

DIVORCE LITIGATION

Volume 20/Number 1

February 2010

CLASSIFICATION AND DIVISION OF BUSINESS AND PROFESSIONAL GOODWILL

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Few issues have divided American courts over the past thirty years as much as division of business and professional goodwill in divorce cases. Some courts and commentators claim that goodwill is nothing more than future earnings, and that attempts to divide it are nothing more than a thinly-disguised demand for additional spousal support. Other courts and commentators claim that goodwill is an asset of real economic value, and that the actual products of the marital partnership cannot be fully and fairly divided unless goodwill is included. In the past ten years, the decisions have moved slowly toward consensus on the key legal issues. But applying the law to the facts remains as difficult as ever.

I. Overview

One of the most valuable types of property owned by many divorcing spouses is a business or professional practice. Regardless of whether the business or practice can be sold on the open market as a going concern, all businesses own tangible assets which were acquired by purchase and which can be sold in a similar manner. There is no doubt, therefore, that businesses and professional practices

constitute marital property. *See, e.g., Esposito v. Esposito*, 651 So. 2d 1248 (Fla. Dist. Ct. App. 1995); *Benjamin v. Benjamin*, 798 N.E.2d 881 (Ind. Ct. App. 2003); *Peddycord v. Peddycord*, 479 N.E.2d 615 (Ind. Ct. App. 1985); *McNamara v. McNamara*, 178 Mich. App. 382, 443 N.W.2d 511 (1989); *Stern v. Stern*, 66 N.J. 340, 331 A.2d 257 (1975); *Cohen v. Cohen*, 104 A.D.2d 841, 480 N.Y.S.2d 358 (1984); *McLean v. McLean*, 323 N.C. 543, 374 S.E.2d 376 (1988); *Hardy v. Hardy*, 2005 WL 2660627 (Ohio Ct. App. 2005); *Calhoun v. Calhoun*, 331 S.C. 157, 501 S.E.2d 735 (Ct. App. 1998) (tangible assets of wife's solo law practice were marital property), *aff'd in part, rev'd in part*, 339 S.C. 96, 529 S.E.2d 14 (2000); *Smith v. Smith*, 709 S.W.2d 588 (Tenn. Ct. App. 1985) (excellent discussion). The divisible asset is of course the owning spouse's *interest* in the business, not the actual business assets. *See Wilen v. Wilen*, 61 Md. App. 337, 486 A.2d 775 (1985) (partnership); *Bannen v. Bannen*, 286 S.C. 24, 331 S.E.2d 379 (Ct. App. 1985).

The difficult legal question with regard to businesses and professional practices is whether they can be valued at an amount over and above the value of their tangible assets. While this question

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technically involves valuation, the core of the dispute is a classification question: whether the intangible business asset known as goodwill meets the definition of marital property. Nationwide case law addressing the dispute has long been divided.

The debate over divisibility of goodwill involves substantial amounts of money. In states where goodwill is divisible, its value is often substantially greater than the tangible assets of the practice. *See, e.g., Mitchell v. Mitchell*, 152 Ariz. 317, 732 P.2d 208 (1987) (accountant practice; \$35,000 tangible assets and \$115,000 goodwill); *Sorenson v. Sorenson*, 769 P.2d 820 (Utah Ct. App. 1989) (dental practice; \$37,500 tangible assets and \$62,560 goodwill); *Marion v. Marion*, 11 Va. App. 659, 401 S.E.2d 432 (1991) (veterinary practice; \$64,000 tangible assets and \$46,000 goodwill); *Russell v. Russell*, 11 Va. App. 411, 399 S.E.2d 166 (1990) (psychiatric practice; \$10,700 tangible assets and \$40,000 goodwill). The practical effort of excluding unrealizable goodwill from the marital estate is therefore often to reduce the value of the business by 50% or more.

The first step in understanding the division of authority on the divisibility of good will is to define goodwill accurately. When businesses are bought and sold on the open market under conditions far removed from any divorce case, the negotiated sale

price is often greater than the total net value of the tangible assets of the business involved. This fact is neither a theory of law nor an axiom of economics: it is a simple observation of how the commercial world operates.

Why are real-world buyers often willing to pay more for a business than the total net value of its tangible assets? The answer lies in the fact that the income of a business depends upon many factors other than its assets. Some of these factors, such as a convenient business location or the loyalty of long-time customers, survive a change in ownership. Because some of these factors survive, real-world buyers know that certain businesses are likely to produce more future income than their assets alone would suggest, and they are willing to pay an increased price to purchase those businesses. That increase in price constitutes goodwill. *See generally Hanson v. Hanson*, 738 S.W.2d 429, 433 (Mo. 1987) (goodwill is "an economic advantage which exists when the total value of a business is more than the value of its identifiable assets") (quoting Welsch, Zlatovich & Harrison, *Intermediate Accounting* 438 (6th ed. 1982)); *Taylor v. Taylor*, 222 Neb. 721, 386 N.W.2d 851, 857 (1986) (goodwill is "an asset of recognized value beyond the tangible assets" of the business).

If goodwill represents potential sale price above and beyond the value of a business's tangible assets,

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DIVORCE LITIGATION (ISSN 1050-141X) is published by National Legal Research Group, Inc., a Research Group Company, 2421 Ivy Road, Post Office Box 7187, Charlottesville, Virginia 22906; (800) 727-6574. New issues are posted periodically for purchase on the Internet at www.nlrg.com/divlit.

Send address changes to **DIVORCE LITIGATION**, Post Office Box 7187, Charlottesville, Virginia 22906, or send e-mail to divlit@nlrg.com.

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a spouse owns goodwill only when the spouse owns the business. As a matter of law, a spouse who is not an owner cannot have goodwill. See *Blankenship v. Kerr*, 225 A.D.2d 645, 639 N.Y.S.2d 841 (1996) (salaried attorney has no divisible goodwill); *Sonek v. Sonek*, 105 N.C. App. 247, 412 S.E.2d 917 (1992); *In re Marriage of Stuart*, 107 Or. App. 549, 813 P.2d 49 (1991); *Saint-Pierre v. Saint-Pierre*, 357 N.W.2d 250 (S.D. 1984); *Mills v. Mills*, 167 Vt. 567, 702 A.2d 79 (1997) (salaried attorney has no divisible goodwill); *In re Marriage of Hall*, 103 Wash. 2d 236, 692 P.2d 175 (1984); cf. *Gilman v. Hohman*, 725 N.E.2d 425 (Ind. Ct. App. 2000) (where husband was only employee, he had no divisible goodwill, and wife's attorney did not commit malpractice by failing to take steps to value it).

Since goodwill is the additional price which a real-world buyer is willing to pay to purchase a business with a strong likelihood of future earnings, the degree to which a business can be sold on the open market is critical to determining whether goodwill is marital property. If the business can be sold, its goodwill is an asset with real, immediate, tangible cash value. If the business cannot be sold, its goodwill is much less tangible.

In what situations is the goodwill of a business realizable through sale? The most obvious requirement is that the business must be one which can be transferred to another party. Some businesses are very closely tied to the personal identity and reputation of the owner, and cannot be sold to another person. The goodwill of these businesses, often called *individual goodwill*, generally cannot be sold.

Conversely, other businesses are transferable entities with a reputation distinct from the reputation of their owners. The classic example is a corporation whose stock is traded on a public stock exchange. The goodwill of these business,

often called *enterprise goodwill*, clearly can be sold.

The next section will discuss the classification of goodwill which can be realized through sale on the open market. We will then discuss the classification of goodwill which cannot be so realized.

