

VALUATION OF CLOSELY HELD CORPORATIONS

INDEX

	<u>Page</u>
Valuation Terminology and Concepts	1
The Income Concept	2
The Market Concept	2
The Cost Concept	3
Adjustments to Value	3
Additional Resources	4
Industry Examples and "Rules of Thumb"	5
Automotive Dealerships	5
Bars and Restaurants	6
Gasoline Service Stations	7
Construction Companies	7
Professional Practices	8
Medical	8
Legal	9
Dental	10
ADDENDUM	
<u>Hanson v. Hanson</u> , 738 S.W.2d 429 (Mo. banc 1987)	A-1
<u>Thill v. Thill</u> , 26 S.W.3d 199 (Mo.App. WD 2000)	A-13
Glossary of valuation terms	A-26
ASA Appraisal Referral List	A-34
Sample Direct Exam of CPA	A-38
Revenue Ruling 59-60	A-43

VALUATION OF THE CLOSELY HELD CORPORATIONS

Valuation of the stock of a closely held corporation is a difficult matter. Hoffmann v. Hoffmann, 676 S.W.2d 817, 826 (Mo. banc 1984). In a dissolution proceeding, the object of any valuation of a business is, of course, to determine its fair market value for purpose of application of the equitable distribution rules to arrive at a fair property division. The very attributes that simplify valuation of publicly held stock, a ready market and historical sales record, are absent with a closely held corporation.¹ Value is a determination of fact by the trial court, to which we give great deference. In re Marriage of K.B., 648 S.W.2d 201, 206 (Mo.App.1983). No one formula or method of determining value is binding or conclusive. Miranda v. Miranda, 596 S.W.2d 61, 65 (Mo.App.1980). “The judicial determination of value must be an informed judgment, but fair ‘value’ is not susceptible of determination by any precise mathematical computation” Flarsheim v. Twenty Five Thirty Two Broadway Corp., 432 S.W.2d 245, 255 (Mo.1968). Generally, therefore, the trial court can accept the opinion of one expert as to value over another and can prefer one method of valuation over competing methods based on the particular facts of the case and the circumstances of the corporate entity involved. Id.

When business valuations first evolved, it was clear that various practitioners used different terminology to describe business valuation approaches. In fact, there was no general agreement on what constituted an approach, method or procedure. Business valuation techniques, to a certain extent, have been developed from the valuation of real property and securities. There are a number of various valuation methodologies which fall within one of the following broad categories: (1) earnings (“income”) approach; (2) liquidation (“underlying asset” or “cost”) approach; and (3) comparable sale (“market”) approach. Some experts may, in fact, use some combination of these approaches.²

FN1. A closely held corporation is characterized by (1) a small number of shareholders, (2) lack of a ready market for the stock and (3) substantial participation in business operations by the stockholder. See O’Neal & Thompson, O’Neal’s Close Corporations; (3rd Ed).

FN2. For a more detailed discussion of the most common methods, see O’Neal, *supra* at § 7.26 and other authorities cited in footnote 1 to that section.

The Earnings or Income Concept

Since future benefits (the underlying element of value) cannot be known with certainty, business appraisers use several approaches, based on the aforementioned three basic concepts, to determine the present worth of future benefits. Operationally, the “income” concept is usually a good determinant of future benefits. The term “income” as used in this concept is a general term that connotes any future benefits that can be quantified in monetary terms. The value of a closely held business is driven by the expected future distributable *cash flows* the business is projected to generate, not by their future *accounting earnings*. One cannot spend accounting earnings; in other words, “Cash is King.” Expected accounting earnings are analytically useful when they provide a reasonable proxy for expected future distributable cash flow.

One method of applying the income concept involves two general steps. The first is making a projection of total monetary benefits expected to accrue to an equity holder in the property. The second step involves discounting these monetary benefits to present worth at a discount rate that considers both the degree of risk (or uncertainty) associated with the realization of the projected monetary benefits, as well as the strata of taxes included in the projection (i.e. pre-corporate tax or after corporate tax). Everything else being equal, the higher the risk, the higher the discount rate, and the fewer strata of taxes included in the projection, the higher the discount rate.

Another method of applying the income concept is to capitalize annual income which is determined to be indicative of future monetary benefits. The same rules that apply to discount rate adjustments for risk and tax affect can be applied to capitalization rates.

The Market or Comparable Sales Concept

The market concept reflects that value may be estimated through analysis of recent sales of comparable property. For example, in the valuation of real estate, similar properties recently sold or offered for sale in the current market are analyzed and compared with the property being appraised, and adjustments are made for differences in such factors as date of sale; location, size, shape and topography of the land; type, age, and conditions of the improvements; and prospective use. The use of the market concept in business valuations compares the subject

company to the reported value of similar companies with appropriate adjustments to fine tune comparability.

The Cost Concept

Conceptually, the cost concept is the most complex of the valuation concepts. It is complex because it may take a variety of forms. Generally, the cost concept can be considered to represent the “value” of the underlying assets. To do this, the cost of replacing the existing asset is estimated and this estimate is adjusted for any and all accrued depreciation, which is the loss in value from any source. Accrued depreciation is attributable to three sources: physical deterioration, functional obsolescence, and external obsolescence. In the context of equitable distribution there are two significant weaknesses to the cost approach that render it less effective than the sales comparison approach. In the dissolution context, the marital estate usually benefits from the preservation of a closely held business as a going concern. Liquidation value assumes that a firm’s operations cease and assets are sold, either piecemeal or in groups, and obligations or debts are satisfied. Liquidation value is generally based on an “orderly liquidation” process where assets are sold in a manner that realizes the greatest possible process. In contrast, a “forced liquidation” process occurs when assets are sold as quickly as possible, often through an auction. As a general rule, the law does not favor forced liquidations in order to affect a just division of the marital estate. Parker v. Parker, 744 S.W.2d 469 (Mo.App.W.D. 1987).

Adjustments to Value

Once a value has been determined it may be further reduced due to “lack of marketability” and “minority ownership.” A “marketability discount” is used to reduce the value to reflect that there is no established public market for the shares of the entity. As a result, the shareholder's investment is less liquid or more difficult to sell or liquidate. This liquidity adjustment will vary depending upon the type of business and the opinion of the valuation expert. A “minority discount” is intended to reflect that a minority shareholder does not have sufficient shares to exercise legal control of the corporation, a buyer would therefore pay less for shares that did not constitute a majority interest. Again, the percentage of this adjustment will vary.

In Thill v. Thill, 26 S.W.3d 199 (Mo.App.W.D. 2000), Husband retained as an expert witness James Marberry. He used a discounted capitalized excess earnings method and a comparable sale method. He indicated that there were difficulties inherent in and specific to the comparable sale method in this case. As the value he opined was higher, and he believed more reliable, under the earnings method, that was the method he found preferable. Marberry testified that the value of Mo. Corp. was \$775,399 before determination of Husband's interest. He believed, however, that value should be further adjusted to reflect a lack of marketability ("marketability discount") and Husband's minority interest in the corporation ("minority discount"). The discount percentages he used were 34 percent and 30 percent, respectively. Wife also presented expert testimony, through Leslie Lorts. Like Marberry, he also used the excess earnings method. He agreed that marketability and minority discounts should be applied, but utilized different figures than Marberry -- 20 percent and 15 percent, respectively. He concluded that, as of December 31, 1998, Husband's interest in Mo. Corp. had a value of between \$845,253 and \$1,264,834.

Resources

Several resources are available to aid the attorney in identifying essential factors when valuing a business. One of the most notable guidelines is Internal Revenue Service (IRS) Revenue Ruling 59-60. This Ruling identifies eight factors that must be considered in determining the fair market value of a closely held company. One of these factors explicitly addresses the need for the appraiser to consider "the economic outlook in general and the condition and outlook of the specific industry in particular." The first step in researching a specific industry environment is the selection of the Company's Standard Industrial Classification (SIC) or North American Industry Classification System (NAICS) code. These classification codes were developed by the federal government to classify data for business activity in the United States. SIC codes can be researched online via the Occupational Safety

and Health Administration (OSHA) Web site.³ The Standard & Poor's Industry Surveys are another widely recognized resource for industry information. These surveys, which cover over 50 major Northern American and global industries, include information on the current industry environment, industry trends and forecasts, and a comparative company analysis on some of the Value Line Investment Survey, which tracks over 1,700 public companies in over 90 industries. Value Line can be accessed through its Web site.⁴

Once counsel is familiar with the terms of art utilized in business valuation and industry in which the closely held corporation competes, selection of an expert to assist in valuation is necessary. Locally, many attorneys rely on Certified Public Accountants to assist in discovery and valuation of business interests. While extremely helpful, not all CPA's are certified to prepare business valuations. The preeminent certifying entity in the field is the American Society of Appraisers (ASA). The ASA maintains a website with a search engine to assist in locating a qualified business appraiser.⁵ A listing of the certified business valuers willing to accept employment in this area is attached. A sample direct examination of an expert witness (CPA) is also attached.

Industry Examples and Rules of Thumb

When determining the fair market value of an *automotive dealership*, the Comparable Sales Method and the Discounted Cash Flow Method are generally considered to be the most appropriate methods to use. When valuing an automotive dealership, one needs to collect information beyond what is typically collected in appraising a close held firm, including the following:

1. Dealer Operating Statements for fiscal year end;
2. Thirteenth-Month Dealer Operating Statements;
3. Franchise Agreement Between the Dealership and the Manufacturer;

³ <http://www.osha.gov/pls/imis/sicsearch.html>

⁴ <http://www.valueline.com>

⁵ <http://www.appraisers.org/ASAHome.aspx>

4. Manufacturer's Planning Potential. Dealership unit growth is constrained by the volume of cars available to sell. The manufacturer's planning potential for a dealership can provide insight into sales capacity.
5. Manufacturer Dealer Performance Report.
6. Consumer Satisfaction Index (CSI) Reports as compiled by the manufacturer.
7. Twenty Group Reports and Manufacturer Profiles.

Today, about 46 percent of all U.S. adults are daily users of restaurants, and they spend nearly half of their food dollars eating out. The following documents are need for the valuation of *bars and restaurants*:

1. Copies of financial statements and income tax returns for at least the prior five years;
2. Copies of sales tax returns filed with authorities over the same period;
3. Breakdown of sales among food, alcoholic beverages and other revenues, such as private groups and catering;
4. Breakdown of expenses, including owner remuneration, bonuses, car allowance, and any other benefits;
5. Company's internal policy regarding gratuities. Obtain a copy of IRS "Tip Rate Determination Letter."
6. List of major food and beverage suppliers, with volume of purchases from each;
7. Copies of property leases;
8. Copies of any leases for equipment;
9. Copies of coin-operated vending machines leases;
10. Copies of any appraisals of the fixed assets;
11. Copies of federal, state, and local licenses to sell alcoholic beverages;

For restaurants, the following rules of thumb are cited by *The Handbook of Small Business Valuation Formulas and rules of thumb*.

- Monthly Net Revenue 2.5 x to 5.0 x (or roughly 20 -40 percent of annual revenues).
- Owners' Cash Flow 1.0 x to 3.0 x annual owners' cash flow.

The *1998 Business Reference Guide* cites the following rules of thumb:

- Revenue multiples of close to 30% for most restaurants that do not serve alcohol, higher for brew pubs, night clubs, and other establishments serving alcohol.
- Restaurants in a good location with a superb concept that be replicated may rate higher multiples, while those stuck in a poor location or with a short lease will have lower multiples.
- Franchised food businesses often command higher multiples, often as high as 50%.

For gasoline service stations, *The Handbook of Small Business Valuation Formulas and Rules of Thumb* recommends using different annual net revenue multiple for each category of services offered:

- Multiple of revenues from gasoline, oil, tires, batteries, and accessories of 1.0 x to 2.0 x annual net revenue.
- Multiple of revenues from mechanical and towing of 1.5 x to 3.0 x annual net revenue.
- Multiple of revenues from convenience store operations of 1.5 x to 4.5 x annual net revenue.

For appraisal of a *construction company*, a list of documents typically requested includes the following:

1. Detailed financial statements for the company, including any supplemental information or management reports, for a business cycle. At least five years of statements preceding the valuation date are required.
2. Federal income tax returns for the company for at least the five years preceding the valuation date.
3. The fixed asset schedule for the company, including date of purchase, original cost, depreciation, and current net book value, as of the valuation date.
4. Schedule of revenue by line of service provided.
5. Schedule of accounts receivable, amounts held as retainage, and probability of collections regarding any doubtful accounts.

6. Schedule of work-in-process that details the overall cost of each construction job in progress and amount of revenue earned by percentage of completion.

7. Copies of any buy-sell agreements or shareholders' agreements, if applicable for the five years preceding the valuation date.

8. Copies of brochures or descriptive materials about the operation of the company and/or its services.

9. Details of any offer, either oral or written, to buy the company or an interest in it.

10. Any business, equipment, and real estate appraisals or consultant reports dealing with the value of the company or any of its underlying assets.

11. Details on any buy-in or buy-out transactions during the five years preceding the valuation date, including price paid, how the price was determined, terms, and types of assets acquired.

Generally speaking, many construction companies do not have significant goodwill (value over and above the tangible asset value) attributable to them. Searching for goodwill may be elusive⁶ for the following types of companies:

- Companies that generate all of their revenue from "bid" work
- Small firms with few employees
- Companies with volatile earnings

Medical Practices and *Legal Practices* raise unique valuation issues. For example, young doctors may work at reduced compensating rates in the first few years of their association with a practice with the understanding that their buy-in price into the practice will be lower because they bought in through "sweat equity." The same may be true for legal practices. Additionally, many professional practices are subject to operating agreements which define the rights of the various members upon termination of the association. The following documents and materials should be requested in order to proceed with the valuation of a medical practice:

1. Financial statements (including income and expense statements and balance sheets) and tax returns (including attachments and schedules) for the last five years, plus updates to the most recent quarter, or month prior to the date of valuation.

2. Aged accounts receivable as of date of valuation.

⁶ Bill Rotts coined the term "searching for UFO's"

3. Inventory of medical equipment and office equipment in use in the practice with date and cost of acquisition. Detailed depreciation schedules should be included from tax return or accountant's records.

4. An estimate of active patient charts which had experienced activity within the last 18-24 months.

5. Copy of all employment agreements, partnership agreements, shareholders agreements, buy/sell agreements, consulting agreements, management agreements, and income distribution plans in use in the practice.

6. Copy of all agreements for past transactions involving the transfer of any equity or ownership interest in the practice prior to the date of valuation.

7. Copy of Declaration Page of malpractice insurance.

8. Copy of all managed care contracts.

There are several characteristics that make *law firms* unique to other types of businesses. These include the following:

- Reliance on the professional and his/her skill set
- Degree of intangible assets (including goodwill) relative to total entity value
- Marketability issues.
- Restrictions on fee agreements and money held in escrow. Typically an adjustment must be made for unearned fees.
- Degree of specialization
- Accounting conventions (cash basis vs. accrual). With the cash basis of accounting, revenue is generally limited to cash collected and expenses are limited to cash disbursed. Typically, a law firm's most significant unrecorded assets using cash basis are accounts receivable and work-in-process. In general, the appraiser will need to request this data.
- "Professional goodwill" vs. "practice goodwill." By definition, professional goodwill is non-transferable. On the other hand, practice goodwill is associated with the business itself and is, therefore, transferrable.
- Discovery difficulties attendant to attorney-client privilege.

For small firms or sole practitioners, there is likely no transferable "good will." As a practice note, the author uses a simple rule of thumb equating value to one year's earnings.

Most of the data required for an appraisal of a *dental practice* are the same as for any closely held company. The appraisal process as described in Revenue Ruling 59-60 suggests that at least three years of financial data be analyzed. The following data are usually requested:

1. Financial statements and U.S. federal income tax returns for the five years preceding the valuation date.
2. Interim financial data covering the period between the latest fiscal year end and the valuation date, plus the same interim financial data for the prior year.
3. Partnership or shareholder agreement between the owners that was in effect at the valuation date, plus any addenda or exhibits.
4. Employment contracts between the practice and all employees of the practice, especially those showing terms under which the employee may earn or purchase an equity stake in the practice.
5. Transactional documentation for any interests that were bought or sold in the 10 years before the valuation date, including sale agreements, covenants not to compete, and subsequent consultant contracts.
6. Documentation on any offers to purchase the practice.
7. Copies of all prior appraisals completed of the practice or any of its underlying assets, including any reports from practice consultants.
8. A list of the practice's Fixed Asset Schedule, which shows each asset, its date of purchase, cost, depreciation method, accumulated depreciation, and current book value.
9. The accounts receivable as of the date of the valuation.
10. Copies of the profit-sharing plan or 401(K) plan and a list of contributions made on behalf of all plan participants.

11. The personal income tax returns (Form 1040) for the owner for the five years preceding the valuation date.

12. Copies of all credit applications and personal financial statements submitted to banks or lending institutions where the dental practice may be listed as an asset at a value designated by the dentist himself or herself.

Additionally, the American Dental Association provides members with assistance in finding brokers and business valuers.⁷

Panelists:

Gary L. Stamper

Jean Goldstein

Ed Orr

Helen Wade

⁷ http://www.ada.org/sections/professionalResources/pdfs/dir_appraise_brokers.pdf A sample dental practice valuation may be found online at www.spardata.com.

738 S.W.2d 429, 78 A.L.R.4th 831, 56 USLW 2219
(Cite as: 738 S.W.2d 429)

▷

Supreme Court of Missouri,
En Banc.

Brenda M. **HANSON**, Plaintiff-Respondent,
v.
Jonathan Grant **HANSON**, Defendant-Appellant.
Barbara **GRAHAM**, Petitioner-Appellant/Cross-Respondent,
v.
Richard **GRAHAM**, Respondent-Respondent/Cross-Appellant.
Nos. 68827, 69067.

Sept. 15, 1987.

As Modified on Denial of Rehearing Oct. 13, 1987.

