responsible for extraordinary medical expenses, [Richard] Sweet at a level of 75% and Janet at a level of 25%. . . .

The child support guidelines set out in KRS 403.212 serve as a rebuttable presumption for the establishment or modification of the amount of child support. Courts may deviate

from the guidelines only upon making a specific finding that application of the guidelines would be unjust or inappropriate. KRS 403.211(2). However, KRS 403.211(3)(e) specifically designates that "combined monthly adjusted parental gross income in excess of the Kentucky child support guidelines" is a valid basis for deviating from the child support table. Furthermore, the trial court may use its judicial discretion to determine child support in circumstances where combined adjusted parental gross income exceeds the uppermost level of the guidelines table. KRS 403.212(5). The child support table ends at the $15,000.00 per month level, so deviation from the guidelines is clearly appropriate in this case.

Kentucky trial courts have been given broad discretion in considering a parent's assets and setting correspondingly appropriate child support. Redmon v. Redmon, Ky. App., 823 S.W.2d 463 (1992). A reviewing court should defer to the lower court's discretion in child support matters whenever possible. See Pegler v. Pegler, Ky. App., 895 S.W.2d 580 (1995). As long as the trial court's discretion comports with the guidelines, or any deviation is adequately justified in writing, this Court will not disturb the trial court's ruling in this regard. Commonwealth ex rel. Marshall v. Marshall, Ky. App., 15 S.W.3d 396, 400-401 (2000). A judgment concerning child support will not be disturbed "unless there has been a clear and

flagrant abuse of the powers vested in that court." Bradley v. Bradley, Ky., 473 S.W.2d 117, 118 (1971). However, a trial court's discretion is not unlimited. The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Goodyear Tire and Rubber Co. v. Thompson, Ky., 11 S.W.3d 575, 581 (2000); Commonwealth v. English, Ky., 993 S.W.2d 941, 945 (1999); Downing v. Downing, Ky. App., 45 S.W.3d 449, 454 (2001).

In this case the family court thoroughly supported its determination of the appropriate level of child support. Janet argues that the family court's setting of child support at $3,000.00 was arbitrary; however, to the contrary, the setting of child support at $3,000.00 was a sound exercise of the family court's discretion.

Next, Janet contends that the family court's valuation of Richard's life insurance policy was erroneous. Richard owns, and was awarded by the family court, a New England Life Insurance Policy having a total cash value of $57,777.00. Of this amount, Richard could receive $36,040.00 upon cashing in the policy. The family court valued the policy at a net equity Richard could receive if he cashed in the policy rather than the total cash value. The family court's determination that the policy should be valued at the amount it would bring if it were cashed in currently was not clearly erroneous, nor was it an

abuse of its discretion to use this approach. Janet does not dispute the penalty associated with an early cash-in, and it is reasonable to assign a value to the policy which reflects the actual cash proceeds it could currently generate.

Next, Janet contends that the family court erred in qualifying Richard's business valuation expert, Bonnie Ciresi, as an expert witness. Janet contends that Ciresi has insufficient education and experience to testify regarding matters concerning the valuation of Richard's interest in his various medical practices. The family court addressed this issue as follows:

> Janet Sweet challenged Ms. Ciresi's credibility/credentials and knowledge to offer expert testimony with regard to valuation of this practice. The Court held a pre-trial hearing pursuant to Daubert vs. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579, [113 S. Ct. 2786, 125 L. Ed. 2d 469] (1993). Ms. Ciresi received a Bachelor of Arts Degree in Accounting from Eastern Kentucky University in 1979. She became a certified public accountant in 1981. She has specialized in accounting practices within the medical profession and has been employed as a CPA by Carpenter, Mountjoy a respected general certified public accounting firm, since January 1990. She is currently the partner in charge of healthcare divisions and currently services approximately 16 medical practices providing traditional accounting services, management consulting and reviewing practices for efficiency and compliance with federal and other regulations.

