

**ESOP** *from page 2*

agreed with the husband and the trial court adopted that recommendation. The wife appealed.

On appeal, the wife argued that the magistrate incorrectly interpreted the MSA. The appellate court disagreed. It reasoned that since the ESOP ceased to be marital property when the MSA was executed and the MSA awarded the wife a monetary interest rather than

an ownership interest in the ESOP, she was not entitled to any post-MSA appreciation in the ESOP stock. Further, it similarly reasoned that the wife was not entitled to share in the dividends earned on the ESOP stock after the MSA was executed. The appellate court concluded that the MSA was clear and unambiguous and the MSA limited the wife to a fixed monetary amount based on the 2002 value of the ESOP interest to be paid when the husband retired. ❖

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# Valuation Newsletter

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## Business's Post-Separation Declines Considered

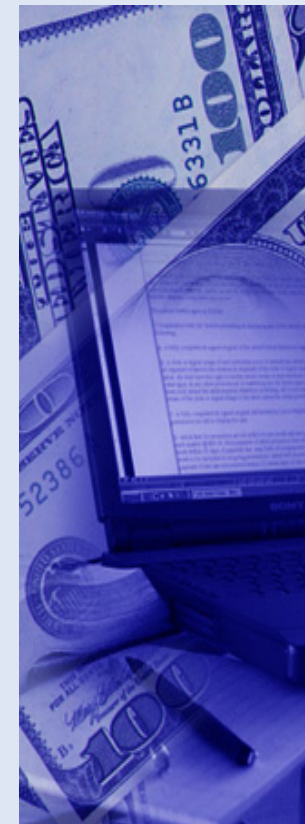
*In Michelle L. Grosnickle v. Harold L. Grosnickle, III, 2007 Ohio 3613 (Ohio App. 12 Dist. July 16, 2007), the Ohio Court of Appeals, Twelfth Appellate District, considered several issues relating to the valuation of a plumbing business.*

The husband, a plumber, and the wife acquired a 10% interest in the business as a bonus from the previous owner. In 2003, they purchased the remaining interest for \$41,000. Between the date of acquisition and September 2004, the date of separation, the parties jointly operated the business. The husband performed all the manual labor, working 60 to 70 hours weeks, while the wife handled the business operations and administration. Dur-

ing this period, the business's profits increased. As a result, the husband earned \$59,000 in 2002, \$49,000 in 2003, and \$58,000 in 2004.

Following the parties' separation, the business suffered a decline in profitability. The decline resulted from the actions of both parties. The wife fired the business's staff, terminated its line of credit, and ceased managing the business. Further, her father prohibited the husband access to the business's vehicles and tools for a short period of time. The husband failed to mitigate the wife's actions, negligently operated the business during the post-separation period, and took on significant debt to con-

*SEPARATION continued on page 3*



*A discussion of recent  
valuation & taxation  
rulings regarding divorce*

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## Institutional Goodwill Is Marital Property Despite Non-Compete Agreement

*In In re the Marriage of Baker, No. A06-1252 (Minn. App. July 3, 2007), the Minnesota Court of Appeals considered whether institutional goodwill should be included in the value of a business when a hypothetical buyer of the business would require the business owner spouse to execute a non-competes agreement in connection with the sale.*

The husband was a surgeon engaged in private practice prior to and throughout the marriage. The trial court appointed an expert to value the practice.

The court-appointed expert determined the practice had a value of \$112,000 exclusive of goodwill. He further determined that the business had a value of \$365,000 inclusive of personal and institutional goodwill. He defined institutional goodwill as having a work force, lease, and hospital relationship in place. He assigned a value of \$73,000 to the institutional goodwill. However, he reasoned that institutional goodwill should be excluded from the value of the practice because a hypothetical buyer of the practice would require the husband to execute a non-competes agreement.

*AGREEMENT continued on page 3*

## Malpractice Claim Brought Where Valuation of Medical Practice Was Not Obtained

In *Traystman, Coric and Keramidas v. Martha Hundley*, No. AC 27415 (Conn. App. July 17, 2007), the Connecticut Court of Appeals affirmed a lower court's finding that an attorney did not commit malpractice when an appraisal of the owner-spouse's business was not obtained where the non-owner spouse was advised to obtain an appraisal of the owner-spouse's business and signed a statement rejecting that advice.

Hundley engaged Traystman, Coric and Keramidas ("TCK") to represent her in her divorce from her physician-husband. Her husband operated a private practice that owned the real estate where the practice was located. The husband did not disclose any value of the practice or its real estate. TCK advised Hundley that an appraisal of the practice and its real estate should be obtained. However, Hundley signed a statement rejecting that advice. Hundley was not awarded any value of the practice or its real estate in the divorce.

Hundley did not pay TCK's final bill of \$2,825.09, and TCK sued to recover that amount. Hundley counter-

claimed for malpractice. At trial, the judge instructed the jury that "an attorney does not commit legal malpractice where, after impressing upon the client the importance of having an appraisal of her husband's professional good will and his real estate, the client instructs the attorney not to proceed with the appraisals and signs a letter stating that she is proceeding without the appraisals and against the attorney's advice." The jury awarded TCK damages of \$3,345.20 and found against Hundley on the malpractice claim. She appealed.

