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IN THE SUPREME COURT OF FLORIDA

WILLIAM DEFOREST THOMPSON,

Petitioner,

vs.

TOBITHA THOMPSON,

Respondent.

Case No. 74,419
Fourth District Court of Appeal
Case No. 87-1356

_____ /

BRIEF OF
THE FAMILY LAW SECTION OF THE FLORIDA BAR
AS AMICUS CURIAE

Appeal from the District Court of Appeal
for the Fourth District of Florida

*then? marks
see change
of affiliation
10-19-90
JB*

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Issue

IN MARRIAGE DISSOLUTION PROCEEDINGS TO WHICH AN OWNER OF A PROFESSIONAL ASSOCIATION IS A PARTY, MAY THE VALUE OF THE PROFESSIONAL ASSOCIATION'S GOOD WILL BE FACTORED IN IN DETERMINING THE PROFESSIONAL ASSOCIATION'S VALUE?

Argument

IN MARRIAGE DISSOLUTION PROCEEDINGS TO WHICH AN OWNER OF
A PROFESSIONAL ASSOCIATION IS A PARTY, MAY THE VALUE OF
THE PROFESSIONAL ASSOCIATION'S GOOD WILL BE FACTORED IN
IN DETERMINING THE PROFESSIONAL ASSOCIATION'S VALUE?

The Family Law Section of the Florida Bar asks this Court to answer the question certified by the Fourth District Court of Appeal in this case with a qualified yes. The Family Law Section of the Florida Bar believes that professional goodwill, when it exists, is a real asset which should be subject to division, but would point out that it is necessary for this Court, were it to make that pronouncement, to both define "professional goodwill" and to expressly note that it does not exist as a positive value in all professional practices.

While the American Academy of Matrimonial Lawyers has correctly advised this Court that there is authority for whatever determination might ultimately be reached, the Academy has urged this Court to adopt a minority opinion- that the determination should be made on a case by case basis, with the determination depending upon whether the asset is salable or marketable. The majority of States having considered whether professional goodwill may be a distributable asset have, however, simply answered the question in the affirmative. A list of some of the cases so holding is contained in the brief of the Respondent, at 18-19 and shall not be repeated here. The Family Law Section of

the Florida Bar asks this Court to adopt the majority opinion, tempered by a statement that whether goodwill exists will be determined on a case by case basis but the decisive factor need not be marketability.

Goodwill has been defined as "essentially reputation that will probably generate business" See, Dugan v. Dugan, 92 N.J. 423, 457 A.2d 1 (1983) wherein that court further opined:

[goodwill] does not exist at the time professional qualifications and a license to practice are obtained. A good reputation is earned after accomplishment and performance. Field testing is an essential ingredient before goodwill comes into being. Future earning capacity per se is not goodwill. However, when that future earning capacity has been enhanced because reputation leads to probable future patronage from existing and potential clients, goodwill may exist and have value. When that occurs the resulting goodwill is property subject to equitable distribution. Dugan, at 433.

There appears to be little disagreement between all parties to this action that "goodwill" can exist and may be an asset subject to distribution if that "goodwill" exists due to a trade name or location which, without the contribution of the spouse against whom the compensating award is to be made, will continue to maintain the value of the goodwill. Thus, in a large professional partnership with an established clientele, i.e. "The XXXYY Animal Hospital" which has operated for 35 years at one address with regular patients as different professionals come and go, there will be divisible goodwill. The disagreements arise in

the small or sole practices of attorneys, who may not ethically sell their clients, and with other professionals with specialized followings. This Amicus will only discuss these last types of cases, as there appears to be no real argument that the type of goodwill characterized as "enterprise" by the American Academy of Matrimonial Lawyers, should be a class of professional goodwill which should be considered in making an equitable distribution of assets.

