

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT NASHVILLE

RAY OWEN ALSUP,)
)
Plaintiff/Appellant,) **Wilson Chancery No. 9660**
)
VS.) **Appeal No. 01A01-9509-CH-00404**
)
JUDITH VANHOOK ALSUP,)
)
Defendant/Appellee.)

APPEAL FROM THE CHANCERY COURT OF WILSON COUNTY
AT LEBANON, TENNESSEE
THE HONORABLE C. K. SMITH, CHANCELLOR

FILED

July 24, 1996

Cecil W. Crowson
Appellate Court Clerk

B. KEITH WILLIAMS
Lebanon, Tennessee
Attorney for Plaintiff/Appellant

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Hartsville, Tennessee
Attorney for Defendant/Appellee

AFFIRMED

ALAN E. HIGHERS, J.

CONCUR:

W. FRANK CRAWFORD, P.J., W.S.

DAVID R. FARMER, J.

This is a divorce case. The trial court awarded an absolute divorce to Judy Alsup

("Wife") and divided the marital assets. Ray Alsup ("Husband") has appealed and raised the following issues for our consideration: (1) whether the trial court erred in failing to include the goodwill value of the parties' business; (2) whether the trial court erred in excluding an expert witness' testimony relating to the value of the business; and (3) whether the trial court erred in failing to credit Husband's portion of the marital estate with the value of certain equipment that was allegedly located on the premises of the business. For the reasons stated below, we affirm the judgment of the trial court.

The parties were married in 1962. Throughout the marriage, Husband worked at Pirelli Armstrong Rubber Co. and its predecessors. Wife kept children in the parties' home for approximately 15 years. In 1984, the number of children had increased substantially, and the parties purchased additional property in which to operate a day-care center. In 1985, the parties moved the day-care business into an even larger building. The day care business, "Ms. Judy's Playschool," ("Ms. Judy's") was incorporated in 1991. Husband and Wife each owned 50% of the stock. Husband was named as president, and Wife was named as vice-president and director of Ms. Judy's.

At the hearing, the parties stipulated that Wife was entitled to a divorce on grounds of Husband's inappropriate marital conduct. The trial court divided the marital property, and awarded to Wife the stock in Ms. Judy's, and the vehicles and inventory located on Ms. Judy's premises. Wife was also awarded the parties' house and farm, all bank accounts in her name, and the balance of a note from the sale of a building. Husband was awarded the building in which Ms. Judy's operated, his retirement accounts, all bank accounts in his name, horses, and farm equipment. The trial court declined to award alimony.

This appeal involves issues solely relating to the trial court's valuation of Ms. Judy's.

At trial, Husband attempted to introduce the testimony of Mike Flanagan, C.P.A., who was the accountant for Ms. Judy's. The trial court ruled that Flanagan was not

sufficiently qualified to testify as an expert as to the value of Ms. Judy's. Pursuant to an offer of proof, Flanagan stated that in his opinion, Ms. Judy's was worth \$200,000.00 to \$250,000.00. Wife introduced the testimony of Ray Bowling, C.P.A., who testified that the fair market value of the stock in Ms. Judy's was \$58,156.00. In contrast, Husband's expert, David Wood, C.P.A., testified that the fair market value was \$280,000.00.

The trial court stated in its Finding of Facts and Final Decree as follows:

