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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002149-MR
AND
NO. 2007-CA-002199-MR

RANDALL E. KING

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM DAVIESS CIRCUIT COURT
v. HONORABLE THOMAS O. CASTLEN, JUDGE
ACTION NO. 05-CI-00182

KAREN LYNN KING

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART, REVERSING
IN PART, AND REMANDING

** ** * ** * ** *

BEFORE: DIXON AND THOMPSON, JUDGES; LAMBERT,¹ SENIOR
JUDGE.

THOMPSON, JUDGE: Randall E. King, M.D. appeals and Karen Lynn King
cross-appeals from a decision of the Daviess Circuit Court in an action for
dissolution of their marriage. Dr. King alleges the following errors: (1) the circuit

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

court erred when it assigned a value to his medical practice; (2) the circuit court failed to make findings of fact regarding Karen's marital contribution to the medical practice; (3) the circuit court erred when it awarded the couple's Texas Roadhouse restaurant investment to Karen; (4) the circuit court failed to consider and divide the loss carry forward associated with an investment account awarded Karen; and (5) the parties' 2005 Maxima automobile should not have been included as an asset awarded to Dr. King. In her cross-appeal, Karen claims three errors: (1) the award of child support was insufficient; (2) the award of maintenance was insufficient in amount and duration; and (3) the refusal to award her attorney's fees and the imposition on her for one-half the court costs.

Following the most recent opinion rendered by our Supreme Court in *Gaskill v. Robbins*, 282 S.W.3d 306 (Ky. 2009), regarding the issue of goodwill in a professional practice, we reverse and remand the case to the circuit court for a reconsideration of the valuation of goodwill. Furthermore, because of the impact any adjustment in the value of the marital property awarded will have on the issues of maintenance, child support, and attorney's fees and costs, those issues are also remanded for reconsideration. We otherwise affirm.

The parties were married for twenty-five years, during which they had five children, the oldest born in 1987 and the youngest in 1997.² At the beginning of the marriage, Dr. King was in medical school and Karen, a nurse, worked outside the home. After the birth of their second child in 1989, Karen did not work

² At the time the decree of dissolution was entered, the oldest child was eighteen.

outside the home except occasionally in Dr. King's medical practice and was the primary caretaker of the children. Because he was a sole practitioner and there were few OB/GYNs in the Daviess County area, Dr. King worked extensive hours and spent little time at home. At the time of the dissolution, his practice was a sole proprietorship and his annual income exceeded \$700,000.

The parties and their children enjoyed a lifestyle commensurate with their income, including private schools, a vacation home, horses, sports lessons for the children, and frequent dining out. While maintaining their lifestyle, the parties accumulated a marital estate with a net value of \$4,900,000.

The parties were awarded joint custody and Karen was designated as the primary residential custodian. Custody and visitation are not issues on appeal.

Based on Dr. King's annual income and \$50,000 imputed annual income to Karen based on her earning potential and income generated from her marital assets, Dr. King was ordered to pay child support in the amount of \$3,720 per month as long as four children qualify, to be reduced to \$2,799 per month when only three qualify, and to be reduced in proportionate amounts as each child reaches eighteen years.

Each party received \$2,368,834.70 in marital property effectuating an equal division. The trial court valued the medical practice at \$1,013,000, \$799,841 of which consisted of goodwill.

The court further awarded Karen maintenance in the amount of \$3,500 per month until she is fully restored her marital property, at which time it

will be reduced to \$2,500 per month to continue for six years or until Karen remarries, cohabitates with another adult, or the death of either party.

Much of the evidence presented at the hearing before the domestic relations commissioner concerned the value of Dr. King's medical practice. This evidence and other evidence presented will be discussed as necessary. We now address the specific issues raised by the parties in the context of the specific facts applicable to each.

The value of Dr. King's medical practice was vigorously litigated by the parties and remains a subject of controversy in this appeal. Both parties presented expert testimony. Mr. York, Dr. King's expert, valued the practice at \$636,000, and Terry Walker, Karen's expert, valued the practice at \$1,013,000. The circuit court was persuaded by Karen's expert and valued the practice accordingly. Dr. King alleges that his expert offered the more accurate opinion because he considered two factors significant to his valuation: The hours worked by Dr. King and the shortage of OB/GYNs in the Daviess County area.

The data collected by the two experts, and therefore that upon which their opinions were based, substantially differ. Karen's expert based his opinion upon information provided by 1,567 practicing OB/GYNs from across the country to an organization known as MGMA. Based on the data collected, Mr. Walker determined what a professional with Dr. King's experience, expertise, education and age could earn in the Daviess County area. Using the capitalization of excess earnings method, Mr. Walker determined the goodwill of the medical practice by

dividing the excess earnings by the capitalization rate. After adjusting for taxes on ordinary income, he concluded that the value of the medical practice was \$1,013,000, including \$797,841 of goodwill.