The arguments against inclusion of other professional goodwill in a marital estate generally include assertions that consideration of professional goodwill ascribes to the Professional Association in question an asset which is really personal to the professional, creates "double-dipping" when coupled with an alimony award, creates difficulty in evaluation, and forces one party to buy the other out of an asset which may never exist if it is technically unsalable or were the professionals to become ill or otherwise unable to continue their practice. These arguments either misapprehend what it is which is being divided, or base their objections upon inappropriate considerations.

With reference to the first objection, that the "goodwill" is an asset personal to the professional and not really an asset of the professional association where there is an individual or small professional association without trade name or location

"goodwill", this objection while technically possible, truly begs the question. The ultimate issue to be reached by a lower tribunal in a dissolution of marriage action is a division of all assets and liabilities between two parties. If the professional goodwill is a real asset, whether it is an asset of the professional association through which the professional chooses to practice, or is an asset of a sole proprietorship or is a personal asset of a party makes no real difference to the "bottom line" in the dissolution judgment. It may be that the goodwill is not an asset of the corporation apart from the professional, but since the professional has chosen to place those portions of his or her assets which relate to his or her professional life into that corporate entity, the professional goodwill should likewise follow- along with the desks, specialized equipment and receivables.

It should be noted that the rest of the above objections are identical to the objections raised, in the past, with reference to pension plans, especially where the plans are not as yet vested. However, this Court, and the Florida Legislature, have disregarded the arguments as related to those plans. This Court should similarly disregard those arguments here. The test of whether a recognized intangible asset should be divisible is whether the item is a benefit acquired during the marriage with a recognizable value. If it is, then if one party is allowed to

leave the marriage with that benefit, the other should receive just compensation. The issue is not whether the asset can be sold, it is whether the asset is of value to the party departing the marriage with it. See, In Re Fleege, 558 P.2d 1136 (Wash SupCt 1979) (goodwill of husband's solo dental practice was community asset).

A thorough understanding of the goodwill concept will negate any misconception that the division of goodwill will create impermissible double-dipping. Utilizing a definition of goodwill consistent with reputation acquired during the marriage, creates an asset capable of present value, unconnected to alimony. A Colorado Court, in Nichols v. Nichols, 606 P.2d 1314 (Colo. 1980) noted:

As long as husband continues to practice, the value of his professional goodwill, generated by his skill, effort and reputation, will continue to inhere in the practice after dissolution even as it did during the marriage. Further, husband will continue to reap the returns on the professional goodwill which, at the time of the dissolution, was associated with his dental practice. The fact that goodwill may be difficult to value, is elusive in nature, and not easily marketable, is not a proper reason to disregard it in the valuation of the marital estate. (Citations omitted)

A California court carefully, and correctly, explained that goodwill has a present value and may not be assigned by any method that looks at future earnings of the professional spouse:

Since a community interest can only be acquired during the time of the marriage the value of the goodwill must exist at the time of the dissolution and that value must be established without dependence on the potential or continuing net income of the professional spouse. (In re Marriage of Fortier, supra, 34 Cal.App.3d 384, 388)

Community goodwill is a portion of the community value of the professional practice as a going concern on the date of the dissolution of the marriage. As observed in Golden, "... in a matrimonial matter, the practice of the sole practitioner husband will continue, with the same intangible value as it had during the marriage. Under the principles of community property law, the wife, by virtue of her position as wife, made to that value the same contribution as does a wife to any of the husband's earnings and accumulations during the marriage. She is as much entitled to be recompensed for that contribution as if it were represented by the increased value of stock in a family business" n.4 (270 Cal.App.2d 401, 405)

In sum we conclude the applicable rule in evaluating community goodwill to be that such goodwill may not be valued by any method that takes into account the post marital efforts of either spouse but that a proper means of arriving at the value of such goodwill contemplates any legitimate method of evaluation that measures its present value by taking into account some past result. Insofar as the professional practice is concerned it is assumed that it will continue in the future. In re Marriage of Foster, 42 Cal.App.3d 577 (1974), citing Golden v. Golden, 270 Cal.App.2d 401. Also cited in Slater v. Slater, 100 Cal.App.3d 241 (1979), Lopez v. Lopez, 38 Cal.App.3d 93 (1974) and Dugan v. Dugan, supra.

