RENDERED: DECEMBER 8, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

MODIFIED: DECEMBER 22, 2006; 10:00 A.M.

DISCRETIONARY REVIEW GRANTED BY KENTUCKY SUPREME COURT:
OCTOBER 24, 2007
(2007-SC-0190-DGE & 2007-SC-0207-DGE)

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-002088-MR

JULIE ANN GASKILL — APPELLANT

v.

APPEAL FROM WARREN FAMILY COURT
HONORABLE MARGARET RYAN HUDDLESTON, JUDGE
ACTION NO. 03-CI-01652

JON KEVIN ROBBINS — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; HENRY, JUDGE; PAISLEY,[1] SENIOR JUDGE.

HENRY, JUDGE: Julie Ann Gaskill appeals from the circuit court's "Findings of Fact, Conclusions of Law and Decree of Dissolution of Marriage," which granted her ex-husband, Jon Kevin Robbins, sole custody of the parties' son to Robbins and

[1] Senior Judge Lewis G. Paisley, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

which provided for an equal division of marital property between the parties. Upon review, we reverse and remand for a new trial.

The parties were married on May 24, 1992 in Christian County, Kentucky, with the marriage producing a son, C.H.R. Gaskill is an oral and maxillofacial surgeon who, at the time of the marriage, had already opened a successful professional practice in Russellville, Kentucky. She eventually opened a practice in Bowling Green, Kentucky, as well, once the parties were married. Robbins was employed with Thomas & Thorngren and handled a number of tax and client relation matters; however, he also assisted Gaskill in opening her Bowling Green office by interviewing and training staff, setting up the physical structure of the office, and assisting in clerical matters. He was also involved in the tax, payroll, and accounting matters of Gaskill's business, prepared profit and loss statements, negotiated lease agreements for the office space, and terminated employees when necessary. The parties both contributed to maintaining their household and caring for their son.

Gaskill and Robbins separated on August 1, 2003, and Gaskill filed a "Verified Petition for Dissolution of Marriage" in the Warren Family Court on October 14, 2003. The primary issues of concern in the parties' divorce proceedings were the valuation of Gaskill's professional practice, how the marital property should be divided, and who should have custody of

C.H.R. On September 30, 2005, the family court entered a judgment entitled "Findings of Fact, Conclusions of Law, and Decree of Dissolution of Marriage" giving sole custody of C.H.R. to Robbins and dividing the marital assets of the parties in an approximately 50/50 ratio. This appeal followed.

On appeal, Gaskill first argues that the family court erred in failing to allow the introduction of a prior inconsistent statement made by Dr. Bruce Fane, a psychologist, ruling that the statement was inadmissible hearsay. Initially, the family court granted temporary joint custody of C.H.R. to both parties, with Gaskill serving as his primary residential custodian. As noted by Robbins, Dr. Fane became involved in this case following allegations that C.H.R. witnessed sexual activity while in Gaskill's care. He interviewed Robbins and C.H.R. on November 12, 2003, and wrote a letter that was submitted to the family court on November 17, 2003 along with Robbins' motion for a modification of temporary custody and supporting affidavit. The letter was reviewed by the court in an emergency hearing conducted on November 19, 2003, along with an affidavit tendered by Gaskill. After considering these items, the court temporarily granted Robbins' motion and held that Gaskill was to receive only supervised visitation until an evidentiary hearing could be held on November 21, 2003. After hearing additional testimony from Dr. Fane at this hearing in

which he stated his belief that C.H.R. had been exposed to some sort of sexual behavior, the court subsequently entered an order – agreed to by the parties - on November 25, 2003 in which Robbins was named primary residential custodian of C.H.R. and Gaskill was allowed co-parenting and unsupervised visitation.

At trial, Dr. Fane testified about his conclusions concerning the relationship of the parties with each other and with their son. During his testimony, he stated that he did not believe that either parent could be considered better than the other, as both of them had good qualities. On cross-examination, counsel for Gaskill attempted to question Dr. Fane about an alleged statement that he had made to Dr. John Buchanan indicating that Gaskill was a better parent than Robbins. Dr. Fane testified that he did not recall making such a statement or expressing any opinion about the parties' parenting skills, but admitted that he did remember talking to Dr. Buchanan about the case. Gaskill subsequently attempted to call Dr. Buchanan to rebut Dr. Fane's denial and to impeach his testimony. Counsel for Robbins objected and the family court sustained the objection, ruling that the proffered evidence constituted inadmissible hearsay. The testimony was then introduced into the record by avowal out of the family court judge's presence.

