20CA0242 Marriage of Kim 10-28-2021

COLORADO COURT OF APPEALS

Court of Appeals No. 20CA0242
Arapahoe County District Court No. 17DR30739
Honorable Maria E. Berkenkotter, Judge

In re the Marriage of

Carey Jungmin Kim,

Appellee,

and

Steven Young Kim,

Appellant.

JUDGMENT AFFIRMED

Division VI
Opinion by JUDGE FOX
Welling and Johnson, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced October 28, 2021

Griffiths Law P.C., Suzanne Griffiths, Duncan Griffiths, Christopher Griffiths, Kimberly Newton, Lone Tree, Colorado, for Appellee

Teddi Ann Barry, P.C., Teddi Ann Barry, Thornton, Colorado, for Appellant

¶ 1 In this dissolution of marriage proceeding, Steven Young Kim (husband) appeals those parts of the district court's permanent orders that valued his surgical practice, allocated $274,832 as marital rather than separate property, and awarded spousal maintenance to Carey Jungmin Kim (wife). We affirm.

I. Background

¶ 2 During their nineteen-year marriage, wife stayed at home to care for their three children so that husband could establish himself as a surgeon. Husband started his own surgical practice in 2005 and, at the time of the 2019 permanent orders, owned Premier Surgery, P.C., Acute Surgical and Trauma Services, and SK Surgery (collectively "the practice"). As of the hearing date, husband worked as a general surgeon and trauma surgeon. He paid himself $720,000 annually and gave himself substantial benefits each year (401(k) contributions, cash balance contributions, automobile expenses, and the like).

¶ 3 The parties stipulated to have their marriage dissolved and permanent orders entered by a retired judge pursuant to section 13-3-111, C.R.S. 2020. They also stipulated that wife could earn

$40,000 annually. As relevant here, the parties disputed the value of the practice and wife's request for spousal maintenance.

¶ 4 A few months before the scheduled permanent orders hearing, husband notified wife that he intended to sell the practice and move to Cambodia. Husband said that he had received a two-year offer to perform surgeries on behalf of an organization called Jeremiah's Hope for a $36,000 annual stipend. Husband also said that his partner intended to purchase the practice for $40,000. Based on husband's decisions, the parties' business valuation experts provided diverging opinions concerning the practice's value — $337,000, $1,786,000, and $2,237,000.

¶ 5 In a written order issued after a two-day contested hearing, the court valued the practice at $1,760,000 and awarded it to husband. The court allocated the remaining marital property between the parties, giving each party more than $4,000,000 of marital assets. The court granted wife's request for spousal maintenance, awarding her $14,000 per month for one year and $7,500 per month for nine more years.

¶ 6 After the court granted the parties' C.R.C.P. 59 stipulation to resolve issues not pertinent here, husband appealed.

II. Property Distribution

¶ 7 Husband contends that the court overvalued the practice and erroneously allocated $274,832 of separate property as marital property. We address and reject each contention.

¶ 8 In reviewing a district court's property distribution, we recognize that the district court has great latitude to effect an equitable distribution based upon the facts and circumstances of each case and that such distribution may not be disturbed absent a clear abuse of discretion. *In re Marriage of Balanson*, 25 P.3d 28, 35 (Colo. 2001).

A. Practice Valuation

1. Valuation Method

¶ 9 The court valued the practice based on the capitalized excess earnings method. Husband argues that this method was inappropriate because his plan to sell the practice eliminated the probability of future earnings and determination of goodwill. We disagree.