Actions were brought to dissolve marriages, both of which involved division of husband's interest in oral surgery partnership as marital property. In first action, the Circuit Court of Boone County, Frank Conley, J., entered judgment dissolving marriage, and husband appealed. The Court of Appeals affirmed in part and reversed in part, and transfer was granted. In second case, the Circuit Court, Cole County, James F. McHenry, J., entered judgment dissolving marriage, and appeals were taken. The Court of Appeals recommended transfer prior to opinion, which was granted. The Supreme Court, Robertson, J., held that: (1) goodwill in professional practice was marital asset subject to division in dissolution proceeding, and (2) evidence did not establish value of goodwill in oral surgery partnership which could be used in valuing husbands' shares of partnership subject to division as marital property.

Circuit Courts reversed and remanded.

West Headnotes

[1] Divorce 134 ⚡682

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

134V(D) Allocation of Property and Liabilities; Equitable Distribution

134V(D)2 Property Subject to Distribution or

Division

134k679 Separate or Marital Property in General

134k682 k. Time of acquisition. **Most Cited Cases**

(Formerly 134k253(2))

Property acquired during marriage is presumed marital property. **V.A.M.S. § 452.330**, subd. 3.

[2] Divorce 134 ⚡674

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

134V(D) Allocation of Property and Liabilities; Equitable Distribution

134V(D)2 Property Subject to Distribution or Division

134k672 Time of Acquisition of Property in General

134k674 k. Property acquired before marriage. **Most Cited Cases**
(Formerly 134k252.3(3))

Divorce 134 ⚡675

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

134V(D) Allocation of Property and Liabilities; Equitable Distribution

134V(D)2 Property Subject to Distribution or Division

134k672 Time of Acquisition of Property in General

134k675 k. Property acquired after divorce or dissolution. **Most Cited Cases**
(Formerly 134k252.3(3))

Property acquired prior to marriage or after entry of decree of legal separation or dissolution is not marital property. **V.A.M.S. § 452.330**, subd. 3.

[3] Good Will 192 ⚡1

192 Good Will

192k1 k. Nature of property. **Most Cited Cases**
Goodwill produced in professional setting is no less prop-

A-1

738 S.W.2d 429, 78 A.L.R.4th 831, 56 USLW 2219
(Cite as: 738 S.W.2d 429)

erty than that arising from commercial setting.

[4] Good Will 192 ⚖️1

192 Good Will

192k1 k. Nature of property. Most Cited Cases

Good Will 192 ⚖️2

192 Good Will

192k2 k. Elements and incidents. Most Cited Cases

“Goodwill” is property which attaches to and is dependent upon existing business entity; reputation and skill of individual entrepreneur, whether professional or traditional businessman, is not component of intangible asset identified generally as goodwill.

[5] Divorce 134 ⚖️706

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

134V(D) Allocation of Property and Liabilities; Equitable Distribution

134V(D)2 Property Subject to Distribution or Division

134k688 Particular Interests as Separate or Marital Property

134k706 k. Good will. Most Cited Cases

(Formerly 134k252.3(1))

Goodwill in professional practice, defined to mean value of practice which exceeds its tangible assets and which is result of tendency of clients/patients to return to and recommend practice irrespective of reputation of individual practitioner, is marital asset subject to division in dissolution proceeding. V.A.M.S. § 452.330, subds. 1-3.

[6] Divorce 134 ⚖️706

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

134V(D) Allocation of Property and Liabilities; Equitable Distribution

134V(D)2 Property Subject to Distribution or Division

134k688 Particular Interests as Separate or Marital Property

134k706 k. Good will. Most Cited Cases

(Formerly 134k253(2))

Divorce 134 ⚖️876

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

134V(D) Allocation of Property and Liabilities; Equitable Distribution

134V(D)9 Proceedings for Division or Assignment

134k876 k. Evidence. Most Cited Cases

(Formerly 134k253(2))

Evidence that other professionals are willing to pay for goodwill when acquiring practice is only acceptable evidence of existence of goodwill subject to division in marital dissolution proceeding; thus, existence of goodwill is shown only when there is evidence of recent actual sale of similarly situated professional practice, offer to purchase such practice, or expert testimony and testimony of members of subject profession as to existence of goodwill in similar practice in relevant geographic and professional market. V.A.M.S. § 452.330, subds. 1-3.

[7] Divorce 134 ⚖️706

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

134V(D) Allocation of Property and Liabilities; Equitable Distribution

134V(D)2 Property Subject to Distribution or Division

134k688 Particular Interests as Separate or Marital Property

134k706 k. Good will. Most Cited Cases

(Formerly 134k252.3(1))

Goodwill cannot exist and be subject to division in dissolution proceeding if it may not be sold. V.A.M.S. § 452.330, subds. 1-3.

[8] Divorce 134 ⚖️797

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

134V(D) Allocation of Property and Liabilities; Equitable Distribution

134V(D)5 Valuation, Division or Distribution of Particular Property or Interests

134k797 k. Good will. Most Cited Cases

738 S.W.2d 429, 78 A.L.R.4th 831, 56 USLW 2219
(Cite as: 738 S.W.2d 429)

(Formerly 134k253(3))

Value of goodwill of professional practice, subject to division in dissolution proceeding, is determined by price practice would bring were it sold on open, relevant market to qualified professional; under certain circumstances value may be established by buy-sell agreement. V.A.M.S. § 452.330, subds. 1-3.

[9] Divorce 134 ⚡794

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

134V(D) Allocation of Property and Liabilities; Equitable Distribution

134V(D)5 Valuation, Division or Distribution of Particular Property or Interests

134k794 k. Businesses and associated assets in general. Most Cited Cases
(Formerly 134k253(2))

Divorce 134 ⚡797

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

134V(D) Allocation of Property and Liabilities; Equitable Distribution

134V(D)5 Valuation, Division or Distribution of Particular Property or Interests

134k797 k. Good will. Most Cited Cases
(Formerly 134k253(2))

Divorce 134 ⚡876

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

134V(D) Allocation of Property and Liabilities; Equitable Distribution

134V(D)9 Proceedings for Division or Assignment

134k876 k. Evidence. Most Cited Cases
(Formerly 134k253(2))

Evidence did not support trial court's valuation of husband's share of oral surgery partnership, insofar as valuation reflected goodwill and accrued net profits. V.A.M.S. § 452.330, subds. 1-3.

[10] Divorce 134 ⚡738

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

134V(D) Allocation of Property and Liabilities; Equitable Distribution

134V(D)3 Proportion or Share Given on Division

134k731 Particular Factors and Considerations

134k738 k. Income and earning capacity; employment. Most Cited Cases

(Formerly 134k252.2)

Trial court could divide marital property on equal basis between parties, in dissolution of marriage action, though there was no dispute that husband brought more money into household than wife. V.A.M.S. § 452.330, subd. 1(1).

[11] Divorce 134 ⚡794

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

134V(D) Allocation of Property and Liabilities; Equitable Distribution

134V(D)5 Valuation, Division or Distribution of Particular Property or Interests

134k794 k. Businesses and associated assets in general. Most Cited Cases
(Formerly 134k253(2))

Divorce 134 ⚡797

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

134V(D) Allocation of Property and Liabilities; Equitable Distribution

134V(D)5 Valuation, Division or Distribution of Particular Property or Interests

134k797 k. Good will. Most Cited Cases
(Formerly 134k253(2))

Evidence 157 ⚡571(1)

157 Evidence

157XII Opinion Evidence

157XII(F) Effect of Opinion Evidence

157k569 Testimony of Experts

157k571 Nature of Subject

738 S.W.2d 429, 78 A.L.R.4th 831, 56 USLW 2219
(Cite as: 738 S.W.2d 429)

157k571(1) k. In general. Most Cited Cases

(Formerly 134k253(2))

Evidence supported trial court's valuing oral surgery partnership without reference to goodwill, where expert testified that in his experience in relevant market, practices similar to that of husband's oral surgery partnership were sold without payment for goodwill or going concern value. V.A.M.S. § 452.330, subds. 1-3.

[12] Divorce 134 ⚡ 559

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

134V(C) Spousal Support

134k559 k. Nature and purpose of spousal support; property award distinguished. Most Cited Cases
(Formerly 134k231)

Award of permanent maintenance could be made to wife in dissolution of marriage action.

[13] Divorce 134 ⚡ 699

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

134V(D) Allocation of Property and Liabilities; Equitable Distribution

134V(D)2 Property Subject to Distribution or Division

134k688 Particular Interests as Separate or Marital Property

134k699 k. Accounts and deposits. Most Cited Cases

(Formerly 134k252.3(1))

Trial court could characterize three certificates of deposit, held jointly by parent and child, as marital property, despite wife's claim that certificates were custodial accounts for children under Uniform Gifts to Minors Act, where no evidence was presented that formalities required by Act were met in establishing amounts or in purchasing certificates. V.A.M.S. §§ 404.020-404.040, 452.330, subds. 1-3.

[14] Divorce 134 ⚡ 803

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

134V(D) Allocation of Property and Liabilities;

Equitable Distribution

134V(D)5 Valuation, Division or Distribution of Particular Property or Interests

134k803 k. Retirement or pension rights.

Most Cited Cases

(Formerly 134k253(3))

Value placed on husband's Keough plan should have been its value at time of trial, rather than its value on date dissolution of marriage action was filed, for purposes of dividing marital property. V.A.M.S. § 452.330, subds. 1-3.

[15] Divorce 134 ⚡ 1147

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

134V(H) Counsel Fees, Costs, and Expenses

134k1142 Need and Ability to Pay

134k1147 k. Effect of divorce recoveries.

Most Cited Cases

(Formerly 134k224)

Trial court was not required to award wife attorney fees in dissolution of marriage action, despite husband's greater financial resources, given division of property fashioned by trial court and assets devoted to wife. V.A.M.S. § 452.355.

*430 Dale C. Doerhoff, Jefferson City, for Jonathan Hanson.

James W. Gallaher, Jefferson City, for Richard Graham.

Jean E. Goldstein, James C. Butcher, Columbia, for respondents.

ROBERTSON, Judge.

These are consolidated appeals arising out of decrees of dissolution of marriage entered by the Circuit Courts of Boone County and Cole County. The husbands in the consolidated cases are the sole partners in an oral surgery partnership. In *Hanson v. Hanson*, the Circuit Court of Boone County valued the partnership at \$324,862, including \$233,727, an amount characterized as "goodwill" by the parties. In *Graham v. Graham*, the Circuit Court of Cole County, hearing virtually identical evidence, valued the same partnership at \$90,280.

The Western District affirmed the judgment of the Circuit Court of Boone County in *Hanson v. Hanson* as to the dissolution of the marriage "and the determination that

738 S.W.2d 429, 78 A.L.R.4th 831, 56 USLW 2219
(Cite as: 738 S.W.2d 429)

professional goodwill is a divisible asset” but reversed the case “in all other respects.”

We granted transfer to determine whether our dissolution of marriage laws recognize the existence of goodwill in a professional practice as a marital asset and to determine the extent to which those laws permit the division of such goodwill upon dissolution of marriage. Following our grant of transfer in *Hanson v. Hanson*, No. 68827, the Court of Appeals, Western *431 District, received a notice of appeal in *Graham v. Graham*, No. 69067; that court recommended, and we granted, transfer prior to opinion in the *Graham* case. We have jurisdiction. Mo. Const. art. V, sec. 10.

We hold that goodwill in a professional practice is a marital asset subject to division in dissolution proceedings.

\$ 39,750.00 equipment
\$ 51,385.00 accounts receivable
\$351,077.00 going concern value

\$442,212.00 Total Value

Smith defined “going concern value” as the “opportunity to walk into a successful situation and to start work and earn money without having to build the practice.” Smith further testified that going concern value represented the ability of the buyer to trade on the past reputation of the seller.

Smith applied an 85 percent capitalization rate to the previous year's gross receipts to determine the value of the partnership. This capitalization rate was the product of Smith's assessment of the partnership's “monopolistic” position in the Jefferson City market, its expenses, the degree of risk attendant to the practice, and the reputation of the practice and the practitioners in the community. From these factors, Smith fashioned a tentative going concern value for the partnership. He compared his tentative conclusions to the national average sales price for oral surgery practices, for gross production per oral surgeon, and for average revenues and expenses for oral surgery partnerships containing five or fewer oral surgeons. From these considerations Smith reached his conclusion as to the appropriate capitalization factor to apply to the Graham and Hanson partnership.

Smith defined “goodwill” as the excess of return in a given business over the average or norm that could be expected for that business. Smith found no such excess in the part-

The judgment of the Circuit Court of Boone County in *Hanson v. Hanson* is affirmed in part, reversed in part and remanded with directions. The judgment of the Circuit Court of Cole County in *Graham v. Graham* is affirmed in part, reversed in part, and remanded with directions.

I.

The Oral Surgery Partnership

Drs. Graham and Hanson formed their partnership for the practice of oral surgery in Jefferson City, Missouri, in July, 1973. At trial, both Mrs. Hanson and Mrs. Graham employed Stephen Smith, a C.P.A., as an expert witness. Smith valued the oral surgery partnership as follows:

nership, and thus no goodwill, even though he testified that going concern value contained a component of the seller's reputation.

Both Dr. Hanson and Dr. Graham produced Elmer Evers, C.P.A. as an expert for purposes of valuing their partnership interests. Evers valued the partnership at \$91,000, the approximate value of equipment, cash on hand and accounts receivable. Evers compared sales of professional practices in the area served by the partnership, the nature of the partnership's patronage, and the reputation of the partners to determine that neither goodwill nor going concern value existed in the partnership.

Dr. Thomas Coyle, an oral surgeon practicing in Columbia, Missouri, testified on behalf of Dr. Hanson. Dr. Coyle bought into a partnership with another oral surgeon already in practice in Columbia in 1975. He testified that his purchase price included neither an amount for goodwill nor for the going concern value of the existing practice. Upon the retirement of Dr. Coyle's partner, Dr. Coyle bought his partner's interest in the partnership; again, Dr. Coyle paid nothing for goodwill or going concern value.

Drs. Graham and Hanson introduced their partnership agreement in their respective cases. Paragraph eight of that agreement provided:

738 S.W.2d 429, 78 A.L.R.4th 831, 56 USLW 2219
(Cite as: 738 S.W.2d 429)

The value of the interest of a withdrawing partner shall be the sum of: (a) One-half of the reasonable market value of the fixtures, equipment and contents of the office partnership; (b) His proportionate*432 share of the accrued net profits; (c) One-half of all accounts receivable as of the date of dissolution which can be reasonably expected to be collected in the first six months following the date of dissolution; (d) No value for goodwill or firm name shall be included in any computations of a partner's interest; (e) If a net loss has been incurred to the date of dissolution, his share of such loss shall be deducted.

Dr. Hanson testified that profits were drawn from the partnership account twice monthly; there were no accrued net profits.

The Hanson Marriage

Dr. and Mrs. Hanson married on March 20, 1974. By the time of the marriage, Dr. Hanson had already completed his oral surgery training, had retired all but \$1,000 of the debt he incurred to finance his education and had opened the oral surgery practice with Dr. Graham. Mrs. Hanson came to the marriage with a nursing degree. Following the marriage, Mrs. Hanson continued to pursue her nursing career. She earned a Master's Degree in nursing in December, 1981. At the time of the trial, Dr. Hanson earned approximately \$120,000 per year in his oral surgery practice; Mrs. Hanson earned approximately \$7,000 per year. There were no children.

The Boone County Circuit Court valued the partnership at \$324,862.00, an amount which included the fair market value of the partnership's equipment (\$39,750), the accounts receivable (\$51,385) and the partnership's ordinary income for 1984 (\$233,727). The trial court noted that it used "the valuation technique contained in paragraph 8 of [the Graham and Hanson] partnership agreement." The court dissolved the marriage, ordered maintenance in favor of Mrs. Hanson of \$1,000 per month for 24 months, and divided the other assets of the parties, including Dr. Hanson's share of the partnership.

Dr. Hanson appeals the valuation of his partnership interest by the circuit court. He attacks the admissibility of the testimony of Mrs. Hanson's expert, Mr. Smith. He also assigns error (1) to the division of a portion of the marital property on an equal basis where appellant provided 95 percent of the marital assets, (2) in the court's valuation of

a money market account, and (3) the valuation of a bank account.

The Graham Marriage

Dr. and Mrs. Graham married on May 24, 1969. The marriage produced two children. By the time of the marriage, Dr. Graham had completed his dental studies; he finished his oral surgery training during the marriage. Mrs. Graham completed registered nurse training prior to the marriage. In 1978, the Grahams began investing in real estate. The couple accumulated several parcels of improved real estate, Mrs. Graham managed the couple's properties. In 1980, she obtained a real estate license and began selling real estate on a full-time basis. In 1983, Mrs. Graham grossed approximately \$27,000 as a real estate salesperson. After the couple's separation in 1983, her income declined to \$5,000 in 1984. Dr. Graham earned approximately \$120,000 per year at the time of the trial.

The Circuit Court of Cole County dissolved the marriage, valued Dr. Graham's interest in the partnership at \$45,140, divided the marital property equally between the parties, awarded Mrs. Graham permanent maintenance of \$500 per month to continue until remarriage, death or modification by court order, awarded custody of the minor son to Dr. Graham and of the minor daughter to Mrs. Graham, established reasonable rights of visitation to the noncustodial parent, and fixed Dr. Graham's child support obligation at \$500 per month, payable to Mrs. Graham.

Both parties appealed the trial court's order. Mrs. Graham assigns error to the court's valuation of Dr. Graham's interest in the oral surgery partnership. She also contends the trial court erred in (1) valuing certain items of personal property, (2) valuing bank accounts held in the names of the minor children, (3) valuing a Keough Plan, (4) valuing the Graham's investment real property and (5) failing to award her attorney's*433 fees and costs. Dr. Graham appeals the trial court's award of permanent maintenance to Mrs. Graham.

II.

[1][2] Section 452.330.1, RSMo 1986, authorizes the court to "set apart to each spouse his property and ... divide the marital property in such proportions as the court deems just...." Marital property is "all property acquired by either spouse subsequent to the marriage" with exceptions not relevant here. Section 452.330.2, RSMo 1986. Property acquired during the marriage is presumed marital property.

738 S.W.2d 429, 78 A.L.R.4th 831, 56 USLW 2219
(Cite as: 738 S.W.2d 429)

Section 452.330.3, RSMo 1986. Conversely, property acquired prior to the marriage or after the entry of decree of legal separation or dissolution is not marital property. *Id.*

A.