KRE[2] 801A(a)(1) provides that a "statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the declarant testifies at the trial or hearing and is examined concerning the statement, with a foundation laid as required by KRE 613," when the statement is "[i]nconsistent with the declarant's testimony." Consequently, "the credibility of any witness, including one's own witness, may be impeached by showing that the witness has made prior inconsistent statements." Wise v. Commonwealth, 600 S.W.2d 470, 472 (Ky.App. 1978). This is because "when a witness has testified about some of the facts in a case, the jury is entitled to know what else the witness has said about the case, so long as it is relevant to the merits of the case as distinguished from mere collateral issues." Id. Under Kentucky law, prior inconsistent statements may be introduced not only for impeachment purposes, but also to serve as substantive evidence. See Jett v. Commonwealth, 436 S.W.2d 788, 792 (Ky. 1969). We also note that such statements can be introduced through the testimony of another witness and need not be limited to impeachment purposes. Wise, 600 S.W.2d at 472. Trial judges are afforded "a broad discretion in deciding whether or not to permit the introduction of such contradictory evidence." Id. Accordingly, we review a trial court's evidentiary rulings for

[2] Kentucky Rules of Evidence.

abuse of that discretion. Goodyear Tire & Rubber Co. v. Thompson, 11 S.W.3d 575, 577 (Ky. 2000), citing Tumey v. Richardson, 437 S.W.2d 201, 205 (Ky. 1969); Transit Authority of River City (TARC) v. Vinson, 703 S.W.2d 482, 484 (Ky.App. 1985). An appellant claiming that an evidentiary ruling was in error must prove that the ruling was arbitrary, unreasonable, or unsupported by sound legal principles. Id. at 581, citing Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999).

After reviewing the record, we believe that the family court clearly erred and abused its discretion in refusing to allow the impeachment testimony of Dr. Buchanan to be introduced into evidence on the justification that it was inadmissible hearsay. First and foremost, the statement in question appears to satisfy the requirements of KRE 801A(a)(1), so the court's conclusion that it was inadmissible hearsay is questionable, particularly as it also appears from the record that Gaskill laid a proper foundation for Dr. Buchanan's testimony to be heard. Indeed, Robbins disputes neither of these facts. Moreover, the findings of fact reveal that Dr. Fane's testimony was relied upon by the family court in its custody determination. We note that it was the letter from Dr. Fane that ultimately changed Gaskill's status as primary residential custodian. The court also cited to Dr. Fane's testimony that Gaskill had boundary issues with C.H.R. that had the potential

of being "dangerous emotionally" to him in its judgment. Consequently, a statement made by Dr. Fane pertaining to who was the better parent between Gaskill and Robbins – given the weight afforded to his testimony about both parents - would certainly be a relevant and material evidentiary matter for the court to consider in its custody determination. Therefore, we believe that its omission on purely hearsay grounds was in error.

Whether this error, standing alone, is one that merits reversal as to the family court's custody determination is – in our view – arguable. However, ultimately this is a question we need not consider, as we also believe that the court erred in making findings of fact that relied upon unsworn statements made at a September 9, 2005 hearing dealing with a motion of the Guardian Ad Litem to review temporary custody. At this hearing, counsel for Robbins, as well as the Guardian Ad Litem, recited a number of hearsay accounts about Gaskill's purported interference with C.H.R.'s schooling, including statements allegedly made by a principal at C.H.R.'s school and by C.H.R. to Robbins.

Specifically, the Guardian Ad Litem stated that she had requested the temporary custody review because the principal at C.H.R.'s school had contacted her about disciplinary problems that the boy had been having at school. The principal also expressed concern that C.H.R. was getting a "bad name" at

school, and that he would never be able to escape it. Counsel for Robbins also expressed concern about alleged actions taken by Gaskill regarding C.H.R.'s enrollment at his new school. These actions included Gaskill obtaining disciplinary records from C.H.R.'s previous school and delivering them to his new teacher, making disparaging remarks about public school and public school teachers in C.H.R.'s presence, and telling C.H.R. not to worry if he got into trouble at his new school because she would "take care of it." Gaskill subsequently filed an affidavit on September 14, 2005, in which she admitted obtaining C.H.R.'s disciplinary records from his previous school and taking them to his new teacher. However, she denied the other allegations made at the hearing.