¶ 10 The valuation method used is a factual question for the district court. *In re Marriage of Huff*, 834 P.2d 244, 257 n.17 (Colo. 1992). The excess earnings approach is a generally accepted

method for determining the present value of a spouse's interest in a business. *Id.* at 256; *In re Marriage of Nevarez*, 170 P.3d 808, 812 (Colo. App. 2007). It capitalizes the amount by which the spouse's historical earnings exceed that which a professional with similar education, experience, and capabilities earned during that period. *Huff*, 834 P.2d at 256. It represents the value of the tangible assets and goodwill of the spouse's interest on the dissolution date. *Id.*

¶ 11 Goodwill is a property or an asset that supplements the earning capacity of another asset, business, or profession, and, therefore, it not the earning capacity itself. *In re Marriage of Bookout*, 833 P.2d 800, 805 (Colo. App. 1991); *see also In re Marriage of Hall*, 692 P.2d 175, 178 (Wash. 1984) ("Goodwill . . . is a distinct *asset* of a professional practice, not just a *factor* contributing to the value or earning capacity of the practice."). It is "generally regarded as the summation of all the special advantages, not otherwise identifiable, related to a going concern. It includes such items as a good name, capable staff and personnel, high credit standing, reputation for superior products and services, and favorable location." *Dugan v. Dugan*, 457 A.2d 1, 4 (N.J. 1983).

¶ 12 Discontinuation of a business or profession may greatly diminish the value of the goodwill but does not destroy its existence. *Hall*, 692 P.2d at 178. Rather, a professional who has established a reputation for skill and expertise can expect his patrons to return to him, to speak well of him, and upon selling his practice, can expect that many will accept the buyer and will utilize the buyer's professional expertise. *In re Marriage of Nichols*, 43 Colo. App. 383, 385, 606 P.2d 1314, 1315 (1979). "If goodwill exists, it exists only as a value which attaches to the business as a whole." Alan S. Zipp, *Divorce Valuation of Business Interests: A Capitalization of Earnings Approach*, 23 Fam. L.Q. 89, 96 (1989).

¶ 13 Bill Vincent, one of wife's experts, testified that the

> [e]lements present in [husband]'s practice which suggest the likelihood of the existence of goodwill include that there are side practices that generate profits, that the practice targets generation of income from out of network patients and yet is able to generate good collections from them, and that [husband]'s reputation as the Trauma Director contributes to the reputation of the practice.

Husband's partner, who pledged to buy the practice, said that she was buying "the convenience of stepping into something that's already established" and "taking on a bunch of employees." Wife's

other expert, Michael Schlueter, calculated that the practice had $1,211,587 of goodwill based on husband's past sales, production, and results. As a check for that figure, Mr. Schlueter analyzed and determined that the goodwill in husband's practice was comparable to the goodwill present in similar surgery practices at the time of their sales.

¶ 14 Husband created goodwill in the practice's reputation, location, referrals, and staff, and not just in his ability to earn future income. That goodwill did not diminish simply because husband decided to sell the practice. It would be inequitable to wife, who contributed to the marriage, to ignore the value of that goodwill as a marital asset. *See In re Marriage of Banning*, 971 P.2d 289, 292 (Colo. App. 1998); *see also Dugan*, 457 A.2d at 6 ("It would be inequitable to ignore the contribution of the non-attorney spouse to the development of that economic resource."). Accordingly, because of the existence of goodwill, the court did not err in using the excess earnings method. *See Huff*, 834 P.2d at 257 n.17.

2. Reasonable Compensation

¶ 15 Next, husband argues that there is no record support for the district court's finding — made in valuing the practice — that his reasonable compensation is $533,175. We disagree.

¶ 16 The experts disputed what reasonable compensation amount (i.e., salary) to apply to husband when valuing the practice. All three experts considered the Medical Group Management Association (MGMA) survey as the benchmark to determine husband's productivity. The survey "presents percentile benchmarks for a variety of metrics relating to physician compensation, including salary, benefits, collections, and various productivity measures." The MGMA benchmark considers what one practitioner earns as compared to another practitioner with the same qualifications and years of experience who works the same number of hours in the same general area. According to Mr. Vincent, the benchmark is generally measured by the median unless circumstances, like very specialized expertise, national reputation, or location of practice, support a higher than median comparison.

