RENDERED: March 11, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court of Appeals

NO. 2003-CA-002195-MR
AND
NO. 2003-CA-002221-MR

PATRICIA P. HESS — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 02-CI-00387

RALPH C. HESS, III — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; MINTON, JUDGE; MILLER, SENIOR JUDGE.[1]

MILLER, SENIOR JUDGE: This is an appeal and cross-appeal arising from a decree of dissolution of the marriage of Appellant/Cross-Appellee Patricia P. Hess (Patricia) and Appellee/Cross-Appellant Ralph C. Hess, III (Ralph), entered by the Boyd Circuit Court on August 2, 2002. Specifically, the parties appeal from two Orders of the Boyd Circuit Court: the

[1] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

first, entered September 3, 2003, adopting the July 14, 2003, report and recommendations of the Domestic Relations Commissioner (DRC) and ruling on all issues pertaining to the distribution of marital assets and debts; and the second, entered September 19, 2003, overruling Patricia's Kentucky Rule of Civil Procedure (CR) 59.05 motion to alter, amend or vacate.

We review questions of fact under the clearly erroneous standard of CR 52.01 and questions of law *de novo*. As we conclude that the findings of the circuit court are supported by substantial evidence and are not an abuse of discretion, we affirm the circuit court.

The parties were married on December 28, 1975, and had three children during the marriage: Jennifer, born in 1978; Chip, born in 1980; and Nicki, born in 1985. Due to Ralph's education and training, the parties moved several times during the first ten years of their marriage. During this time Ralph attended graduate and medical school, completed his internship, opened a private medical practice, and completed a residency in emergency medicine. Also during this time, in addition to raising the parties' children, Patricia worked as a licensed practical nurse (LPN), worked in Ralph's medical office full-time and part-time, obtained her real estate license, and dabbled in MaryKay Cosmetics and Prepaid Legal Plans. The parties' last move was to Ashland in 1992, where Ralph accepted

a position as an emergency room physician with Ashland Emergency Medical Associates (AEMA) and where he remains employed. He became Board Certified in Emergency Medicine in 1996.

On April 16, 2002, Ralph filed a petition for dissolution of marriage. On August 2, 2002, the Boyd Circuit Court entered a final decree of dissolution of marriage with all other issues reserved. On July 14, 2003, following a hearing on the contested issues, the DRC filed its report and recommendations. Both parties filed exceptions. On September 3, 2003, the circuit court entered its order, sustaining certain of Ralph's exceptions, overruling all others, and accepting the DRC's report and recommendations as follows:

> 1) With regard to the Beaver, West Virginia, condominium serving as residence for the parties' daughter while attending college (valued at $65,000.00 with a mortgage of $60,000.00), consistent with the parties' proposals, that it be sold and the proceeds evenly split;
>
> 2) With regard to the former marital residence (valued at $215,000.00 with a mortgage of $214,000.00), Ralph proposed it be sold but consistent with Patricia's proposal it was awarded to Ralph along with the debt;
>
> 3) With regard to the vehicles:
>
> a) In accord with Patricia's proposal, that Patricia have ownership, possession, and financial responsibility for the costs of ownership of the 2000 Jeep Grand Cherokee which she drives, with the exception that Ralph was responsible for the remaining debt approximating $13,460.00;

b) In accord with Patricia's proposal, that Ralph have ownership, possession and responsibility of all costs of the 1995 Toyota Tacoma pickup which he drives (valued at $5,000.00 with no debt);

c) In accord with Patricia's proposal, that Ralph have ownership and responsibility for the three remaining vehicles driven by the parties' children (two 1998 Jeep Grand Cherokees and a 1998/1999 Chevrolet Tahoe, all with debt corresponding to their value, and each with debt of $10,000.00 to $11,000.00);

4) With regard to the furniture in Ralph's apartment and condominium (agreed value totaling $3,000.00), that Ralph takes ownership and possession;

5) With regard to the furniture in the former marital residence (agreed value of $20,000), and her account with Community Trust Bank (valued at $1,000.00), that Patricia take ownership and possession;