In its findings of fact, the family court noted that it was "particularly troubled that [Gaskill] may have set out to hinder with her son's adjustment at his new school." The court also expressed concern that Gaskill had taken it upon herself, without being asked, to deliver her son's behavior records to his new school; had scheduled therapy appointments for her son on her visitation days without informing Robbins; and had tried to get her son to deny these appointments to Robbins. Gaskill argues that all of these factual findings came directly from the arguments made by Robbins' counsel at the aforementioned temporary custody hearing and that no sworn testimony supporting

these findings was ever taken at said hearing. Accordingly, they were based on inappropriate hearsay.

Robbins makes little effort to dispute Gaskill's contentions. Instead, he argues that trial judges are generally presumed to be able to discern "the grain from the chaff, and to decide the case alone upon the law," G.E.Y. v. Cabinet for Human Resources, 701 S.W.2d 713, 715 (Ky.App. 1985), citing Andrews v. Hayden's Adm'rs, 88 Ky. 455, 11 S.W. 428 (1889), and that such a rule should apply here. He further argues that Gaskill "cannot seriously argue that the trial court's custody decision ultimately turned on the responsive arguments of counsel during a hearing after the evidence had closed. Instead, the trial court was persuaded by a mountain of evidence, and it did not improperly consider statements which [Gaskill,] herself, verified." Consequently, we read Robbins' contention to be that, even assuming that an error occurred here, it is not of a reversible nature. We are inclined to disagree.

In doing so, we acknowledge Robbins' position that "when a judge acts as a fact finder it is presumed that he will be able to disregard hearsay statements." Id. With this said, however, "where, as here, it is apparent that he relied on the hearsay in making his decision, the error in the admission of the unreliable evidence cannot be deemed harmless or nonprejudicial." Id. "Admission of incompetent evidence in a

bench trial can be viewed as harmless error, but only if the trial judge did not base his decision on that evidence ... or if there was other competent evidence to prove the matter in issue ....” Prater v. Cabinet for Human Resources, Com. of Ky., 954 S.W.2d 954, 959 (Ky. 1997), citing G.E.Y., 701 S.W.2d at 715; Holcomb v. Davis, 431 S.W.2d 881, 883 (Ky. 1968); Escott v. Harley, 308 Ky. 298, 214 S.W.2d 387, 389 (1948) (Emphasis in original).

As noted above, the family court noted in its factual findings that it was “particularly troubled that [Gaskill] may have set out to hinder with her son’s adjustment at his new school.” Consequently, it cannot be said that the statements and arguments made at the temporary custody hearing did not impact the court’s decision. Moreover, there was not “other competent evidence” to prove the matter in issue. While Gaskill’s affidavit admitted that she delivered C.H.R.’s behavior records to his new school, she denied the other allegations made at the custody hearing. We must therefore conclude, per G.E.Y., that the court’s consideration of these items was prejudicial, particularly when this fact is coupled with our previous finding of error with respect to the court’s failure to allow the impeachment testimony of Dr. Buchanan. Consequently, we are compelled to conclude that the family court’s custody determination must be reversed and remanded for

a new trial, the evidence in support of the court's decision notwithstanding. Given our ruling and decision to remand, we decline to consider Gaskill's remaining arguments relating to the sufficiency of the evidence supporting the family court's custody determination.

Gaskill next argues that the family court erred in assigning value to the parties' marital property by failing to properly exercise its discretion with respect to assigning goodwill value to Gaskill's business and by failing to distinguish between "personal" and "enterprise" goodwill. We address each of these contentions in turn.