In contrast to the data offered by the 1,567 physicians used by Mr. Walker, Dr. King's expert, Mr. York, relied upon data offered by one local OB/GYN, referred to as the "Peer Doctor." Mr. York stressed that the Daviess County area had a shortage of OB/GYNs and, as a result, Dr. King worked 15.4 percent more than the Peer Doctor, or 100 hours per week. He then adjusted Dr. King's earnings by \$214,000, representing the excess hours worked and compensated. He valued the practice at \$636,000. The difference in the value offered by Mr. York was his reduction in the goodwill attributable to Dr. King's extensive work hours and the shortage of OB/GYNs in the area.

We have previously stated that the determination of goodwill is a question of fact rather than law, and each case must be determined on its own facts and circumstances. *Clark v. Clark*, 782 S.W.2d 56, 59 (Ky.App. 1990). However, the Supreme Court's decision in *Gaskill* promulgates a new rule of law pursuant to which the amount of goodwill attributable to a sole practitioner is to be calculated. Our review, therefore, is *de novo*. *Smith v. Smith*, 235 S.W.3d 1 (Ky.App. 2006).

The concept of goodwill emerged in our jurisprudence in *Heller v. Heller*, 672 S.W.2d 945 (Ky.App. 1984), and since that time has proven difficult to quantify. It has been generally described as "the expectation that patrons or patients will return because of the reputation of the business or firm." *Clark*, 782

S.W.2d at 59. It has been defined as the excess of return in a given business over the average or norm that could be expected from that business. *Id.* The definition recited has been particularly troublesome where a professional is a sole practitioner. Unlike a business that sells goods where the purchaser seeks a commodity, the purchaser of a personal service often is primarily motivated by the provider's skills, qualifications, and reputation.

In *Gaskill*, the Supreme Court recognized the inequity from the failure to distinguish between that goodwill that is an asset of the business and that attributable to the individual. It observed that a majority of jurisdictions now specify two types of goodwill: enterprise goodwill and personal goodwill. Personal goodwill in a solo professional practice is associated with the professional and is that part of the increased earning capacity resulting from the "reputation, knowledge, and skills" of the individual. Enterprise goodwill is a business's established relations with employees, customers and suppliers, and may include a business location, name recognition, and business reputation. *Id.* at 313-315.

The Kentucky Supreme Court found persuasive the rationale of the Court in *Yoon v. Yoon*, 711 N.E.2d 1265, 1268-70 (Ind. 1999), wherein it elaborated on the concept of goodwill:

Goodwill has been described as the value of a business or practice that exceeds the combined value of the net assets used in the business. Goodwill in a professional practice may be attributable to the business enterprise itself by virtue of its existing arrangements with suppliers, customers or others, and its anticipated future customer base due to factors attributable to the business. It may

also be attributable to the individual owner's personal skill, training or reputation. This distinction is sometimes reflected in the use of the term “enterprise goodwill,” as opposed to “personal goodwill.”

Enterprise goodwill is based on the intangible, but generally marketable, existence in a business of established relations with employees, customers and suppliers. Factors affecting this goodwill may include a business's location, its name recognition, its business reputation, or a variety of other factors depending on the business. Ultimately these factors must, in one way or another, contribute to the anticipated future profitability of the business. Enterprise goodwill 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. It is not necessarily marketable in the sense that there is a ready and easily priced market for it, but it is in general transferrable to others and has a value to others.

In contrast, the goodwill that depends on the continued presence of a particular individual is a personal asset, and any value that attaches to a business as a result of this “personal goodwill” represents nothing more than the future earning capacity of the individual and is not divisible. Professional goodwill as a divisible marital asset has received a variety of treatments in different jurisdictions, some distinguishing divisible enterprise goodwill from nondivisible personal goodwill and some not.

Id. Citing with approval the rationale in *Yoon*, the Kentucky Supreme Court pronounced that the distinction made between personal goodwill and enterprise goodwill shall be considered in dissolution actions and only that attributable to enterprise goodwill is subject to division as marital property. *Id.*

The facts in *Gaskill* presented a similar situation to the present. Dr. Gaskill was a successful oral and maxillofacial surgeon who maintained a solo practice and worked extended hours. Included in the personal goodwill of Dr. Gaskill's practice were her skills, personality, work ethic, reputation, and relationships. The Court pointed out that Dr. Gaskill's attributes will continue with her after the marital dissolution and cannot be sold to a subsequent practitioner. *Id.* It further explained that because the value attached to personal goodwill necessarily represents the future earnings of the professional spouse, its division as marital property results in unintended consequences:

To consider this highly personal value as marital would effectively attach her future earnings, to which Robbins has no claim. Further, if he or someone similarly situated were then awarded maintenance, this would amount to "double dipping," and cause a dual inequity to Gaskill.

Id. at 315.

In the present case, no distinction was made between enterprise and personal goodwill. Based on the testimony of both experts, Dr. King's higher than average income was the result of his work ethic and dedication, personal assets that are neither transferrable to others nor have a value to others.