6) With regard to Ralph's Fifth Third Bank checking account (valued at $7,000.00), Ralph's life insurance policies (the only one with cash surrender valued at $14,161.20), and Ralph's interest in AEMA (valued at $125,000.00, including $48,000.00 attributable to goodwill), that Ralph take ownership and possession but Ralph to pay Patricia $73,000.00 representing one-half compensation for her interests in the Fifth Third Bank Account, the cash value in the life insurance policy and AEMA;

7) With regard to Ralph's retirement account and the 401K in Ralph's name, both managed by Merrill Lynch (valued at $172,545.46 and $53,796.62), and the 401K at Fifth Third Bank (valued between $7,300.00 and $7,400.00), Patricia to receive one-half (approximately $116,846.04);

> 8) With regard to the credit card debt of $62,000.00, Ralph to be responsible for all of it;
>
> 9) With regard to maintenance, Ralph to pay Patricia the sum of $4,000.00 per month until further orders of the court;
>
> 10) With regard to expert witness fees, Ralph to be responsible for Patricia's expert witness fees and $17,000.00 of Patricia's attorney fees;
>
> 11) With regard to the costs of the hearing, Ralph to be responsible for payment; and
>
> 12) With regard to Ralph's items received from his family and his tools, that Ralph takes possession.

On September 19, 2003, Patricia's CR 59.05 motion was overruled. Patricia filed a notice of appeal on October 15, 2003, and Ralph filed a notice of cross-appeal on October 20, 2003.

Before us, the issues on appeal and cross-appeal relate to the amount and duration of maintenance and the valuation of the medical practice. Patricia's appeal claims an abuse of discretion as to the amount of maintenance, and Ralph's cross-appeal claims an abuse of discretion as to the duration of the maintenance. Patricia's appeal and Ralph's cross-appeal both claim error by the circuit court in the valuation of the medical practice, specifically issues as to tax credit, assessment of collection rate, and percentage assigned to the collection rate, and valuation of goodwill associated with the

practice. Because the issues on appeal and cross-appeal address mutual issues, this Court will address the issues simultaneously.

Patricia first argues an abuse of discretion by the circuit court with regard to the award of maintenance of $4,000.00 per month to her, arguing that the circuit court's award was based on an erroneous finding of fact that Ralph earned $15,000.00 monthly in gross income and that the amount was insufficient. Ralph disagrees with Patricia's characterization of the circuit court's finding of his income, and additionally cross-appeals on the duration of the maintenance award, which entitled Patricia to maintenance "until further orders of the Court."

The amount and duration of maintenance is within the sound discretion of the circuit court. Gentry v. Gentry, 798 S.W.2d 928 (Ky. 1990). The award of maintenance is governed by KRS 403.200 which states in relevant part:

> (1) (T)he court may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance:
>
> (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...

(2) The maintenance order 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...;

(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;

(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 Perrine v. Christine, 833 S.W.2d 825, 826 (Ky. 1992), the Supreme Court stated:

> Under this statute, the trial court has dual responsibilities: one, to make relevant findings of fact; and two, to exercise its discretion in making a determination on maintenance in light of those facts. In order to reverse the trial court's decision, a reviewing court must find either that the findings of fact are clearly erroneous or that the trial court has abused its discretion.

The DRC, after hearing testimony, and the circuit court, after hearing arguments and considering the DRC's report and recommendations, found that an award of maintenance was appropriate based on the following:

> [Patricia] is employed as a billing clerk by the Urology Center of Northeastern Kentucky, earning $9.50 per hour. (She started at $9.00 per hour in March 2002). Based on a forty hour week, [Patricia's] gross income is $1,647.00 per month while [Ralph's] current gross monthly salary draw from AEMA is $15,000.00 per month. (Previously his draw was $11,800.00. The physician-owners determine what their individual monthly draw is. However, it must be approved by a vote of the "owners" and obviously it must be reasonable considering the individual's portion of the expenses, etc.)
>
> [Patricia] worked as an LPN prior to the parties' marriage in 1975 and for several years thereafter. She became a licensed real estate agent in Michigan after she attended real estate school (although she testified that the only property she sold was their home when they moved from Michigan), sold prepaid legal plans, Mary Kay cosmetics, served as a volunteer cheerleading coach and basketball coach, volunteered to break down charts in the ER for AEMA working everyday for 3 months at one time and in the summer of 2001 typed [Ralph's] transcriptions.
>
> [Patricia] alleged that she is unable to work as an LPN both because of the number of years out of the profession and the physical demands of such a job. [Patricia] testified that she had been diagnosed with Lupus in 1988. However, [Patricia] acknowledged that after being diagnosed she continued to play tennis 3 to 4 times per week until three or four years ago.