Steve Wheeler, a certified public accountant ("C.P.A."), performed a business valuation on Gaskill's behalf and testified that the value of the goodwill attributable to her oral and maxillofacial surgery practice was $0.00 because any goodwill the practice enjoyed was actually "personal" goodwill attributable in its entirety to Gaskill. Accordingly, he ultimately opined that the fair market value of the practice was $114,000.00. Robbins employed Richard Callahan, also a C.P.A., to conduct his own evaluation of Gaskill's practice. Callahan included goodwill in his valuation calculations and opined that the practice had a value of $669,075.00. Obviously, then, the decision to include or not to include goodwill in the valuation

process was a notable one in the context of determining the practice's value.

The family court rejected the valuation given by Wheeler, stating that "[t]here is no reported legal authority for the distinction in goodwill made by Mr. Wheeler." The court further stated, "To the contrary, it is generally accepted in Kentucky that the goodwill of a closely held medical corporation should be assigned value in a dissolution proceeding," citing to Drake v. Drake, 809 S.W.2d 710 (Ky.App. 1991), Clark v. Clark, 782 S.W.2d 56 (Ky.App. 1990), and Heller v. Heller, 672 S.W.2d 945 (Ky.App. 1984), in support of this proposition. The court also took issue with Wheeler's valuation because he "did not adequately explain why he approximately doubled the salaries of the practice's staff when calculating its value," noting that "Mr. Callahan testified that this single adjustment reduced the value of the business by $315,890." The court subsequently concluded that Callahan's valuation of the practice was more credible and assigned it a value of $669,075.00.

Gaskill first contends that the family court erred because it operated under the misconception that it was compelled to assign a goodwill value in valuing her practice, as demonstrated by the court's statement that "it is generally accepted in Kentucky that the goodwill of a closely held medical corporation should be assigned value in a dissolution

proceeding." We agree. In Gomez v. Gomez, 168 S.W.3d 51 (Ky.App. 2005), we addressed another case in which the issue at hand was whether a value for goodwill should have been assigned to a medical practice. While we acknowledged that "the goodwill contained in a business should be considered when arriving at the value of a practice," Id. at 55, citing Heller, 672 S.W.2d at 947 (Emphasis added), we rejected the argument that Heller held that all businesses have goodwill. Id. Consequently, we upheld the trial court's decision to not include an amount for goodwill in valuing the appellee's medical practice, concluding that the trial court's decision was supported by substantial evidence. Id. at 56.

As Gaskill points out here, it appears from the family court's opinion that it felt required to assign a goodwill value in this case and had no discretion to do otherwise. The question therefore arises as to whether the court gave appropriate consideration to the issue and properly exercised the discretion afforded to it in matters of valuation. See Clark, 782 S.W.2d at 60, citing Platt v. Platt, 728 S.W.2d 542 (Ky.App. 1987). We believe that it did not. As the court was laboring under the misconception that providing a value for goodwill was compulsory in reaching its decision, we believe that it cannot be said that the court exercised its discretion appropriately. Cf. University of Kentucky Albert B. Chandler

Medical Center v. Partin, 745 S.W.2d 148, 149 (Ky.App. 1988) (holding that the trial court "did not exercise its discretion using appropriate standards" in deciding whether or not to dismiss an appeal when the court mistakenly "felt constrained by CR[3] 6.02 to require a showing that the Medical Center failed to learn of the entry of a judgment or order affecting the time for appeal"); Adkins v. Adkins, 574 S.W.2d 898, 900 (Ky.App. 1978), citing Malloy v. Malloy, 460 S.W.2d 15 (Ky. 1970) (holding that the trial court failed to exercise appropriate discretion when it mistakenly believed that it lacked the authority to award attorney's fees). Accordingly, we believe that the issue requires remand for further consideration.

With this said, we have also been asked by Gaskill to consider the related issue of whether a distinction should be drawn between "personal" goodwill and "enterprise" goodwill for the purposes of valuing a business in a divorce proceeding. The family court declined to make such a distinction, citing a lack of precedent for such a distinction, and we similarly can find no Kentucky case law in which this distinction has been made.

Gaskill submits that "there is a majority trend in the United States for courts to distinguish between enterprise goodwill and personal goodwill in a divorce." Specifically, she cites to the West Virginia Supreme Court's decision in May v.

[3] Kentucky Rules of Civil Procedure.

