

STATE OF MICHIGAN
COURT OF APPEALS

JEANNE T. CONGER,

Plaintiff-Appellee,

v

LAWRENCE D. CONGER,

Defendant-Appellant.

UNPUBLISHED

December 26, 2000

No. 219373

Ottawa Circuit Court

LC No. 97-028425-DO

Before: Smolenski, P.J., and Zahra and Collins, JJ.

PER CURIAM.

In this divorce proceeding, defendant appeals the circuit court's valuation and distribution of marital assets. We affirm.

I. Factual and Procedural Background

Both plaintiff and defendant are computer software engineers. They married on December 9, 1992, and divorced on April 19, 1999. During the marriage, defendant owned and operated a corporation called Digital Design and Drafting, Inc., through which he offered software consulting services. At trial, the circuit court was required to determine the corporation's value in order to distribute the marital assets. Plaintiff's expert valued the corporation at approximately \$250,000. Defendant's expert utilized several different methods to value the corporation, but ultimately relied on the highest value which his calculations produced, approximately \$66,500. The trial court applied a modified version of the holder's interest method and valued the corporation at \$90,000. The trial court then distributed the marital assets, awarding plaintiff assets totaling approximately \$143,000 and awarding defendant assets totaling approximately \$113,000. On appeal, defendant challenges both the valuation of the corporation and the distribution of marital assets.

II. Valuation of Defendant's Business

Defendant's primary contention on appeal is that the circuit court erroneously applied the holder's interest method to determine the value of defendant's corporation. We disagree.

A trial court's factual findings in a divorce matter are reviewed for clear error. *Sparks v Sparks*, 440 Mich 141, 149-150; 485 NW2d 893 (1992). No single method of valuation need be

uniformly applied to determine the value of business assets for the purpose of distributing marital property. *Kowalesky v Kowalesky*, 148 Mich App 151, 155; 384 NW2d 112 (1986). “Rather, this Court will review the method applied by the trial court, and its application of that method, to determine if the trial court’s valuation was clearly erroneous.” *Id.* at 155-156. A trial court is given great latitude in determining the value of a marital asset, and this Court will not find clear error if the valuation is within the range established by the proofs, even if the circuit court miscalculated individual factors. *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994). We will only find that a trial court’s valuation of an asset constitutes clear error if, after reviewing the entire record, we are left with the definite and firm conviction that a mistake has been committed. *Kowalesky, supra* at 155; *Perrin v Perrin*, 169 Mich App 18, 22; 425 NW2d 494 (1988).

The holder’s interest method is utilized in divorce proceedings to quantify the present value of a business to its proprietor. One commentator described this valuation method as follows:

Applying the holder’s interest measure of value to a personal service business such as a professional practice is simply an extension of the principles of case specific valuation commonly used by trial courts in dividing marital assets under equitable distribution principles. Stripped to its core, the holder’s interest value means that:

(1) If an interest in a personal service business is worth considerably more to the owner (a) under the assumption that he or she will continue to operate the business – and accordingly, continue to reap the financial benefits it provides, than (b) assuming the owner will sell the business to a third party . . .

(2) then the appropriate value for divorce settlement purposes, that is, for determining the offsetting amount of cash or value of other property for the nonowner spouse, is the value to the owner, not the lower [fair market value]. . . .

[A]doption of the holder’s interest measure of value simply brings into conformity the valuation of personal service businesses with the way most other marital assets have been valued for years. [Cunningham, *Equitable Distribution and Professional Practices: Case Specific Approach to Valuation*, 73 Mich B J 666, 667 (July 1994).]

In the present case, the circuit court recognized its own discretion in choosing the valuation method to apply. The court exercised that discretion by choosing the holder’s interest method, reasoning that the closely held corporation was worth more to defendant than the fair market value of the business, based on the assumption that defendant would continue to operate the business after the parties’ divorce.