II. Realizable (Enterprise) Goodwill

A. General Rule: Marital Property

The easiest type of goodwill to classify is realizable goodwill—goodwill which the owner can convert into cash at any time by selling his business on the open market. Where goodwill is readily convertible into a cash equivalent, the cases agree almost uniformly that it constitutes marital property. See *Wright v. Wright*, 904 P.2d 403 (Alaska 1995); *Hunt v. Hunt*, 698 P.2d 1168 (Alaska 1985); *Nicholson v. Nicholson*, 11 Ark. App. 299, 669 S.W.2d 514 (1984); *Malkowski v. Malkowski*, 613 So. 2d 924 (Fla. Dist. Ct. App. 1993); *Olsen v. Olsen*, 125 Idaho 603, 873 P.2d 857 (1994); *Carr v. Carr*, 108 Idaho 684, 701 P.2d 304 (Ct. App. 1985); *In re Marriage of Talty*, 166 Ill. 2d 232, 652 N.E.2d 330 (1995); *DeSalle v. Gentry*, 818 N.E.2d 40 (Ind. Ct. App. 2004); *Hollander v. Hollander*, 89 Md. App. 156, 597 A.2d 1012 (1991); *Knigge v. Knigge*, 903 S.W.2d 225 (Mo. Ct. App. 1995); *Nastrom v. Nastrom*, 262 N.W.2d 487 (N.D. 1978); *Traczyk v. Traczyk*, 891 P.2d 1277, 1279 (Okla. 1995); *In re Marriage of Triperinas*, 185 Or. App. 283, 59 P.3d 586 (2002); *Fexa v. Fexa*, 396 Pa. Super. 481, 578 A.2d 1314 (1990); *Ullom v. Ullom*, 384 Pa. Super. 514, 559 A.2d 555 (1989); *Moretti v. Moretti*, 766 A.2d 925 (R.I. 2001); *Endres v. Endres*, 532 N.W.2d 65 (S.D. 1995); *Finch v. Finch*, 825 S.W.2d 218 (Tex. App. 1992); *Buckl v. Buckl*, 373 Pa. Super. 521, 542 A.2d 65 (1988); *Hoebelheinrich v. Hoebelheinrich*, 43 Va. App. 543, 600 S.E.2d 152 (2004); *May v. May*, 214 W. Va. 394, 589 S.E.2d 536 (2003); *In re Marriage of Peerenboom*, 147

Wis. 2d 547, 433 N.W.2d 282 (Ct. App. 1988); *Lewis v. Lewis*, 113 Wis. 2d 172, 336 N.W.2d 171 (Ct. App. 1983).

Given that realizable goodwill has an immediate cash value, it cannot plausibly be argued that it represents nothing more than speculative future earnings. If increased future earnings are sufficiently likely that buyers in arms' length transactions are willing to pay an enhanced price, the increased earnings are not at all speculative. As one court noted, "[t]rue goodwill reflects not simply a *possibility* of future earnings, but a *probability* based on existing circumstances." *Prahinski v. Prahinski*, 75 Md. App. 113, 540 A.2d 833, 841 (1988), *aff'd*, 321 Md. 227, 582 A.2d 784 (1990).

A number of states have first considered the classification of goodwill in a case involving unrealizable goodwill, and held broadly that goodwill is never marital property. When the question has arisen in a case involving realizable goodwill, however, these states have distinguished their prior case law and limited it to unrealizable goodwill.

For cases from these states seeming to hold that goodwill can never be divided, see *In re Marriage of Zells*, 143 Ill. 2d 251, 572 N.E.2d 944 (1991); *Head v. Head*, 168 Ill. App. 3d 697, 523 N.E.2d 17 (1988); *Courtright v. Courtright*, 155 Ill. App. 3d 55, 507 N.E.2d 891 (1986); *DeMasi v. DeMasi*, 366 Pa. Super. 19, 530 A.2d 871 (1987); *Beasley v. Beasley*, 359 Pa. Super. 20, 518 A.2d 545 (1986); *Nail v. Nail*, 486 S.W.2d 761 (Tex. 1972); *Finn v. Finn*, 658 S.W.2d 735 (Tex. App. 1983); *Holbrook v. Holbrook*, 103 Wis. 2d 327, 309 N.W.2d 343 (Ct. App. 1981). For later decisions from the same states limiting the earlier decisions to unrealizable goodwill, see *Talty*; *Fexa*; *Buckl v. Buckl*, 373 Pa. Super. 521, 542 A.2d 65 (1988); *Geesbrecht v. Geesbrecht*, 570 S.W.2d 427 (Tex. Civ. App. 1978); and *Peerenboom*.

B. Professional Practice

Realizable enterprise goodwill is a valid element of value if even the enterprise at issue is a professional practice. As a Colorado court noted:

Professional practices that can be sold for more than the value of their fixtures and accounts receivables have salable goodwill. A professional, like any entrepreneur 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 his professional expertise. These expectations are a part of goodwill, and they have a pecuniary value While we recognized that professional goodwill is not an asset which has an independent market value, it can, in conjunction with the assets of the practice, be sold. This limited marketability distinguishes professional goodwill from the advanced educational degree[.]

In re Marriage of Nichols, 43 Colo. App. 383, 606 P.2d 1314, 1315 (1979).

To similar effect is an Idaho decision:

There seems to be no principled reason to treat the goodwill of a business differently when it is a professional services corporation. The property rights of individuals with professional educations and licenses do not differ from the rights of people engaged in other types of business. Determining the value of goodwill in small professional services corporations may indeed be difficult, since Idaho law treats personal skill and reputation as separate assets rather than community property. . . . Where a professional business is an independent entity, however, goodwill is

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calculable and divisible in divorce just as goodwill in any other business.

Stewart v. Stewart, 143 Idaho 673, 152 P.3d 544, 548-49 (2007).

The list of cases by type of business which follows this article cites many cases finding enterprise goodwill to exist in a professional practice.

C. Minority Rule

Two states hold that realizable enterprise goodwill is not marital property. See *Yelverton v. Yelverton*, 961 So. 2d 19, 29 (Miss. 2007) ("goodwill,' whether 'personal goodwill' or 'business enterprise goodwill' shall not be included in the valuation of Jim Yelverton Imports"); *Dickert v. Dickert*, 2010 WL 98698 (S.C. 2010); *Casey v. Casey*, 293 S.C. 503, 362 S.E.2d 6 (1987). These cases essentially insist that business must be limited to their net asset value, *even if they could be immediately sold on the open market for a materially greater sum*. This rule is terrible policy, and it has been widely rejected in other states.

III. Unrealizable (Individual) Goodwill

Division of goodwill is a closer question when the business in question cannot be sold on the open market. This fact situation applies most frequently to law and other professional practices, but it has also been applied to other types of nonprofessional small businesses where the business is essentially marketing the personal skills of the owner.

Case law on division of unrealizable goodwill has traditionally been divided, and at one point the division was close to equal. See generally Brett R. Turner, *Equitable Distribution of Property* § 6.22

(2d ed. 1994). In the past ten years, there has been a clear shift away from dividing unrealizable goodwill, and the states which refuse to divide such goodwill are now in the majority.

A. Policy Arguments: Separate Property

Courts refusing to divide unrealizable goodwill have made a number of different but related arguments. First, dividing goodwill would divide the owner's future earnings. The Nebraska Supreme Court has held:

[I]f goodwill depends on the continued presence of a particular individual, such goodwill, by definition, is not a marketable asset distinct from the individual. Any value which attaches to the entity solely as a result of personal goodwill represents nothing more than probable future earning capacity, which, although relevant in determining alimony, is not a proper consideration in dividing marital property in a dissolution proceeding.

Taylor v. Taylor, 222 Neb. 721, 386 N.W.2d 851, 858 (1986). The Wisconsin Court of Appeals has made this point more succinctly: "The concept of professional goodwill evanesces when one attempts to distinguish it from future earning capacity." *Holbrook v. Holbrook*, 103 Wis. 2d 327, 309 N.W.2d 343, 354 (Ct. App. 1981).

Second, a spouse who owns unrealizable goodwill can never actually recover the value of that goodwill on the open market. A Wisconsin decision explained:

Like an educational degree, a partner's theoretical share of a law firm's goodwill cannot be exchanged on an open market: it cannot be assigned, sold, transferred, conveyed or pledged. Although we recognize

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the factual distinction between a degree-holder and a partner or shareholder in a law firm, we think the similarities compel analogous treatment in a divorce setting. In both cases, the "asset" involved is not salable and has computable value to the individual only to the extent that it promises increased future earnings.

There is a 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.

309 N.W.2d at 354-55 (footnotes omitted); *see also Wilson v. Wilson*, 294 Ark. 194, 741 S.W.2d 640, 647 (1987) ("[F]or goodwill to be a marital asset, it 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"); *Travis v. Travis*, 795 P.2d 96 (Okla. 1990) (adopting the holding in *Holbrook*).

Third, goodwill is indistinguishable from the owning spouse's personal reputation. A Kansas court stated:

[A professional] practice is personal to the practitioner. When he or she dies or retires nothing remains. The professional's files and lists of clients are of no use to others. The very nature of a professional practice is that it is totally dependent upon the professional.