[3] Is goodwill property? Our courts have long recognized that "the good will of a business is property...." *Sessinghaus Milling Co. v. Hanebrink*, 247 Mo. 212, 152 S.W. 354, 357 (Mo.1912); *Montgomery v. Getty*, 284 S.W.2d 313 (Mo.App.1955); *Magee v. Pope*, 234 Mo.App. 191, 112 S.W.2d 891, 899 (1938); *Kreger Glass Co. v. Kreger*, 49 S.W.2d 260 (Mo.App.1932). Goodwill produced in a professional setting is no less property than that arising from a commercial setting.

Accounting texts define goodwill as "an economic advantage which exists when the total value of a business is more than the value of its identifiable assets. This economic advantage arises because the expected earnings of the business exceed the level of earnings on only its identifiable assets...." Welsch, Zlatkovich, and Harrison, *Intermediate Accounting*, 438 (6th ed. 1982). "[It] is an intangible asset that attaches to a business as a result of such favorable factors as location, product superiority, reputation, and managerial skill...." Niswonger and Fess, *Accounting Principles*, 257 (12th ed. 1977).

Courts have defined goodwill as "nothing more than the probability, that the old customers will resort to the old place." *Cruttwell v. Lye*, 17 Ves. 335, 346, 34 Eng.Rep. 129, 134 (Ch. 1810). "Men will pay for any privilege that gives a reasonable expectancy of preference in the race of competition. Such expectancy may come from succession in a place or name or otherwise to a business that has won the favor of its customers." *In re Brown*, 242 N.Y. 1, 6, 150 N.E. 581, 582 (1926).

The common theme in all of these definitions is that the goodwill which can be sold, and is therefore property, attaches not to an individual but to a business entity. Goodwill has no separate existence; it has value only as an incident of a continuing business.

B.

In addressing the question of the existence and value of goodwill in a professional context as marital property, the courts have not spoken with a uniform voice.

1.

In *Dugan v. Dugan*, 92 N.J. 423, 457 A.2d 1 (1983), the New Jersey Supreme Court found that goodwill in the law practice of a sole practitioner is property subject to distribution in a dissolution action. The court recognized that reputation is "at the core" of any consideration of professional goodwill. 457 A.2d at 6. While acknowledging that future earning capacity is not *per se* goodwill, the New Jersey justices noted that when "future earning capacity has been enhanced because reputation leads to probable future patronage from existing and potential clients, goodwill may exist and have value." *Id.* *Dugan* has been criticized, and properly so in our view, for its failure to distinguish between the reputation of the professional as an individual and the reputation of the professional practice as a business entity. Parkman, *The Treatment of Professional Goodwill in Divorce Proceedings*, 18 Fam.L.Q., 213, 219 (Summer 1984).

In *In the Matter of the Marriage of Fleege*, 91 Wash.2d 324, 588 P.2d 1136 (banc 1979), the Washington Supreme Court defined the critical question as "not *434 whether the goodwill of the practice could be sold ... but whether it [the goodwill] has value to [the practitioner]." 588 P.2d at 1138-9. In determining the value of the such goodwill, *Fleege* outlined several factors for consideration: "[T]he practitioner's age, health, past earning power, reputation in the community for judgment, skill and knowledge, and his comparative professional success." 588 P.2d at 1138. Each of these factors is, in our view, directly attributable to the professional as a person. For this reason, we find that the *Fleege* analysis is mired in the same mixture of personal reputation and entity reputation as is found in *Dugan*.

2.

Several courts have refused to acknowledge professional goodwill as property. A leading case is *Holbrook v. Holbrook*, 103 Wis.2d 327, 309 N.W.2d 343 (App.1981). There the court refused to follow "the twisted and illogical path that other jurisdictions have made in dealing with the concept [of professional goodwill] in the context of divorce." The court continued, "[t]he concept of professional goodwill evanesces when one attempts to distinguish it from future earning capacity.... The goodwill or reputation of such a business accrues to the benefit of the owners only through increased salary." 309 N.W.2d at 354. See also *Powell v. Powell*, 231 Kan. 456, 648 P.2d 218, 223 (1982). ("We are not persuaded that a professional practice such as Dr. Powell's has a good will value. The practice is personal

738 S.W.2d 429, 78 A.L.R.4th 831, 56 USLW 2219
(Cite as: 738 S.W.2d 429)

to the practitioner.... [I]t is totally dependent upon the professional.”) *Nail v. Nail*, 486 S.W.2d 761 (Tex.1972), reaches a similar result.

3.

Between the opposing results reached in *Dugan* and *Holbrook*, several courts have attempted to chart a course which recognizes that goodwill is marital property, but only insofar as it exists independently of the individual professional's reputation. Characteristic of these cases is *Taylor v. Taylor*, 222 Neb. 721, 386 N.W.2d 851 (1986). There the Nebraska Supreme Court concluded that “goodwill must be a business asset with value independent of the presence or reputation of a particular individual, an asset which may be sold, transferred, conveyed, or pledged.... If a party produces appropriate evidence establishing salability or marketability of goodwill as a business asset of a professional practice, professional goodwill may be considered in determining the value of property in a marital estate to be divided in a dissolution proceeding.” *Taylor*, 386 N.W.2d at 858-9.

Beasley v. Beasley, 359 Pa.Super. 20, 518 A.2d 545 (1986), and *Geesbreght v. Geesbreght*, 570 S.W.2d 427 (Tex.Civ.App.1978), are equally insistent on separating the reputation of the professional from the reputation of the business entity in which he practices in determining the value of any goodwill in a professional setting.

C.

[4] As we have said, goodwill is recognized as property in this state; that recognition is not dependent on a traditional mercantile setting. Goodwill may exist in both commercial and professional entities. Irrespective of the setting in which it is found, the meaning of goodwill does not change. It is property which attaches to and is dependent upon an existing business entity; the reputation and skill of an individual entrepreneur—be he a professional or a traditional businessman—is not a component of the intangible asset we identify generally as goodwill.

[5] With the caveats which follow, we hold that goodwill in a professional practice acquired during a marriage is marital property subject to division in a dissolution of marriage proceeding. We define goodwill within a professional setting to mean the value of the practice which exceeds its tangible assets and which is the result of the tendency of clients/patients to return to and recommend the practice irrespective of the reputation of the individual

practitioner. Our understanding of goodwill is thus consistent with and no broader than the economic, accounting and legal definition which existed prior to the advent of *435 *Dugan*, *Fleege* and cases reaching similar results.

Goodwill is not dependent, however, on the manner in which the professional practice is organized nor the size of the practice itself. We recognize, as is implied in *Geesbreght*, 570 S.W.2d at 427, that goodwill will more likely exist in larger professional practices than in the offices of sole practitioners. This is so because reliance by patients/clients on the reputation and skill of the individual practitioner is, in most cases, inversely related to the number of practitioners in the practice. However, to the extent that, for instance, competent evidence exists that clients/patients will return to the place of the practice or recommend it to acquaintances who have not yet patronized it—irrespective of the presence of the individual professional, goodwill exists in the solo practice.

Professional goodwill may not be confused with future earning capacity. We have not declared future earning capacity to be marital property. We do not now do so. Instead, we leave to the trial court broad discretion in striking an appropriate balance between husband and wife in the division of property and any award of maintenance. *Scott v. Scott*, 645 S.W.2d 193 (Mo.App.1982).

D.

1.

[6] Proof of the existence of goodwill is particularly troublesome in a professional context. This difficulty is a product of the fact that the reputation of the individual practitioner and the goodwill of his enterprise are often inextricably interwoven. Because of the difficulties inherent in separating the reputation of the professional from that of his enterprise, evidence that other professionals are willing to pay for goodwill when acquiring a practice is, in our view, the only acceptable evidence of the existence of goodwill. Thus, as a matter of proof, the existence of goodwill is shown only when there is evidence of a recent actual sale of a similarly situated professional practice, an offer to purchase such a practice, or expert testimony and testimony of members of the subject profession as to the existence of goodwill in a similar practice in the relevant geographic and professional market. Absent such evidence, one can only speculate as to the existence of goodwill.^{FNI} Divisions of marital property may not be based on speculation as to the very existence of the prop-

738 S.W.2d 429, 78 A.L.R.4th 831, 56 USLW 2219
(Cite as: 738 S.W.2d 429)

erty being divided.

FN1. Courts which have employed capitalization formulae, *see* discussion, *infra*, often appear to mix concepts of value with concepts of proof. *See, e.g., In re Marriage of Hall*, 692 P.2d at 175. Expert testimony concerning the value of goodwill based on capitalization formulae is not tantamount to proof of the existence of goodwill. An expert can simply assume the existence of goodwill and, using a capitalization formula, produce a value.

2.

[7][8] As to the issue of valuation, *In re the Marriage of Hall*, 103 Wash.2d 236, 692 P.2d 175, 179-80 (1984), outlines five major formulae for establishing goodwill value. Of these, three are accounting formulae. The first utilizes a straight capitalization method. The average net profits of the professional are capitalized. The result is the total value of the business including tangible and intangible assets. Book value of the assets is subtracted to determine goodwill value.

The second formula is the capitalization of excess earnings method. The annual salary of the average employee practitioner is subtracted from the average net income of the practice. The remaining amount is multiplied by a capitalization rate to determine goodwill value.

The third method is the Internal Revenue Service variation of capitalized excess earnings. Under this formula, a reasonable rate of return based on the business' average net tangible assets is subtracted from the average net income of the business for the last five years. From this amount a comparable net salary is subtracted. A capitalization rate is applied to determine goodwill value.

The fourth *Hall* formula focuses on fair market value. The value of goodwill, if *436 any, is determined by the price the practice would bring were it sold on the open, relevant market to a qualified professional.

The fifth valuation method is based on a buy-sell agreement. The value established in a partnership agreement, for example, determines the value of any goodwill in the practice.

Of the suggested formulae, we state our strong preference

for the fair market value approach. First, the fair market value approach "does not take explicitly into consideration the future earning capacity of the professional goodwill or the post-dissolution efforts of the professional spouse." Comment, *Professional Goodwill in Louisiana: An Analysis of Its Classification, Valuation and Partition*, 43 La.L.Rev. 139, 142 (1982). As we have previously said, in Missouri, the future earning capacity of one of the marital partners is not *per se* property. *See*, discussion at II, C. *supra*.

Second, fair market value evidence appears to us to be the most equitable and accurate measure of both the existence and true value of the goodwill of an enterprise. Evidence of a recent actual sale of a similarly situated practice, an offer to purchase the subject or a similar practice, or expert testimony and testimony of members of the subject profession as to the present value of goodwill of a similar practice in the open, relevant, geographical and professional market is the best evidence of value.

Third, the fair market value method is most likely to avoid the "disturbing inequity in compelling a professional practitioner to pay a spouse a share of intangible assets at a judicially determined value that could not be realized by a sale or another method of liquidating value." *Holbrook*, 309 N.W.2d at 355. We therefore reject the notion advanced by some courts that goodwill may exist and be subject to division in a dissolution proceeding even though it may not be sold. *See, e.g., In re Marriage of Freedman*, 23 Wash.App. 27, 592 P.2d 1124 (1979); *Hall*, 692 P.2d at 175.

Under certain circumstances, the buy-sell agreement method for determining goodwill value may be appropriate. We believe the trial court is best suited to determine when a buy-sell agreement constitutes competent evidence of goodwill value, *In re Marriage of Morris*, 588 S.W.2d 39, 43-4 (Mo.App.1979), recognizing that "the professional spouse may be influenced by many factors other than fair market value in negotiating the terms of the agreement...." *Hall*, 692 P.2d at 180.

We reject the use of capitalization formulae as a substitute for fair market value evidence of the value of goodwill in a professional practice.^{FN2} The very purpose of capitalization formulae is to place a present value on the future earnings of the business entity being valued. *Beasley*, 518 A.2d at 552. The formulae draw no distinction between the future earning capacity of the individual and that of the entity in which he or she practices. And as we have said previously,

738 S.W.2d 429, 78 A.L.R.4th 831, 56 USLW 2219
(Cite as: 738 S.W.2d 429)

the future earning capacity of the individual professional is not, *per se*, an item of marital property subject to division in a dissolution proceeding.

FN2. We recognize that evidence of the fair market value of the goodwill of an entity may reveal that such value is the product of the application of a capitalization rate to the gross receipts or net income of the entity. To the extent that fair market value as shown by the evidence includes such a product, we obviously do not reject it.

III.

A.

The wives' expert, Mr. Smith, found a going concern value of \$351,077 in the partnership. "Going concern value" is defined as follows:

A business that is established and operating but with only average profits is more valuable than a collection of similar assets and liabilities about to be launched as a business. This difference, the "more valuable" aspect, is the essence of going [concern] value.... Thus, going [concern] value is akin to goodwill, but different from it. Goodwill relates to above-average profitability; going [concern] value does not.... In acquisition *437 transactions in which goodwill is properly recognized, a portion of the payment may actually represent a payment for going [concern] value, but separation of the two is almost never attempted. Any going value in such a case usually is subsumed under goodwill.

Welsch, Zlatkovich and Harrison, *Intermediate Accounting*, 438, n. 3, (6th ed. 1982).

Goodwill in the economic sense is another word for organization. To be more specific, *the value of goodwill is derived from the economic benefits that a going concern may enjoy as compared with a new firm, ...* [Emphasis added.]

Parkman, *The Treatment of Professional Goodwill in Divorce Proceedings*, 18 Fam.L.Q. 213, 214 (1984).

Dugan, 457 A.2d at 5 notes that

[g]oodwill is keyed to reputation; going concern value to the enhanced value of assets due to their presence in an

established firm. [citation omitted]. Going concern value has many of the characteristics of goodwill and in many situations will constitute an asset enhancing the value of an enterprise. In that event it will be a component of the property subject to equitable distribution.

Going concern value contemplates an ongoing business entity; it obviously cannot attach to an individual practitioner.

Smith testified that there was no goodwill in the oral surgery partnership. Yet he also testified that going concern value contains a component of the seller's reputation and the ability of the buyer to trade on that reputation. The attorneys representing the parties in these proceedings characterize the trial courts' errors as either failing to include or including goodwill in the partnership as an element of marital property. From a technical accounting perspective, the issue may be mischaracterized. In dissolution proceedings, the courts, however, tend to treat going concern value and goodwill as synonyms in a professional context. *See, e.g., Hall*, 692 P.2d at 175, and *In re Marriage of Hull*, 712 P.2d 1317 (Mont.1986). We believe such treatment is correct.

B.

Hanson v. Hanson

[9] Dr. Thomas Coyle stated that he paid nothing for either goodwill or going concern value when he joined an established oral surgeon in a partnership in Columbia or when he purchased his partner's interest in the practice upon the partner's retirement. The husbands' expert, Mr. Evers, testified that in his experience similar practices were sold in the geographic area of the partnership without payment for goodwill or going concern value. He concluded that there was no going concern value or goodwill in the partnership. Mr. Smith, the wives' expert, provided no fair market value evidence for goodwill or going concern value in the relevant geographical market, relying instead on a capitalization formula we have rejected as competent evidence of goodwill.

The Circuit Court of Boone County valued the partnership at \$324,862. This included \$233,727, the partnership's ordinary income for 1984. Ostensibly, the trial court based its valuation on Paragraph Eight of the partnership agreement. We find no support for the trial court's conclusion in either that document or in the evidence before the court.^{FN3} The fair market value evidence in the record

738 S.W.2d 429, 78 A.L.R.4th 831, 56 USLW 2219
(Cite as: 738 S.W.2d 429)

indicates no goodwill value in the partnership. On the issue of the valuation of the partnership, we therefore remand the case to the Circuit Court of Boone County with directions to assign a value to Dr. Hanson's share in the oral surgery partnership which does not reflect either goodwill or accrued net profits.

FN3. Paragraph Eight of the partnership agreement provides that a withdrawing partner is entitled to 1/2 of the market value of fixtures and equipment, his proportionate share of accrued net profits, 1/2 of the collectible accounts receivable and nothing for goodwill. Dr. Hanson testified that the partnership had no accrued net profits. The trial court's inclusion of an amount greater than the value of the fixtures and equipment and accounts receivable is therefore not supported by Paragraph Eight of the partnership agreement. And, for the reasons we state, the evidence does not support any value in the partnership for goodwill or going concern value.

*438 [10] Dr. Hanson also assigns error to the trial court's division of marital property on an equal basis between the parties. The division of marital property lies within the sound discretion of the trial court. We will disturb the trial court's division of the property only where it is improper, or where an abuse of discretion is shown. Dardick v. Dardick, 670 S.W.2d 865, 868 (Mo. banc 1984).

Section 452.330.1(1), RSMo 1986, requires the trial court to consider the contributions of each spouse to the acquisition of marital property, including the contribution of the spouse as a homemaker. There is no dispute that Dr. Hanson brought more money into the household than did Mrs. Hanson; having reviewed the evidence, however, we find that the trial court's decision is amply supported. We find no abuse of discretion. Dr. Hanson's point is without merit.

Nevertheless, our holding as to the absence of goodwill value in Dr. Hanson's interest in the oral surgery partnership may require an adjustment in the overall division of the marital property. We therefore reverse the judgment of the trial court as to its division of the marital property and remand for reconsideration in light of this opinion.

Dr. Hanson's fourth and fifth points on appeal assign error to the trial court's valuation of a money market account and an account in the South County Bank. We need not reach these points here. On remand, the trial court will fashion a

new division of marital property. The court may wish to consider Dr. Hanson's arguments as to the proper value of the account.

The judgment of the Circuit Court of Boone County in *Hanson v. Hanson* is affirmed as to the dissolution of the marriage. In all other respects, the judgment of the trial court is reversed and remanded with directions to conduct such further proceedings as may be necessary and are consistent with this opinion.

C.

Graham v. Graham

[11] The only evidence of fair market value before the trial court in the *Graham* case consisted of the testimony of Elmer Evers, Dr. Graham's expert. As he did in the *Hanson* case, Mr. Evers stated that in his experience in the relevant market, practices similar to that of the Graham and Hanson oral surgery partnership are sold without payment for goodwill or going concern value. The court heard no contrary fair market value evidence. We must, therefore, affirm the trial court's valuation of the oral surgery partnership.