May, 589 S.E.2d 536 (W.Va. 2003), in which a survey conducted by that Court found that 25 jurisdictions have adopted the view that these two categories of goodwill should be distinguished, with only "enterprise" goodwill constituting divisible marital property.[4] According to May, Kentucky's current position is in line with 12 other jurisdictions. Gaskill argues that we should join the majority position and find that there should "be personal goodwill that belongs to the individual professional and is not attributable to the enterprise. That personal goodwill should be left with a professional who brought it into the marriage from inception." She further submits that failing to create such a distinction as a matter of law "is to grant the non-professional spouse a property interest in the future earning capacity of the professional spouse."

The issue of business goodwill in the context of a dissolution of marriage proceeding is one for which Kentucky has

[4] The May Court defined "enterprise" goodwill as follows: "Enterprise goodwill attaches to a business entity and is associated separately from the reputation of the owners. Product names, business locations, and skilled labor forces are common examples of enterprise goodwill. The asset has a determinable value because the enterprise goodwill of an ongoing business will transfer upon sale of the business to a willing buyer." May, 589 S.E.2d at 541, citing Courtney E. Beebe, The Object of My Appraisal: Idaho's Approach to Valuing Goodwill as Community Property in Chandler v. Chandler, 39 Idaho L.Rev. 77, 83-84 (2002); Frazier v. Frazier, 737 N.E.2d 1220, 1225 (Ind.Ct.App. 2000). It further defined "personal" goodwill as being "associated with individuals. It is that part of increased earning capacity that results from the reputation, knowledge and skills of individual people. Accordingly, the goodwill of a service business, such as a professional practice, consists largely of personal goodwill." Id. at 542, citing Diane Green Smith, 'Til Success Do Us Part: How Illinois Promotes Inequities in Property Distribution Pursuant to Divorce by Excluding Professional Goodwill, 26 J. Marshall L.Rev. 147, 164-65 (1992).

limited authority. We first dealt with the issue, in depth, in Heller v. Heller, supra. There, we cited to In re Marriage of Nichols, 606 P.2d 1314 (Colo.Ct.App. 1979), for the proposition that "the value of goodwill incident to a professional practice is a divisible marital asset." Heller, 672 S.W.2d at 948. In reaching this decision, we explicitly distinguished between "the value of goodwill in an existing business and the value of an advanced educational degree" as follows:

> [P]rofessional practices that can be sold for more than the value of their fixtures and accounts receivable have salable 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 goodwill, and they have a pecuniary value ... This limited marketability distinguishes professional goodwill from the advanced educational degree, which, because it is personal to its holder and is non-transferable, was held not to be property in Graham.

Id., citing In re Marriage of Nichols, 606 P.2d at 1315; In re Marriage of Goger, 557 P.2d 46 (Ore.Ct.App. 1976); Hurley v. Hurley, 615 P.2d 256 (N.M. 1980), overruled on other grounds by Ellsworth v. Ellsworth, 637 P.2d 564 (N.M. 1981); Slater v. Slater, 100 Cal.App.3d 241, 160 Cal.Rptr. 686 (1980), superseded by statute as stated in In re Marriage of Ostler & Smith, 223

Cal.App.3d 33, 272 Cal.Rptr. 560 (1990). Heller drew no distinction between "personal" and "enterprise" goodwill, instead suggesting that both categories were subject to division as marital assets.

In Clark v. Clark, supra, we again ruled that "the goodwill contained in a business or professional organization is a factor to be considered in arriving at the value of the practice." Clark, 782 S.W.2d at 59. We defined "goodwill" as "the expectation that patrons or patients will return because of the reputation of the business or firm," and noted that "[t]his goodwill has specific pecuniary value." Id. We further recognized that "[g]oodwill has also been defined as the excess of return in a given business over the average or norm that could be expected for that business." Id., citing Hanson v. Hanson, 738 S.W.2d 429 (Mo. 1987). We also held that "[t]he 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 goodwill." Id., citing Poore v. Poore, 331 S.E.2d 266 (N.C.Ct.App. 1985). Again, we drew no distinction between "personal" and "enterprise" goodwill. Indeed, in setting forth the factors of goodwill, we included items that could be considered as falling under both categories.