Powell v. Powell, 231 Kan. 456, 648 P.2d 218, 223 (1982). A Wisconsin court made the same point:

Although a professional business's good reputation, *which is essentially what its goodwill consists of*, is certainly a thing of value, we do not believe that it bestows on those who have an ownership interest in the

business, an actual, separate property interest. The reputation of a law firm or some other professional business is valuable to its individual owners to the extent that it assures continued substantial earnings. . . . The goodwill or reputation of such a business accrues to the benefit of the owners only through increased salary.

Holbrook, 309 N.W.2d at 354 (emphasis added); *accord Nail v. Nail*, 486 S.W.2d 761 (Tex. 1972).

Courts which refuse to divide unrealizable goodwill have recognized that such goodwill is to some extent a product of the nonowning spouse's efforts. These courts have held, however, that the nonowning spouse is already sufficiently compensated for those contributions in two distinct ways. First, the court considers these contributions when it divides the other marital property. An Illinois court has noted:

Although many businesses possess this intangible asset known as good will, the concept is unique in a professional business. The concept of professional good will is the sole asset of the professional. If good will is that aspect of a business which maintains the clientele, then the good will in a professional business is the skill, the expertise, and the reputation of the professional. It is these qualities which would keep patients returning to a doctor and which would make those patients refer others to him. The bottom line is that this is reflected in the doctor's income gathering ability.

Courtright v. Courtright, 155 Ill. App. 3d 55, 507 N.E.2d 891, 894 (1987); *see also In re Marriage of Zells*, 143 Ill. 2d 251, 572 N.E.2d 944 (1991) (similar decision from the Illinois Supreme Court relying extensively on *Courtright*). Since a doctor's income-gathering ability is already considered once

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by the court when it determines how much of the marital property to award to each spouse, the court held that goodwill need not be considered as a separate item of marital property. *Courtright*, 507 N.E.2d at 894.

Second, since future earnings and professional reputation form a large part of a business owner's income capacity, these interests are also fully considered when the court sets its alimony award. If some portion of the owner's future earnings are treated as "goodwill" and distributed immediately, the owner will be doubly penalized when the same income is treated as a resource from which to pay alimony. The Pennsylvania Superior Court recently held:

The single exception to contingent value to be considered under the partnership concept of acquisition of marital property, which is both presently unascertainable and subject to double assessment through alimony, is professional good will. Thus no matter how ingenious the formulae are in establishing "value," assessing it as value and subjecting the same assessment to alimony is inequitable and prohibited by the Divorce Code.

Beasley v. Beasley, 359 Pa. Super. 20, 518 A.2d 545, 554 (1986); *accord Casey v. Casey*, 293 S.C. 503, 362 S.E.2d 6 (1987); *Smith v. Smith*, 709 S.W.2d 588 (Tenn. Ct. App. 1985); *DeMasi v. DeMasi*, 366 Pa. Super. 19, 530 A.2d 880 (1987).

For cases accepting the above arguments and holding that unrealizable goodwill is not divisible, see *Fortson v. Fortson*, 131 P.3d 451 (Alaska 2006); *Kelsey v. Kelsey*, 186 Ariz. 49, 918 P.2d 1067 (Ct. App. 1996); *Tortorich v. Tortorich*, 50 Ark. App. 114, 902 S.W.2d 247 (1995); *Wilson v. Wilson*, 294 Ark. 194, 741 S.W.2d 640 (1987); *Eslami v. Eslami*, 218 Conn. 801, 591 A.2d 411 (1991); *Thompson v. Thompson*, 576 So. 2d 267

(Fla. 1991); *Weinberg v. Dickson-Weinberg*, 121 Haw. 401, 220 P.3d 264 (Ct. App. 2009); *Antolik v. Harvey*, 7 Haw. App. 313, 761 P.2d 305 (1988); *In re Marriage of Zells*, 143 Ill. 2d 251, 572 N.E.2d 944 (1991); *Head v. Head*, 168 Ill. App. 3d 697, 523 N.E.2d 17 (1988); *Courtright v. Courtright*, 155 Ill. App. 3d 55, 507 N.E.2d 891 (1986); *In re Marriage of Bethke*, 484 N.W.2d 604 (Iowa Ct. App. 1992); *In re Marriage of Hogeland*, 448 N.W.2d 678 (Iowa Ct. App. 1989); *Powell v. Powell*, 231 Kan. 456, 648 P.2d 218, 223 (1982); *Gaskill v. Robbins*, 282 S.W.3d 306, 312 (Ky. 2009); *Preis v. Preis*, 649 So. 2d 593 (La. Ct. App. 1994); *Pearce v. Pearce*, 482 So. 2d 108 (La. Ct. App. 1986); *Depner v. Depner*, 478 So. 2d 532 (La. Ct. App. 1985); *Ahern v. Ahern*, 938 A.2d 35 (Me. 2008); *Prahinski v. Prahinski*, 75 Md. App. 113, 540 A.2d 833 (1988), *aff'd*, 321 Md. 227, 582 A.2d 784 (1990); *Hanson v. Hanson*, 738 S.W.2d 429 (Mo. 1987); *Taylor v. Taylor*, 222 Neb. 721, 386 N.W.2d 851 (1986); *Josselson v. Josselson*, 52 Ohio App. 3d 60, 557 N.E.2d 835 (1988); *Travis v. Travis*, 795 P.2d 96 (Okla. 1990); *Casey v. Casey*, 860 P.2d 807 (Okla. Ct. App. 1993); *Ford v. Ford*, 840 P.2d 36 (Okla. Ct. App. 1992); *Soloman v. Soloman*, 531 Pa. 113, 611 A.2d 686 (1992); *DeMasi v. DeMasi*, 366 Pa. Super. 19, 530 A.2d 871 (1987); *Beasley v. Beasley*, 359 Pa. Super. 20, 518 A.2d 545 (1986); *Donohue v. Donohue*, 299 S.C. 353, 384 S.E.2d 741 (1989); *Hazard v. Hazard*, 833 S.W.2d 911 (Tenn. Ct. App. 1991); *Nail v. Nail*, 486 S.W.2d 761 (Tex. 1972); *Finn v. Finn*, 658 S.W.2d 735 (Tex. App. 1983); *Smith v. Smith*, 709 S.W.2d 588 (Tenn. Ct. App. 1985); *Sorenson v. Sorenson*, 839 P.2d 774 (Utah 1992); and *Holbrook v. Holbrook*, 103 Wis. 2d 327, 309 N.W.2d 343 (Ct. App. 1981). *See also Jondahl v. Jondahl*, 344 N.W.2d 63 (N.D. 1984) (court can divide goodwill, but not the personal entrepreneurial skill of the owning spouse); *cf. Gibbons v. Gibbons*, 619 A.2d 432 (R.I. 1993) (split decision; two judges essentially held that the goodwill of a solo practitioner is not divisible, while two other judges held that the issue was not presented).

B. Policy Arguments: Marital Property

A minority of courts continue to treat unrealizable goodwill as marital property. These states recognize that when goodwill cannot be realized, it cannot be immediately converted into cash. But many assets with no immediate cash value are treated as marital property. Unvested retirement benefits, for example, cannot be converted into cash for many years to come, and indeed may be lost before they vest. But they are still treated as marital property in almost every state. *See generally* Turner, *supra*, § 6:22. States following the minority rule reason that like an unvested pension, goodwill provides a sufficiently high probability of future earnings that it constitutes presently existing divisible property. *See, e.g., Mitchell v. Mitchell*, 152 Ariz. 317, 732 P.2d 208, 211 (1987) ("The better analogy is to pension rights which are marital property"); *Clark v. Clark*, 782 S.W.2d 56 (Ky. Ct. App. 1990); *Ford v. Ford*, 105 Nev. 672, 782 P.2d 1304 (1989).

To the extent that the probability is less than a complete certainty, the proper response is to discount the value of the goodwill, and not to exclude it entirely from division.

It should also be noted that in very few of the realizable goodwill cases does the owning spouse have any actual plans to sell the business in the foreseeable future. In reality, therefore, most spouses who own marketable business receive the value of their goodwill through enhanced future earnings and not through sale on the open market. The fact that a business cannot be sold diminishes in importance when one realizes that very few marketable businesses actually are sold upon or after the divorce. In the real world, both nonprofessional and professional owners realize the value of goodwill in the same manner: through enhanced future earnings after the divorce. For this reason, "a doctor's goodwill has value despite its

immarketability." *Ford*, 782 P.2d at 1310; *see also Hurley v. Hurley*, 94 N.M. 641, 615 P.2d 256 (1980).