That the parties own all of the stock to the corporation known as and doing business under the name Miss Judy's Playschool and that said stock is valued at \$58,000.00 to \$60,000.00. This value is based on: case law that makes it clear that this type of business has very little value without Mrs. Alsup working there; the Court's finding that there is no goodwill or going concern of this business without Mrs. Alsup running it; that the business is a result of the individual efforts of the Defendant; the stipulation of the testimony of several parents that they would remove their children if Mrs. Alsup was not at Miss Judy's Playschool; testimony of expert witnesses of the parties; the fear of Plaintiff that Defendant might open up a business across the street or down the street breaking him, contrary to the testimony of Plaintiff's expert, who testified that competition would not be a factor in assessing the value of the business; the formula used by Plaintiff's expert in calculating his value of this business. In his formula, Plaintiff's expert used a value of \$15,000.00 as officer's salary, which the Court found ridiculously low based on other testimony given as to a reasonable officer's salary and based on common sense. The Court feels, based on other testimony heard including that of Michael Flanagan, that \$24,000.00 to \$30,000.00 would be a reasonable officer's salary to use in this formula. Plaintiff's expert's formula, at line E, included \$19,700.00 for nonbusiness expenses. The Court found that there has been no evidence to support this figure and if taken out of the formula and increasing the taxes in line with the increase in officer's salary, the value of the business, based on Plaintiff's expert's theory, would be \$58,000.00 to \$60,000.00.

Husband's first contention on appeal is that the trial court erred in finding that Ms. Judy's had no goodwill value. At the outset, we note that the trial court did not find that Ms. Judy's had no goodwill value. Rather, the trial court held that Ms. Judy's had no goodwill without Wife running the business. Therefore, we will treat the issue on appeal as whether the trial court erred in failing to include the goodwill value in its valuation of Ms. Judy's and its subsequent distribution of the marital estate.

Our courts have adopted the position that in valuing a professional practice, goodwill may not be included as part of the marital estate. Smith v. Smith, 709 S.W.2d 588 (Tenn. App. 1985); Hazard v. Hazard, 833 S.W.2d 911 (Tenn. App. 1991). This rule has been applied to professional practices such as a physician's practice, Hazard, 833 S.W.2d 911, an attorney's practice, Smith, 709 S.W.2d 588, and an accountant's practice. Enoch v. Enoch, No. 1, 1987 WL 12042 (Tenn. App. June 10, 1987).

The Court in Smith explained the reasoning behind this rule as follows:

The concept of professional goodwill evanesces when one attempts to distinguish it from future earning capacity. Although a professional business's good reputation, which is essentially what its goodwill consists of, is certainly a thing of value, we do not believe that it bestows on those who have an ownership interest in the business, an actual, separate property interest. The reputation of a law firm or some other professional business is valuable to its individual owners to the extent that it assures continued substantial earnings in the future. It cannot be separately sold or pledged by the individual owners. The goodwill or reputation of such a business accrues to the benefit of the owners only through increased salary.

* * * * *

There is a disturbing inequity in compelling a professional practitioner to pay a spouse a share of intangible assets at a judicially determined value that could be not realized by a sale or another method of liquidating value.

309 N.W.2d at 354-355.

Thus, the professional goodwill is not a marital asset which would be accounted for in making an equitable distribution of the marital estate.

Id. at 591-92 (quoting Holbrook v. Holbrook, 309 N.W.2d 343 (Wis. Ct. App. 1981)).

The holdings of the Smith and Hazard cases have been extended to apply to sole proprietorships and partnerships, as well. In Koch v. Koch, 874 S.W.2d 571 (Tenn. App. 1993), the husband was a self-employed painter. The court held, "In our view, the valuation of a sole proprietorship is analogous to the valuation of a professional practice. In both enterprises, the conduct of the business or profession is dependent upon the owner thereof." Id. at 576. Consequently, the court held, the goodwill value was not a marital asset subject to distribution. Id.

In the recent case of Lyle v. Lyle, No. 03A01-9412-GS-00434, 1995 WL 324033 (Tenn. App. May 31, 1995), husband and wife owned a veterinary clinic as a partnership. The court noted that, “if the [husband] were to leave the business and go into competition with the present clinic, the goodwill would, in essence, follow him. Therefore, the goodwill is an asset that would be almost valueless without the presence of the [husband].” Id. at *3. The court held that the goodwill value of the veterinary clinic was not marital property subject to division. The court noted that the partnership was, in essence, a sole proprietorship, and should therefore be treated accordingly. Id.