> She does not have a certified valuation administrator degree (CVA) and acknowledges that she does not know the specific qualifications for that certification. Mr. Ray Strothman, CPA, CVA, the managing partner of Strothman and Co., an accounting firm does have the CVA degree; however, he acknowledged the he performed numerous valuations of various business entities before he obtained this certification. Other members of Ms. Ciresi's firm have the CVA and she has worked in collaboration with them on business evaluations. While she is more familiar with medical practices than Mr. Strothman, she has little experience independently, in performing general business evaluations and has testified only once before concerning the valuation of a medical practice in a dissolution case. Ms. Ciresi was asked by Petitioner to evaluate Dr. Sweet's practice only in relation to its buy/sell agreement and also to review Ray Strothman's evaluation and prepare a critique for counsel for [Richard] Sweet.
>
> The Court entered an Interlocutory Order in this case finding that Ms. Ciresi was qualified to testify as an expert in the area of business evaluation within the context of buy/sell agreements among medical partnerships. The Court considers that the specific directions to Ms. Ciresi concerning the narrow scope of her evaluation as well of [sic] her lack of experience in valuation of businesses generally goes to the weight, not to the competency, of her testimony.

KRE 702, which governs the admission of expert testimony, provides,

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill,

> training, or education, may testify thereto in the form of an opinion or otherwise.

Application of KRE 702 is addressed to the sound discretion of the trial court. Ford v. Commonwealth, Ky., 665 S.W.2d 304, 309 (1983), cert. denied, 469 U.S. 984, 105 S. Ct. 392, 83 L. Ed. 2d 325 (1984). An abuse of discretion occurs when a "trial judge's decision [is] arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Goodyear Tire and Rubber Co. v. Thompson, Ky., 11 S.W.3d 575, 581 (2000). A trial court's ruling on the qualifications of an expert should not be overturned unless the ruling is clearly erroneous. Commonwealth v. Rose, Ky., 725 S.W.2d 588, 590 (1987), cert. denied, 484 U.S. 838, 108 S. Ct. 122, 98 L. Ed. 2d 80 (1987), overruled on other grounds by Commonwealth v. Craig, Ky., 783 S.W.2d 387, 389 (1990); Farmland Mut. Ins. Co. v. Johnson, Ky., 36 S.W.3d 368, 378 (2000).

The family court's determination that Ms. Ciresi was qualified to testify as an expert in the area of business valuation within the context of buy-sell agreements in a medical partnership situation, and that she was qualified to review and critique the opinion of the appellee's expert based upon her general knowledge and expertise in the area of business valuation was not clearly erroneous. Ciresi has a Bachelor's degree in accounting; she had been a CPA for approximately 21

years; had been employed by the respected CPA firm of Carpenter, Mountjoy for approximately 12 years; she specializes in medical profession accounting; and she is the partner at her CPA firm in charge of healthcare accounting practice and services approximately 16 medical practices providing traditional accounting services, management consulting and reviewing practices for efficiency and compliance with federal and other regulations. While she does not have a CVA qualification, Janet's own valuation expert testified that he had performed numerous valuations of business entities prior to obtaining his certification. The trial court did not err in permitting Ms. Ciresi to testify within the limits permitted. Any lack of experience or other qualification goes to the weight, not the competency, of her testimony.

Janet also contends that Ciresi should not have been permitted to testify because Richard failed to comply with the trial court's order requiring pretrial compliance regarding expert witnesses in accordance with CR 26. Janet contends that despite repeated requests for disclosure, Richard repeatedly failed to comply with the trial court's order and, as a sanction, the trial court should have excluded Ciresi's testimony.

The trial judge "has wide discretion in (the) determination to admit and exclude evidence, and this is

particularly true in the case of expert testimony." Keene v. Commonwealth, Ky., 516 S.W.2d 852, 855 (1974), (quoting Hamling v. United States, 418 U.S. 87, 94 S. Ct. 2887, 2903, 41 L. Ed. 2d 590, 615 (1974). Sanctions relating to the violation of a pretrial discovery order are governed by Kentucky Rule of Civil Procedure CR 37.02 and are within the trial court's discretion. Morton v. Bank of the Bluegrass and Trust Co., Ky. App., 18 S.W.3d 353, 360 (1999). "The sanction imposed [for a violation] should bear some reasonable relationship to the seriousness of the defect." Bridewell v. City of Dayton ex rel. Urban Renewal and Community Development Agency of City of Dayton, Ky. App., 763 S.W.2d 151, 153 (1988), (quoting Ready v. Jamison, Ky., 705 S.W.2d 479, 482 (1986).