States following the minority rule see a very real difference between unrealizable goodwill and the future earnings of the owning spouse. Goodwill does not consist solely of future earnings; it consists of that portion of future earnings which are caused by presently existing factors such as location and reputation. In other contexts where the products of marital contributions are realized after the divorce, courts have had little difficulty concluding that the future earnings constitute property acquired during the marriage. The most common analogy is again retirement benefits, which are marital property to the extent they are earned during the marriage, even if they are not received until many years after divorce. *See also* Turner, *supra*, § 5:22 (bonuses acquired after the marriage are marital property if they are consideration for marital efforts).

Minority rule states also see a substantial difference between unrealizable goodwill and the owning spouse's personal reputation. Even in the professional context, goodwill is often based upon factors other than reputation. Law firms, for instance, frequently retain the name of a retired or deceased partner until many years after his or her death. This fact is strong evidence that lawyers do have a transferable capacity to generate repeat business which exists even after they have left the firm in question. Likewise, professional practices may attract business based on a desirable location as well as upon factors unique to the professional. For example, a dentist would probably attract more business by practicing on the ground floor of a busy office building than by practicing in an isolated building. There is certainly a degree of overlap between goodwill and personal reputation, but the two concepts are not by any means entirely identical.

For minority cases holding that unrealizable goodwill is marital property, see *Mitchell*; *In re Marriage of Marron*, 170 Cal. App. 3d 151, 215 Cal. Rptr. 894 (1985); *In re Marriage of Antuna*, 8 P.3d 589 (Colo. Ct. App. 2000); *In re Marriage of Banning*, 971 P.2d 289 (Colo. Ct. App. 1998); *In re Marriage of Huff*, 834 P.2d 244 (Colo. 1992); *In re Marriage of Nichols*, 43 Colo. App. 383, 606 P.2d 1314 (1979); *McDiarmid v. McDiarmid*, 649 A.2d 810 (D.C. 1994); *In re Marriage of Stufft*, 276 Mont. 454, 916 P.2d 767 (1996) (law firm); *In re Marriage of Lopez*, 255 Mont. 238, 841 P.2d 1122 (1992); *Piscopo v. Piscopo*, 232 N.J. Super. 559, 557 A.2d 1040 (App. Div. 1989); *Dugan v. Dugan*, 92 N.J. 423, 457 A.2d 1 (1983) (the leading case nationwide); *McLean v McLean*, 323 N.C. 543, 374 S.E.2d 376 (1988); *Weaver v. Weaver*, 72 N.C. App. 409, 324 S.E.2d 915 (1985); *Poore v. Poore*, 75 N.C. App. 414, 331 S.E.2d 266 (1985); *Hurley; Ford*; *Goswami v. Goswami*, 152 Ohio App. 3d 151, 787 N.E.2d 26 (2003); *Kahn v. Kahn*, 42 Ohio App. 3d 61, 536 N.E.2d 678 (1987); *In re Marriage of Goger*, 27 Or. App. 729, 557 P.2d 46 (1976); *Gardner v. Gardner*, 748 P.2d 1076 (Utah 1988); *In re Marriage of Hall*, 103 Wash. 2d 236, 692 P.2d 175 (1984).

IV. Determining Realizability

As the decisions nationwide have moved toward a sharp legal distinction between enterprise and individual goodwill, the distinction between these two types of goodwill has become a critical question of fact. In many situations, the distinction between enterprise and individual goodwill determines whether goodwill is marital or separate property.

It is important to understand at the outset that enterprise vs. individual goodwill is not a simple matter of black against white. Whether a business has enterprise or individual goodwill fundamentally depends upon why it is patronized by its customers.

In particular, it depends upon whether customers are attracted by the untransferable individual reputation of the owner, or by other intangible factors which can be transferred to another owner. But customers, like snowflakes, are unique. In some businesses, all of the customers will be attracted by factors specific to the owner or the enterprise, but in other businesses, different customers will be attracted by different factors. If some of the customers are attracted by the owner's individual reputation, while others are attracted by the convenience of the location or the reputation of the entity, the business has both enterprise and individual goodwill. See, e.g., *In re Marriage of Talty*, 166 Ill. 2d 232, 652 N.E.2d 330, 334 (1995) (trial court may determine on remand "that the goodwill of the business comprises a combination of personal and enterprise goodwill").

The cases examine a number of factors when determining the extent to which the goodwill of a business is enterprise or individual.

A. Actual Past Sales

The best way to prove that a business has realizable enterprise goodwill is to prove that the business has actually been sold for a price which included goodwill. Since individual goodwill is by definition not transferable, any goodwill which was actually transferred in a prior sale must necessarily be enterprise goodwill. See *Wright v. Wright*, 904 P.2d 403 (Alaska 1995) (relying upon evidence of an actual prior offer to purchase the business for more than the value of its tangible assets, plus expert testimony that goodwill of business was marketable); *Hess v. Hess*, 927 A.2d 391 (Me. 2007) (goodwill was marital property, where both experts admitted it "had substantial value that could be quantified and realized from a sale"; trial court properly rejected husband's contention that goodwill was nevertheless somehow individual); *Traczyk v.*

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Traczyk, 891 P.2d 1277 (Okla. 1995) (relying on comparable sales data from the Goodwill Registry, a compilation of actual sales data in which good will was one element of value); *Johnson v. Johnson*, 471 N.W.2d 156 (S.D. 1991) (preferring value based upon comparable sales).

Conversely, if comparable sales have not included any value for goodwill, that fact is strong evidence that the business has no realizable goodwill. See *LeBlanc v. LeBlanc*, 694 So. 2d 1172, 1173 (La. Ct. App. 1997) (where husband's expert "testified that during the interim between the time he prepared his initial report and the date of the trial three [comparable stores] were sold for the cost of the inventory, basic market value of the equipment and assumption of the lease obligation" without goodwill, trial court properly held that store had no goodwill).

A sale need not involve the entire business. Where the business has multiple partners or shareholders, enterprise goodwill is present if other partners or shareholders have bought into or sold out of the practice for a price which included goodwill. See *In re Marriage of Antuna*, 8 P.3d 589 (Colo. Ct. App. 2000) (valuing practice at the price another doctor paid to buy into the practice).

Realizability can be proven in this manner even without an actual sale, if a buy-sell agreement obligates the business to purchase the shares of a withdrawing shareholder or partner for a price which includes good will. See *Geesbrecht v. Geesbrecht*, 570 S.W.2d 427 (Tex. Civ. App. 1978) (medical practice had buy-sell agreement with price greater than total tangible assets; difference was divisible goodwill); *Naddeo v. Naddeo*, 426 Pa. Super. 131, 626 A.2d 608 (1993) (valuing business at going concern value, which included goodwill, where that value was accepted in buy-sell agreement); *Lewis v. Lewis*, 113 Wis. 2d 172, 336 N.W.2d 171 (Ct. App. 1983) (veterinary practice's

buy-sell agreement included goodwill in valuation formula).

The weight of an actual prior sale involving other partners of a business can be reduced if it can be shown that the partners who left took clients with them. See *Butler v. Butler*, 541 Pa. 364, 663 A.2d 148 (1995). This fact is good evidence that at least some of the goodwill is individual. Again, however, if a withdrawing partner actually received more consideration for his or her interest than his or her share of the business's assets, this fact would show that the goodwill so transferred is not only realizable, but in fact actually realized in at least one prior actual market transaction. Goodwill which can be realized through sale on the open market is necessarily enterprise and not individual goodwill.

If the specific business at issue has not been bought and sold, the court can look at evidence of sales of similar businesses. *Hanson v. Hanson*, 738 S.W.2d 429 (Mo. 1987). The definition of a similar business, of course, is often a contested factual issue.

A few decisions hold that comparable sales are the only way of proving enterprise goodwill. See *Weinstock v. Weinstock*, 634 So. 2d 775 (Fla. Dist. Ct. App. 5th Dist. 1994); *Hanson*. But cf. *In re Marriage of Brooks*, 742 S.W.2d 585 (Mo. Ct. App. 1987) (limiting *Hanson* to professional practices, and refusing to extend it to commercial businesses). The effect of this rule is make enterprise goodwill an element of value only where an actual comparable sale exists. The rule therefore disfavors enterprise goodwill in businesses located in areas without an active market.