Husband argues that the present case is distinguishable from cases involving professional practices or sole proprietorships because Ms. Judy’s is a corporation. At the hearing in this matter, Wife submitted the stipulated testimony of twenty-seven individuals whose children attended Ms. Judy’s. All of these individuals testified that Wife was the reason that they brought their children to Ms. Judy’s and that if Wife was not there, they would no longer bring their children to Ms. Judy’s. Husband testified that he had not been involved with the day care or assisted with any day-to-day activities for a considerable length of time.

From the foregoing evidence, it is apparent that the goodwill of Ms. Judy’s would be valueless without Wife’s presence. Therefore, the goodwill value of Ms. Judy’s depends solely upon the reputation of Judy Alsup, as is true in the cases of professional practices and sole proprietorships. The fact that Ms. Judy’s is a closely held corporation is of no moment under the circumstances of the present case because, for all practical purposes, Ms. Judy’s was operated as a sole proprietorship. Accordingly, we hold that the goodwill value of Ms. Judy’s is not a marital asset subject to distribution with the marital property.

Husband’s second contention on appeal is that the trial court erred in excluding the testimony of Mike Flanagan, the accountant for Ms. Judy’s. During voir dire, Flanagan testified that he was not an expert in the area of business valuation, and that he had no experience in appraising businesses. He admitted that there had been two previous

occasions on which his accounting firm had given the sellers of certain businesses an opinion as to what the businesses were worth. However, he stated that appraising was not part of the firm's practice or specialty area. The trial court held that Flanagan could not testify as an expert in appraising businesses, but could testify as an expert in accounting. Pursuant to an offer of proof, Flanagan testified that Ms. Judy's was worth approximately \$200,000.00 to \$250,000.00. These figures included the goodwill value of Ms. Judy's.

A trial court is generally afforded considerable latitude in the admission or exclusion of evidence, and will be reversed only upon a showing of an abuse of discretion. Steele v. Ft. Sanders Anesthesia Group, P.C., 897 S.W.2d 270, 275 (Tenn. App. 1994).

We find no evidence of any abuse of discretion by the trial judge in this case. Even if we were to find such an abuse, the error would be harmless because Flanagan's figures included the goodwill value. We have held that goodwill may not properly be considered in valuing Ms. Judy's.

Husband's final issue on appeal is whether the trial court erred in failing to credit his portion of the marital estate with the value of certain equipment that he alleges is located on the premises of Ms. Judy's. Husband argues that both the Wife's expert and the trial court failed to include the value of items such as cabinets, bookshelves, food, black boards, tables, and chairs, which Husband estimates is worth \$30,000 to \$40,000.00.

At the conclusion of the hearing, the chancellor stated:

I find that...the value of the business is worth somewhere around \$60,000.00...That is the value of the business, the value of the assets there. The cash, the inventory inside the building, the buses outside, that's my determination as the value of that business.

Because the trial judge specifically stated that the figure included the inventory inside the building and because the trial judge stated that he had problems with Husband's credibility, we find Husband's final contention to be without merit. In valuing marital assets,

the trial court may consider all relevant evidence. Wallace v. Wallace, 733 S.W.2d 102 (Tenn. App. 1987). At the court stated in Wallace,

The burden is on the parties to produce competent evidence of the value, and the parties are bound by the evidence they present. Thus the trial court in its discretion, is free to place a value on a marital asset that is within the range of evidence submitted. (Citations omitted)

Id. at 107.

The trial court's determination as to the value of Ms. Judy's was well within the range of competent evidence submitted both by Wife's expert and Husband's expert.

We do not deem this to be an appropriate case for imposition of sanctions for a frivolous appeal and, therefore, respectfully deny Wife's request in this regard.

The judgment of the trial court is hereby affirmed. Costs on appeal are taxed to appellant, for which execution may issue if necessary.

HIGHERS, J.

CONCUR:

CRAWFORD, P.J., W.S.

FARMER, J.