Massachusetts Courts Leaning Toward 'Equitable' Solution to the Double Dip

Case name: Kowalska-Davis v. Davis
Citation: 2012 Mass. App. Unpub. LEXIS 213
Date of decision: Feb. 27, 2012
Country: US
State or Federal: State
State/Jurisdiction: Massachusetts
Court: Court of Appeals
Type of action: Marital Dissolution
Experts: unnamed
Judge: Berry, Cohen, and Sikora
SIC: 8021 Offices and Clinics of Dentists

During the marriage, the husband was one of eight partners in a dental practice that also owned commercial real estate. During the parties' divorce, the husband's expert used two methods to value the practice.

Under an excess earnings approach, the husband's expert applied a 2.5% capitalization rate to the salary of the highest paid dentist in the practice, then applied a 55% marketability discount to reach a value for the husband's interest of $225,000. Under a market approach, the expert valued the interest at $188,000. After reconciling the values, he concluded the husband's practice was worth $205,000.

The trial court accepted the expert's excess earnings approach, but disagreed with his selected capitalization rate and marketability discount. Under the court's calculations, the husband's interest in the dental practice was worth $300,000; after subtraction of its debt ($177,000), this left an equity value of $123,000, plus $35,000 for the husband's one-eighth interest in the commercial real estate. The trial court awarded the wife 50% of the total value of the husband's practice, and he appealed.

Argument based on the double dip. In particular, the husband argued that because the dental practice furnished the parties' primary source of support during the marriage, the trial court should not have treated it as a separate asset for purposes of the marital division. In his view, "to assign a value to the business and allocate part of that value to the wife creates a double-dipping for the wife which is inequitable to the husband."

The Court of Appeals acknowledged the "seeming injustice" that occurs when "property is awarded to one spouse in an equitable distribution of marital assets and then also considered as a source of income for purposes of imposing support obligations." See *Champion v. Champion*, 2002 Mass. App. LEXIS 363 (available at *BVLaw*.)

At the same time, Massachusetts courts have “declined to find inequitable double dipping” in those cases in which it is possible to identify the separate portions of a given asset that furnish the basis for separate awards of support and property distribution. For example, in a prior case in which one spouse owned a solo proprietorship, “it was possible to identify these separate bases by distinguishing the income of the business from the reasonable salary of the owner-operator, which was deducted as an expense from the business income,” the court explained, citing *Sampson v. Sampson*, 2004 Mass. App. LEXIS 1223 (also available at *BVLaw*).

In this case, the husband argued that the trial court failed to make specific findings that separated his income from the net income of the business. Although the trial court purportedly based its valuation on an excess earnings approach—and there was some evidence that the expert also considered the husband’s salary—the record was incomplete. In fact, portions of the transcript were missing, including the entire testimony by the husband’s expert.

As a result, the appellate court was “unfortunately” left without enough evidence to “shed light” on the husband’s argument, which was his burden to carry. In an unpublished decision, the court declined to disturb the trial court’s valuation for a possible double dip, leaving the issue for a future case, with a better supported record, to clarify and perhaps confirm.