However, she actually stopped playing then due to a stress fracture in her foot. She does not and has not seen a physician on a regular basis since being diagnosed in 1988. (She does not nor did she receive therapeutic massages as listed in her expense schedule.)

The parties' former marital residence is a home with approximately 2,600 square feet with an additional finished basement. There is also a pool and hot tub. The home was purchased in July 1993 for $170,000.00. The mortgage payments are currently $1,916.00 per month. As noted previously, the parties stipulated a value of $215,000.00 for the former marital residence. The payoff on the mortgage on the property is approximately $214,000.00. Therefore, not only is there little or no equity in the house, if the parties use a realtor to sell, it is likely that the parties will actually owe money at the closing.

A review of [Patricia's] monthly claimed expenses of $11,179.00 includes a mortgage of $2,000.00, utilities, two cell phones, car payment, clothing of $1,000.00, travel expenses of $750.00 per month, retirement investment of $500.00, $350.00 per month for pets, lawn care of $400.00, therapeutic massages, etc. During the parties' separation, [Ralph] paid approximately $3,600.00 to or on behalf of the parties' children for apartments, condominium mortgage, allowances, and another $5,400.00 on the former marital residence, utilities, cars, etc. and $1,200.00 in maintenance to [Patricia].

The parties are the parents of three children with the youngest scheduled to graduate from high school in late May, 2003. As a result, there is no issue with respect to custody or child support. However, despite the ages of the two older children, a great deal of money is spent on supporting them. Not only are the children provided with vehicles, but a condominium was

purchased for the oldest as well as furnishings; rent on an apartment for the parties' son was paid; and substantial allowances were provided to all three children in addition to paying for insurance, cell phones, tuition, books, etc. [Ralph] is still paying the expenses for Jennifer, age 25, who is scheduled to finish school this year as a physician's assistant. He was also paying expenses for Chip, age 23, the parties' son, until he recently decided to quit school at Marshall University after attending four years with no degree. Chip is now employed, however, from [Patricia's] testimony it appears that she still believes that Chip must be taken care of.

[Patricia] acknowledged that a lot of money went to the children, stating that "the children are my life." Although [Ralph] earned a reasonably substantial income, it is clear that it was insufficient to maintain three separate households, four car payments, insurance on five vehicles with three drivers under the age of 25, an unknown number of cell phones, not to mention the clothes, pets, tuition, and all of the extras for the children.

Quite simply, the parties have lived way beyond their means for years.

[Patricia] is now 48 and [Ralph] is 52. Even if [Patricia] could go back to work as an LPN immediately, it is unlikely that she could make much more than she does working as a billing clerk. In reviewing her work history, it appears that after she stopped working as an LPN and until her current job, [Patricia] has not seriously sought employment although she has briefly explored several opportunities in sales.

Based on all the foregoing, the Commissioner finds that [Patricia] is currently unable to adequately support herself through employment even including her portion of the marital property assigned

> to her.[2] As a result, an award of maintenance is appropriate.
>
> Neither parent has a legal obligation to continue to financially support their children. The decision to do so must be an individual choice for each parent after considering the resources each has available. Therefore, [Patricia] cannot include expenses for the children in her budget and expect [Ralph] to provide the funds.
>
> Therefore, based on all of the foregoing, the Commissioner finds that an award of $4,000.00 per month in maintenance coupled with [Patricia's] current income, will allow [Patricia] to meet her needs and allow her to maintain somewhat the same standard of living which she previously enjoyed.