[12] Dr. Graham assigns error to the trial court's award of permanent maintenance to Mrs. Graham. The trial court has broad discretion in determining both the amount and duration of maintenance. We will interfere only where the award is improper or there is an abuse of discretion. Dardick, 670 S.W.2d at 868. Our review of the record reveals no abuse of discretion. The point is denied.

Mrs. Graham urges that the trial court erred in the division of several items of personal property. We will disturb the trial court's division of property only where it is improper or an abuse of discretion is found. Dardick, 670 S.W.2d at 868. Our review of the record does not reveal an improper division of the property or an abuse of discretion. The point is denied.

[13] Mrs. Graham next contends that the trial court erred in valuing and setting aside as marital property three certificates of deposit (one held in the name of Dr. Graham and son, Jonathan, one held in the name of Dr. Graham and daughter, D'Arcy, and one held in the name of Mrs. Graham and D'Arcy), and two bank accounts (one held in the name of Dr. Graham and Jonathan and one held in the name of Dr. Graham and D'Arcy). Mrs. Graham claims

738 S.W.2d 429, 78 A.L.R.4th 831, 56 USLW 2219
(Cite as: 738 S.W.2d 429)

these certificates are custodial accounts for the children under the Uniform Gifts to Minors Act, Sections 404.020, .030 and .040, RSMo 1978 (the law in effect at the time of trial).

We must deny Mrs. Graham's point. The trial court heard no evidence supporting her claim. No evidence was presented *439 that the formalities required by the Act were met in establishing the accounts or in purchasing the certificates. The evidence showed only accounts held in joint names. On the evidence before it, the trial court cannot be convicted of error in characterizing the accounts and certificates as marital property.

[14] For her fourth point on appeal, Mrs. Graham argues that the trial court erred in valuing Dr. Graham's Keough Plan at \$104,136 and apportioning \$77,317 of that amount to her. The central issue for Mrs. Graham's purposes is whether the Plan should be valued at the date the dissolution action is filed or at the time of trial. With commendable candor, Dr. Graham admits that the valuation placed on the Plan by the trial court is its value on the date the dissolution was filed, and concedes that the proper value is \$122,581.13, its value at the time of trial. *Giedinghagen v. Giedinghagen*, 712 S.W.2d 711 (Mo.App.1986). See also *Taylor v. Taylor*, 736 S.W.2d 388 (Mo. banc 1987). The difference between the two valuations is \$18,445.13. The trial court divided the marital property on an equal basis.^{FN4} We, therefore, reverse the trial court's decision as to the valuation and division of the Keough Plan and remand with directions to value the Plan at \$122,581.13, to increase Mrs. Graham's share by \$9,222.57 and to increase Dr. Graham's share by \$9,222.56.

^{FN4}. The entire corpus of the marital property was divided on an equal basis. In order to achieve that result, the Keough Plan assets were divided somewhat unequally.

Mrs. Graham next argues that the trial court erred in valuing certain investment property owned by the Grahams. There is sufficient evidence in the record to support the trial court's valuation of the property. Mrs. Graham presents no basis for our disturbing it. *Dardick*, 670 S.W.2d at 868. The point is denied.

[15] Finally, Mrs. Graham urges that the trial court abused its discretion in failing to award her attorney's fees and costs, given her husband's far greater financial resources. Section 452.355, RSMo 1986, allows the trial court to award attorney's fees and costs after considering "all re-

levant factors including the financial resources of both parties...." Given the division of property fashioned by the trial court and the assets devoted to Mrs. Graham, we cannot say that an abuse of discretion is present in this case. The point is denied.

The judgment of the Circuit Court of Cole County in *Graham v. Graham* is reversed as to the valuation of the Keough Plan and remanded with directions to increase Mrs. Graham's share by \$9,222.57 and to increase Dr. Graham's share by \$9,222.56.

In this case of first impression, we have recognized goodwill in a professional practice as property subject to division in a dissolution of marriage proceeding. We have also approved a limited means of proving and valuing that goodwill in a professional context.

In both cases, the trial courts heard evidence of the fair market value of the practice in the relevant geographic and professional market. This evidence was, in each case, presented by the professional spouses. On the evidence before it, the trial court in *Graham* properly found no goodwill value in the practice. Under different circumstances, we would affirm the trial court in *Graham*.

Given the nature of our decision, however, our sense of justice dictates that we allow the nonprofessional spouses in each case an opportunity to present fair market value evidence of goodwill value in this practice.

The judgments of the circuit courts in *Graham v. Graham* and *Hanson v. Hanson* are reversed and remanded for proceedings consistent with this opinion.

BILLINGS, C.J., BLACKMAR, DONNELLY, RENDLEN, HIGGINS, JJ. and PREWITT, Special Judge, concur.

WELLIVER, J., not sitting.

Mo., 1987.

Hanson v. Hanson

738 S.W.2d 429, 78 A.L.R.4th 831, 56 USLW 2219

END OF DOCUMENT

26 S.W.3d 199
(Cite as: 26 S.W.3d 199)

▷

Missouri Court of Appeals,
Western District.
Anne C. THILL, Appellant,
v.
Ronald E. THILL, Respondent.
No. WD 57151.

May 31, 2000.
Motion for Rehearing and/or Transfer to Supreme
Court Denied Aug. 1, 2000.
Application for Transfer Denied Oct. 3, 2000.

Following entry of dissolution judgment by the Circuit Court, Cole County, Patricia S. Joyce, J., former wife appealed. The Court of Appeals, Holliger, J. held that: (1) it was illogical and unreasonable for trial court to base valuation of closely-held corporations on only partial consolidation of finances of two corporations; (2) remand of child support issue was necessary when trial court made numerous calculation errors, including calculation of husband's income; and (3) remand of denial of attorney fees award to wife was necessary when it was unclear whether wife needlessly obtained second valuation expert.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Divorce 134 ⚡ 252.1

134 Divorce

134V Alimony, Allowances, and Disposition of Property

134k248 Disposition of Property

134k252.1 k. Discretion of Court. Most Cited Cases

Divorce 134 ⚡ 286(8)

134 Divorce

134V Alimony, Allowances, and Disposition of Property

134k278 Appeal

134k286 Review

134k286(6) Questions of Fact, Verdicts and Findings

134k286(8) k. Disposition of Property. Most Cited Cases

Trial court is permitted great flexibility in division of marital property, and is free to believe or disbelieve all, parts, or none of the testimony given by any of the witnesses, and, on appeal, evidence and favorable inferences are accepted and contrary evidence is disregarded.

[2] Divorce 134 ⚡ 253(3)

134 Divorce

134V Alimony, Allowances, and Disposition of Property

134k248 Disposition of Property

134k253 Proceedings for Division or Assignment

134k253(3) k. Valuation of Assets. Most Cited Cases

In a dissolution proceeding, the object of any valuation of a business is to determine its fair market value for purpose of application of the equitable distribution rules to arrive at a fair property division.

[3] Corporations 101 ⚡ 3

101 Corporations

101I Incorporation and Organization

101k3 k. Kinds and Classes of Corporations.

Most Cited Cases

"Closely-held corporation" is characterized by: (1) a small number of shareholders, (2) lack of a ready market for the stock, and (3) substantial participation in business operations by the stockholder.

[4] Divorce 134 ⚡ 253(3)

134 Divorce

134V Alimony, Allowances, and Disposition of Property

134k248 Disposition of Property

134k253 Proceedings for Division or Assignment

134k253(3) k. Valuation of Assets. Most

A-13

26 S.W.3d 199
(Cite as: 26 S.W.3d 199)

Cited Cases

Divorce 134 ⚡ 286(8)

134 Divorce

134V Alimony, Allowances, and Disposition of Property

134k278 Appeal

134k286 Review

134k286(6) Questions of Fact, Verdicts and Findings

134k286(8) k. Disposition of Property. Most Cited Cases

Value of the stock of a closely-held corporation for the purposes of property division upon divorce is a determination of fact by the trial court, to which the appellate court gives great deference.

[5] Divorce 134 ⚡ 253(3)

134 Divorce

134V Alimony, Allowances, and Disposition of Property

134k248 Disposition of Property

134k253 Proceedings for Division or Assignment

134k253(3) k. Valuation of Assets. Most Cited Cases

No one formula or method of determining value of the stock of a closely-held corporation for the purposes of property division upon divorce is binding or conclusive.

[6] Divorce 134 ⚡ 253(3)

134 Divorce

134V Alimony, Allowances, and Disposition of Property

134k248 Disposition of Property

134k253 Proceedings for Division or Assignment

134k253(3) k. Valuation of Assets. Most Cited Cases

Judicial determination of value of stock in a closely-held corporation, for purposes of division of property upon divorce, must be an informed judgment, but fair value is not susceptible of determination by any precise mathematical computation, and thus the trial court can accept the opinion of one expert as to value over another and can prefer one method of valuation

over competing methods based on the particular facts of the case and the circumstances of the corporate entity involved.

[7] Corporations 101 ⚡ 182.4(5)

101 Corporations

101IX Members and Stockholders

101IX(A) Rights and Liabilities as to Corporation

101k182 Corporate Property, Funds, and Securities

101k182.4 Sale or Transfer of Assets

101k182.4(5) k. Payment of Value of Stock. Most Cited Cases

There are a number of various valuation methodologies which fall within one of the following broad categories: (1) earnings approach, (2) liquidation, or underlying asset, approach, and (3) comparable sale approach, and some experts may, in fact, use some combination of these approaches.

[8] Corporations 101 ⚡ 182.4(5)

101 Corporations

101IX Members and Stockholders

101IX(A) Rights and Liabilities as to Corporation

101k182 Corporate Property, Funds, and Securities

101k182.4 Sale or Transfer of Assets

101k182.4(5) k. Payment of Value of Stock. Most Cited Cases

"Marketability discount" is used reduce the value of stock of a closely-held corporation to reflect that there is no established public market for the shares of the entity, and as a result, the shareholder's investment is less liquid or more difficult to sell or liquidate, and this liquidity adjustment will vary depending upon the type of business in the opinion of the valuation expert.

[9] Corporations 101 ⚡ 182.4(5)

101 Corporations

101IX Members and Stockholders

101IX(A) Rights and Liabilities as to Corporation

101k182 Corporate Property, Funds, and Securities

101k182.4 Sale or Transfer of Assets

26 S.W.3d 199
(Cite as: 26 S.W.3d 199)

101k182.4(5) k. Payment of Value of Stock. Most Cited Cases
“Minority discount” to the value of shares in a closely-held corporation is intended to reflect the fact that a minority shareholder does not have sufficient shares to exercise legal control of corporation, and a buyer would pay less for shares that did not constitute a majority interest, and the percentage of this adjustment will vary.

[10] Corporations 101 ⚡ 182.4(5)

101 Corporations

101IX Members and Stockholders

101IX(A) Rights and Liabilities as to Corporation

101k182 Corporate Property, Funds, and Securities

101k182.4 Sale or Transfer of Assets

101k182.4(5) k. Payment of Value of Stock. Most Cited Cases
Tax depreciation and true economic depreciation may be different, for the purpose of valuing the assets of a corporation, in light of provisions of tax code which allow for depreciation for tax purposes on an accelerated basis that is less than the reasonable useful life of the property, and in such an event, the actual depreciated value of the asset would exceed the tax depreciated value.

[11] Corporations 101 ⚡ 182.4(6)

101 Corporations

101IX Members and Stockholders

101IX(A) Rights and Liabilities as to Corporation

101k182 Corporate Property, Funds, and Securities

101k182.4 Sale or Transfer of Assets

101k182.4(6) k. Proceeding for Appraisal. Most Cited Cases
Absent definitive evidence that a particular valuation method or adjustment is not an acceptable accounting practice, the use of and value given particular adjustments and methods is a question of fact for the trial court aided by expert testimony to determine, in determining the value of assets of a corporation.

[12] Corporations 101 ⚡ 182.4(6)

101 Corporations

101IX Members and Stockholders

101IX(A) Rights and Liabilities as to Corporation

101k182 Corporate Property, Funds, and Securities

101k182.4 Sale or Transfer of Assets

101k182.4(6) k. Proceeding for Appraisal. Most Cited Cases
Question of whether when an asset subject to tax depreciation is actually increasing in value, and the depreciation should not be used in calculating the ongoing concern value of the corporation which owns the asset, or whether the tax depreciation represents a figure for determining the replacement cost of the asset, and thus should be used in valuing the owning corporation, is a question of fact for the trial court.

[13] Corporations 101 ⚡ 182.4(6)

101 Corporations

101IX Members and Stockholders

101IX(A) Rights and Liabilities as to Corporation

101k182 Corporate Property, Funds, and Securities

101k182.4 Sale or Transfer of Assets

101k182.4(6) k. Proceeding for Appraisal. Most Cited Cases
It was illogical and unreasonable for trial court to base valuation of closely-held corporations on only partial consolidation of finances of two corporations, and thus remand was necessary, where calculations introduced into evidence apparently included losses of corporation consolidated into larger corporation, but not assets.

[14] Corporations 101 ⚡ 182.4(5)

101 Corporations

101IX Members and Stockholders

101IX(A) Rights and Liabilities as to Corporation

101k182 Corporate Property, Funds, and Securities

101k182.4 Sale or Transfer of Assets

101k182.4(5) k. Payment of Value of Stock. Most Cited Cases
When two wholly separate business entities are combined for purposes of losses, they should be consis-

26 S.W.3d 199
(Cite as: 26 S.W.3d 199)

tently treated with regard to income and assets, or in other words, the consolidations of financial data should include both sides of the balance sheet and income and expense statements, for the purpose of valuing those businesses.

[15] Divorce 134 ⚡ 253(3)

134 Divorce

134V Alimony, Allowances, and Disposition of Property

134k248 Disposition of Property

134k253 Proceedings for Division or Assignment

134k253(3) k. Valuation of Assets. Most Cited Cases

Valuation of an asset in a dissolution is a question of fact.

[16] Child Support 76E ⚡ 559

76E Child Support

76EXII Appeal or Judicial Review

76Ek559 k. Determination and Disposition of Cause. Most Cited Cases

(Formerly 285k3.3(10))

Appellate court does not need to remand errors in child support calculations, where it can correct the calculations based on the findings of the trial court.

[17] Child Support 76E ⚡ 559

76E Child Support

76EXII Appeal or Judicial Review

76Ek559 k. Determination and Disposition of Cause. Most Cited Cases

(Formerly 134k312.7)

Remand of child support issue was necessary, where trial court inexplicably used lower figure for former husband's income on standard child support calculation form and figure for income and findings, did not include maintenance awarded to former wife, subtracted depreciation losses on farm awarded to former wife from former husband's income, reduced former husband's income by 401(k) contributions, and erroneously based child support on improperly calculated average of former husband's income, when there was no testimony indicating that former husband had realistic and reasonable expectation that income in future years would be lower than in last year averaged.

[18] Child Support 76E ⚡ 91

76E Child Support

76EIII Factors Considered

76EIII(B) Factors Relating to Custodians and Obligors

76Ek86 Income

76Ek91 k. Calculation. Most Cited

Cases

(Formerly 285k3.3(7))

Past earnings history is indicative of present earning capacity, for purposes of calculating child support.

[19] Child Support 76E ⚡ 9

76E Child Support

76EI In General

76Ek9 k. Discretion. Most Cited Cases

(Formerly 285k3.3(6))

Award of child support is within the sound discretion of the trial court.

[20] Child Support 76E ⚡ 556(1)

76E Child Support

76EXII Appeal or Judicial Review

76Ek548 Review

76Ek556 Discretion

76Ek556(1) k. In General. Most Cited

Cases

(Formerly 285k3.3(10))

Court of Appeals will not substitute its judgment for that of the trial court absent a manifest abuse of discretion and will not disturb an award of child support unless the evidence is palpably insufficient to support it.

[21] Child Support 76E ⚡ 89

76E Child Support

76EIII Factors Considered

76EIII(B) Factors Relating to Custodians and Obligors

76Ek86 Income

76Ek89 k. Imputed Income of Obligor.

Most Cited Cases

(Formerly 285k3.1(5))

Court may consider past, present, and anticipated

26 S.W.3d 199
(Cite as: 26 S.W.3d 199)

earning capacity in determining a parent's ability to pay child support.

[22] Child Support 76E ⚡91

76E Child Support

76EIII Factors Considered

76EIII(B) Factors Relating to Custodians and Obligors

76Ek86 Income

76Ek91 k. Calculation. Most Cited

Cases

(Formerly 285k3.3(7))

Averaging of income historically is not appropriate in the determination of child support, where there is evidence that it does not reflect the parent's current earning capacity.

[23] Child Support 76E ⚡85

76E Child Support

76EIII Factors Considered

76EIII(B) Factors Relating to Custodians and Obligors

76Ek85 k. Assets, Investments, and Holdings. Most Cited Cases

(Formerly 76Ek91, 285k3.3(7))

Whether a trial court, in the calculation of a party's income, for the purpose of setting child support, allows adjustments to the party's income for depreciation in assets of subchapter S corporations and other property, is within the court's discretion.

[24] Child Support 76E ⚡146

76E Child Support

76EIV Amount and Incidents of Award

76Ek146 k. Construction, Operation, and Effect of Guidelines. Most Cited Cases

(Formerly 285k3.3(7))

Where complicated business and tax status applies to a parent, the partnership and subchapter S income reflected on the parent's individual tax return may not represent the true amount of cash or benefit that may be available to the parent and, therefore, for the support of the child, and when complex business interests are present, the trial court must at least consider the distinction between a parent's income for tax purposes and for child support purposes, as illustrated by the directions to the standard child support calculation

form, which defines "income" as including financial benefits or money received that could have a positive impact on the parent's ability to pay child support.

[25] Divorce 134 ⚡221

134 Divorce

134V Alimony, Allowances, and Disposition of Property

134k220 Allowance for Counsel Fees and Expenses

134k221 k. In General. Most Cited Cases

As a general rule, the parties to a dissolution are to pay their own attorney fees. V.A.M.S. § 452.355, subd. 1.

