

No. 31123 – *Hillman H. May v. Carol S. May*

FILED

December 4, 2003

**RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

Albright, Justice, concurring:

The majority tackles many tough aspects of domestic relations law not addressed by this Court since the principle of equitable distribution of marital property was first adopted in *LaRue v. LaRue*, 172 W.Va. 158, 304 S.E.2d 312 (1983), which the Legislature later codified. As such, the opinion provides a useful road map not only for present application but also for future development of this area and thus deserves serious study and reflection by the Bar. To aid in this process, I write separately.

The majority builds on the still vital equitable distribution principle set forth in *Tankersley v. Tankersley*, 182 W.Va. 627, 390 S.E.2d 826 (1990): that the starting point for valuing a business is fair market value, with the net value of a business calculated by deducting the debts related to the business from the total market value. By recognizing goodwill as a component of the valuation process and a distinction between enterprise and personal goodwill to determining the distributable value of sole proprietorships, professional practices and, by extension, other non-corporate forms of business or practices such as partnerships, the majority has provided needed uniform direction for the lower courts. In time, this concept may eventually be extended to include closely-held corporations where one of the litigants is a major stockholder whose involvement in a business may represent

a significant portion of overall goodwill. By defining and adopting a distinction between the intangible assets of “enterprise” and “personal” goodwill and providing that only enterprise goodwill is subject to equitable distribution, the majority has established a consistent foundation on which determinations regarding both equitable distribution and alimony can be made. As I indicated before, the benefits of this approach may well be extended to apply not only to sole proprietorships, professional practices and other non-corporate forms of business but also to closely-held corporations. Clearly, the categorization of goodwill decreases the likelihood that future earning capacity – personal goodwill – will be improperly considered as part of the valuation process while increasing the probability that it will be correctly factored into the determination of alimony.

The majority provides further helpful guidance by identifying five commonly used, but not exclusive, methods for valuing goodwill once it has been determined that a sole proprietorship, professional practice or non-corporate form of business possesses distributable goodwill. These methods include: straight capitalization accounting; capitalization of excess earnings; IRS variation of capitalized excess earnings; market value; and the buy/sell agreement. Admittedly, none of the methods provides a completely accurate measure of worth and no method is favored over another. Nonetheless, they should provide an adequate evidentiary basis for the lower court to reach its factual conclusion regarding an amount of distributable goodwill for business valuation purposes. However, as the

majority clearly related, the parties and the experts in the case at hand were not using the same terminology with regard to goodwill, resulting in conclusions – and a record – which were indeed confusing. While trial courts have broad discretion in factual determinations, the record must show some reliable evidentiary basis for the factual conclusions in order to withstand appellate review. Courts and practitioners alike need to have a working knowledge of the valuation methods as well as of relevant accounting terms and definitions¹ so that their use is selectively and appropriately applied.² The definitions set forth in the opinion should, by supplying a standard, aid in reaching this end.

Two issues which I believe require further comment include the discount for lack of marketability and spousal contribution. While the majority did not find a discount for marketability appropriate in this case, the reason for doing so was not related to any one valuation method. Rather, this conclusion was reached because the recommendation was made on the factually unsupported assumption of Dr. May's expert that the practice would be hard to sell. Consequently, in my view such discounts are a viable tool in the valuation

¹There are a number of publications which can serve to develop a working familiarity with business valuation terminology, including one published by the American Bar Association's Section of Family Law Publications Development Board entitled *The Lawyer's Business Valuation Handbook* by Shannon Pratt (2000).

²I simply note that the problem with inaccurate use of accounting terms appears to plague this area of law generally, as demonstrated in the opinion in quotes of courts from other jurisdictions which incorrectly categorize goodwill as a tangible asset and cash as a fixed asset.

process when they are appropriate to the valuation method being employed and the circumstances, supported by documented evidence, so warrant.

As a point of clarification with regard to spousal contribution, the majority implies what *Hoak v. Hoak*, 179 W.Va. 509, 370 S.E.2d 473 (1988), explicitly decided: the contribution a spouse makes to the home during the time a person is earning a professional degree or by assisting in the establishment of a professional practice plays no part in determining the portion of a professional practice's value which is subject to equitable distribution. Rather, these contributions may be considered in appropriate circumstances for award of reimbursement alimony. *Id.* at Syl. pt. 2.

While I expect that this opinion will generate additional valuation concerns for this Court to address, the majority has made significant strides in this area of equitable distribution of marital property with which I unhesitatingly concur.