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

[2] Patricia's portion of the marital property is $20,000.00 in furniture from the former marital residence; a 2000 Jeep Grand Cherokee; $73,000.00 from one-half of Ralph's cash, life insurance and AEMA interest; and approximately $166,846.04 from one-half of Ralph's retirement accounts. Ralph's portion additionally includes four vehicles; vehicle debt approximating $40,000.00; $3,000.00 in furniture from the apartment and condominium; $62,000.00 in credit card debt; and a majority of the costs of the dissolution proceeding.

KRS 403.200 seeks to enable the unemployable spouse to acquire the skills necessary to support himself in the current workforce so that he does not rely upon the maintenance of the working spouse indefinitely. Clark v. Clark, 782 S.W.2d 56, 61 (Ky.App. 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, 26 years, and the discrepancy in income is great. Patricia has not participated to a great extent in the work force during those twenty-six years, and especially not in the most recent fifteen, instead focusing on maintaining the home and raising the parties' children. Her current annual gross earning capability is in the $20,000.00 range.

On the other hand, Ralph's earning capacity is far better. The circuit court's finding that he had a gross monthly draw from AEMA of $15,000.00 is supported by testimony before the DRC and from the DRC's painstaking analysis of evidence and testimony from both of the parties' experts which will be addressed in greater detail below.

We conclude, therefore, that the circuit 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 circuit court did not abuse its discretion in its maintenance award.

With regard to Ralph's argument that the circuit court erred by setting the duration of maintenance "until further orders of the court," we further conclude that the circuit court did not err. Pursuant to Combs v. Combs, 622 S.W.2d 679, 680 (Ky.App. 1981), this Court construes this as a permanent award of maintenance that may be rebutted. In Combs, the Court indicated that the duration of maintenance must have a direct relationship to the period over which the need exists and the ability to pay. As in Combs, Ralph failed to rebut Patricia's showing that her needs do not have the potential to be materially different anytime soon or that she will become more self-sufficient anytime soon. As indicated above, in situations

such as herein, courts have upheld maintenance for longer periods than that initially deemed necessary to allow the spouse the time to acquire the skills necessary to support themselves. Clark, 782 S.W.2d at 61. Although Patricia has prior skills as an LPN and in sales, given her age, health, and time out of the workforce, the duration of the maintenance herein does not amount to an abuse of discretion.

Next Patricia argues error in the valuation of Ralph's interests in AEMA, and both argue error in the assessment of goodwill. First, we disagree with Patricia's argument that the circuit court erred in using the date of dissolution to assign a value to Ralph's interests in AEMA. Upon review of the DRC's analysis, we can find no error in use of this date as the date of valuation. Armstrong v. Armstrong, 34 S.W.3d 83, 86 (Ky.App. 2000).

We review Patricia's next arguments, relating to the valuation of Ralph's interest in AEMA, under the clearly erroneous standard. It is axiomatic that the findings of fact of the circuit court shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the circuit court to judge the credibility of the witnesses. CR 52.01. Findings of fact are not clearly erroneous if supported by substantial evidence, the test of which is, whether when taken alone, or in the light of all the evidence, the findings

have sufficient probative value to induce conviction in the minds of reasonable men. Kentucky State Racing Commission v. Fuller, 481 S.W.2d 298, 308 (Ky. 1972).

The circuit court's judgments and valuations in an action for divorce will not be disturbed on appeal unless it was clearly contrary to the weight of the evidence. Heller v. Heller, 672 S.W.2d 945 (Ky.App. 1984). Thus, it is the duty of this Court to examine the methods used by the circuit court to see if it clearly erred in valuing AEMA's assets. Clark, 782 S.W.2d at 58-59.

There is no single best way to value the business interest of a spouse. The task of the appellate court is to determine whether the circuit court's approach reasonably approximated the net value of the interest. Id. at 59.

Patricia's principle objections to the circuit court's valuation of Ralph's interest in AEMA are that the circuit court erred in assessing AEMA's value by reducing AEMA's accounts receivable and cash on hand by Ralph's effective tax rate of 45%; erred in the assessment of AEMA's collection rate at 31.5%; erred in assessing a rate of 6.056150% to Ralph's interest in accounts receivable and cash on hand; and both Patricia and Ralph contend error in the valuation of goodwill.