B. Covenant Not To Compete

When examining comparable sales in a state which does not divide individual goodwill, it is very

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important to pay close attention to the whether the sale involved a covenant not to compete. Payment for a future covenant not to compete is compensation for postmarital services, and it is therefore not marital property. *See Antolik v. Harvey*, 7 Haw. App. 313, 761 P.2d 305 (1988); *Gaskill v. Robbins*, 282 S.W.3d 306 (Ky. 2009) (trial court improperly relied upon valuation which included a covenant not to compete); *Lowe v. Lowe*, 372 N.W.2d 65 (Minn. Ct. App. 1985); *Gerard v. Gerard*, 825 S.W.2d 21 (Mo. Ct. App. 1992); *Johnston v. Johnston*, 778 S.W.2d 674 (Mo. Ct. App. 1989).

As a corollary of this point, some states hold that if the business at issue cannot be sold without a covenant not to compete, then it has no enterprise goodwill. *See Walton v. Walton*, 657 So. 2d 1214 (Fla. Dist. Ct. App. 1995) (wife's expert destroyed her case by conceding that no buyer would purchase husband's CPA practice without a noncompetition agreement); *Kricsfeld v. Kricsfeld*, 8 Neb. App. 1, 588 N.W.2d 210 (1999) (similar concession that goodwill could not be valued without assuming husband's presence); *McQuay v. McQuay*, 217 P.3d 162 (Okla. Ct. App. 2009).

This second line of cases may go a bit too far. Assume that a business has net tangible assets of \$100,000. A third-party buyer has made a bona fide offer to purchase the business for \$160,000, if the owner also signs a covenant not to compete, for which the buyer is willing to pay an additional \$40,000. The additional \$40,000 is not marital property. But clearly, the business does have a fair market value greater than the net value of its tangible asset assets; the buyer is willing to pay \$160,000 for tangible assets which are worth only \$100,000. The mere fact that buyer requires a covenant does not change the fact that the buyer is also willing to pay more for the business than its net tangible assets. The business has \$60,000 of transferable enterprise goodwill, which should be

treated as marital property.

Now, vary the facts slightly and assume that third party has made a single lump sum offer of \$200,000 for the business, if the buyer signs a covenant. The value of the business is not \$200,000, as some of that amount is consideration for the covenant. But surely the nonowning spouse should be permitted to introduce evidence that the fair value of the covenant is only \$40,000, so that the business again has \$60,000 of enterprise goodwill. When a covenant is part of a comparable sale, the value of the covenant must be subtracted from the sale price, but the mere *presence* of a covenant does not mean that buyer paid nothing for the business and everything for the covenant. It should be possible to compute and subtract a fair value for the covenant.

Where a comparable sale does include separately stated amounts of consideration for the business and the covenant, note that the stated breakdown does not bind the divorce case. There are powerful tax and financial reasons why the parties to sales of businesses sometimes treat part of the consideration for the sale as consideration for the covenant, or treat part of the consideration for the covenant as consideration for the sale. The amount which should be excluded is the actual fair value of the covenant, not the amount stated in the sale documents. *See, e.g., Berger v. Berger*, 648 N.E.2d 378 (Ind. Ct. App. 1995); *Hoefl v. Hoefl*, 74 Ohio App. 3d 809, 600 N.E.2d 746 (1991). *See generally Turner, supra*, § 5:22, at 364-67.

One case held that the value of a covenant not to compete need not be subtracted, where the covenant was too narrow to meaningfully restrict the seller's future employment. "Rather than restricting future employment, a noncompetition agreement may be a protective device intended to assure the value of the business' goodwill." *Baker v. Baker*, 733 N.W.2d 815, 823 (Minn. Ct. App. 2007), *aff'd & rev'd on other grounds*, 753 N.W.2d 644 (Minn. 2008).

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Baker is probably best understood as finding that on the facts presented, the value of the covenant was negligible. Where a covenant would materially limit the seller's future earnings, its value must be excluded, or the court will effectively be dividing the value of the future earnings.

In states which treat individual goodwill as marital property, a covenant not to compete is often treated simply as a device to protect the value of goodwill against unfair competition by the seller, and therefore as marital property. See *In re Marriage of Czapar*, 232 Cal. App. 3d 1308, 285 Cal. Rptr. 479 (1991) (error to exclude value of covenant not to compete; value of such a covenant was too speculative, and no actual sale was pending); *Carr v. Carr*, 108 Idaho 684, 701 P.2d 304 (Ct. App. 1985); *Mitchell v. Mitchell*, 104 N.M. 205, 719 P.2d 432 (Ct. App. 1986).

C. Trade Name

Other factors being equal, a business is more likely to have enterprise goodwill when it practices under a trade name which could be sold to another owner. For example, in *Traczyk v. Traczyk*, 891 P.2d 1277 (Okla. 1995), the husband was a podiatrist whose practice carried the trade name "Bethany Foot Clinic." The trade name was clearly marketable, and an expert witness testified from a professional publication that when similar practices were sold, 32% of the patients remained with the practice. The court affirmed a decision which treated goodwill as marital property. See also *Hunt v. Hunt*, 698 P.2d 1168 (Alaska 1985) (computer consultant practicing under a trade name had enterprise goodwill); *Stewart v. Stewart*, 143 Idaho 673, 152 P.3d 544, 550 (2007) (dermatology practice; "DCI's name, location, and reputation had value separate and apart from James' skill, and was designed to attract new patients not familiar with either James or Dr. Overly"); *DeSalle v. Gentry*, 818

N.E.2d 40 (Ind. Ct. App. 2004) (corporation which ran toy stores under trade name with significant name recognition had enterprise goodwill); *Knigge v. Knigge*, 903 S.W.2d 225 (Mo. Ct. App. 1995) (roofing consultant practicing under a trade name had enterprise goodwill).

A particularly common example of a trade name is a law firm which practices under the names of partners other than the owning spouse. For instance, in *Howell v. Howell*, 31 Va. App. 332, 523 S.E.2d 514 (2000), the court found that enterprise goodwill existed in Hunton & Williams, a large and prestigious Virginia law firm. The husband was neither Hunton nor Williams, so the name of the firm was entirely distinct from his individual reputation. The court found that the husband drew clients from the firm's name and prestige, and therefore that the husband had enterprise goodwill. The court's finding is logical, for large law firms often retain the names of retired or even deceased partners in their firm name, presumably because doing so helps to attract the former partners' clients. Goodwill which arises from a firm name, not including the name of the owning spouse, would normally be enterprise goodwill.

It should be stressed that the presence of a trade name does not guarantee that no individual goodwill is present. The key issue is what attracts the customers, and while the customers of a business might be attracted to its trade name, they also might be attracted to an individual owner. The court in *Howell* recognized that some of the husband's clients were attracted by his own reputation, and therefore that some of his goodwill was individual. Many medical practices have a technical trade name which does not attract any customers, all of whom are attracted by the individual reputations of the various physicians. So while the presence of a trade name raises the possibility that the trade name may have attracted some or all of the customers, it does not conclusively determine the point.

D. Reputation of the Owner

Individual goodwill is obviously most likely to exist where the owner has a favorable reputation. An owner without such a reputation probably did not much benefit from individual goodwill. Conversely, a owner with such a reputation potentially drew significant financial benefit from it, resulting in substantial individual goodwill.

At least one court has looked to the business's competition as a method for evaluating the owner's reputation. If many competing businesses exist, and the owners all of have generally similar reputations, goodwill is more likely to be enterprise. See *Cummings v. Cummings*, 104 Ark. App. 315, 292 S.W.3d 819, 821 (2009) (where a former employee had left the husband and was successfully competing with the business, employee's success was "an indication that [the goodwill] was corporate goodwill, not personal to husband"). Likewise, if no significant competition exists, it would seem unlikely that the owner's reputation attracts much business. Conversely, if a business has only limited competitors, and the owner has a more favorable individual public reputation than those competitors, the good would seem more likely to be individual.

E. Marketing

A useful way to determine what attracted the customers of a business is to look at how the business marketed itself. If the business marketed itself primarily by stressing the reputation and abilities of the owners, and the customers responded to that marketing, the resulting goodwill is probably individual. Conversely, if the business marketed itself under a trade name, encouraging customer loyalty to the name and not to individuals, the resulting goodwill is probably enterprise.

