

***PROFESSIONAL, PERSONAL & CELEBRITY GOODWILL VALUATION:
FORECASTING AN UNCERTAIN FUTURE***

by
Sanford K. Ain, Esquire
Anne Marie Jackson, Esquire

The principal aspects of divorce involve identifying and dividing property acquired during the marriage. In many “equitable distribution” jurisdictions, the court must conduct a three-step analysis: first, the trial court must characterize all property owned by the parties, regardless of title, as either marital or non-marital; next, the court must determine the value of all property; and finally, the court may divide the property in jurisdictions where it has the authority to do so, and where courts may not change title to property, they may make a monetary award as an adjustment of the parties’ rights and equities in the marital property.

While many statutes define “marital property” as property acquired by one or both parties during the marriage, legislatures have not provided a more basic definition of what constitutes property. As a result, courts have been left to determine what will be considered property for purposes of distribution upon divorce.

In the case of intangible assets, this simple issue of what will be considered property for purposes of division pursuant to a divorce has confounded the courts and created fodder for lawyers and experts.¹ In determining that an intangible asset is property subject to division upon divorce, courts evaluate each asset individually; however, courts consistently consider (i) whether it is a separate and distinct asset and (ii) if the asset is capable of being valued. Under

¹ Robin P. Rosen, Note, *A Critical Analysis of Celebrity Careers as Property Upon Dissolution of Marriage*, 61 GEO. WASH. L. REV. 522 (1993) [hereinafter Rosen].

this definition, intangible assets such as pension rights², stock options, and intellectual property rights³, have all been found to be marital property by some jurisdictions. Other intangible assets have been found not to be property subject to division at divorce in some states, and divisible in others. For instance, in Maryland, courts have determined that assets “uniquely personal” to the holder, such as personal injury claims, cannot, by their very nature, be held with another person, and consequently cannot be considered marital property. In the District of Columbia, however, personal injury claims can be divided upon divorce.⁴

Intangible assets, such as professional degrees and licenses and goodwill, have met with varied characterizations throughout the United States. This article will consider how courts have valued these intangible assets in property distribution. We will begin the discussion where many courts have started, by considering professional degrees and licenses. Next, we will address professional and personal goodwill. Finally, we will discuss the concept of celebrity goodwill.

I. Professional Degrees and Licenses

Beginning in the late 1970s, spouses in numerous states sought a share of the professional degrees or licenses obtained during the marriage by their soon-to-be former spouse. While the

² Deering v. Deering, 437 A.2d 883, 888 (Md. 1981) (explaining that pension benefits represent a form of deferred compensation for services already rendered and are marital property.)

³ Smith v. Smith, 682 S.W.2d 834 (Mo. Ct. App. 1984); *In re Marriage of Monslow*, 912 P.2d 735 (Kan. 1996).

⁴ Unkle v. Unkle, 305 Md. 587, 596, 505 A.2d 849 (1986); *see also* Landwehr v. Landwehr, 545 A.2d 738 (N.J. 1988) (recognizing that a settlement for personal pain, suffering, and mental and physical disabilities is inherently personal and may not be treated as marital property subject to division). *Boyce v. Boyce*, 541 A.2d 614 (D.C. 1988).

majority of jurisdictions have found professional degrees and licenses not to be marital property,⁵ there are a few jurisdictions that have held that a professional degree or license is marital property subject to distribution at divorce.⁶ The New York case, *O'Brien v. O'Brien*,⁷ holding that a professional degree is marital property, has been used by subsequent courts as a

⁵ *In re Marriage of Graham*, 574 P.2d 75 (Colo. 1978) (holding that “[a]n educational degree, such as an M.B.A., is simply not encompassed even by the broadest view of the concept of “property.” It does not have an exchange value or any objective transferable value on an open market. It is personal to the holder. It terminates on death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed, or pledged. An advanced degree is a cumulative product of many years of previous education, combined with diligence and hard work. It may not be acquired by the mere expenditure of money. It is simply an intellectual achievement that may potentially result in the future acquisition of property.”). *See also* *Jones v. Jones*, 454 So.2d 1006 (Ala. Civ. App. 1984); *In re Marriage of Stuart*, 813 P.2d 49 (Or. 1991); *Hodge v. Hodge*, 520 A.2d 15 (Pa. 1986); *Beeler v. Beeler*, 715 S.W.2d 625 (Tenn. Ct. App. 1986); *Marrion v. Marrion*, 401 S.E.2d 432 (Va. Ct. App. 1991); *Hoak v. Hoak*, 370 S.E.2d 473 (W. Va. 1988). *O'Brien v. O'Brien*, 489 N.E.2d 712 (N.Y. 1985); *Lewis v. Lewis*, 448 N.W.2d 735 (Mich. App. 1989).