On appeal, Hundley argued that the jury "instruction was too restrictive because it focused on [the attorney's] actions rather than on whether the defendant reasonably could have agreed to proceed with the dissolution trial without obtaining a valuation...." The appellate court rejected Hundley's argument. It found that the jury instruction adequately stated the law. Further, "the issue at trial was whether [TCK] properly advised the defendant, not whether the defendant made a reasonable decision to proceed with the dissolution trial." ❖

## ESOP Appreciation and Dividends Are Separate Property

In *Maritza Rivero v. Jorge H. Rivero*, No. 3D06-481 (Fla. 3 DCA July 18, 2007), the Florida Court of Appeal, Third District, affirmed a magistrate's decision limiting a former wife's interest in an employee stock option plan ("ESOP") to a monetary amount even though that amount would not be distributed until the ESOP owner retired.

The defendant was employed by Publix Supermarket, a private, employee-owned company that reports under the Securities Exchange Act of 1934. The husband held 7,543 shares of Publix stock through the ESOP, which had an approximate value of \$287,146.95 in 2002 when the parties executed their marital settlement agreement ("MSA"). The MSA assigned the ESOP a value of \$300,000 and awarded the wife one-half that value payable when the husband leaves Publix or retires. The ESOP interest was otherwise awarded to the husband.

Between 2002 and 2005, the value of Publix stock rose from \$40.00 per share to \$72.75 per share. Further, Publix declared dividends in each year. The husband retained all dividends issued by Publix.

In 2005, the wife sought readjustment of the support orders. As part of her claim, she argued that the husband improperly retained the entire dividends declared on the Publix stock. The husband sought a motion for clarification of the wife's interest in the Publix ESOP. He claimed that the MSA was clear and unambiguous and limited the wife's interest to one-half the stipulated 2002 value of the ESOP. Further, he argued that the wife was not entitled to share in the appreciation of the ESOP or in the dividends declared on the ESOP stock. The Magistrate

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## Separation from page 1

tinue business operations. Further, his time available to contribute to the business was diminished because his parental responsibilities increased.

The value of the business was an issue before the trial court, but neither party provided the trial court with an expert appraiser's opinion. The husband argued that the business was worthless considering the decline in profitability experienced during the post-separation period and the increase in the business's debt. The wife argued that the business had substantial value and the post-separation decreases should not be taken in account. The trial court rejected both parties' positions, finding the decline was the result of both parties' actions. It then valued the business on the 2005 date of trial by reference to the purchase price, inclusive of costs, of the business at the time of its acquisition in 2004. Thus, it valued the business at \$51,000. Further, it determined that the husband's income available for support was only \$35,000 per year. In reaching this decision, it considered the post-separation decline of the business and the husband's increased parental responsibilities. Both parties appealed.

On appeal, the parties contested the valuation of the business. The husband renewed his argument that the business was worthless while the wife argued that the post-separation declines should not be considered. The appellate court rejected both parties' positions. The appellate court determined that the trial court's findings that the business was successful before the parties' separation, suffered decline during the post-separation period, but remained viable were not in error. Further in the absence of evidence such as expert testimony providing some other value, the appellate court found that the trial court's assessment of the value based on the actual purchase price was not in error.

The wife also argued that the trial court erred when it determined the husband's income for child support purposes below an amount that the husband historically earned from the plumbing business. The appellate court rejected that argument. While acknowledging that the husband made substantially more in the years before the separation, it affirmed the lower court's consideration of the business's decline and the husband's inability to continue to contribute long hours to the business due to his increased parental responsibilities occasioned by the divorce. ❖

## Agreement from page 1

The trial court adopted the expert's opinion and valued the practice at \$112,000. In doing so, it reasoned that since the husband would be required to execute a non-compete agreement and the non-compete agreement restricted his future earnings, all the goodwill was non-marital property. *Grigsby v. Grigsby*, 648 N.W.2d 716, 722 (Minn. App. 2002), review denied (Minn. Oct. 15, 2002). The wife appealed.

On appeal, the wife argued that the trial court erred when it characterized the institutional goodwill as non-marital property because it was subject to a non-compete agreement. The appellate court agreed. It determined that when a non-compete agreement is executed as part of a business transaction, it may be a device to

restrict the future employment of the seller, to protect the goodwill value of the sold business, or some combination of the two. The court then determined that institutional goodwill is not related to the future employment of the hypothetical seller in this case but related to the business. It concluded, "[E]ven if a buyer required a noncompetition agreement to be attached to the value of the practice's intuitional goodwill in addition to the value of husband's personal goodwill, that portion of the noncompetition agreement pertaining to the institutional goodwill would not be intended to restrict husband's future employment." Therefore, it reversed the lower court's valuation of the practice for inclusion of the institutional goodwill in the value of the practice. ❖