A good example of enterprise marketing is

Cleary v. Cleary, 582 N.E.2d 851 (Ind. Ct. App. 1991). *Cleary* involved a medical practice which generated substantial revenue from contracts to supply emergency room physicians to two local hospitals. These contracts were not based upon the particular individual skills of the practice's physicians; indeed, many physicians were probably capable of providing services under the contract. The contract was held by the practice as an entity, and would still have been held by the practice even if all of the physicians left and were replaced by others. The value created by the contract was therefore an asset of the practice as an entity, not an asset of any particular individual physician. *Cleary* was expressly approved by the Indiana Supreme Court in *Yoon v. Yoon*, 711 N.E.2d 1265 (Ind. 1999). See also *Stewart v. Stewart*, 143 Idaho 673, 152 P.3d 544, 550 (2007) (noting that trade name of dermatology practice "was designed to attract new patients not familiar with either James or Dr. Overly").

Individual goodwill is also somewhat more likely when a business generates substantial revenue through referrals. If the referrals are based upon the personal reputation or other unique qualities of the owner, the resulting goodwill is probably individual. See *Williams v. Williams*, 82 Ark. App. 294, 108 S.W.3d 629 (2003) (husband was one of only two black gastroenterologists in Arkansas, and received considerable business through personal referrals; finding goodwill to be individual). Conversely, referrals based upon such transferable factors as a convenient location would probably generate enterprise goodwill.

Another special case is the older, established business which does little or no marketing, and mostly relies on repeat business from the existing customers. If the repeat customers are loyal to the owner individually, there is probably no enterprise goodwill. See *Gaydos v. Gaydos*, 693 A.2d 1368 (Pa. Super. Ct. 1997) (husband's dental practice had

no enterprise goodwill, where husband was an older dentist who depended primarily upon the personal loyalty of his clients). Conversely, if the clients are more loyal to the location or other transferable factors, enterprise goodwill may exist.

F. Nature of the Business

Considerable insight into the presence of enterprise and individual goodwill can be obtained by looking at the nature of the business itself. Businesses which depend critically upon the skill of a single individual person are more likely to have individual goodwill. The classic example is a law or medical practice, where the personal skill of the professional is critical to the success of the business.

Where a single individual does provide much of a business's service, it is also important to consider the uniqueness of the service offered. Owners who attract customers with their individual reputation are generally providing a service which no other owner can provide. For example, highly specialized cardiologists and oncologists attract patients because they can provide care which no other physicians can provide. General practice dentists, by contrast, are not as unique; there are many dentists who are able to competently perform a routine dental examination and cleaning. See *Hollander v. Hollander*, 89 Md. App. 156, 597 A.2d 1012 (1991) (finding enterprise goodwill in solo dental practice). Other factors being equal, individual goodwill is more likely to exist in unique and highly specialized businesses.

Conversely, if the business depends upon the skill of many people working together, the role of the individual is less important, and individual goodwill is less likely. A business which employs many interchangeable employees probably does not have much individual goodwill, as there is no individual whose performance is uniquely important

to the final product. See *Rush v. Rush*, 932 So. 2d 800, 805-06 (Miss. Ct. App. 2005)¹ (husband's heating and air conditioning systems service company had enterprise goodwill, where husband admitted that "out of the twenty five other technicians employed by Hermetic, there were many others who could do his job"); *In re Marriage of Triperinas*, 185 Or. App. 283, 59 P.3d 586, 591 (2002) ("[O]perating businesses such as car dealerships have goodwill value unless the success or failure of the business depends on the services of one individual."); *In re Thomas*, 231 B.R. 581 (Bankr. E.D. Pa. 1999), *aff'd*, 246 B.R. 500 (E.D. Pa. 2000) (express overnight delivery service had marketable business goodwill and not unmarketable professional goodwill; stressing the fact that the business did not provide unique professional services in the same manner as an attorney or physician).

G. Expert Testimony

Finally, some cases have relied upon expert testimony that the goodwill of a particular business is enterprise or individual. See, e.g., *Wright v. Wright*, 904 P.2d 403 (Alaska 1995); *Makowski v. Makowski*, 613 So. 2d 924 (Fla. Dist. Ct. App. 1993); *Traczyk v. Traczyk*, 891 P.2d 1277 (Okla. 1995) (finding enterprise goodwill; relying in part upon an expert who testified, based upon a

¹The Mississippi Supreme Court refused to review the goodwill issue in *Rush*, see *Rush v. Rush*, 932 So. 2d 794 (Miss. 2006) (reversing the Court of Appeals in a child support issue). Nevertheless, *Rush* is apparently overruled by *Yelverton v. Yelverton*, 961 So. 2d 19, 29 (Miss. 2007), which holds that enterprise goodwill is not marital property. *Rush* is nevertheless relevant in identifying enterprise goodwill in the great majority of states in which enterprise goodwill remains divisible.

professional publication, that when similar practices were sold, 32% of the patients remained with the practice); *Hoebelheinrich v. Hoebelheinrich*, 43 Va. App. 543, 600 S.E.2d 152 (2004).

Expert testimony is always less persuasive than an actual history of past transactions involving either the present business or a similar one, and it is therefore essential to make every effort to produce data on past transactions. But some businesses have limited marketability, and where no sale of a similar business has taken place, it is still possible that goodwill might be included when a sale does take place. The goal of this sort of expert testimony is therefore to convince the court that a reasonable buyer making an actual offer to purchase the business would or would not be willing to pay a purchase price which included goodwill.

V. CONCLUSION

The clear modern trend is that the marital estate does not include individual goodwill—goodwill which is derived from the personal reputation of the owner, and which cannot be sold for value on the open market. Whenever a nonowning spouse seeks to classify goodwill as marital property, it is therefore extremely important to present strong evidence, including expert testimony, reassuring the court that the goodwill at issue is enterprise and not individual.

If the rule against division of individual goodwill is applied too vigorously, however, it runs the risk of coming into conflict with a higher principle—the rule that marital property should not be valued for divorce purposes at an amount less than its fair market value. It is an observed fact of life that business are often sold on the open market for an amount more than the total net value of their tangible assets. Such a *realizable* difference cannot be individual goodwill, for individual goodwill by definition cannot be sold for consideration.

The recent case law from Mississippi and South Carolina, holding that *all* goodwill is separate property, suggest that some courts are getting carried away with the individual goodwill argument, and losing track of a larger and more important point. The value of a business for divorce purposes should always include its fair market value—the price which a willing buyer would pay to a willing seller, with neither operating under any compulsion of time. If the value of a business is limited to its total net tangible assets only, *that value will be less than the business's fair market value* in a significant number of cases. The inevitable result will be an unfair division of marital property, as the business is awarded to the owning spouse at a value less than its immediate sale value. When goodwill acquired during the marriage has realizable present value, that value should be treated as marital property.

A BREAKDOWN OF GOODWILL CASES BY THE TYPE OF BUSINESS INVOLVED

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When litigating a case involving divisibility of professional goodwill, it is often helpful to review cases in which the court determined the divisibility of the goodwill of a similar business. A general review of the case law by type of business also sheds light on how courts have approached the definition of realizability in states where only realizable goodwill can be divided.

This list of cases is primarily organized by the type of business involved in each reported decision. Further, in accordance with the law set forth earlier in this issue, the cases within each type of business are broken down into three different categories. The first category consists of decisions holding that the goodwill of the particular business was realizable in a state where only realizable goodwill can be divided. The second category consists of decisions from states following the same rule but holding that the goodwill was not realizable. The third category consists of decisions from states where all goodwill is divisible, regardless of realizability.

ACCOUNTING

Unrealizable, Separate. *Williams v. Williams*, 667 So. 2d 915 (Fla. Dist. Ct. App. 1996) (solo accounting practice); *Walton v. Walton*, 657 So. 2d 1214 (Fla. Dist. Ct. App. 1995) (CPA practicing with two associates as "Walton & Co."; wife's expert conceded that no one would purchase company without a noncompetition agreement); *Butler v. Butler*, 541 Pa. 364, 663 A.2d 148 (1995) (three-person accounting firm).

Always Marital. *Mitchell v. Mitchell*, 152 Ariz.

317, 732 P.2d 208 (1987) (accounting partnership); *Heller v. Heller*, 672 S.W.2d 945 (Ky. Ct. App. 1984) (accounting practice); *Weaver v. Weaver*, 72 N.C. App. 409, 324 S.E.2d 915 (1985) (accounting partnership).