¶ 17 Mr. Schlueter reviewed husband's income over a four-year period to determine his reasonable compensation. Mr. Schlueter commented that husband, as the owner, could "determine his own salary which may or may not reflect the market value of his services" and pay himself perks not available to other employees and that were not ordinary and necessary to operate the practice. Mr. Schlueter thus had to "normalize," or adjust, husband's reported salary and payroll taxes. He said that he would add items back to husband's net income (like husband's 401(k) contributions) and then subtract out an estimate of market-based salary and payroll taxes. To determine the estimate, Mr. Schlueter analyzed and averaged MGMA data for general surgery and trauma surgery because husband "has one foot in both worlds." He also compared husband's production against the two other doctors in the practice, noting that husband produces more and therefore his compensation should be higher. Ultimately, Mr. Schlueter selected the 75th percentile for the estimate of market compensation and payroll tax adjustment and, applying that percentile, determined that a four-year average of husband's reasonable compensation was $533,175.

¶ 18 Husband's expert, Mr. Meindl, asserted that the 75th percentile was lower than husband's production and did not compensate him for his actual work. Mr. Meindl stated that husband collected $482,312 in 2018, ranking him in the 87th percentile of all observed data points on the MGMA scale for trauma surgeons. Applying the 87th percentile to husband would result in a $660,000 salary, or a reasonable compensation of $126,825 more than what Mr. Schlueter determined husband could earn. Mr. Meindl then adjusted the MGMA data to husband's $720,000 salary as "used elsewhere in the marital dissolution process." Mr. Meindl said that $720,000 was an appropriate compensation amount even when compared against the MGMA salary of $660,000.

¶ 19 The court found Mr. Schlueter's valuation the most accurate and adopted his conclusion that husband's reasonable compensation was $533,175. The court found that Mr. Meindl inflated husband's reasonable compensation and did not account for his retirement plan costs. The record supports these findings.

¶ 20 Husband is a general and a trauma surgeon. Mr. Meindl only analyzed the MGMA data related to a trauma surgeon, while Mr. Schlueter's compensation analysis considered both specialties. Mr.

Meindl relied on husband's self-reported $720,000 salary as his starting and ending points in determining husband's reasonable compensation, while Mr. Schlueter reviewed four years of husband's salary and recognized that husband's salary decisions might not represent market rates. Finally, Mr. Schlueter included the substantial retirement benefits that husband paid to himself, while Mr. Meindl — while recognizing their significance to the determination — did not. The district court did not abuse its discretion because it found Mr. Schlueter's calculation opinion on this point more persuasive than Mr. Meindl's. *See In re Marriage of Antuna*, 8 P.3d 589, 593 (Colo. App. 2000) (determining the sufficiency and credibility of valuation evidence, including the weight to be given to an expert's techniques, is within the district court's province).

3. Accounts Receivable

¶ 21 Finally, and citing to *In re High*, 638 P.2d 818, 820 (Colo. App. 1981), husband argues that there is no "evidential efficacy" to support Mr. Schlueter's calculation of the collections percentage for the practice's accounts receivable. *See id.* (holding that an expert opinion "buttressed by assumed facts at variance with the actual

facts has no evidential efficacy" and cannot be the basis for a court's findings or conclusions (*quoting Dandrea v. Bd. of Cnty. Comm'rs*, 144 Colo. 343, 347, 356 P.2d 893, 895 (1960))). Again, we disagree.

¶ 22 The practice negotiates billed on a case-by-case basis, and sometimes negotiated with insurance companies, so it had an exceptionally large accounts receivable balance of $1,329,138. Mr. Schlueter testified that he did not receive the information necessary to determine the actual collection percentage of that balance. He said he spoke with Shelly Behm, the owner of the practice's billing company, but that neither Ms. Behm nor husband were forthcoming with basic information about the practice's billing records. They refused to clarify the collectability of accounts receivable with documentation, and husband did not demonstrate any understanding of the ultimate collectability of accounts receivable. Mr. Schlueter thought that the person in the best position to analyze the collectability of the accounts receivable was Ms. Behm since her company did the bulk of the collections. Ms. Behm told Mr. Schlueter that "the historical collection rates for all clients were around 65%." Based on that statement, Mr. Schlueter

used a 65% collection rate for the practice's accounts receivable balance.