[26] Divorce 134 ⚡221

134 Divorce

134V Alimony, Allowances, and Disposition of Property

134k220 Allowance for Counsel Fees and Expenses

134k221 k. In General. Most Cited Cases

Statute authorizing attorney fee awards in dissolution matters permits, but does not require a trial court to award attorney fees. V.A.M.S. § 452.355, subd. 1.

[27] Divorce 134 ⚡223

134 Divorce

134V Alimony, Allowances, and Disposition of Property

134k220 Allowance for Counsel Fees and Expenses

134k223 k. Discretion of Court. Most Cited Cases

Divorce 134 ⚡286(4)

134 Divorce

134V Alimony, Allowances, and Disposition of Property

134k278 Appeal

134k286 Review

134k286(3) Discretion of Lower Court

134k286(4) k. Temporary Alimony, Counsel Fees and Expenses. Most Cited Cases
Court has broad discretion in ordering or refusing to order attorney fees, and its ruling will be disturbed on

26 S.W.3d 199
(Cite as: 26 S.W.3d 199)

appeal only upon a showing of abuse of discretion.
V.A.M.S. § 452.355, subd. 1.

[28] Divorce 134 ↪ 223

134 Divorce

134V Alimony, Allowances, and Disposition of Property

134k220 Allowance for Counsel Fees and Expenses

134k223 k. Discretion of Court. Most Cited Cases

To show an abuse of discretion by the trial court, the complaining party has the burden to show that the order for attorney fees is clearly against the logic of the circumstances and is so arbitrary and unreasonable as to shock one's sense of justice and to indicate a lack of deliberation. V.A.M.S. § 452.355, subd. 1.

[29] Divorce 134 ↪ 224

134 Divorce

134V Alimony, Allowances, and Disposition of Property

134k220 Allowance for Counsel Fees and Expenses

134k224 k. Grounds. Most Cited Cases
Parties' financial situation is only one of other relevant factors a trial court must consider in determining whether an attorney fee award is justified in a dissolution action, and it is not a controlling factor. V.A.M.S. § 452.355, subd. 1.

[30] Divorce 134 ↪ 287

134 Divorce

134V Alimony, Allowances, and Disposition of Property

134k278 Appeal

134k287 k. Determination and Disposition of Questions. Most Cited Cases

Remand of denial of attorney fees award to wife was necessary, where record was unclear as to whether wife needlessly obtained second valuation expert, and fees were denied for that reason. V.A.M.S. § 452.355, subd. 1.

***202** Jean Goldstein, Columbia, for appellant.

Paul Trees Graham, Jefferson City, for respondent.

Before EDWIN H. SMITH, Presiding Judge, VICTOR C. HOWARD, Judge, and RONALD R. HOLLIGER, Judge.

RONALD R. HOLLIGER, Judge.

Anne Thill ("Wife") appeals a Judgment and Decree of Dissolution of Marriage entered on March 22, 1999 dissolving her eighteen-year marriage to Ronald Thill ("Husband"). Wife raises six points on appeal. Two points deal with the valuation made by the court of Husband's interest in two closely held corporations; Wife attacks the calculation of Husband's income for child support purposes; she contends the court erred in making an unequal distribution of property based on a finding of her misconduct; she claims the court erred in denying her attorney's fees; and in her last point, she claims error in the omission and valuation of several other pieces of property. Wife does not appeal the grant of maintenance to her or the custody determinations for their two children. We affirm in part and reverse in part for further proceedings.

BACKGROUND

Husband owns 49 percent of the shares of two "Subchapter S" corporations, ^{FN1} CSPI, Inc., Missouri ("Mo.Corp.") and CSPI, Inc., Delaware ("Del.Corp."). There is one other shareholder. Husband is also a member of two partnerships which own real estate. One partnership owns the office building used by the two corporations and a residence built for Husband after his separation from Wife. The other partnership owns hangars at the Jefferson City airport, where planes used in the Husband's business are housed. No error is alleged with regard to the valuation of the partnerships.^{FN2} The parties also own a farm, where Wife and the children continue to live; Wife stables some horses there, including show horses ridden by their daughter; the parties own various other property which will be discussed only as relevant to a particular issue.

^{FN1}. Subchapter S is a tax status provided certain corporations under the Internal Revenue Code. Although not completely identical, the tax treatment is substantially like that afforded a partnership. IRC (1954) Secs 1361-1379; 26 U.S.C.A. §§ 1361-1379;

26 S.W.3d 199
(Cite as: 26 S.W.3d 199)

O'Neal & Thompson, O'Neal's Close Corporations; § 2.06 (3rd Ed).

FN2. R & B Properties was valued by the court at \$14,000 for the airplane hangers. Wife suggested a value of \$55,000 for Husband's interest. The court has been unable to find in the record any evidence that supports the value ascribed by the court. No claim of error is raised regarding this discrepancy.

Mo. Corp. sells and maintains computer hardware and software for the small banking industry with customers in at least a dozen states. To more efficiently service its customers, Mo. Corp. flies its employees by private planes to the various sites. Del. Corp., the owner of those airplanes, was established for the sole purpose of owning and operating the planes.

Husband was ordered to pay Wife \$1,443.68 per month for the support of their two children. He was also ordered to pay Wife \$1,000 per month for maintenance for a period of three years. The court's judgment found Husband's income to be \$12,123.92 per month and imputed income to Wife of \$700 per month. The court prepared its own Form 14 using an income figure, however, of \$10,877.92 for Husband. The court also gave Husband a Line 10 overnight visitation credit of 10 *203 percent based on a basic child support amount of \$1,726.

The trial court also made a disproportionate division of the marital property based on an express finding that Wife had committed marital misconduct. Husband was awarded 60 percent of the marital assets.

STANDARD OF REVIEW

[1] Our review is governed by Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976). We will affirm the trial court's judgment unless it is against the weight of the evidence, it is not supported by the evidence or it erroneously declares or applies the law. Id. The trial court is permitted great flexibility in its division of marital property. Woolridge v. Woolridge, 915 S.W.2d 372, 376 (Mo.App.1996). The trial court is free to believe or disbelieve all, part, or none of the testimony given by any of the witnesses. Price v. Price, 921 S.W.2d 668, 671 (Mo.App.1996). Evidence and favorable inferences are accepted and contrary evidence

disregarded. Welker v. Welker, 902 S.W.2d 865, 867 (Mo.App.1995).

VALUATION OF THE CLOSELY HELD CORPORATIONS

[2][3][4][5][6][7] Valuation of the stock of a closely held corporation is a difficult matter. Hoffmann v. Hoffmann, 676 S.W.2d 817, 826 (Mo. banc 1984). In a dissolution proceeding, the object of any valuation of a business is, of course, to determine its fair market value for purpose of application of the equitable distribution rules to arrive at a fair property division. The very attributes that simplify valuation of publicly held stock, a ready market and historical sales record, are absent with a closely held corporation.^{FN3} Value is a determination of fact by the trial court, to which we give great deference. In re Marriage of K.B., 648 S.W.2d 201, 206 (Mo.App.1983). No one formula or method of determining value is binding or conclusive. Miranda v. Miranda, 596 S.W.2d 61, 65 (Mo.App.1980). "The judicial determination of value must be an informed judgment, but fair 'value' is not susceptible of determination by any precise mathematical computation" Flarsheim v. Twenty Five Thirty Two Broadway Corp., 432 S.W.2d 245, 255 (Mo.1968). Generally, therefore, the trial court can accept the opinion of one expert as to value over another and can prefer one method of valuation over competing methods based on the particular facts of the case and the circumstances of the corporate entity involved. Id. There are a number of various valuation methodologies which fall within one of the following broad categories: (1) earnings approach; (2) liquidation ("underlying asset") approach; and (3) comparable sale approach. Some experts may, in fact, use some combination of these approaches.^{FN4}

FN3. A closely held corporation is characterized by (1) a small number of shareholders, (2) lack of a ready market for the stock and (3) substantial participation in business operations by the stockholder. See O'Neal, *supra* at § 1.02.

FN4. For a more detailed discussion of the most common methods, see O'Neal, *supra* at § 7.26 and other authorities cited in footnote 1 to that section.

26 S.W.3d 199
(Cite as: 26 S.W.3d 199)

[8][9] Husband retained as an expert witness James Marberry. He used a discounted capitalized excess earnings method ^{FN5} and a comparable sale method. He indicated that there were difficulties inherent in and specific to the comparable sale *204 method in this case. As the value he opined was higher, and he believed more reliable, under the earnings method, that was the method he found preferable. Marberry testified that the value of Mo. Corp. was \$775,399 before determination of Husband's interest. He believed, however, that value should be further adjusted to reflect a lack of marketability ("marketability discount") ^{FN6} and Husband's minority interest in the corporation ("minority discount"). ^{FN7} The discount percentages he used were 34 percent and 30 percent, respectively. He thus calculated Husband's interest to be worth \$175,535 as of a date (based on then available information) approximately one year before trial. By later supplemental testimony, using 1998 data, he arrived at a final opinion of the value of Mo. Corp., and that Husband's interest was \$159,265.

FN5. Marberry's method involved (1) computation of the average net worth of the company weighted on a sum of the years digit method, (2) calculation of the average net income again using a weighted sum of the years digit method, (3) calculation of the rate of return on the average net worth, (4) expected rate of return was subtracted from average net income to arrive at gross earnings attributable to goodwill, (5) calculation of the gross earnings attributed to goodwill capitalized at a rate of 25%, (6) liabilities are subtracted from assets and that product is added to the goodwill value to arrive at a total valuation before applying any discounts.

FN6. A "marketability discount" is used to reduce the value to reflect that there is no established public market for the shares of the entity. As a result, the shareholder's investment is less liquid or more difficult to sell or liquidate. This liquidity adjustment will vary depending upon the type of business and the opinion of the valuation expert.

FN7. A "minority discount" is intended to reflect that a minority shareholder does not have sufficient shares to exercise legal con-

trol of the corporation, a buyer would therefore pay less for shares that did not constitute a majority interest. Again, the percentage of this adjustment will vary.

Wife also presented expert testimony, through Leslie Lorts. Like Marberry, he also used the excess earnings method. He agreed that marketability and minority discounts should be applied, but utilized different figures than Marberry-20 percent and 15 percent, respectively. He concluded that, as of December 31, 1998, Husband's interest in Mo. Corp. had a value of between \$845,253 and \$1,264,834. ^{FN8}

FN8. Lorts actually arrived at three different valuations depending upon whether certain adjustments were made for excess officer's compensation and deferred income. Marberry considered such adjustments but did not find them appropriate. It seems obvious that the trial court rejected those adjustments, as it was entitled to do. *Flarsheim*, 432 S.W.2d at 255. For purposes of our analysis, we use the lower, unadjusted figure to compare the two opinions and consider Wife's arguments.

Both experts used weighted net average income figures in their methods, although with slightly different weights and a one-year difference in the start year. The most substantial difference in *methodology* was Marberry's use in valuing Mo. Corp. of the depreciation on the airplanes owned by Del. Corp. Marberry deducted this depreciation from Mo. Corp.'s earnings in making his calculations. Both experts' opinions were admitted without objection. It is the use of Del Corp.'s depreciation to reduce Mo. Corp.'s earnings, and therefore value, that leads to Wife's first point on appeal.

[10] Wife first argues that the trial court erred in valuing Mo. Corp. because the valuation accepted from Husband's expert used tax losses from the separate Del. Corp. to reduce the value. Specifically, Wife complains the net operating losses and depreciation from the Del. Corp. were used by the expert in determining the Mo. Corp.'s fair market value. She claims this was improper both for the reason that they were separate legal and tax entities, and because downward adjustments for depreciation were not

26 S.W.3d 199
(Cite as: 26 S.W.3d 199)

justified because the depreciation was a “paper loss” and the airplanes had actually maintained their value, if not appreciated.^{FN9} Husband argues in response that it was proper to adjust Mo. Corp.’s value by use of the Del. Corp.’s operating losses and depreciation because the two corporations were essentially integrated by function and that the only reason for maintaining separate corporations was to enhance the appearance *205 of Mo. Corp.’s balance sheet to its customers.^{FN10}

FN9. There may be a difference between tax depreciation and true economic depreciation. The tax code may, under various provisions, allow for depreciation for tax purposes on an accelerated basis that is less than the reasonable useful life of the property. In such an event, the actual depreciated value of the asset exceeds the tax depreciated value.

FN10. The operating expenses and depreciation were “available” in the valuation process for use in Mo. Corp.’s value because both parties had agreed to use a net asset value for the Del. Corp. rather than a going concern valuation.

[11][12][13] Neither party has favored us with any authority, legal or accounting, supporting or rejecting the treatment or use of the Del. Corp.’s operating loss and depreciation by Husband’s expert in this case. In fact, Wife’s expert testified he would have no particular objection to consolidating the income statements and balance sheets of the two corporations. He disagreed, however, with Marberry’s consolidation since it was only partial. Marberry did not utilize, at a minimum, Del. Corp.’s *assets* as well as operating losses and depreciation. To have included those assets along with the actual assets of Mo. Corp. would certainly have increased his valuation.^{FN11} The parties spend considerable time arguing whether depreciation is an economic or tax loss. Wife argues that, where the asset subject to tax depreciation is actually increasing in value, then depreciation should not be used in calculating the going concern value of a business.^{FN12} Husband disagrees and argues that the tax depreciation represents a figure for determining the replacement cost for the asset.^{FN13} Again, in the absence of some evidence as to controlling authority, we cannot approve or disapprove of that distinction as a matter of law but find it to be a question of fact for the trial

court. We do, however, find that it was illogical and unreasonable for the trial court to base its valuation on only a partial consolidation of the finances of the two corporations. In fact, Husband’s expert, Marberry, in his written report stated that “the tangible assets of CSPI Delaware *should* be considered in the overall valuation and the losses be considered in the computation of net income.” (Emphasis added). Inexplicably, the calculations introduced into evidence apparently included the losses but not the assets.

FN11. Wife’s expert also testified that a proper consolidation method would have required adjustments for certain transactions such as intercompany loans, rent paid by Mo. Corp., etc. We believe that, absent definitive evidence that a particular valuation method or adjustment is not an acceptable accounting practice, the use of and value given particular adjustments and methods is a question of fact for the trial court, aided by expert testimony, to determine. *Flarsheim*, 432 S.W.2d at 255. *Miranda*, 596 S.W.2d at 65. Because we reverse, we leave these issues open for resolution by the trier of fact based on the value and weight of the evidence presented.

FN12. There would be some tax consequence by sale of an asset that had tax depreciated more than its economic depreciation. The tax consequence could be either as a capital gain or depreciation recapture. To the extent such a taxable consequence exists, the difference between economic and tax depreciation is reduced.

FN13. Curiously, Husband’s expert was not asked whether any such distinction is appropriate. He, in fact, seemed to have little information concerning whether the airplanes owned by Del. Corp. were appreciating or declining in value.

[14] Husband argues that the trial court’s valuation should be accepted because there were numerous errors, both legal and factual, in Wife’s expert’s valuation of Mo. Corp. We do not decide that issue because we do not discern Wife’s argument to be that the value selected by the court was against the weight of the evidence. Rather, we interpret the argument to be

26 S.W.3d 199
(Cite as: 26 S.W.3d 199)

and agree that the court's valuation of this asset was not supported by competent and substantial evidence. The issue of the valuation of Mo. Corp. will therefore be remanded to the trial court for the receipt of evidence and redetermination of the business' value(s). The trial court retains its discretion to weigh and choose between competing opinions and methods as to valuation. We hold only that where two wholly separate business entities are combined for purposes of losses, they should be consistently treated *206 with regard to income and assets.^{FN14} In other words, the consolidations of financial data should include both "sides" of the balance sheet and income and expense statements.

^{FN14}. The astute reader may note that Del. Corp. was given a separate value (based on a net asset method) by the trial court. If Del. Corp.'s assets were included in Mo. Corp.'s value, there would be no reason to separately value Del. Corp. The reader might wonder whether there would, therefore, be any net difference in the result reached by the trial court. We are unable to calculate from the record that effect and thus must return that question to the trial court.

[15] Wife contends in Point II that the trial court's determination of Del. Corp. value was against the weight of the evidence. She complains that the trial court found a net asset value for Husband's interest of \$268,580 when the appraisals, exhibits and even Husband's testimony, gave a value of \$340,000. The valuation of an asset in a dissolution is a question of fact. *In re K.B.*, 648 S.W.2d at 206. We do not address this issue, however, because of our disposition of Point I. On remand, the trial court may or may not decide to give a separate value to Del. Corp.

CALCULATION OF CHILD SUPPORT

[16] In Point III, Wife attacks the trial court's calculation of child support in several respects. The trial court rejected the Forms 14 submitted by the parties and prepared its own. Wife first complains that the court's findings of fact found the Husband's income to be \$12,123.92, but inexplicably used a figure of \$10,877.92 on the Form 14. Her second complaint is that husband should not have received the overnight visitation credit because her imputed income was too

low. The court's Form 14, however, did not include the \$1,000 per month maintenance awarded to Wife, which should have been considered in determining her income. *Directions and Comments*, Form 14. This omission affected both the calculation of the basic child support amount and the determination whether Husband was entitled to an overnight visitation credit on Line 11 of Form 14. Wife next complains the court erroneously reduced Husband's income by subtracting from it depreciation losses on the couple's farm which was awarded to Wife; she argues this was error because those losses would not affect Husband's income in the future because of the property division awarding the farm to her. Husband concedes these errors and he points out that the trial court erred in also reducing his income by his 401k contributions. Husband contends that with the aid of a new Form 14 submitted to this court we can recalculate the proper support amount and avoid a remand. We do not need to remand where we can correct the calculations based on the findings of the trial court. Rule 84.14. *Trausch-Azar v. Trausch*, 983 S.W.2d 199, 203 (Mo.App.1998).