We conclude that the circuit court did not err in the valuation of Ralph's interest in AEMA, including goodwill, and therefore adopt the DRC's discussion of these issues:

> [Ralph] has been an emergency room physician since July 1992 when the parties moved to Ashland. He received board certification in emergency care in 1996. Prior to beginning his residency in ER medicine, [Ralph] worked approximately two years as a general practitioner beginning in 1981.
>
> He, along with eleven other physicians, own Ashland Emergency Medical Associates, Inc., ("AEMA"), which staffs the emergency room for King's Daughters Medical Center, ("KDMC"), in accordance with an agreement signed October 27, 2000, effective January 1, 2001 through December 31, 2004. (That agreement terminated a prior agreement dated July 27, 1998.)
>
> Pursuant to that agreement AEMA was obligated to provide eleven (11) full time physicians for the ER based upon annual emergency room visits of 50,000 per year with an additional physician for each increase in annual visits of 4,700. Each full time physician is required to be board certified (or obtaining board certification) in emergency medicine, family practice, pediatrics or internal medicine (with a physician certified in emergency medicine on duty in the ER at all times). AEMA is required to replace a departing physician within six months.
>
> In the first year of the agreement, as there were only eight full time physicians in AEMA, KDMC agreed to help recruit physicians for AEMA and guarantee a salary of at least $240,000.00 per year plus pay relocation costs, etc.
>
> The agreement requires AEMA to provide emergency services to KDMC employees and visitors who are injured on the premises and waive any professional fees for that care

"to the extent and in proportion to the degree that [KDMC] charges are reduced or waived." It is also specified that all patient care records are the property of KDMC. AEMA is prohibited from providing emergency room staffing to any other facility within a 50 mile radius.

The By-Laws for AEMA provide that a physician can become a shareholder following one year of continuous full-time employment by the corporation and paying the sum set in the employment agreement for one share of stock. However, the employment agreement in use in 2001 (only signed by three of the twelve shareholders) sets no amount for a buy in. In fact, the only "money" the agreement actually addresses is what moneys can be expected upon termination of employment (the amount attributable to the physician in his/her profit center less a proportionate share of expenses) (Several physicians have left the practice over the last several years and there has been no compensation other than what was actually earned while practicing. In addition, several physicians have come into the practice and have not paid any funds for a "share" of the corporation.)

Since January 2001, AEMA has been responsible for its own billing and collection which it contracts out to ProBill. Each physician-owner's compensation is based on that physician's percentage of billing to the whole on a four month rolling average. That percentage is then applied to the overall collections to determine what amount is placed or assigned to that physician's "profit center". [Due to the low collection rate (approximately one third) for billing in the ER and to prevent "picking patients" based on the likelihood of payment, the overall collection rate is used.]

As [Ralph's] portion of AEMA is a marital asset, the fair market value must be determined. Goodwill in a professional organization is a factor to consider in

arriving at the value of a medical practice. In the seminal case of Clark v. Clark, Ky.App., 782 S.W.2d 56 (1990), the Court noted that there is no single best method in valuing the net value of a business interest. The Court commented that capitalization of excess earnings is widely accepted. However, the Court further noted that there are a number of acceptable methods.

In Clark, the Court enumerated the four steps involved in the capitalization of excess earnings method: (1) a determination of the earnings of a professional of comparable experience, expertise, education and age as an employee in the same general locale; (2) determine and average the professional's net income before federal and state income taxes for a period of approximately five years; (3) compare the actual average with the employee; and then (4) multiply the excess by a capitalization factor.

Both [Ralph and Patricia] called expert witnesses to testify as to the fair market value of [Ralph's] interest in AEMA. Robert E. DeLawder ("DeLawder") of DeLawder & Associates testified for [Ralph] and Michael B. Mountjoy ("Mountjoy") of Carpenter, Mountjoy and Bressler, PSC testified for [Patricia]. DeLawder placed the fair market value of [Ralph's] interest at $77,000.00 on July 31, 2002 (which included no value assigned to good will) while Mountjoy found [Ralph's] interest in AEMA to be $544,000.00 on August 31, 2002, which included $366,000.00 attributable to good will. (Mountjoy used July 31, 2002 in valuing [Ralph's] interest in the primary assets of AEMA.) Following is the Commissioner's analysis.