Both the method contained in Internal Revenue Code Revenue Ruling 59-60 and 68409 utilizing a formula approach and the method set forth in Dugan v. Dugan, supra, are consistent with the above philosophy in that they are based upon past earnings not future earnings. While the Amicus brief filed by the American Academy states that it is their position that these types of approach may reward a lazy professional and penalize one working long hours, it is possible to normalize past income to reasonable hours prior to applying any type of excess earnings formula- and this should be done. The need for thys type of adjustment and normalization is part of the reason for requiring expert testimony to assist courts in evaluating intangible assets like goodwill.

This Court has previously addressed the issue of professional goodwill in the dicta contained in Swann v. Mitchell, 435 So.2d 797 (Fla. 1983) wherein this Court, at 800, opined:

The goodwill of a professional practice has been held to be community property subject to division in a marriage dissolution proceeding. Re Marriage of Lukens, 558 P.2d 279 (Wash.App. 1976)

The Family Law Section of the Florida Bar asks this Court to adopt the reasoning of the Washington Courts, as it did in the dicta cited above, and to further bolster that position with an affirmative answer to the question certified herein.

The Family Law Section of the Florida Bar believes that a strict application of the market approach is not consistent with equity. It is possible for there to be a value to the goodwill asset which is not reflected in a salable asset- in the same way as there is a value in a non-vested pension plan. In Golden v. Golden, 270 Cal.App.2d 401, at 405, the court aptly described the current situation as follows:

A professional practice goes automatically to the spouse licensed to practice it. He is not selling out or liquidating, but continuing in business. Effectively, it is the case of the silent partner withdrawing from a going business. And, if such partner is to receive fair compensation for her share, or her enforced retirement, it should be so evaluated.

Goodwill must still be determined on a case by case basis for not in all cases will goodwill exist. Unlike a situation where one is attempting to impermissibly value a license to practice, goodwill will not attach at the moment the professional begins his or her practice. It takes time and nurturing to develop. If this time and nurturing takes place during a marital

relationship- the value must be recognized as the spouse taking the goodwill with them will continue to reap the deferred rewards.

CONCLUSION

For the reasons set forth above, the Family Law Section of the Florida Bar suggest that this Court determine that professional goodwill may be considered as an asset in a dissolution of marriage action, that the consideration not be limited to those cases where there is location or trade name recognition, and that the proper measure of evaluation be any legitimate method which is based upon past production with the underlying assumption that the business will continue.

The Family Law Section of the Florida Bar would request that for the benefit of the bench and bar, the opinion contain a caveat that not in all cases will professional goodwill have a positive value which needs to be divided.

Respectfully submitted,

THE FAMILY LAW SECTION OF
THE FLORIDA BAR
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Deborah Marks, Chairman, Amicus
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By: 

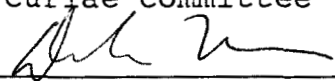
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Certificate of Service

WE CERTIFY that a true and correct copy of the foregoing was mailed this 25th day of October, 1989 to: Edna L. Caruso, Esquire, 1615 Forum Place, Suite 4-B, West Palm Beach, Florida 33401, Esler & Kirschbaum, P.A., 315 S.E. 7th Street, Suite 300, Ft. Lauderdale, Florida 33301-3178, Robert M. Montgomery, Jr. Esquire, 1016 Clearwater Place, West Palm Beach, Florida 33401, Jane Kreuzler-Walsh, Esquire, 501 S. Flagler Drive, Suite 503, Flagler Center, West Palm Beach, Florida 333401, Ronald Sales, Esquire P.O. Box 3107, West Palm Beach, Florida 33402, A. Matthew Miller, Esquire 4040 Sheridan Street, P.O. Box 7259, Hollywood, Florida 33081-1259.

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