¶ 23 Mr. Schlueter's opinion was not lacking in "evidential efficacy" since he explained through direct and cross-examination the facts and data he relied on to reach a 65% collection rate. *See People v. Alward*, 654 P.2d 327, 331 (Colo. App. 1982) ("[I]t is fundamental that an expert witness may be cross-examined concerning the basis of his opinion."). That husband presented contrary evidence does not mean that Mr. Schlueter's opinion was wrong. Moreover, even after hearing both parties' experts' opinions on this issue, the court still chose to rely on Mr. Schlueter's opinion. *See Bookout*, 833 P.2d at 804 ("The weight to be accorded to the valuation techniques of an expert is for the trial court's determination, depending upon the court's assessment of the reliability of the data in a particular case."). Therefore, the court did not err in adopting a 65% collection rate based on Mr. Schlueter's opinion. *See In re Marriage of Tooker*, 2019 COA 83, ¶ 31 ("[A]ny inferences and conclusions to be drawn from the conflicting evidence were for the district court to resolve.").

¶ 24 In sum, we uphold the valuation of the practice.

B. Separate Property Claims

¶ 25 Husband contends that the court abused its discretion because it included separate property in the marital property distribution. We disagree.

1. 681 East Dry Creek Circle (the Dry Creek home)

¶ 26 Husband argues that the equity in the home he purchased during the dissolution proceedings should be his separate property because he used separate funds to purchase the Dry Creek home. The record does not support this assertion, so we uphold the allocation of the home and its equity as marital property.

a. Additional Facts

¶ 27 In November 2017, wife attempted to block husband from using marital funds to close on the purchase of the Dry Creek home. At a hearing held on wife's request, husband explained that he initially planned to take a loan against the parties' Charles Schwab account to purchase the Dry Creek home but had since decided to take out a $420,000 conventional loan and borrow $222,702 from his brother. Husband averred that he would not use marital funds for the purchase and guaranteed that his brother would not collect on the promissory note until the dissolution

proceedings concluded. "[S]atisfied" by these safeguards made on the record, the court allowed husband to continue with the purchase.

¶ 28 In January 2019, wife asked to use the parties' Charles Schwab account and tax refund to pay her reasonable expenses. In response, husband asked the court to make an equal and permanent division of the Charles Schwab account and award him the tax refund. In February 2019, the court entered the following order:

> 50% of the funds in [the] Schwab account are to be paid out to [wife] with the understanding that such is subject to permanent allocation and perhaps reallocation at temporary orders and/or permanent orders. This payment does not alter any existing orders or obligations for payments by [husband] to or on behalf of [wife].
>
> The Tax Refunds are to be deposited by the parties into a separate account and held there until further order of Court.

¶ 29 Husband thereafter withdrew half of the funds from the Charles Schwab account and took half of the tax refund for himself. Using those funds, husband wired $238,476 to his brother in May 2019 as repayment on the promissory note with interest.

b. Law and Analysis

¶ 30 Property acquired during the marriage is presumed to be marital property absent clear and convincing evidence to the contrary. *In re Marriage of Vittetoe*, 2016 COA 71, ¶ 18. Marital assets are subject to division, while separate assets are not subject to division. *In re Marriage of Jorgenson*, 143 P.3d 1169, 1171-72 (Colo. App. 2006); *see also* § 14-10-113(1), C.R.S. 2020 (requiring a court to set apart separate property to each spouse and to divide the marital property). The classification of property as a marital asset or a separate asset is an issue of law that is based on the court's findings of fact. *In re Marriage of Corak*, 2014 COA 147, ¶ 9.

¶ 31 The court's February 2019 order could not be clearer — *wife* would receive half of the Charles Schwab account and the tax refund would remain in an account until further court order. The court neither expressly nor impliedly awarded the remaining half of the Charles Schwab account to husband, authorized him to take half of the tax refund, or permanently allocated the assets to the parties as their separate property. To the contrary, the order plainly says that the money wife received from the Charles Schwab account would be permanently allocated at a later date and the tax

refund would be "held" until further court order. Thus, the remainder of the Charles Schwab funds and the entire tax refund remained marital assets until distributed by the court at a later time.