AEMA is medical practice with no patient base. The physicians do not have ownership interest in the medical records of the patients whom they treat. It is extremely doubtful that a patient would choose to come to the ER of KDMC because of

[Ralph] or any of the other physicians which comprise AEMA. However, a patient may come to the ER because of the other specialists that practice at KDMC or have privileges there.

The rate of collections for services rendered in an ER is less than optimal, considering that all patients must be treated regardless of their ability to pay. AEMA can also be forced to treat some patients without assessing any professional service fees at all (or at a reduced rate at the discretion of KDMC) pursuant to their contract. However, AEMA has no shortage of patients, also because of the very nature of an emergency room.

As a result, although not a typical medical practice, it is appropriate to evaluate [Ralph's] interest in AEMA to determine if there is goodwill.

[Ralph's] gross income (and the figure used by the experts except as noted) for 1998 was $238,676.00; 1999 was $163,700.00; 2000 was $311,431.00; 2001 was $466,887.00; and for 2002 it was $262,617.00 according to [Ralph's] W-2, but $285,242.00 as projected and used by Mountjoy. (In addition, [Ralph] worked some shifts in the emergency room at a Kanawha County hospital earning additional income in 2002 which Mountjoy also included in calculating [Ralph's] excess earnings. However, inclusion of [Ralph's] additional earning outside AEMA is inappropriate for a determination of excess earnings. It is also inappropriate to "project" income when the actual figures are available.)

For the years 2002 and 2001, Mountjoy used $210,597.00 as the comparable professional earnings to compare with [Ralph's] gross income for those years. He used $198,423.00 for 2000; $186,663.00 for 1999 and $176,217.00 for 1998. These figures represent the mean average for all emergency room physicians as determined by the Medical Group Management Association for 1998 through 2001. However, DeLawder used the 75$^{th}$ percentile (rather than the 50$^{th}$

percentile used by Mountjoy) for his professional compensation comparison and further adjusted that figure by taking into consideration the geographic location and single specialty versus multiple specialty group which resulted in a much larger comparable professional earning for each year. DeLawder also projected the comparable earnings for 2002 based on historical data while Mountjoy made no adjustment for 2002, but simply used the same figure as 2001.

Based on the direction in Clark, Mountjoy's use of the mean average for all emergency room physicians is inappropriate as it does not take into consideration [Ralph's] board certification, years of experience, or the locale in which he practiced. However, DeLawder's use of the 75$^{th}$ percentile due to [Ralph's] experience and certification along with the other adjustments may have overly inflated what an ER physician with similar experience, training, etc., in this area would make.

Of note in determining a comparable professional income is the fact that as of January 1, 2001, KDMC was willing to guarantee a starting salary of $240,000.00 for an emergency room physician (board certified or eligible for certification) for AEMA with no requirement of prior experience. Also, based on the $120.00 per hour rate that [Ralph] was paid in West Virginia, assuming working 15 shifts per month at approximately ten hours per shift, the annual income is $216,000.00 and working twelve hours per shift, the resulting annual income is $259,200.00.

Therefore, the Commissioner finds that the more appropriate figures to use are a combination of those used by the two experts with DeLawder's figures given more weight than Mountjoy's.

In calculating the average excess earnings, Mountjoy used a weighted average assigning a multiple of 5 to the 2002 excess earnings, 4 for 2001, etc. Calculating

excess earnings as a purely academic exercise, DeLawder used a straight average.

However, a simple review of [Ralph's] income for the years 1999, 2000 and 2001 indicate that obviously there were problems over that period of time. [Ralph] testified, and [Patricia] agreed, that [Ralph] got behind on his charts in 1999. As a result, he was not paid until the charts were brought up to date (AEMA policy, not KDMC). [Ralph] ultimately received his compensation for 1999; it was simply delayed for a period of time. This resulted in lower figures for 1999 and overly inflated figures for at least 2000.

Also worthy of consideration is the fact that there were only eight full time physicians with AEMA near the end of October 2000 with a patient load in the ER that required eleven physicians (according to the contract with KDMC). Pursuant to that contract, three additional full time ER physicians were scheduled to be hired over a period of twelve months. As a result it was necessary in 2000 and 2001 for each of the physicians in AEMA to see more patients at that time than when AEMA became fully staffed.