It is conceded that the areas to be addressed by Ciresi, the valuation of Richard's interests in his medical practice, were the most substantial of the contested issues. Although the family court found that Richard's initial disclosures regarding Ciresi were not in compliance with the trial court's pretrial order, the family court also determined that Janet's counsel were "experienced and skilled" and were "amply prepared to cross-examine Ciresi at trial on the basis of their pretrial knowledge of Ciresi's opinions." Given the devastating consequences to Richard's case in the event of the exclusion of Ciresi's testimony in comparison with the prejudice

to Janet by the admitting of the testimony, we conclude that the trial court did not abuse its discretion by not excluding Ciresi's testimony.

Next, Janet contends that the family court erred in its valuation of Richard's interest in Surgecenter. Janet argues that the family court should have accepted her expert's valuation of $62,000.00 and should not have reduced the value to $59,000.00 based upon anticipated competition to result from Jewish Hospital's completion of a facility to offer services similar to those provided by Surgecenter.

Richard has a 1% interest in Surgecenter. Based upon the capitalization of earnings method and applying a capitalization rate of 19.6%, Janet's expert, Strothman, valued Richard's interest in the practice at $62,000.00. Richard did not obtain an expert opinion as to the value of his interest in Surgecenter but submitted that he would be entitled to $54,000.00 based upon his most recent K-1. The family court stated as follows:

> [Richard] testified that an additional capital contribution will be needed in order to renovate and expand the Surgecenter in order to stay competitive. He noted that Jewish Hospital is building what he refers to as a "Taj Mahal" which he believes will offer serious competition for the Surgecenter. Accordingly, he anticipates some cutting of income. This Court finds that Mr. Strothman did not consider the competition from the new Jewish Hospital

> facility or the additional capital contribution which may increase the capitalization rate somewhat based upon additional risk considerations. The Court additionally finds that no one has a crystal ball or a precise measurement tool and sets a value of $59,000.00 upon [Richard] Sweet's interest in Surgecenter.

The family court identified specific reasons for its slight reduction to the valuation submitted by Strothman. The reduction was based upon Richard's testimony regarding factors not considered by Strothman. The family court's valuation was supported by substantial evidence, and accordingly was not clearly erroneous.

Finally, Janet contends that the family court's valuation of Richard's interest in Louisville Orthopaedic Center was incorrect. Janet's expert, Strothman, using the capitalization of earnings method, valued Richard's interest in the practice as $810,000.00. Richard's expert, Ciresi, using a calculation based upon the partnership's buy/sell agreement, valued the practice at $332,171.00. Ultimately, the trial court adopted the capitalization of earnings method proposed by Strothman, but applied different calculation factors to arrive at a value of $332,171.00.

We discussed the trial court's valuation of Louisville Orthopaedic Center extensively in our consideration of the issue in Richard's appeal. Much of that discussion is applicable to

Janet's appeal and we incorporate that discussion into the present discussion.

Janet contends the family court erred by accepting the tax rate and median salary for a Louisville Orthopaedic Surgeon proposed by Ciresi rather than the tax rate and median salary proposed by her expert. The trial court, rather than this Court, was in the better position to weigh the testimony and judge the credibility of the witnesses. Ciresi's testimony is substantial evidence supporting the tax rate and median salary used in the family court's calculation of the practice under the capitalization of earnings method. The family court's decision to use the values proposed by Ciresi was not clearly erroneous nor an abuse of discretion.

Janet also contends that the family court erred by using a capitalization rate of 32.5% rather than a rate of 25% as proposed by her expert. Richard's expert proposed a rate of 40%. Again, in light of the competing testimony of the experts, the trial court was in the better position to resolve the dispute concerning the proper capitalization rate. The rate applied by the family court was within the range proposed by the experts. Its decision was not clearly erroneous nor an abuse of discretion.

For the foregoing reasons we affirm in part, reverse in part, and remand for the trial court's additional

consideration concerning the character of the payment made by Richard to Janet in December 2001.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-APPELLEE:

Eugene L. Mosely
Anne Courtney Coorssen
Louisville, Kentucky

BRIEF FOR APPELLEE/CROSS-APPELLANT, JANET M. SWEET AND CROSS-APPELLANTS, VICKI L. BUBA AND STONE, PREGLIASCO, HAYNES, BUBA, LLP:

Vicki L. Buba
Louisville, Kentucky