[17] We, however, find additional fundamental errors in the trial court's calculations which prevents us from calculating the proper support amount. With the recalculations agreed to by Husband, he would have a Form 14 income of \$12,693.17 per month, or \$152,170.40 annually. Husband had Form 1040 "total income" of \$215,414.^{FN15} Through the company accountant, Husband presented, and the court adopted, a calculation based on averaging Husband's income from his tax returns over a period of five years. The income for some of the earliest years was as low as \$70,000. These were the years when the business was just getting started. The accountant attempted to reduce the impact *207 of the lower wage years by weighting the average to give more credit to the more recent years. There was no testimony that the 1997 tax year income was an aberration. The substantial increases in Husband's income over those years seems to be roughly parallel to the growth in his various business interests over that time. There was no testimony that Husband had a realistic and reasonable expectation that his income in future years would be less than in 1997.

^{FN15}. After reduction for a "self employed health insurance cost," his "adjusted gross" income was \$213,794. The *Directions, Comments for Use in Completion of Form*

26 S.W.3d 199
(Cite as: 26 S.W.3d 199)

14, do not indicate directly whether such a reduction is correct. The comment regarding self-employment indicates that gross income is the net profit or loss on the schedules filed as part of the parent's tax returns. A non-self-employed parent would not receive any deduction for the parent's cost of health insurance for him or herself.

[18][19][20][21] We are mindful that a past earnings history is indicative of present earning capacity. An award of child support is within the sound discretion of the trial court. *Price v. Price*, 921 S.W.2d 668, 673 (Mo.App.1996). "We will not substitute our judgment for that of the trial court absent a manifest abuse of discretion and will not disturb an award of child support unless the evidence is 'palpably insufficient' to support it." *Holmes v. Holmes*, 878 S.W.2d 906, 909 (Mo.App.1994). A court may consider past, present and anticipated earning capacity in determining the ability to pay child support. *Effinger v. Effinger*, 913 S.W.2d 909, 914 (Mo.App.1996). However, unlike *In re Marriage of Spence*, 943 S.W.2d 373, 379 (Mo.App.1997), there was no evidence or finding that a high earnings year was not typical or an aberration.

[22][23] Where averaging of income historically is appropriate, it is not proper where, as here, there is evidence that it does not reflect current earning capacity. Even if averaging were appropriate, the trial court did not follow the *Directions and Comments* for calculating a parent's income in a business such as Husband was involved. The *Directions and Comments* for Form 14 to Line 1 (page 4) indicate that if a parent receives "rents or royalties or is self-employed, in a sole proprietorship or business with joint ownership, 'gross income' is gross receipts minus the ordinary and necessary expenses incurred to produce such receipts. ***Depreciation, investment tax credits and other noncash reductions of gross receipts*** may be excluded from such ordinary and necessary expenses." (Line 1, page 4) (Emphasis added). *Douglas-Hill v. Hill*, 1 S.W.3d 613, 617 (Mo.App.1999). In the present case, Husband had rental income and partnership income. In addition, because the two corporations had chosen Subchapter S status under Internal Revenue law, they were taxable substantially as is done with a partnership. In that arrangement, no taxes are assessed at the corporate level but rather the income and losses (including depreciation) are passed through to the individual tax returns of the share-

holders.^{FN16} Such, in fact, happened here. The parties' tax returns indicate reductions in income for depreciation of farm assets, and § 179 deductions from one of the corporations. More specifically, Husband's calculation of his income was further reduced by depreciation not only of the airplanes but other depreciable assets in which he had an interest through the various formal partnerships. Whether the trial court allows such adjustments is within the court's discretion. *Klockow v. Klockow*, 979 S.W.2d 482, 490 (Mo.App.1998); *In re the Marriage of Chorum*, 959 S.W.2d 900, 905 (Mo. App.1997). There is no indication the trial court considered any of these factors in determining Husband's income and in fact it would appear to the contrary.

FN16. O'Neal, *supra*, at § 2.06.

[24] Where complicated business and tax status applies, the partnership and Subchapter S income reflected on the individual's tax return may not represent the true amount of cash or benefit that may be available to the parent and therefore, for the support of the child. The importance of this distinction is demonstrated by the first Form 14 *Comment* on page 4: "Income" for purposes of computing the presumed child support amount consists of a financial benefit or money received by a parent that could have a positive impact on the parent's ability to support the parent's *208 children." There was no evidence of the actual cash available to Husband for the payment of child support. Where there are complex business interests such as here, the court must at least consider the issues raised by *Directions and Comments*, Form 14. Except for the averaging, the court appeared to make the child support calculation in a manner more properly suited for a salaried or hourly employee. The point is sustained.

ATTORNEY'S FEES

[25][26][27] Wife asserts in Point IV that the trial court erred in refusing to order Husband to pay her attorney's fees and expenses. As a general rule, the parties to a dissolution are to pay their own attorney's fees. *Rich v. Rich*, 871 S.W.2d 618, 627 (Mo.App.1994). RSMo. § 452.355.1 permits, but does not require, a trial court to award attorney's fees. Two factors for consideration under RSMo. § 452.355.1 are the actions of the parties during the pendency of the

26 S.W.3d 199
(Cite as: 26 S.W.3d 199)

action, and the parties' financial situation. The court has broad discretion in ordering or refusing to order attorney fees, and its ruling will be disturbed on appeal only upon a showing of abuse of discretion. Cohn v. Cohn, 841 S.W.2d 782, 787 (Mo.App.1992).

[28] To show an abuse of discretion by the trial court, the complaining party has the burden to show that the order for attorney's fees is "clearly against the logic of the circumstances and is so arbitrary and unreasonable as to shock one's sense of justice and to indicate a lack of deliberation." Ederle v. Ederle, 741 S.W.2d 883, 885 (Mo.App.1987).

[29] Wife argues that she is entitled to attorney's fees because the trial court erroneously found that her actions delayed the proceedings and caused additional costs to be incurred, and that she had substantial assets with which to pay her attorney's fees.

[30] With regard to the court's finding that Wife's change in counsel delayed proceedings, the record demonstrates that the proceedings were indeed delayed at least once at Wife's request. This was because her expert witness required additional time to revise his opinion. The court specifically found that the disposition of this case had been in part delayed by her actions, by changing her attorney, and consequent need to obtain a second appraisal of Husband's business interests.

Furthermore, with regard to whether Wife had substantial assets with which to pay her attorney's fees, the parties' financial situation is only one of other relevant factors the trial court must consider in determining whether an attorney's fee award is justified; it is not a controlling factor. Cohn, 841 S.W.2d at 787. Given the court's disposition regarding the property division, we cannot say that Wife needlessly obtained a second valuation expert and should therefore be denied attorney's fees for that reason. Because of our disposition herein, we also remand the question of attorney's fees to the trial court for consideration after completion of the evidence of all of the factors set forth in § 542.355.1.

UNEQUAL DISTRIBUTION OF PROPERTY

In her fifth point, Wife contends the court erred in its award to Husband of 60 percent of marital assets. The

court found that Wife was guilty of marital misconduct and awarded marital property disproportionately in a 60/40 split in favor of Husband.

Wife contends that she did not begin her affair until after Husband began his relationship. In essence, she asks us to reverse the trial court's apparent credibility determination in favor of Husband. The trial court has broad discretion in dividing marital property, In re Marriage of Pew, 780 S.W.2d 687 (Mo.App.1989); the division must be done fairly but not necessarily equally. Carter v. Carter, 940 S.W.2d 12, 16 (Mo.App.1997). The division will *209 only be disturbed when it is so "heavily and duly weighted in favor of one party as to amount to an abuse of discretion." Allen v. Allen, 961 S.W.2d 891, 893 (Mo.App.1998). We have approved distributions more unequal than the one herein. Earle v. Earle, 901 S.W.2d 140, 142 (Mo.App.1995). Wife does not contend that the degree of unequal distribution constituted an abuse of discretion but instead challenges the sufficiency and weight of the evidence to support the finding of her misconduct as a basis for the disproportionate division. The trial court is in a superior position to judge the credibility of witnesses. Unless the judgment lacks substantial evidence to support it, or is against the clear weight of the evidence, we will sustain the trial court's finding. Pederson v. Pederson, 599 S.W.2d 51 (Mo.App.1980). The court's findings of misconduct are supported by the evidence. We make no specific finding approving or disapproving of the amount of the disparity in the division. Because there are a number of factors, including misconduct, that are relevant to the division and because the court must re-value several substantial assets, its new judgment after remand may or may not have exactly the same percentage division.

The division of marital property lies within the sound discretion of the trial court and we will disturb the trial court's division of the property only where it is improper, or where an abuse of discretion is shown. Dardick v. Dardick, 670 S.W.2d 865, 868 (Mo. banc 1984). Having reviewed the evidence, the trial court's decision is supported and there has been no abuse of discretion. Point V, therefore, is denied.

OTHER PROPERTY

Wife complains in her last point that the court erred in

26 S.W.3d 199
(Cite as: 26 S.W.3d 199)

either including or omitting certain personal property from its distribution. Husband concedes virtually all of these matters. They can be corrected on remand and, therefore, no additional discussion is needed.

For the reasons stated, the cause is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. On remand the trial court should reconsider the valuation of the business as indicated herein. The trial court shall also reconsider the proper amount of child support and the issue of attorney fees consistent with this opinion and correct the technical errors in omission or inclusion of certain personal property that are conceded by the parties. In all other respects, the judgment is affirmed.

EDWIN H. SMITH, Presiding Judge, and VICTOR C. HOWARD, Judge, concur.
Mo.App. W.D.,2000.
Thill v. Thill
26 S.W.3d 199

END OF DOCUMENT

Definitions

Adjusted Book Value. The book value that results after asset or liability amounts are added, deleted, or changed from their respective book amounts.

Adjusted Book Value Method.* A method within the asset approach whereby all assets and liabilities (including off-balance sheet, intangible, and contingent) are adjusted to their fair market values (Note: In Canada on a going concern basis).

Adjusted Net Asset Method.* See **Adjusted Book Value Method**.

Appraisal. See **Valuation**.

Appraisal Approach.* See **Valuation Approach**.

Appraisal Date.* See **Valuation Date**.

Appraisal Method.* See **Valuation Method**.

Appraisal Procedure.* See **Valuation Procedure**.

Appraised Value. The appraiser's opinion or conclusion of value.

Arbitrage Pricing Theory.* A multivariate model for estimating the cost of equity capital, which incorporates several systematic risk factors.

Asset (Asset-Based) Approach.* A general way of determining a value indication of a business, business ownership interest, security or intangible asset using one or more methods based on the value of the assets net of liabilities.

Beta.* A measure of systematic risk of a stock; the tendency of a stock's price to correlate with changes in a specific index.

Blockage Discount.* An amount or percentage deducted from the current market price of a publicly traded stock to reflect the decrease in the per share value of a block of stock that is of a size that could not be sold in a reasonable period of time given normal trading volume.

Book Value.* See **Net Book Value**.

Business.* See **Business Enterprise**.

Business Appraiser. A person who, by education, training and experience, is qualified to develop an appraisal of a business, business ownership interest, security or intangible assets.

Business Enterprise.* A commercial, industrial, service, or investment entity (or a combination thereof) pursuing an economic activity.

Business Risk.* The degree of uncertainty of realizing expected future returns of the business resulting from factors other than financial leverage. See **Financial Risk**.

Business Valuation.* The act or process of determining the value of a business enterprise or ownership interest therein.

Capital Asset Pricing Model (CAPM).* A model in which the cost of capital for any stock or portfolio of stocks equals a risk-free rate plus a risk premium that is proportionate to the systematic risk of the stock or portfolio.

Capitalization.* A conversion of a single period of economic benefits into value.

Capitalization Factor.* Any multiple or divisor used to convert anticipated economic benefits of a single period into value.

Capitalization of Earnings Method.* A method within the income approach whereby economic benefits for a representative single period are converted to value through division by a capitalization rate.

Capitalization Rate.* Any divisor (usually expressed as a percentage) used to convert anticipated economic benefits of a single period into value.

Capital Structure.* The composition of the invested capital of a business enterprise, the mix of debt and equity financing.

Cash Flow.* Cash that is generated over a period of time by an asset, group of assets, or business enterprise. It may be used in a general sense to encompass various levels of specifically defined cash flows. When the term is used, it should be supplemented by a qualifier (e.g., "discretionary" or "operating") and a specific definition in the given valuation context.

Common Size Statements.* Financial statements in which each line is expressed as a percentage of the total. On the balance sheet, each line item is shown as a percentage of total assets, and on the income statement, each item is expressed as a percentage of sales.

Control.* The power to direct the management and policies of a business enterprise.

Control Premium.* An amount or a percentage by which the pro rata value of a controlling interest exceeds the pro rata value of a non-controlling interest in a business enterprise, to reflect the power of control.

Cost Approach.* A general way of determining a value indication of an individual asset by quantifying the amount of money required to replace the future service capability of that asset.

Cost of Capital.* The expected rate of return that the market requires in order to attract funds to a particular investment.

Debt-Free.* Use of this term is discouraged. See **Invested Capital**.

Discount for Lack of Control.* An amount or percentage deducted from the pro rata share of value of 100 percent of an equity interest in a business to reflect the absence of some or all of the powers of control.

Discount for Lack of Liquidity. An amount or percentage deducted from the value of an ownership interest to reflect the relative inability to quickly convert property to cash.

Discount for Lack of Marketability.* An amount or percentage deducted from the value of an ownership interest to reflect the relative absence of marketability.

Discount for Lack of Voting Rights.* An amount or percentage deducted from the per share value of a minority interest voting share to reflect the absence of voting rights.

Discount Rate.* A rate of return used to convert a future monetary sum into present value.

Discounted Cash Flow Method.* A method within the income approach whereby the present value of future expected net cash flows is calculated using a discount rate.

Discounted Future Earnings Method.* A method within the income approach whereby the present value of future expected economic benefits is calculated using a discount rate.

Discretionary Earnings. Earnings that may be defined, in certain applications, to reflect earnings of a business enterprise prior to the following items:

- Income taxes
- Nonoperating income and expenses
- Nonrecurring income and expenses
- Depreciation and amortization
- Interest expense or interest income
- Owner's total compensation for those services, which could be provided by a sole owner/manager.

Economic Benefits.* Inflows such as revenues, net income, net cash flows, etc.

Economic Life.* The period of time over which property may generate economic benefits.

Effective Date.* See **Valuation Date**.

Enterprise.* See **Business Enterprise**.

Equity.* The owner's interest in property after deduction of all liabilities.

Equity Net Cash Flows.* Those cash flows available to pay out to equity holders (in the form of dividends) after funding operations of the business enterprise, making necessary capital investments, and increasing or decreasing debt financing.

Equity Risk Premium.* A rate of return added to a risk-free rate to reflect the additional risk of equity instruments over risk free instruments (a component of the cost of equity capital or equity discount rate).

Excess Earnings.* That amount of anticipated economic benefits that exceeds an appropriate rate of return on the value of a selected asset base (often net tangible assets) used to generate those anticipated economic benefits.

Excess Earnings Method.* A specific way of determining a value indication of a business, business ownership interest, security or intangible asset determined as the sum of a) the value of the assets derived by capitalizing excess earnings and b) the value of the selected asset base. Also frequently used to value intangible assets. See **Excess Earnings**.

Fair Market Value.* The price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm's length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts. (Note: In Canada, the term "price" should be replaced with the term "highest price")

Fairness Opinion.* An opinion as to whether or not the consideration in a transaction is fair from a financial point of view.

Financial Risk.* The degree of uncertainty of realizing expected future returns of the business resulting from financial leverage. See **Business Risk**.

Forced Liquidation Value.* Liquidation value, at which the asset or assets are sold as quickly as possible, such as at an auction.

Free Cash Flow.* Use of this term is discouraged. See **Net Cash Flow**.

Going Concern.* An ongoing operating business enterprise.

Going Concern Value.* The value of a business enterprise that is expected to continue to operate into the future. The intangible elements of Going Concern Value result from factors such as having a trained work force, an operational plant, and the necessary licenses, systems, and procedures in place.

Going Concern Value. Refers to the intangible elements that result from factors such as having a trained work force, an operational plant, and the necessary licenses, systems and procedures in place. Also refers to the premise of value based on the concept that a business enterprise is expected to continue operations into the future.

Goodwill.* That intangible asset arising as a result of name, reputation, customer loyalty, location, products, and similar factors not separately identified.

Goodwill. That intangible asset arising as a result of elements such as name, reputation, customer loyalty, location, products and related factors not separately identified and quantified.

Goodwill Value.* The value attributable to goodwill.

Goodwill Value. The value attributable to the elements of intangible assets above the identifiable tangible and intangible assets employed in a business.

Guideline Public Company Method.* A method within the market approach whereby market multiples are derived from market prices of stocks of companies that are engaged in the same or similar lines of business, and that are actively traded on a free and open market.

Guideline Transactions Method. See **Merger and Acquisition Method**.

Holding Company. An entity that derives its returns from investments rather than from the sale of products or services.

Hypothetical Condition. That which is contrary to what exists but is supposed for the purpose of analysis.

Income (Income-Based) Approach.* A general way of determining a value indication of a business, business ownership interest, security, or intangible asset using one or more methods that convert anticipated economic benefits into a present single amount.

Intangible Assets.* Non-physical assets such as franchises, trademarks, patents, copyrights, goodwill, equities, mineral rights, securities and contracts (as distinguished from physical assets) that grant rights and privileges, and have value for the owner.

Internal Rate of Return.* A discount rate at which the present value of the future cash flows of the investment equals the cost of the investment.

Intrinsic Value.* The value that an investor considers, on the basis of an evaluation or available facts, to be the "true" or "real" value that will become the market value when other investors reach the same conclusion. When the term applies to options, it is the difference between the exercise price or strike price of an option and the market value of the underlying security.

Invested Capital.* The sum of equity and debt in a business enterprise. Debt is typically a) all interest bearing debt or b) long-term interest-bearing debt. When the term is used, it should be supplemented by a specific definition in the given valuation context.

Invested Capital Net Cash Flows.* Those cash flows available to pay out to equity holders (in the form of dividends) and debt investors (in the form of principal and interest) after funding operations of the business enterprise and making necessary capital investments.

Investment Risk.* The degree of uncertainty as to the realization of expected returns.

Investment Value.* The value to a particular investor based on individual investment requirements and expectations. (Note: in Canada, the term used is "Value to the Owner").