All of these factors combined caused the figures for at least 1999, 2000 and 2001 to be skewed. Therefore, it was inappropriate to give any more weight to one year than another during this three year period. It appears that 1998 and 2002 were more representative of the actual earnings of [Ralph] and should therefore given slightly more weight. (If [Ralph's] income for 1999 and 2000 is averaged, the result is a figure consistent with [Ralph's] earnings for 1998. Also calculating [Ralph's] 2001 income based on a "normal" work load, [Ralph's] income would have been less than his actual earnings.)

Based on all the foregoing, the Commissioner finds [Ralph's] modified weighted average excess earnings to be approximately $14,000.00. Using a cap rate

> of 33.33%, the same rate utilized by both Mountjoy and DeLawder, the goodwill in AEMA attributable to [Ralph] is $48,000.00.
>
> Mountjoy determined that the value of [Ralph's] interest in AEMA was $178,000.00 while DeLawder placed the value at $77,000.00. Both of these figures were based primarily on [Ralph's] percentage of the accounts receivable after allowance for that portion which is uncollectible.
>
> In reviewing the calculations, Mountjoy used 8.29% (or [Ralph's] charges for January through December 2002 as compared to the total charges for the year). That is inappropriate as the amount assigned to each owner-physicians' profit center is calculated on a four month rolling average, not an average for the year (i.e. for the month of April 2002 he was entitled to only 5.41% of the funds actually collected, but for the month of May 2002 he was entitled to 6.39020% of the funds collected). In addition, had [Ralph] left the practice in July 2002 (the date for valuing purposes), he would have been entitled to receive compensation for four months thereafter or through November 2002 using the average of his last four months rolling average (or 6.056150% which is the average of the rolling averages for the months of April, May, June and July).
>
> Applying the correct percentage to Mountjoy's figures after adjustments for the month of December, the result is within a few thousand dollars of DeLawder's.
>
> Based on all the foregoing, the Commissioner finds that the fair market value of [Ralph's] interest in AEMA, including $48,000.00 attributable to goodwill, is $125,000.00.

We recognize that the DRC heard testimony from experts whose methods and calculations produced a variation in the estimated value of the business, $77,000.00 to $178,000.00. This simply illustrates that there is no single best

mathematical formula for precisely calculating the value of a medical practice. The DRC established a value of $125,000.00, which falls within the range of values established by the expert witnesses. "Although not calculated with mathematical exactitude, [this] figure clearly falls within the range of competent testimony." Underwood v. Underwood, 836 S.W.2d 439, 444 (Ky.App. 1992), overruled in part on other grounds by Neidlinger v. Neidlinger, 52 S.W.3d 513 (Ky. 2001).

With regard to the use of the 45% tax credit in the calculation of accounts receivable and cash on hand, expert testimony clearly supported use of this percentage. With regard to the use of 31.3% for the collection rate on the accounts receivable, testimony based on information from the billing agency clearly supported this conclusion. With regard to the use of 6.056150% as the rate to be applied to Ralph's interest in the accounts receivable and cash of AEMA, the findings are clearly supported by an analysis based on testimony from several sources as to AEMA's operations.

And, with regard to goodwill, Patricia's expert found $366,000.00 in goodwill, while Ralph's expert found goodwill valued at zero. After analyzing testimony from both experts, the DRC concluded that although this was not a typical medical practice, it was still appropriate to evaluate Ralph's interest in AEMA to determine the existence of goodwill and after

analysis based on the experts' testimony assessed a goodwill value of $48,000.00. We conclude that the findings of fact made by the DRC in its valuation of AEMA were not clearly erroneous, and that the method used in arriving at the valuation was not an abuse of discretion.

For the foregoing reasons, the orders of the Boyd Circuit Court, entered September 3, 2003, and September 19, 2003, are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT/CROSS-APPELLEE:

R. Stephen McGinnis
Greenup, Kentucky

BRIEFS FOR APPELLEE/CROSS-APPELLANT:

Kent Masterson Brown
Christopher J. Shaughnessy
Lexington, Kentucky