ARCHITECTURE

Realizable. *Malkowski v. Malkowski*, 613 So. 2d 924 (Fla. Dist. Ct. App. 1993) (surveying firm); *Buckl v. Buckl*, 373 Pa. Super. 521, 542 A.2d 65 (1988) (architectural practice).

ARTS AND ENTERTAINMENT

Unrealizable, Separate. *In re Marriage of McTiernan & Dubrow*, 133 Cal. App. 4th 1090, 35 Cal. Rptr. 3d 287 (2005) (star motion picture director); *Akins v. Akins*, 659 So. 2d 330 (Fla. Dist. Ct. App. 1995) (commercial artist in solo practice).

Always Marital. *Piscopo v. Piscopo*, 232 N.J. Super. 559, 557 A.2d 1040 (App. Div. 1989) (goodwill of comedian/entertainer); *Elkus v. Elkus*, 169 A.D.2d 134, 572 N.Y.S.2d 901 (1991) (career of opera singer).

AUTOMOTIVE

Realizable. *Scott v. Scott*, 668 N.E.2d 691, 706 (Ind. Ct. App. 1996) (used car business); *Nastrom v. Nastrom*, 262 N.W.2d 487 (N.D. 1978) (various realty and automobile corporations); *In re Marriage of Triperinas*, 185 Or. App. 283, 59 P.3d 586 (2002)

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(car dealership); *Ullom v. Ullom*, 384 Pa. Super. 514, 559 A.2d 555 (1989) (automobile dealership); *Finch v. Finch*, 825 S.W.2d 218 (Tex. App. 1992) (automobile alternator/starter business).

Unrealizable. *Stonehocker v. Stonehocker*, 2008 UT App 11, 176 P.3d 476 (automobile dealership).

Other. See also *In re Marriage of Talty*, 166 Ill. 2d 232, 652 N.E.2d 330 (1995) (automobile dealership; reversing summary holding that goodwill was marketable; remanding for factual determination of extent to which goodwill was marketable).

CHIROPRACTIC

Unrealizable, Separate. *Antolik v. Harvey*, 7 Haw. App. 313, 761 P.2d 305 (1988) (chiropractic practice); *Helper v. Helper*, ___ W. Va. ___, 686 S.E.2d 64 (2009) (chiropractic practice).

CONSULTING

Realizable. *Hunt v. Hunt*, 698 P.2d 1168 (Alaska 1985) (computer consultant practicing under a trade name); *Olsen v. Olsen*, 125 Idaho 603, 873 P.2d 857 (1994) (livestock nutrition consulting business); *Knigge v. Knigge*, 903 S.W.2d 225 (Mo. Ct. App. 1995) (roofing consultant who was one of seven such employees in consulting firm practicing under a trade name).

Unrealizable, Separate. *Collier v. Collier*, 790 So. 2d 759 (La. Ct. App. 3d Cir. 2001) (consulting business run by petroleum engineer).

COSMETICS

Unrealizable, Separate. *Kelsey v. Kelsey*, 186 Ariz. 49, 918 P.2d 1067 (Ct. App. 1996) (hair

transplant clinic); *Hickum v. Hickum*, 320 S.C. 97, 463 S.E.2d 321 (Ct. App. 1995) (wife and sister ran cosmetics business; proper to value at amount of inventory alone).

DENTISTRY

Realizable. *Hollander v. Hollander*, 89 Md. App. 156, 597 A.2d 1012 (1991) (solo dental practice); *Fexa v. Fexa*, 396 Pa. Super. 481, 578 A.2d 1314 (1990) (dental practice); *In re Marriage of Peerenboom*, 147 Wis. 2d 547, 433 N.W.2d 282 (Ct. App. 1988) (dental practice).

Unrealizable, Separate. *Tortorich v. Tortorich*, 50 Ark. App. 114, 902 S.W.2d 247 (1995) (solo oral surgery practice); *In re Marriage of Schneider*, 214 Ill. 2d 152, 824 N.E.2d 177 (2005) (dental practice); *In re Marriage of Hogeland*, 448 N.W.2d 678 (Iowa Ct. App. 1989) (dental practice); *Gaskill v. Robbins*, 282 S.W.3d 306, 312 (Ky. 2009) (solo "oral and maxillofacial surgery practice"); *Ahern v. Ahern*, 2008 ME 1, 938 A.2d 35; *Donohue v. Donohue*, 299 S.C. 353, 384 S.E.2d 741 (1989) (dental practice); *Sorenson v. Sorenson*, 839 P.2d 774 (Utah 1992) (dental practice); *May v. May*, 214 W. Va. 394, 589 S.E.2d 536 (2003) (dental practice).

Always Marital. *In re Marriage of Nichols*, 43 Colo. App. 383, 606 P.2d 1314 (1979) (dental practice); *Poore v. Poore*, 75 N.C. App. 414, 331 S.E.2d 266 (1985) (incorporated dental practice); *In re Marriage of Goger*, 27 Or. App. 729, 557 P.2d 46 (1976) (dental practice).

ENERGY

Unrealizable, Separate. *Collier v. Collier*, 790 So. 2d 759 (La. Ct. App. 2001) (consulting business run by petroleum engineer).

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INSURANCE

Unrealizable, Separate. *Held v. Held*, 912 So. 2d 637 (Fla. Dist. Ct. App. 2005) (insurance agency).

Always Marital. *In re Marriage of Lopez*, 255 Mont. 238, 841 P.2d 1122 (1992) (solo insurance practice).

LAW

Realizable. *Naddeo v. Naddeo*, 426 Pa. Super. 131, 626 A.2d 608 (1993) (valuing law practice at going concern value, which included goodwill, where that value was accepted in buy-sell agreement); *Howell v. Howell*, 31 Va. App. 332, 523 S.E.2d 514 (2000) (large law firm).

Unrealizable, Separate. *Weinberg v. Dickson-Weinberg*, 121 Haw. 401, 220 P.3d 264 (Ct. App. 2009) (law firm); *In re Marriage of Zells*, 143 Ill. 2d 251, 572 N.E.2d 944 (1991) (law practice); *Josselson v. Josselson*, 52 Ohio App. 3d 60, 557 N.E.2d 835 (1988) (law practice); *Travis v. Travis*, 795 P.2d 96 (Okla. 1990) (solo law practice); *Ford v. Ford*, 840 P.2d 36 (Okla. Ct. App. 1992) (law firm); *Beasley v. Beasley*, 359 Pa. Super. 20, 518 A.2d 545 (1986) (solo law practice); *Gibbons v. Gibbons*, 619 A.2d 432 (R.I. 1993) (split decision; two judges essentially held that the goodwill of a solo practitioner is not divisible, while two other judges held that the issue was not presented); *Smith v. Smith*, 709 S.W.2d 588 (Tenn. Ct. App. 1985) (law practice); *Nail v. Nail*, 486 S.W.2d 761 (Tex. 1972) (solo law practice); *Finn v. Finn*, 658 S.W.2d 735 (Tex. App. 1983) (law firm); *Holbrook v. Holbrook*, 103 Wis. 2d 327, 309 N.W.2d 343 (Ct. App. 1981) (law practice).

Always Marital. *In re Marriage of Marron*, 170 Cal. App. 3d 151, 215 Cal. Rptr. 894 (1985) (law partnership); *In re Marriage of Huff*, 834 P.2d 244

(Colo. 1992) (law practice); *McDiarmid v. McDiarmid*, 649 A.2d 810 (D.C. 1994) (goodwill in law partnership was marital property, although it had no value on facts of case); *In re Marriage of Stufft*, 276 Mont. 454, 916 P.2d 767 (1996) (law firm); *Dugan v. Dugan*, 92 N.J. 423, 457 A.2d 1 (1983) (law firm); *McLean v McLean*, 323 N.C. 543, 374 S.E.2d 376 (1988) (law practice); *In re Marriage of Freedman*, 35 Wash. App. 49, 665 P.2d 902 (1983) (solo law practice).

LAW ENFORCEMENT

Unrealizable, Separate. *Bertholet v. Bertholet*, 725 N.E.2d 487 (Ind. Ct. App. 2000) (bail bondsman).

LITERATURE

Unrealizable, Separate. *In re Marriage of Maxwell*, 128 Or. App. 565, 876 P.2d 811 (1994) (self-employed advertising copywriter had no goodwill apart from his own skill and reputation).

MANUFACTURING

Realizable. *Landers v. Landers*, 4 P.3d 51 (Okla. Ct. App. 2000) (machine shop).