Defendant first contends that the circuit court erroneously applied the holder’s interest method because the corporation was not a going concern at the time of trial. Defendant argues that the following factors mandate the conclusion that the corporation was “dead” at the time of trial: (1) seventy-five percent of the corporation’s former clients had gone out of business; (2)

over ninety percent of the corporation's business in 1997 was linked to a single client; (3) defendant had accepted employment with ICEM Technologies and was no longer operating the corporation; and (4) defendant was attempting to sell the corporation. We cannot conclude that the trial court clearly erred in finding that the corporation was a going concern at the time of trial. The testimony presented at trial supported a finding that defendant's business required continuous cultivation of new clients. Therefore, the status of the corporation's former clients was irrelevant to whether the corporation was a going concern. We also note that defendant personally negotiated his business relationship ICEM, as an independent contractor, and billed ICEM for his services through the corporation. We conclude that this indicates ongoing operation of defendant's personal consulting business. While defendant did testify that he received an offer to purchase the corporation for \$43,000, his testimony regarding his intention to sell the business appeared lukewarm at best. In contrast to defendant's aggressive pursuit of clients for his consulting business, he was not aggressively pursuing a buyer. Finally, defendant's description of his future expectations, that he planned to continue as a one-man consulting firm, belied any implication of a sale. Given all of the above factors, we do not believe that the circuit court clearly erred in holding that the corporation remained a going concern at the time of trial.

Defendant next contends that the holder's interest valuation method has been limited to professional practices and that application of that method to his software consulting business was clearly erroneous. However, the authority cited by defendant on this point concerns the value of professional degrees as either marital assets or factors in alimony awards, not the proper accounting method for determining the value of a closely held personal service corporation. "A statement of position without supporting citations is insufficient to bring an issue before this Court. A party may not leave it to this Court to search for authority to sustain or reject its position." *Wiand v Wiand*, 178 Mich App 137, 150; 443 NW2d 464 (1989). While we need not address defendant's argument on this point, we are nevertheless convinced that the holder's interest method is equally applicable to professional practices and closely held corporations offering personal services. Accordingly, we believe that defendant's argument is without merit.

Defendant next argues that the trial court's valuation of the corporation was excessive because the court undervalued the cost of obtaining a replacement employee. Plaintiff's expert estimated the cost of a replacement employee at \$73,000 per year. Defendant's expert assigned a replacement cost based on a wage of \$40 per hour. Although the testimony of defendant's expert was confused and included some calculation errors, he assigned a yearly cost for a replacement employee somewhere between \$76,000 and \$152,000. The circuit court accepted the estimate of neither expert, fashioning its own replacement cost figure. The court utilized a base salary of \$70,000 per year and multiplied that figure by a factor of 1.5 to reflect the number of hours worked by defendant, arriving at a total cost for a replacement worker of \$100,000.

Defendant argues that the circuit court should have valued the cost of a replacement employee in excess of \$188,000. However, that figure is not supported by the testimony presented at trial. The circuit court's valuation of \$100,000 for a replacement employee is within the range of evidence presented by both experts. Therefore, we cannot conclude that the court's determination is clearly erroneous. *Jansen, supra* at 171. Further, the circuit court carefully considered the evidence and specifically accounted for the large number of hours worked by

defendant. The court assigned a conservative figure for the cost of a replacement employee, just as each expert had done. Because replacement costs can be calculated in many different ways, we cannot find clear error in the circuit court's calculation.

Defendant next argues that proper application of the holder's interest method requires the circuit court to distinguish between personal and business goodwill. Although defendant acknowledges that no Michigan court has ever distinguished between business and personal goodwill, he urges this Court to accept the holdings of various foreign jurisdictions and to recognize a distinction between personal and business goodwill for the purpose of business asset valuations. Because defendant failed to raise this issue before the trial court, it is unpreserved for appeal. Further, we are unpersuaded of the need to adopt a distinction between personal and business goodwill, for purposes of valuing business assets in the context of a divorce action.

Finally, defendant argues that the circuit court should have utilized a buy/sell agreement method to determine the value of the corporation, rather than the holder's interest method. Applying the buy/sell agreement method, defendant argues that his business was worth only \$25,370. We note that defendant's trial counsel did not request the trial court to apply the buy/sell agreement method. While defendant's expert noted the existence of an offer to purchase the corporation for \$43,000, he nevertheless valued the business at \$66,500, stating that his valuation was derived from a variation of the holder's interest method. We believe that it is within the discretion of the trial court to select and apply the appropriate method for valuing business assets for distribution in a divorce action. *Kowalesky, supra* at 155. We conclude that the circuit court's application of the holder's interest method to defendant's closely held personal service corporation was appropriate and that decision did not constitute clear error.