¶ 32 The Dry Creek home was presumptively marital because it was purchased during the marriage, and husband did not prove by clear and convincing evidence that it was his separate property. *See Vittetoe*, ¶ 18. Husband repaid his brother during the proceedings with marital funds — money from the Charles Schwab account and the tax refund. And there is no record evidence that husband paid the mortgage on the Dry Creek home with his separate funds. Hence, the district court did not err in finding that the Dry Creek home and its equity were marital assets subject to division.

2. Husband's Mother's Accounts

¶ 33 Husband contends that the court erroneously allocated two accounts holding $30,484 that belonged to his mother. We are not persuaded.

¶ 34 It is the parties' duty to present the district court with the requisite data to value and distribute property, and any failure in

that regard should not provide them with grounds for review. *In re Marriage of Zappanti*, 80 P.3d 889, 892 (Colo. App. 2003).

¶ 35 The court heard the following evidence: (1) husband has been giving his mother an "allowance" since 1997; (2) husband increased the "allowance" to $1,500 per month during the dissolution proceedings; and (3) husband shared two accounts with his mother.

¶ 36 The court heard no other evidence regarding these accounts, including when they were established or how they were funded. On this limited evidence, the court could reasonably find that the two accounts in husband's name were marital assets. *See Tooker*, ¶ 31. We perceive no error by the court in so allocating the $30,484.

III. Maintenance Award

¶ 37 Husband contends that the court abused its discretion by failing to consider whether the maintenance award was fair and equitable to both parties in light of the property division and his decision to retire and move to Cambodia. We disagree.

A. Law

¶ 38 "An award of maintenance shall be in an amount and for a term that is fair and equitable to both parties . . . ." § 14-10-114(2), C.R.S. 2020; *see also* § 14-10-114(3)(e) ("The court has discretion to

determine the award of maintenance that is fair and equitable to both parties based upon the totality of the circumstances."). The court must make certain findings when determining whether to award maintenance. *See* § 14-10-114(3)(a)(I). The court shall award maintenance only if, after making those findings, it finds that the spouse seeking maintenance lacks sufficient property, including marital property apportioned to him or her, to provide for his or her reasonable needs and is unable to support himself or herself through appropriate employment. § 14-10-114(3)(d). A district court has broad discretion in determining the amount and duration of a maintenance award and its order will not be reversed absent an abuse of discretion. *Antuna*, 8 P.3d at 595.

B. Property Award

¶ 39 Husband argues that wife received enough marital property to meet her reasonable needs without a maintenance award. The court disagreed.

¶ 40 Wife received of $1.3 million in retirement assets and $2.8 million in real property, but the court found that these assets were illiquid. Further, using Exhibit 85, wife demonstrated to the court that she would incur significant costs in maintaining the properties,

which would reduce the actual income those assets would produce. For example, wife testified, as reflected in Exhibit 85, that if she received all seven of the parties' rental properties (which we note she did not), she would net $1,277.38 per month after paying the mortgage, homeowners insurance, property taxes, management fees, trash, recycling, homeowner's association fees, and making repairs. The court found that some of wife's costs were inflated, but that the exhibit and testimony nevertheless undermined husband's argument that "these properties will produce a substantial stream of income that will totally provide for [w]ife's reasonable needs."

¶ 41 The court also considered the income potential to wife if she sold the properties, but found that it would take six to nine months to sell the marital home and six months to a year to sell the rental homes (because some still had tenants). In the meantime, wife would still have to pay the costs listed in Exhibit 85. Further, wife would be subject to brokerage commissions and tax consequences on the sales, which husband did not consider when claiming that wife could meet her needs with just the property division. In the end, the court found that wife would not "necessarily have sufficient

resources available to meet her reasonable needs even though she is being awarded almost $4.5 million in marital property."

¶ 42 These findings sufficiently explain why the court found wife could not utilize the property division in a way that would allow her to meet her reasonable needs without an award of maintenance. *See In re Marriage of Rozzi*, 190 P.3d 815, 822 (Colo. App. 2008) ("A trial court's order must contain findings of fact and conclusions of law sufficiently explicit to give an appellate court a clear understanding of the basis of its order and to enable the appellate court to determine the grounds upon which it rendered its decision."). And perceiving no abuse of discretion by the court, we decline to disturb those findings on review.