Key Person Discount.* An amount or percentage deducted from the value of an ownership interest to reflect the reduction in value resulting from the actual or potential loss of a key person in a business enterprise.

Levered Beta.* The beta reflecting a capital structure that includes debt.

Limited Appraisal. The act or process of determining the value of a business, business ownership interest, security, or intangible asset with limitations in analyses, procedures, or scope.

Liquidation Value.* The net amount that would be realized if the business is terminated and the assets are sold piecemeal. Liquidation can be either "orderly" or "forced."

Liquidity.* The ability to quickly convert property to cash or pay a liability.

Liquidity. The ability to readily convert an asset, business, business ownership interest, security or intangible asset into cash without significant loss of principal.

Majority Control.* The degree of control provided by a majority position.

Majority Interest.* An ownership interest greater than 50 percent of the voting interest in a business enterprise.

Market (Market-Based) Approach.* A general way of determining a value indication of a business, business ownership interest, security, or intangible asset by using one or more methods that compare the subject to similar businesses, business ownership interests, securities or intangible assets that have been sold.

Market Capitalization of Equity.* The share price of a publicly traded stock multiplied by the number of shares outstanding.

Market Capitalization of Invested Capital.* The market capitalization of equity plus the market value of the debt component of invested capital.

Market Multiple.* The market value of a company's stock or invested capital divided by a company measure (such as economic benefits, number of customers).

Marketability.* The ability to quickly convert property to cash at minimal cost.

Marketability. The capability and ease of transfer or salability of an asset, business, business ownership interest, security or intangible asset.

Marketability Discount.* See **Discount for Lack of Marketability**.

Merger and Acquisition Method.* A method within the market approach whereby pricing multiples are derived from transactions of significant interests in companies engaged in the same or similar lines of business.

Mid-Year Discounting.* A convention used in the Discounted Future Earnings Method that reflects economic benefits being generated at midyear, approximating the effect of economic benefits being generated evenly throughout the year.

Minority Discount.* A discount for lack of control applicable to a minority interest.

Minority Interest.* An ownership interest less than 50 percent of the voting interest in a business enterprise.

Multiple.* The inverse of the capitalization rate.

Net Assets. Total assets less total liabilities.

Net Book Value.* With respect to a business enterprise, the difference between total assets (net of accumulated depreciation, depletion, and amortization) and total liabilities as they appear on the balance sheet (synonymous with shareholders' equity). With respect to a specific asset, the capitalized cost less accumulated amortization or depreciation as it appears on the books of account of the business enterprise.

Net Cash Flows.* A form of cash flow. When the term is used, it should be supplemented by a qualifier (e.g., "equity" or "Invested Capital") and a specific definition in the given valuation context.

Net Income. Revenue less expenses and taxes.

Net Present Value.* The value, as of a specified date, of future cash inflows less all cash outflows (including the cost of investment) calculated using an appropriate discount rate.

Net Tangible Asset Value.* The value of the business enterprise's tangible assets (excluding excess assets and non-operating assets) minus the value of its liabilities. (Note: in Canada, tangible assets also include identifiable intangible assets).

Non-Operating Assets.* Assets not necessary to ongoing operations of the business enterprise. (Note: in Canada, the term used is "Redundant Assets").

Normalized Earnings*. Economic benefits adjusted for nonrecurring, non-economic, or other unusual items to eliminate anomalies and/or facilitate comparisons.

Normalized Financial Statements.* Financial statements adjusted for non-operating assets and liabilities and/or for nonrecurring, non-economic, or other unusual items to eliminate anomalies and/or facilitate comparisons.

Operating Company. A business that conducts an economic activity by generating and selling, or trading in a product or service.

Orderly Liquidation Value.* Liquidation value at which the asset or assets are sold over a reasonable period of time to maximize proceeds received.

Portfolio Discount.* An amount or percentage deducted from the value of a business enterprise to reflect the fact that it owns dissimilar operations or assets that do not fit well together.

Premise of Value.* An assumption regarding the most likely set of transactional circumstances that may be applicable to the subject valuation; e.g., going concern, liquidation.

Present Value.* The value, as of a specified date, of future economic benefits and/or proceeds from sale, calculated using an appropriate discount rate.

Price/Earnings Multiple.* The price of a share of stock divided by its earnings per share.

Rate of Return.* An amount of income (loss) and/or change in value realized or anticipated on an investment, expressed as a percentage of that investment.

Redundant Assets.* See **Non-Operating Assets**.

Replacement Cost New.* The current cost of a similar new property having the nearest equivalent utility to the property being valued.

Report Date.* The date conclusions are transmitted to the client.

Reproduction Cost New.* The current cost of an identical new property.

Required Rate of Return.* The minimum rate of return acceptable by investors before they will commit money to an investment at a given level of risk.

Residual Value.* The value as of the end of the discrete projection period in a discounted future earnings model.

Return on Equity.* The amount, expressed as a percentage, earned on a company's common equity for a given period.

Return on Investment.* See **Return on Invested Capital** and **Return on Equity**.

Return on Invested Capital.* The amount, expressed as a percentage, earned on a company's total capital for a given period.

Risk-Free Rate.* The rate of return available in the market on an investment free of default risk.

Risk Premium.* A rate of return added to a risk-free rate to reflect risk.

Rule of Thumb.* A mathematical formula developed from the relationship between price and certain variables based on experience, observation, hearsay, or a combination of these; usually industry specific.

Special Interest Purchasers.* Acquirers who believe they can enjoy post-acquisition economies of scale, synergies, or strategic advantages by combining the acquired business interest with their own.

Standard of Value.* The identification of the type of value being used in a specific engagement; e.g. fair market value, fair value, investment value.

Sustaining Capital Reinvestment.* The periodic capital outlay required to maintain operations at existing levels, net of the tax shield available from such outlays.

Systematic Risk.* The risk that is common to all risky securities and cannot be eliminated through diversification. The measure of systematic risk in stocks is the beta coefficient.

Tangible Assets.* Physical assets (such as cash, accounts receivable, inventory, property, plant and equipment, etc.)

Terminal Value.* See **Residual Value**

Transaction Method.* See **Merger and Acquisition Method** and **Guideline Transactions Method**.

Unlevered Beta.* The beta reflecting a capital structure without debt.

Unsystematic Risk.* The risk specific to an individual security that can be avoided through diversification.

Valuation.* The act or process of determining the value of a business, business ownership interest, security, or intangible asset.

Valuation Approach.* A general way of determining a value indication of a business, business ownership interest, security, or intangible asset using one or more valuation methods.

Valuation Date.* The specific point in time as of which the valuator's opinion of value applies (also referred to as "Effective Date" or "Appraisal Date" or "as of" date).

Valuation Method.* Within approaches, a specific way to determine value.

Valuation Procedure.* The act, manner, and technique of performing the steps of an appraisal method.

Valuation Ratio.* A fraction in which a value or price serves as the numerator and financial, operating, or physical data serves as the denominator.

Value to the Owner.* See **Investment Value**.

Voting Control.* *de jure* control of a business enterprise.

Weighted Average Cost of Capital (WACC). The cost of capital (discount rate) determined by the weighted average, at market values, of the cost of all financing sources in the business enterprise's capital structure.

Working Capital. The amount by which current assets exceed current liabilities.



The International Society of Professional Valuers®

Type text to search

Go

Home

Contact Us

Site Map

About Us Find an Appraiser Consumer For Appraisers Join ASA Accreditation Education ASA Store Conferences

[Find an Appraiser](#) > Find An Appraiser Search

- ▶ Appraisal Review & Management
- ▶ Business Valuation
- ▶ Gems & Jewelry
- ▶ Machinery & Technical Specialties
- ▶ Personal Property
- ▶ Real Property

Show Directions

What Kind of Appraiser do I need? (Discipline)

- Review of a completed appraisal or management of large projects - *Appraisal Review and Management*
- What is my business worth? - *Business Valuation*
- Gems and Jewelry - the only obvious one!
- Equipment, farm animals, high-tech, green tech, mines, yachts and more - *Machinery and Technical Specialties*
- Antiques, fine art, collectibles, cars, home contents, tangible non-technical items - *Personal Property*
- Real estate - *Real Property*

Welcome to the American Society of Appraisers' (ASA) Find an Appraiser Referral System!

- ☐ Find appraisers by last name ☒ Find appraisers by attributes

Revise My Search

Start New Search

Results for Search of:

- Experienced as an expert witness
- Zip Code 65201
- Discipline Business Valuation

Your search did not find any exact matches; however, below you will list of appraisers willing to work in the area you entered.

The following are appraisers willing to work in your search area:

Name	Discipline	Specialty	City	State	Country	Phone
Nancy J. Matheny, ASA	Business Valuation		St. Charles	MO	United States	1 (636) 754-0215
Ralph E. Ostermueller, ASA	Business Valuation		Manchester	MO	United States	1 (314) 965-5921
Patrick G. Cooney, ASA	Business Valuation		St. Louis	MO	United States	1 (314) 434-3800
Mary J. Dempsey, ASA	Business Valuation		St. Louis	MO	United States	1 (314) 692-2249
Bryan D. Goetz, ASA	Business Valuation		St. Louis	MO	United States	1 (314) 434-3800

A-34

Gregory J. Austin, ASA	Business Valuation	St. Louis	MO United States 1 (314) 398-5085 Contact Info
Todd A. Zigrang, ASA	Business Valuation	St. Louis	MO United States 1 (314) 994-7641 Contact Info
Bradley L. Pursel, ASA	Business Valuation	Saint Louis	MO United States 1 (314) 983-1344 Contact Info
Donna B. Smith, ASA	Business Valuation	St. Louis	MO United States 1 (314) 983-1259 Contact Info
Robert J. Cimas, ASA	Business Valuation	St. Louis	MO United States 1 (314) 994-7641 Contact Info
Luke A. Waller, ASA	Business Valuation	St. Louis	MO United States 1 (314) 739-1000 Contact Info
Carl E. Lane, ASA	Business Valuation	St. Louis	MO United States 1 (314) 889-1157 Contact Info
Kelli S. Lewis, AM	Business Valuation	St. Louis	MO United States 1 (314) 721-5800 Contact Info
Paul L. Novak, ASA	Business Valuation	St. Louis	MO United States 1 (314) 746-7427 Contact Info
Claren L. O'Bannon, ASA	Business Valuation	St. Louis	MO United States 1 (314) 862-2070 Contact Info
Michael J. Prost, ASA	Business Valuation	St. Louis	MO United States 1 (314) 862-2070 Contact Info
Adam J. Herman, ASA	Business Valuation	St. Louis	MO United States 1 (314) 862-2070 Contact Info
Christopher B. Volz, ASA	Business Valuation	St. Louis	MO United States 1 (314) 862-2070 Contact Info
Lynda L. Lieberman, ASA	Business Valuation	St. Louis	MO United States 1 (314) 615-1455 Contact Info
John A. Reed, ASA	Business Valuation	St. Louis	MO United States 1 (314) 615-1454 Contact Info
Matthew R. West, ASA	Business Valuation	St. Louis	MO United States 1 (314) 621-7025 Contact Info
Kevin P. Summers, ASA	Business Valuation	St. Louis	MO United States 1 (314) 655-5547 Contact Info

Thomas E. Hilton, ASA	Business Valuation	St. Louis	MO United States 1 (314) 655-5515	Contact Info
Chris Louis, ASA	Business Valuation	St. Louis	MO United States 1 (314) 621-7025	Contact Info
Michael D. Morhaus, AM	Business Valuation	St. Louis	MO United States 1 (314) 655-5525	Contact Info
Jodi M. Hollaway, ASA	Business Valuation	Saint Louis	MO United States 1 (314) 231-9844	Contact Info
Michael L. Binz, ASA	Business Valuation	St. Louis	MO United States 1 (314) 342-3190	Contact Info
Brock J. Rule, ASA	Business Valuation	Independence	MO United States 1 (816) 373-1890	Contact Info
Gary L. Schroeder, ASA	Business Valuation	Waterloo	IL United States 1 (618) 939-5255	Contact Info
Brad J. Bollinger, ASA	Business Valuation	Waterloo	IL United States 1 (618) 939-5255	Contact Info
John P. Corbin, ASA	Business Valuation	Kansas City	MO United States 1 (816) 943-0800	Contact Info
Shawn Fox, ASA	Business Valuation	Kansas City	MO United States 1 (816) 412-2552	Contact Info
Teresa A. Fry, ASA	Business Valuation	Kansas City	MO United States 1 (816) 471-6427	Contact Info
Patricia S. McCall, ASA	Business Valuation	Kansas City	MO United States 1 (816) 471-7433	Contact Info
Steven L. York, ASA	Business Valuation	Kansas City	MO United States 1 (816) 868-3346	Contact Info
David K. Jones, ASA	Business Valuation	Kansas City	MO United States 1 (816) 471-4442	Contact Info
John C. Korschot, ASA	Business Valuation	Kansas City	MO United States 1 (816) 471-0005	Contact Info
Kelly A. Skarda, ASA	Business Valuation	Overland Park KS	United States 1 (913) 897-3599	Contact Info
Stephen Gooding, ASA	Business Valuation	Leawood	KS United States 1 (913) 663-1134	Contact Info
Michael W. McLain, ASA	Business Valuation	Overland Park KS	United States 1 (913) 648-0185	Contact Info
Eric C. Frye, ASA	Business Valuation	Overland Park KS	United States 1 (913) 981-7200	Contact Info

Rob Metcalf Jr.,
ASA Business Valuation Overland Park KS United States 1 (913) 498-9000x222 [Contact Info](#)

George M.
Barberich Jr., AM Business Valuation Overland Park KS United States 1 (913) 498-9000 [Contact Info](#)

Direct Exam of Bob Gerding, CPA

Will you state your full name for the record being kept here today?

What is your profession?

How long have you been in the practice of certified public accounting?

Where is your office located?

Is there any area of accountancy in which you specialize?

Does your practice include involvement with clients involved in land development?

Do you know [REDACTED]?

How do you know him?

Are you acquainted with a development commonly referred to as "[REDACTED]"?

How did you become acquainted with "[REDACTED]"?

With whom did you interact, primarily?

When did your involvement begin?

What services did you provide?

Can you briefly describe the entities involved at the inception of the development?

Are those entities and percentage of ownership accurately reflected on Joint Exhibit J-7?

What was the source of the information used to record the "Opening Entries" noted on April 30, 2004?

Has the composition of the participating entities changed since April 2004?

How so?

Direct Exam of Bob Gerding, CPA –Page Two-

Has the scope of your representation included the preparation of any financial statements?

What has been your level of accounting involvement?

Do you know who kept the daily books of [REDACTED] and [REDACTED]?

Do you know what software these entities utilize?

Are entries coded in any manner?

Are adjustments ever required?

How do you keep track of cumulative development costs?

Can you summarize the types of costs incurred in land development?

- Land costs
- Site improvements and amenities
- Marketing costs
- Legal costs
- Maintenance costs
- Real estate taxes
- Overhead
- Interest expense
- Construction supervision
- Depreciation
- Others?

Is land depreciable? Are site improvements depreciable?

What are the most costly components of land development?

Are there any costs associated with development after site improvements and amenities are in place?

How are those costs accounted for?

As of the end of the last accounting period, what was the total costs of development allocated to each lot in [REDACTED]?

Would the difference between sales price of a lot and the per lot costs represent pure profit?

Direct Exam of Bob Gerding, CPA –Page Three-

If not, why not?

Directing you attention to Joint Exhibits 13-16, do you recognize them?

J-13	2004 Balance Sheet [REDACTED], LLC
J-14	2005 Balance Sheet [REDACTED], LLC
J-15	2006 Balance Sheet [REDACTED], LLC
J-16	2007 Balance Sheet [REDACTED], LLC

How does this entity report the value of it's assets?

What is the tangible book value of [REDACTED] as of the end of the last accounting period?

You have indicated that the book value of [REDACTED] as of 12-31-07 was \$ _____

Can we conclude that this was it's fair market value?

If not, why not?

- Book value may or may not reflect fair market value
- Book value of assets not readily available to investors
- Investors must wait for liquidation of assets
- Sales price could be higher or lower than the price at acquisition

Are there any tax consequences in converting tangible assets to cash?

Explain the consequences.

Do accounting conventions permit an entity to change book value?

When, if ever, are fair market value and book value synonymous?

- At the time of acquisition; and
- During a cyclical downtrend

Directing you attention to Joint Exhibits 25-28, do you recognize them?

J-25	2004 Balance Sheet [REDACTED], LLC
J-26	2005 Balance Sheet [REDACTED], LLC
J-27	2006 Balance Sheet [REDACTED], LLC
J-28	2007 Balance Sheet [REDACTED], LLC

Direct Exam of Bob Gerding, CPA –Page Four-

Does this entity own any land?

What asset does [REDACTED] own?

Are you familiar with the terms of this note?

Directing your attention to Respondent's Exhibit P-5, does this document fairly summarize the terms of the [REDACTED] notes?

How does this entity report the value of this asset?

What is the tangible book value of [REDACTED] as of the end of the last accounting period?

You have indicated that the book value of [REDACTED] as of 12-31-07 was \$ _____

Can we conclude that this was its fair market value?

If not, why not?

- The value assumes the note to be collectible
- Other?

To your knowledge, is the note secured?

By what property?

To your knowledge, is the note in good standing?

Assuming the note, or some portion thereof, is paid, are there any tax consequences in converting this asset or the underlying security to cash?

Explain the consequences.

At my request did you prepare any projections of the cash flow to [REDACTED] if the [REDACTED] notes were collected in full, in today's dollars?

Did you also prepare a projection of the cash flow to [REDACTED] if the [REDACTED] notes were discounted prorate under two scenarios?

What discounted scenarios did you consider?

Direct Exam of Bob Gerding, CPA -Page Five-

Finally, did you prepare a projection of the cash flow to [REDACTED] if the [REDACTED] notes are not paid and the underlying security is reduced to cash?

Are you familiar with the terms of Joint Exhibit 57?

What is it? ([REDACTED] LLC)

How did the formation of this entity affect the projected cash flow to all investors?

What key assumptions did you consider in preparing Respondent's Exhibits P-3, P-4 and P-4.5?