III. Distribution of Marital Property

Defendant next contends that the circuit court erred in distributing marital assets. Specifically, defendant argues that the trial court placed too much weight on defendant's extra-marital relationship and on the disparity between the parties' income. We disagree.

Appellate review of a trial court's dispositional rulings is not limited to clear error or abuse of discretion. Rather, the "appellate court must first review the trial court's findings of fact under the clearly erroneous standard. If the findings of fact are upheld, the appellate court must decide whether the dispositive ruling was fair and equitable in light of those facts." *Sparks, supra* at 151-152. We will not overturn a trial court's dispositional ruling unless we are left with the firm conviction that the decision was inequitable. *Id.* at 152.

In *Sparks*, our Supreme Court held that the following factors should be considered by a trial court when distributing marital assets, where the factors are relevant to the circumstances of the particular case: (1) duration of the marriage, (2) contributions of the parties to the marital estate, (3) age of the parties, (4) health of the parties, (5) life status of the parties, (6) necessities and circumstances of the parties, (7) earning abilities of the parties, (8) past relations and conduct of the parties, and (9) general principles of equity. *Id.* at 159-160. Additional factors may also be relevant to a particular case, and there will be many cases where some, or even most, of the above factors will be irrelevant. *Id.* Further, "[w]hile marital misconduct remains one of the considerations for establishing the division of property, it is only one of several relevant factors

that the trial court must consider to reach an equitable division.” *Id.* at 144. Finally, the trial court’s division of property need not be equal, but must be equitable. *Id.* at 159.

Defendant contends that circuit court made factual findings on the record with regard to only two of the *Sparks* factors, the earning capabilities of the parties and relative fault. Defendant contends that the trial court’s failure to consider the remaining *Sparks* factors constitutes clear error and a palpable abuse of discretion. Defendant’s argument is without merit. Our review of the lower court record reveals that the trial court made findings regarding the short duration of the marriage, the health of the parties, the past conduct of both parties, and the earning capabilities of the parties. Additionally, it is apparent from the record that the trial court considered the general circumstances of the parties and their respective contributions to the marriage. Although the trial court gave greater weight to the parties’ earning capabilities and relative fault, we agree that these factors were the most relevant to the distribution of marital assets, given the particular facts presented in this case.

Evidence produced at trial indicated that defendant engaged in an extra-marital affair, during the course of the parties’ marriage. Defendant apparently spent a good deal of money on his girlfriend, as he admitted taking her on vacations to Jamaica, Hawaii and Montana. When plaintiff discovered partially nude pictures of defendant’s girlfriend in his briefcase, she confronted defendant about his affair. Defendant admitted that the affair had been going on for six to eight weeks, refused to break off the relationship, and refused to participate in marriage counseling. At that point, plaintiff began saving her paychecks instead of depositing those funds into the parties’ joint account. Plaintiff testified that she did so because she did not want defendant to spend her money on his girlfriend. Over the course of the next year, plaintiff accumulated approximately \$32,000 in a separate bank account.

As part of the property distribution, the trial court awarded plaintiff the \$32,000 which she had saved from her own paychecks. Defendant argues that such an award was inequitable because plaintiff’s failure to deposit her paychecks into the joint account was devious and deceptive. However, we note that the trial court was also faced with the equities of defendant’s decision to finance vacations with his girlfriend, rather than depositing those funds into the parties’ joint account. The doctrine of unclean hands closes the doors of a court of equity to one tainted with inequity or bad faith relative to the matter in which he seeks relief, however improper the opposing party’s behavior may have been. *Rzadkowolski v Pefley*, 237 Mich App 405, 408 n 1; 603 NW2d 646 (1999). Because defendant’s behavior could also be characterized as devious and deceptive, he cannot come before this Court and invoke the doctrines of equity. Finally, even if we accepted defendant’s argument that the trial court should not have awarded plaintiff the funds which she withheld from the joint account, we would remain convinced that the trial court’s ultimate distribution of marital assets was fair and equitable.

Affirmed.

/s/ Michael R. Smolenski
/s/ Brian K. Zahra
/s/ Jeffrey G. Collins