Our opinion is not to be construed so as to foreclose the court from relying on the methodology employed by Mr. Walker. Although there is no right or wrong method for valuing goodwill, "[t]he capitalization of excess earnings method is a widely accepted method and the most often used." *Clark*, 782 S.W.2d

at 60. The broad survey used in the present case by Mr. Walker was approved by the Court in *Clark. Id.* However, inherent in the method is that “goodwill 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 the same area.” *Id.* at 59. Therefore, any amount attributable to personal goodwill, including that attributable to Dr. King’s work hours in excess of the norm in the profession, must be excluded when valuing the medical practice for the purpose of dividing the marital property.

Dr. King contends that the trial court was required to make specific findings of fact in regard to Karen’s contribution to the acquisition of marital property. Specifically, he contends that he should receive sixty percent of the marital estate because of his economic contribution.

Karen’s contribution as a homemaker was properly considered by the trial court. KRS 403.190(1). As stated by the Supreme Court in *Gaskill*:

[T]he ability to work with the support of a spouse and co-parent is an intangible that goes beyond dollars. All of the work done by either spouse during the marriage is done for the marital purpose: having someone, within the bounds of law, with whom one shares a union that allows for joint homemaking, co-parenting if children are born, and experiencing life in general with another. Within the marital arrangement, abilities are often unequal, the use of one's time varies according to present need, and each spouse does things to accommodate the other. How the parties earn money and build wealth is affected by these variables, but is done for common purpose. The term “contribution” thus has tangible and intangible components that must be weighed by the trial court.

Gaskill, 282 S.W.3d at 317.

The report of the domestic relations commissioner and the order of the circuit court reveal that both gave ample consideration to the evidence presented and the conclusion that a just division of the marital property required that the property be divided equally. The parties were married for twenty-five years during which they accumulated substantial wealth. It is undisputed that while Dr. King worked long hours, Karen was the primary care taker of the parties' five children. We conclude that the trial court stated facts sufficient to support its decision and permit review of the appropriateness of the property division. There was no abuse of discretion. *See Hollon v. Hollon*, 623 S.W.2d 898 (Ky. 1981).

In addition to his objection to the amount of marital property awarded, Dr. King alleges error in regard to the specific property assigned to Karen. Because we are remanding the case to the trial court for a reconsideration of the value of the medical practice, the circuit court will be required to reallocate the marital property in a manner to reflect the percentage awarded each party. Dr. King may again proffer the same arguments; thus, we are compelled to address two points.

First, he alleges that the circuit court erroneously allocated an investment in a Texas Roadhouse franchise to Karen. No current value of the investment was offered by the parties, leaving the initial investment of \$75,000 and \$9,000 in income received and held in an escrow account as the only possible

value that the circuit court could assign. Dr. King's complaint is that the investment should have been divided equally, because it is anticipated that the publicly traded corporation which operates Texas Roadhouse will purchase the property at a higher price than the parties' initial investment.

His second contention is that the circuit court erred when it did not consider and divide a loss carry forward associated with a BB&T investment account awarded to Karen in the amount of \$271,619. Because the parties cost basis of the account was \$707,104.56, he surmised that the sale of the stock would generate a capital loss in excess of \$400,000 and, consequently, substantial tax benefits to Karen.

Our response to both contentions is that the circuit court cannot speculate as to the future value of a marital asset. Although the sale of the Texas Roadhouse investment or the BB&T investment could result in either a gain or a loss whenever it may occur, the court cannot engage in speculation when dividing marital property and must do so based on its current value as supported by the evidence.

Finally, before turning to Karen's contentions, we address Dr. King's contention that the circuit court erred when it included in the assets awarded to him a 2005 Maxima automobile. He contends that the value of the automobile was included in the value of the medical practice and should not have been considered as a separate asset.

After the litigation was commenced and the medical practice valued, both parties expressed that they wanted the use of a 2005 Maxima owned by them. The court entered an order permitting Dr. King to sell a 2001 Avalon and purchase a similar 2005 Maxima, which he did using \$31,914.40 from the medical practice's funds. Because the medical practice was valued prior to the purchase of the vehicle and because it was awarded to Dr. King, there was no error.

Having addressed Dr. King's appeal, we now turn to Karen's cross-appeal.

Karen alleges that the amount and duration of the maintenance award were inadequate; the child support was inadequate; and that she should have been awarded her attorney's fees and costs.

The value of the medical practice excluding the amount attributable to Dr. King's personal goodwill will decrease the value of the marital estate and, necessarily, the property awarded to Karen. A decrease in non-income producing property may or may not have an affect on maintenance, child support, or attorney's fees and costs. However, when as here, the spouse's primary income is generated from the assets awarded, an increase or decrease in the value of the marital property awarded will possibly affect maintenance, child support, attorney's fees and costs. Therefore, on remand, if the value of the medical practice is decreased, the circuit court will then be required to reconsider the award of maintenance, child support, and attorney's fees and costs.

Based on the foregoing, the judgment of the Daviess Circuit Court is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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