- Collectibility or liquidation of security for book value
- Income taxes (LTCG) at present rates
- Likely minority and marketability discount
- Substantial costs to develop property for sale
- Current market conditions negatively impact Lindners's ability to obtain funds to complete the development

Does Respondent's Exhibit P-3 accurately summarize your projection of cash flow to [REDACTED] if the notes are collected in full, in today's dollars?

Does Respondent's Exhibit P-4 accurately summarize your projection of cash flow to [REDACTED] if the original are discounted prorata under two scenarios, a \$13,000,000 collection and a \$11,700,000 collection?

Finally, Does Respondent's Exhibit P-4.5 accurately summarize your projection of cash flow to [REDACTED] if the [REDACTED] notes are not paid and the underlying security is reduced to cash equal to book value?

IRS Revenue Ruling 59-60

Rev. Rul. 59-60, 1959-1 CB 237 -- IRC Sec. 2031 (Also Section 2512.) (Also Part II, Sections 811(k), 1005, Regulations 105, Section 81.10.)

Reference(s): Code Sec. 2031 Reg § 20.2031-2

In valuing the stock of closely held corporations, or the stock of corporations where market quotations are not available, all other available financial data, as well as all relevant factors affecting the fair market value must be considered for estate tax and gift tax purposes. No general formula may be given that is applicable to the many different valuation situations arising in the valuation of such stock. However, the general approach, methods, and factors which must be considered in valuing such securities are outlined.

Revenue Ruling 54-77, C.B. 1954-1, 187, superseded.

Full Text:

Section 1. Purpose.

The purpose of this Revenue Ruling is to outline and review in general the approach, methods and factors to be considered in valuing shares of the capital stock of closely held corporations for estate tax and gift tax purposes. The methods discussed herein will apply likewise to the valuation of corporate stocks on which market quotations are either unavailable or are of such scarcity that they do not reflect the fair market value.

Sec. 2. Background and Definitions.

.01 All valuations must be made in accordance with the applicable provisions of the Internal Revenue Code of 1954 and the Federal Estate Tax and Gift Tax Regulations. Sections 2031(a), 2032 and 2512(a) of the 1954 Code (sections 811 and 1005 of the 1939 Code) require that the property to be included in the gross estate, or made the subject of a gift, shall be taxed on the basis of the value of the property at the time of death of the decedent, the alternate date if so elected, or the date of gift.

.02 Section 20.2031-1(b) of the Estate Tax Regulations (section 81.10 of the Estate Tax Regulations 105) and section 25.2512-1 of the Gift Tax Regulations (section 86.19 of Gift Tax Regulations 108) define fair market value, in effect, as the price at which the property would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, both parties having reasonable knowledge of relevant facts. Court decisions frequently state in addition that the hypothetical buyer and seller are assumed to be able, as well as willing, to trade and to be well informed about the property and concerning the market for such property.

.03 Closely held corporations are those corporations the shares of which are owned by a relatively limited number of stockholders. Often the entire stock issue is held by one family. The result of this situation is that little, if any, trading in the shares takes place. There is, therefore, no established market for the stock and such sales as occur at irregular intervals seldom reflect all of the elements of a representative transaction as defined by the term "fair market value."

Sec. 3. Approach to Valuation.

.01 A determination of fair market value, being a question of fact, will depend upon the circumstances in each case. No formula can be devised that will be generally applicable to the multitude of different valuation issues arising in estate and gift tax cases. Often, an appraiser will find wide differences of opinion as to the fair market value of a particular stock. In resolving such differences, he should maintain a

A-43

reasonable attitude in recognition of the fact that valuation is not an exact science. A sound valuation will be based upon all the relevant facts, but the elements of common sense, informed judgment and reasonableness must enter into the process of weighing those facts and determining their aggregate significance.

.02 The fair market value of specific shares of stock will vary as general economic conditions change from "normal" to "boom" or "depression," that is, according to the degree of optimism or pessimism with which the investing public regards the future at the required date of appraisal. Uncertainty as to the stability or continuity of the future income from a property decreases its value by increasing the risk of loss of earnings and value in the future. The value of shares of stock of a company with very uncertain future prospects is highly speculative. The appraiser must exercise his judgment as to the degree of risk attaching to the business of the corporation which issued the stock, but that judgment must be related to all of the other factors affecting value.

.03 Valuation of securities is, in essence, a prophesy as to the future and must be based on facts available at the required date of appraisal. As a generalization, the prices of stocks which are traded in volume in a free and active market by informed persons best reflect the consensus of the investing public as to what the future holds for the corporations and industries represented. When a stock is closely held, is traded infrequently, or is traded in an erratic market, some other measure of value must be used. In many instances, the next best measure may be found in the prices at which the stocks of companies engaged in the same or a similar line of business are selling in a free and open market.

Sec. 4. Factors To Consider.

.01 It is advisable to emphasize that in the valuation of the stock of closely held corporations or the stock of corporations where market quotations are either lacking or too scarce to be recognized, all available financial data, as well as all relevant factors affecting the fair market value, should be considered. The following factors, although not all-inclusive are fundamental and require careful analysis in each case:

- (a) The nature of the business and the history of the enterprise from its inception.
- (b) The economic outlook in general and the condition and outlook of the specific industry in particular.
- (c) The book value of the stock and the financial condition of the business.
- (d) The earning capacity of the company.
- (e) The dividend-paying capacity.
- (f) Whether or not the enterprise has goodwill or other intangible value.
- (g) Sales of the stock and the size of the block of stock to be valued.
- (h) The market price of stocks of corporations engaged in the same or a similar line of business having their stocks actively traded in a free and open market, either on an exchange or over-the-counter.

.02 The following is a brief discussion of each of the foregoing factors:

- (a) The history of a corporate enterprise will show its past stability or instability, its growth or lack of growth, the diversity or lack of diversity of its operations, and other facts needed to form an opinion of the degree of risk involved in the business. For an enterprise which changed its form of organization but carried on the same or closely similar operations of its predecessor, the history of the former enterprise should be considered. The detail to be considered should increase with approach to the required date of

appraisal, since recent events are of greatest help in predicting the future; but a study of gross and net income, and of dividends covering a long prior period, is highly desirable. The history to be studied should include, but need not be limited to, the nature of the business, its products or services, its operating and investment assets, capital structure, plant facilities, sales records and management, all of which should be considered as of the date of the appraisal, with due regard for recent significant changes. Events of the past that are unlikely to recur in the future should be discounted, since value has a close relation to future expectancy.

(b) A sound appraisal of a closely held stock must consider current and prospective economic conditions as of the date of appraisal, both in the national economy and in the industry or industries with which the corporation is allied. It is important to know that the company is more or less successful than its competitors in the same industry, or that it is maintaining a stable position with respect to competitors. Equal or even greater significance may attach to the ability of the industry with which the company is allied to compete with other industries. Prospective competition which has not been a factor in prior years should be given careful attention. For example, high profits due to the novelty of its product and the lack of competition often lead to increasing competition. The public's appraisal of the future prospects of competitive industries or of competitors within an industry may be indicated by price trends in the markets for commodities and for securities. The loss of the manager of a so-called "one-man" business may have a depressing effect upon the value of the stock of such business, particularly if there is a lack of trained personnel capable of succeeding to the management of the enterprise. In valuing the stock of this type of business, therefore, the effect of the loss of the manager on the future expectancy of the business, and the absence of management-succession potentialities are pertinent factors to be taken into consideration. On the other hand, there may be factors which offset, in whole or in part, the loss of the manager's services. For instance, the nature of the business and of its assets may be such that they will not be impaired by the loss of the manager. Furthermore, the loss may be adequately covered by life insurance, or competent management might be employed on the basis of the consideration paid for the former manager's services. These, or other offsetting factors, if found to exist, should be carefully weighed against the loss of the manager's services in valuing the stock of the enterprise.

(c) Balance sheets should be obtained, preferably in the form of comparative annual statements for two or more years immediately preceding the date of appraisal, together with a balance sheet at the end of the month preceding that date, if corporate accounting will permit. Any balance sheet descriptions that are not self-explanatory, and balance sheet items comprehending diverse assets or liabilities, should be clarified in essential detail by supporting supplemental schedules. These statements usually will disclose to the appraiser (1) liquid position (ratio of current assets to current liabilities); (2) gross and net book value of principal classes of fixed assets; (3) working capital; (4) long-term indebtedness; (5) capital structure; and (6) net worth. Consideration also should be given to any assets not essential to the operation of the business, such as investments in securities, real estate, etc. In general, such nonoperating assets will command a lower rate of return than do the operating assets, although in exceptional cases the reverse may be true. In computing the book value per share of stock, assets of the investment type should be revalued on the basis of their market price and the book value adjusted accordingly. Comparison of the company's balance sheets over several years may reveal, among other facts, such developments as the acquisition of additional production facilities or subsidiary companies, improvement in financial position, and details as to recapitalizations and other changes in the capital structure of the corporation. If the corporation has more than one class of stock outstanding, the charter or certificate of incorporation should be examined to ascertain the explicit rights and privileges of the various stock issues including: (1) voting powers, (2) preference as to dividends, and (3) preference as to assets in the event of liquidation.

(d) Detailed profit-and-loss statements should be obtained and considered for a representative period immediately prior to the required date of appraisal, preferably five or more years. Such statements should show (1) gross income by principal items; (2) principal deductions from gross income including major prior items of operating expenses, interest and other expense on each item of long-term debt, depreciation and depletion if such deductions are made, officers' salaries, in total if they appear to be reasonable or in detail if they seem to be excessive, contributions (whether or not deductible for tax purposes) that the nature of its business and its community position require the corporation to make, and taxes by principal items,

including income and excess profits taxes; (3) net income available for dividends; (4) rates and amounts of dividends paid on each class of stock; (5) remaining amount carried to surplus; and (6) adjustments to, and reconciliation with, surplus as stated on the balance sheet. With profit and loss statements of this character available, the appraiser should be able to separate recurrent from nonrecurrent items of income and expense, to distinguish between operating income and investment income, and to ascertain whether or not any line of business in which the company is engaged is operated consistently at a loss and might be abandoned with benefit to the company. The percentage of earnings retained for business expansion should be noted when dividend-paying capacity is considered. Potential future income is a major factor in many valuations of closely-held stocks, and all information concerning past income which will be helpful in predicting the future should be secured. Prior earnings records usually are the most reliable guide as to the future expectancy, but resort to arbitrary five-or-ten-year averages without regard to current trends or future prospects will not produce a realistic valuation. If, for instance, a record of progressively increasing or decreasing net income is found, then greater weight may be accorded the most recent years' profits in estimating earning power. It will be helpful, in judging risk and the extent to which a business is a marginal operator, to consider deductions from income and net income in terms of percentage of sales. Major categories of cost and expense to be so analyzed include the consumption of raw materials and supplies in the case of manufacturers, processors and fabricators; the cost of purchased merchandise in the case of merchants; utility services; insurance; taxes; depletion or depreciation; and interest.

(e) Primary consideration should be given to the dividend-paying capacity of the company rather than to dividends actually paid in the past. Recognition must be given to the necessity of retaining a reasonable portion of profits in a company to meet competition. Dividend-paying capacity is a factor that must be considered in an appraisal, but dividends actually paid in the past may not have any relation to dividend-paying capacity. Specifically, the dividends paid by a closely held family company may be measured by the income needs of the stockholders or by their desire to avoid taxes on dividend receipts, instead of by the ability of the company to pay dividends. Where an actual or effective controlling interest in a corporation is to be valued, the dividend factor is not a material element, since the payment of such dividends is discretionary with the controlling stockholders. The individual or group in control can substitute salaries and bonuses for dividends, thus reducing net income and understating the dividend-paying capacity of the company. It follows, therefore, that dividends are less reliable criteria of fair market value than other applicable factors.

(f) In the final analysis, goodwill is based upon earning capacity. The presence of goodwill and its value, therefore, rests upon the excess of net earnings over and above a fair return on the net tangible assets. While the element of goodwill may be based primarily on earnings, such factors as the prestige and renown of the business, the ownership of a trade or brand name, and a record of successful operation over a prolonged period in a particular locality, also may furnish support for the inclusion of intangible value. In some instances it may not be possible to make a separate appraisal of the tangible and intangible assets of the business. The enterprise has a value as an entity. Whatever intangible value there is, which is supportable by the facts, may be measured by the amount by which the appraised value of the tangible assets exceeds the net book value of such assets.

(g) Sales of stock of a closely held corporation should be carefully investigated to determine whether they represent transactions at arm's length. Forced or distress sales do not ordinarily reflect fair market value nor do isolated sales in small amounts necessarily control as the measure of value. This is especially true in the valuation of a controlling interest in a corporation. Since, in the case of closely held stocks, no prevailing market prices are available, there is no basis for making an adjustment for blockage. It follows, therefore, that such stocks should be valued upon a consideration of all the evidence affecting the fair market value. The size of the block of stock itself is a relevant factor to be considered. Although it is true that a minority interest in an unlisted corporation's stock is more difficult to sell than a similar block of listed stock, it is equally true that control of a corporation, either actual or in effect, representing as it does an added element of value, may justify a higher value for a specific block of stock.

(h) Section 2031(b) of the Code states, in effect, that in valuing unlisted securities the value of stock or securities of corporations engaged in the same or a similar line of business which are listed on an exchange

should be taken into consideration along with all other factors. An important consideration is that the corporations to be used for comparisons have capital stocks which are actively traded by the public. In accordance with section 2031(b) of the Code, stocks listed on an exchange are to be considered first. However, if sufficient comparable companies whose stocks are listed on an exchange cannot be found, other comparable companies which have stocks actively traded in on the over-the-counter market also may be used. The essential factor is that whether the stocks are sold on an exchange or over-the-counter there is evidence of an active, free public market for the stock as of the valuation date. In selecting corporations for comparative purposes, care should be taken to use only comparable companies. Although the only restrictive requirement as to comparable corporations specified in the statute is that their lines of business be the same or similar, yet it is obvious that consideration must be given to other relevant factors in order that the most valid comparison possible will be obtained. For illustration, a corporation having one or more issues of preferred stock, bonds or debentures in addition to its common stock should not be considered to be directly comparable to one having only common stock outstanding. In like manner, a company with a declining business and decreasing markets is not comparable to one with a record of current progress and market expansion.

Sec. 5. Weight To Be Accorded Various Factors.

The valuation of closely held corporate stock entails the consideration of all relevant factors as stated in section 4. Depending upon the circumstances in each case, certain factors may carry more weight than others because of the nature of the company's business. To illustrate:

(a) Earnings may be the most important criterion of value in some cases whereas asset value will receive primary consideration in others. In general, the appraiser will accord primary consideration to earnings when valuing stocks of companies which sell products or services to the public; conversely, in the investment or holding type of company, the appraiser may accord the greatest weight to the assets underlying the security to be valued.

(b) The value of the stock of a closely held investment or real estate holding company, whether or not family owned, is closely related to the value of the assets underlying the stock. For companies of this type the appraiser should determine the fair market values of the assets of the company. Operating expenses of such a company and the cost of liquidating it, if any, merit consideration when appraising the relative values of the stock and the underlying assets. The market values of the underlying assets give due weight to potential earnings and dividends of the particular items of property underlying the stock, capitalized at rates deemed proper by the investing public at the date of appraisal. A current appraisal by the investing public should be superior to the retrospective opinion of an individual. For these reasons, adjusted net worth should be accorded greater weight in valuing the stock of a closely held investment or real estate holding company, whether or not family owned, than any of the other customary yardsticks of appraisal, such as earnings and dividend paying capacity.

Sec. 6. Capitalization Rates.

In the application of certain fundamental valuation factors, such as earnings and dividends, it is necessary to capitalize the average or current results at some appropriate rate. A determination of the proper capitalization rate presents one of the most difficult problems in valuation. That there is no ready or simple solution will become apparent by a cursory check of the rates of return and dividend yields in terms of the selling prices of corporate shares listed on the major exchanges of the country. Wide variations will be found even for companies in the same industry. Moreover, the ratio will fluctuate from year to year depending upon economic conditions. Thus, no standard tables of capitalization rates applicable to closely held corporations can be formulated. Among the more important factors to be taken into consideration in deciding upon a capitalization rate in a particular case are: (1) the nature of the business; (2) the risk involved; and (3) the stability or irregularity of earnings.

Sec. 7. Average of Factors.

Because valuations cannot be made on the basis of a prescribed formula, there is no means whereby the various applicable factors in a particular case can be assigned mathematical weights in deriving the fair market value. For this reason, no useful purpose is served by taking an average of several factors (for example, book value, capitalized earnings and capitalized dividends) and basing the valuation on the result. Such a process excludes active consideration of other pertinent factors, and the end result cannot be supported by a realistic application of the significant facts in the case except by mere chance.

Sec. 8. Restrictive Agreements.

Frequently, in the valuation of closely held stock for estate and gift tax purposes, it will be found that the stock is subject to an agreement restricting its sale or transfer. Where shares of stock were acquired by a decedent subject to an option reserved by the issuing corporation to repurchase at a certain price, the option price is usually accepted as the fair market value for estate tax purposes. See Rev. Rul. 54-76, C.B. 1954-1, 194. However, in such case the option price is not determinative of fair market value for gift tax purposes. Where the option, or buy and sell agreement, is the result of voluntary action by the stockholders and is binding during the life as well as at the death of the stockholders, such agreement may or may not, depending upon the circumstances of each case, fix the value for estate tax purposes. However, such agreement is a factor to be considered, with other relevant factors, in determining fair market value. Where the stockholder is free to dispose of his shares during life and the option is to become effective only upon his death, the fair market value is not limited to the option price. It is always necessary to consider the relationship of the parties, the relative number of shares held by the decedent, and other material facts, to determine whether the agreement represents a bonafide business arrangement or is a device to pass the decedent's shares to the natural objects of his bounty for less than an adequate and full consideration in money or money's worth. In this connection see Rev. Rul. 157 C.B. 1953-2, 255, and Rev. Rul. 189, C.B. 1953-2, 294.

Sec. 9. Effect on Other Documents.

Revenue Ruling 54-77, C.B. 1954-1, 187, is hereby superseded.