C. Husband's Retirement

¶ 43 Husband argues that the award of maintenance was unfair in light of his decision to retire and move to Cambodia. As mentioned, husband planned to sell his practice and continue working as a surgeon with Jeremiah's Hope for "the next two to ten years." The court found that husband's career decision was not made in good faith. We uphold this finding because the record supports it.

¶ 44 When determining maintenance, a court may consider whether a spouse is voluntarily unemployed or underemployed. *See In re Marriage of Young*, 2021 COA 96, ¶ 21; § 14-10-114(8)(a)(II). Voluntary underemployment means that the party is shirking a financial obligation by unreasonably forgoing higher paying employment that he or she could obtain. *Young*, ¶ 22.

¶ 45 A spouse may not be deemed voluntarily underemployed if their employment is a good faith career choice. § 14-10-114(8)(c)(V)(B). However, a career change may not be in good faith if it was intended as a means to reduce or eliminate a maintenance obligation. *In re Marriage of Thorstad*, 2019 COA 13, ¶ 38 (concerning maintenance modification); *see also In re Marriage of Swing*, 194 P.3d 498, 501 (Colo. App. 2008) (holding that a spouse's decision to retire must be "made in good faith, meaning not primarily motivated by a desire to decrease or eliminate maintenance"). The court may interpret a spouse's lack of initiative in finding or keeping work as a voluntary refusal to fulfill a support obligation. *See In re Marriage of Campbell*, 140 P.3d 320, 324 (Colo. App. 2006) (child support case).

¶ 46 Husband, who was fifty years old and admitted to being in the prime of his career, voluntarily decided to sell his lucrative surgical practice and move to Cambodia and to continue working as a surgeon for a $36,000 annual stipend. Notably, husband testified that he was making $10,000 *per month* as the trauma director for the practice at the time of the hearing. Husband also testified that he did not want to pay wife anything and that he did not want to work just to finance wife's lifestyle. These facts support the court's finding that husband's career decision was not made in good faith, but instead with the intention to avoid paying a maintenance obligation.

¶ 47 We recognize that maintenance does not guarantee the parties have an equal lifestyle permanently, *Antuna*, 8 P.3d at 595, and that wife's employment choices should not burden husband financially, *see In re Marriage of Mackey*, 940 P.2d 1112, 1114 (Colo. App. 1997) (the mother's choice to stay home with the children and work part-time should not shift the burden to provide child support to the father).

¶ 48 But husband's retirement decision is only one part of the court's overall maintenance analysis. The court must also consider,

among other things, the lifestyle during the marriage. § 14-10-114(3)(c)(III). This is a particularly important factor in a marriage of long duration and where one spouse worked as a homemaker and remained at home to raise the children. *In re Marriage of Sim*, 939 P.2d 504, 507 (Colo. App. 1997). Also, the court must consider the requesting spouse's reasonable needs, which depend on the particular facts and circumstances of the parties' marriage. *See Antuna*, 8 P.3d at 595; *see also* § 14-10-114(3)(a)(I)(D), (c)(I).

¶ 49 Wife stopped working in 2001 to stay home to care for the parties' children. At the time of the hearing, wife was still caring for the parties' two remaining minor children. Wife testified that the parties had an upscale lifestyle during their marriage and spent more than $30,000 per month. She testified that the parties engaged in international travel; dined at nice restaurants; drove nice cars; bought seven homes to use as rental properties; and enrolled their three children in a private school with a $30,000 per child, per year tuition rate.

¶ 50 These factors were relevant to the court's decision to award maintenance and, indeed, the court referenced them in its maintenance analysis. *See In re Marriage of Nelson*, 2012 COA 205,

¶ 23 (maintenance is determined by a discretionary balancing of factors). We conclude that the court appropriately weighed all relevant factors in its maintenance determination, and we disagree that the award is unfair simply because the court did not base its decision on husband's early retirement plans.

¶ 51 We uphold the maintenance award.

IV. Conclusion

¶ 52 The judgment is affirmed.

JUDGE WELLING and JUDGE JOHNSON concur.