Unrealizable, Separate. *Christians v. Christians*, 732 So. 2d 47 (Fla. Dist. Ct. App. 1999) (business building specialized trapezes for Club Med).

MEDICINE

Realizable. *Stewart v. Stewart*, 143 Idaho 673, 152 P.3d 544, 550 (2007) (dermatology practice operating under a trade name which "was designed to attract new patients not familiar with either James

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or Dr. Overly"); *Traczyk v. Traczyk*, 891 P.2d 1277, 1279 (Okla. 1995) (podiatry practice operating under trade name as "Bethany Foot Clinic"); *Hoebelheinrich v. Hoebelheinrich*, 43 Va. App. 543, 600 S.E.2d 152 (2004) (trial court did not err in accepting wife's expert's valuation of goodwill of husband's medical practice, where valuation did not overtly include personal goodwill, and husband's expert did not testify that wife's expert's valuation did include personal goodwill); *Geesbrecht v. Geesbrecht*, 570 S.W.2d 427 (Tex. Civ. App. 1978) (medical practice; buy-sell agreement had price term greater than total tangible assets).

Unrealizable, Separate. *Fortson v. Fortson*, 131 P.3d 451 (Alaska 2006) (dermatology clinic); *Wilson v. Wilson*, 294 Ark. 194, 741 S.W.2d 640 (1987) (medical practice); *Tortorich v. Tortorich*, 50 Ark. App. 114, 902 S.W.2d 247 (1995) (solo oral surgery practice); *Eslami v. Eslami*, 218 Conn. 801, 591 A.2d 411 (1991) (medical practice); *In re Marriage of Head*, 273 Ill. App. 3d 404, 652 N.E.2d 1246 (1995) (medical practice); *Head v. Head*, 168 Ill. App. 3d 697, 523 N.E.2d 17 (1988) (medical practice); *Courtright v. Courtright*, 155 Ill. App. 3d 55, 507 N.E.2d 891 (1986) (medical practice); *Yoon v. Yoon*, 711 N.E.2d 1265 (Ind. 1999) (medical practice); *In re Marriage of Bethke*, 484 N.W.2d 604 (Iowa Ct. App. 1992) (medical practice); *Powell v. Powell*, 231 Kan. 456, 648 P.2d 218, 223 (1982) (surgical practice); *Rao v. Rao*, 927 So. 2d 356 (La. Ct. App. 2005) (endoscopy center); *Pearce v. Pearce*, 482 So. 2d 108 (La. Ct. App. 1986) (medical practice); *Depner v. Depner*, 478 So. 2d 532 (La. Ct. App. 1985) (medical practice); *Hanson v. Hanson*, 738 S.W.2d 429 (Mo. 1987) (medical practice); *Taylor v. Taylor*, 222 Neb. 721, 386 N.W.2d 851 (1986) (medical practice); *Mocnik v. Mocnik*, 838 P.2d 500 (Okla. 1992) (medical practice); *DeMasi v. DeMasi*, 366 Pa. Super. 19, 530 A.2d 871 (1987) (medical practice); *Hazard v. Hazard*, 833 S.W.2d 911 (Tenn. Ct. App. 1991) (medical practice); *Grossnickle v. Grossnickle*, 935

S.W.2d 830 (Tex. App. 1996) (solo ophthalmology practice).

Always Marital. *In re Marriage of Antuna*, 8 P.3d 589 (Colo. Ct. App. 2000) (medical practice); *Drake v. Drake*, 809 S.W.2d 710 (Ky. Ct. App. 1991) (medical practice); *Clark v. Clark*, 782 S.W.2d 56 (Ky. Ct. App. 1990) (medical practice); *Ford v. Ford*, 105 Nev. 672, 782 P.2d 1304 (1989) (solo medical practice); *Goswami v. Goswami*, 152 Ohio App. 3d 151, 787 N.E.2d 26 (2003); (medical practice); *Kahn v. Kahn*, 42 Ohio App. 3d 61, 536 N.E.2d 678 (1987) (solo medical practice); *Gardner v. Gardner*, 748 P.2d 1076 (Utah 1988) (23-physician medical clinic); *Russell v. Russell*, 11 Va. App. 411, 399 S.E.2d 166 (1990) (psychiatric practice); *In re Marriage of Hall*, 103 Wash. 2d 236, 692 P.2d 175 (1984) (medical clinic).

REAL ESTATE—Construction

Realizable. *Rush v. Rush*, 932 So. 2d 800, 805-06 (Miss. Ct. App. 2005), *rev'd on other grounds*, 932 So. 2d 794 (Miss. 2006) (company which repaired and serviced heating and air conditioning systems); *Knigge v. Knigge*, 903 S.W.2d 225 (Mo. Ct. App. 1995) (roofing consultant who was one of seven such employees in consulting firm practicing under a trade name); *Endres v. Endres*, 532 N.W.2d 65 (S.D. 1995) (goodwill of concrete business was realizable; expressly avoiding the question of whether unrealizable goodwill can be divided); *In re Marriage of Brown*, 241 Ill. App. 3d 305, 608 N.E.2d 967 (1993) (proper to value plumbing products business at market value, which apparently included goodwill).

Unrealizable, Separate. *McQuay v. McQuay*, 217 P.3d 162 (Okla. Ct. App. 2009) (concrete business); *In re Marriage of Rolie*, 127 Or. App. 428, 873 P.2d 397 (1994) (suggesting in dicta that solo electrical contractor had no goodwill apart from his own

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reputation; finding on the facts that goodwill had no value even if divisible); *Koch v. Koch*, 874 S.W.2d 571 (Tenn. Ct. App. 1993) (self-employed painter).

Other. See *Moffitt v. Moffitt*, 749 P.2d 343 (Alaska 1988) (builder; remanding for factual determination of whether goodwill was realizable); *Moretti v. Moretti*, 766 A.2d 925 (R.I. 2001) (remanding to determine extent to which goodwill of landscaping business was realizable on the facts).

REAL ESTATE—Other

Realizable. *Nastrom v. Nastrom*, 262 N.W.2d 487 (N.D. 1978) (various realty and automobile corporations); *In re Marriage of Weakley*, 177 Or. App. 363, 33 P.3d 1045 (2001) (logging business).

RESTAURANT

Realizable. *Shewbart v. Shewbart*, 2009 WL 793125 (Ala. Civ. App. 2009) (restaurant and catering business); *Nicholson v. Nicholson*, 11 Ark. App. 299, 669 S.W.2d 514 (1984) (café and tavern); *Chandler v. Chandler*, 136 Idaho 246, 32 P.3d 140 (2001) (restaurant); *Carr v. Carr*, 108 Idaho 684, 701 P.2d 304 (Ct. App. 1985) (truck stop).

SALES

Realizable. *DeSalle v. Gentry*, 818 N.E.2d 40 (Ind. Ct. App. 2004) (corporation which ran toy stores).

Unrealizable, Separate. *Trubetzkoy v. Trubetzkoy*, 205 P.3d 891, 893 (Utah Ct. App. 2009) (traveling business which bought and sold items at renaissance fairs and operated a single retail store).

SERVICES

Unrealizable, Separate. *Hough v. Hough*, 793 So. 2d 57 (Fla. Dist. Ct. App. 2001) (business which sold and serviced air and vacuum machines at convenience stores and service stations).

TECHNOLOGY

Realizable. *Hunt v. Hunt*, 698 P.2d 1168 (Alaska 1985) (computer consultant practicing under a trade name).

TRANSPORTATION

Realizable. *Wright v. Wright*, 904 P.2d 403 (Alaska 1995) (business transporting cars between Alaska and continental United States); *In re Thomas*, 231 B.R. 581 (Bankr. E.D. Pa. 1999), *aff'd*, 246 B.R. 500 (E.D. Pa. 2000) (overnight delivery service).

VETERINARY

Realizable. *Olsen v. Olsen*, 125 Idaho 603, 873 P.2d 857 (1994) (livestock nutrition consulting business); *Lewis v. Lewis*, 113 Wis. 2d 172, 336 N.W.2d 171 (Ct. App. 1983) (veterinary clinic; goodwill included in buy-sell agreement).

Unrealizable, Separate. *Soloman v. Soloman*, 531 Pa. 113, 611 A.2d 686 (1992) (veterinary practice).

Always Marital. *Marion v. Marion*, 11 Va. App. 659, 401 S.E.2d 432 (1991) (veterinary practice).