In Drake v. Drake, supra, we again faced the question of whether goodwill could be considered as an asset in valuing a closely held corporation in a dissolution action. There we deferred to our holdings in Clark and Heller and concluded that goodwill should be considered. Drake, 809 S.W.2d at 713. In doing so, we noted that the facts in Drake were similar to those in Clark in that the latter involved a physician's one-third interest in a medical practice. Id. Again, we made no distinction between "personal" and "enterprise" goodwill.

After considering the issue and the facts of this case, we are not inclined to deviate from long-standing precedent by creating a wholesale change of law holding that "personal" and "enterprise" goodwill should be distinguished for purposes of property valuation in a divorce proceeding – even given that Gaskill's practice is a sole proprietorship. Issues of stare decisis aside, we believe that "[i]t would be inequitable to hold that the form of the business enterprise can defeat the community's interest in the professional goodwill. Such a result ignores the contribution made by the non-professional spouse to the success of the professional ...." Mitchell v. Mitchell, 732 P.2d 208, 211 (Ariz. 1987). As further noted by the California Court of Appeal in Golden v. Golden, 270 Cal.App.2d 401, 75 Cal.Rptr. 735 (Cal.Ct.App. 1969):

> [I]n a divorce case, the good will of the husband's professional practice as a sole practitioner should be taken into consideration in determining the award to the wife.... [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.... [T]he 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.

Id., 270 Cal.App.2d at 405, 75 Cal.Rptr. at 737-38. This view of thinking was also adopted by the Supreme Court of New Jersey in Dugan v. Dugan, 457 A.2d 1 (N.J. 1983):

> After divorce, the law practice will continue to benefit from that goodwill as it had during the marriage. Much of the economic value produced during an attorney's marriage will inhere in the goodwill 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 goodwill and its value as an asset to be considered in equitable 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. at 6. In doing so, the Court distinguished "goodwill" from "earning capacity," stating that goodwill:

> ... reflects not simply a possibility of future earnings, but a probability based on existing circumstances. Enhanced earnings reflected in goodwill 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. The possibility of additional earnings is to be distinguished from the existence of goodwill in a law practice and the probability of its continuation.

Id.

Here, the record reflects that Robbins made a number of contributions to Gaskill's business, including training a number of administrative personnel and handling a number of financial aspects of the practice. Consequently – given these facts – we believe that it is equitable to conclude that the goodwill of Gaskill's practice should remain a relevant consideration in valuing the marital property on remand, keeping in mind – of course – that "[t]he determination of goodwill is a question of fact rather than law, and each case must be determined on its own facts and circumstances." Gomez, 168 S.W.3d at 55, citing Clark, 782 S.W.2d at 60. Given that the assignment of goodwill value must be reconsidered on remand, we decline to consider Gaskill's remaining contentions as to the court's distribution of the marital property as a whole.

The judgment of the Warren Family Court is hereby reversed and remanded for further proceedings consistent with this opinion.

COMBS, CHIEF JUDGE, CONCURS.

PAISLEY, SENIOR JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

PAISLEY, SENIOR JUDGE, CONCURRING IN PART AND DISSENTING IN PART: The trial judge in this case conducted an eight-day trial and heard testimony from 27 witnesses. Her Findings of Fact and Conclusions of Law, which are 35 pages long, are very comprehensive and clearly show that she gave thorough and appropriate consideration to all the issues in this case and also expressly considered the applicable authority. As appellee has pointed out, our task is to determine whether those findings are clearly erroneous, whether the correct law was applied, and whether the trial court abused its discretion. B.C. v. B.T. and K.F., 182 S.W.3d 213 (Ky. App. 2005). Although I agree with the majority that the trial court erred when it did not allow the impeachment testimony by Dr. Buchanan, it seems clear to me that the error was harmless as the evidence in question did not materially affect the trial court's custody ruling. I also do not believe the reference to the unsworn statements of the GAL and by counsel amount to reversible error,

if it is error at all. I would affirm the trial court's award of sole custody to appellee.

With respect to the trial court's ruling valuing the medical practice of appellant, I believe she makes a compelling case that "personal" goodwill should not be considered marital property to be divided between the parties. I believe, however, that this is a matter to be addressed to our Supreme Court. I cannot find that the trial court erred in its ruling on this issue under current Kentucky law. I concur with the majority on this issue.

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