⁶ In addition to New York, courts in Michigan, Wisconsin, Minnesota and Iowa have considered an educational degree or license, and/or the increased income potential associated with it, in determining an equitable distribution award. *Woodworth v. Woodworth*, 337 N.W.2d 332, 334 (Mich. App. 1983), *Lewis v. Lewis*, 448 N.W.2d 735 (Mich. App. 1989); *In re Marriage of Lundberg*, 318 N.W.2d 918 (Wisc. 1982); *De La Rosa v. De La Rosa*, 309 N.W.2d 755 (Minn. 1981); *In re Marriage of Horstmann*, 263 N.W.2d 885 (Iowa 1978). For example, in *Lewis*, Mr. Lewis obtained an Associate’s degree, Bachelor’s degree, and Masters of Business Administration during the parties’ twenty-one year marriage. Both parties were employed by Dow Corning Corporation. Dow Corning had a tuition reimbursement program that both parties could have participated in, and through the program, the company reimbursed the family for Mr. Lewis’ tuition and book expenses. After obtaining his MBA, Mr. Lewis continued to work at Dow Corning. At trial, Dow Corning’s compensation manager testified that while a starting MBA employee could expect to earn four hundred dollars per month more than a starting BS degree employee, all pay increases were performance based for employees that earned their degrees while working. Using the \$400 per month starting differential and a twenty year work expectancy, the wife’s expert calculated the husband’s MBA to be worth \$96,000 over twenty years with a present value of \$42,506.75. The trial court determined that the MBA was not marital property. On appeal, the Court held that husband’s MBA was marital property and directed the trial court to award Mrs. Lewis 50% of the present value of the degree as calculated by her expert or \$21,253.37 over a five year period.

⁷ *O'Brien v. O'Brien*, 489 N.E.2d 712 (N.Y. 1985).

springboard for finding that virtually any enhanced earning potential acquired during the marriage is marital property, including celebrity status.

A. *O'Brien v. O'Brien*

In the ground breaking case of *O'Brien v. O'Brien*, the Court held that a medical degree and license acquired during the marriage is marital property subject to division upon divorce.⁸

1. Factual Background of *O'Brien*

In *O'Brien*, the parties were married in 1971 and at the time of the marriage both parties were teachers. During the marriage, the husband completed his undergraduate education and in 1973 the parties moved to Mexico, where the husband became a full-time medical student.⁹ The parties returned to New York in 1976 so that the husband could complete medical school and his internship training.¹⁰ The husband obtained his license to practice medicine in October 1980 and two months later he filed for divorce.¹¹ Throughout the marriage, Mrs. O'Brien was employed and contributed all of her earnings to the parties' living and educational expenses.¹² In fact, the trial court held that Mrs. O'Brien contributed 76% of the funds used to pay the parties' expenses,

⁸ *Id.* See also, *Holihan v. Holihan*, 159 A.D.2d 685,686, 553 N.Y.S.2d 434, 436 (2d Dep't 1990) (license to work as a guidance counselor); *Morimando v. Morimando*, 145 A.D.2d 609, 609, 536 N.Y.S.2d 701, 701 (2d Dep't 1988) (license to practice as a physicians assistant); *Allocco v. Allocco*, 152 Misc. 2d 529, 534-35, 578 N.Y.S.2d 995, 998-99 (Sup. Ct. Monroe County 1991) (holding that where a policeman earned an Associate's degree and Bachelor's degree, which, although not pre-requisites for advancement, may have aided in his promotion to police lieutenant, the increased earning potential resulting from the promotion is marital property).

⁹ *O'Brien v. O'Brien*, 489 N.E.2d 712, 713-14 (N.Y. 1985).

¹⁰ *Id.* at 714.

¹¹ *Id.*

¹² *Id.*

exclusive of a \$10,000 student loan obtained by the husband.¹³ Further, the trial court found that while the husband pursued his education, Mrs. O'Brien had relinquished the opportunity to obtain a permanent teaching certificate.¹⁴

2. Legal Analysis in *O'Brien*

After considering the enhanced earning potential that Dr. O'Brien would enjoy as a result of his medical degree and Mrs. O'Brien's contributions toward attainment of the degree, the trial court held that Dr. O'Brien's medical license was marital property and granted Mrs. O'Brien an award of \$188,800 representing 40% of the value of the license. The Appellate Division found that the medical degree was not marital property and modified the judgment accordingly and remanded to the trial court for further proceedings. On appeal, the Court of Appeals of New York agreed with the trial court that a medical degree is marital property that is divisible at divorce.

a. Equitable distribution concept in *O'Brien*

The Court of Appeals dismissed Dr. O'Brien's argument that a medical degree does not comport with the traditional concept of property by noting that marital property is a statutory invention that is not related to the common-law principals of property, and the New York legislature went beyond traditional property concepts when it created the Equitable Distribution Law.¹⁵ The Court explained that:

Equitable distribution was based on the premise that a marriage is, among other things, an economic partnership to which both parties contribute as spouse, parent, wage earner or

¹³ *Id.*

¹⁴ *Id.* at 713.

¹⁵ *Id.* at 715.

homemaker. Consistent with this purpose, and implicit in the statutory scheme as a whole is the view that upon dissolution of the marriage there should be a winding up of the parties' economic affairs and a severance of their economic ties by an equitable distribution of the marital assets.¹⁶

The Court went on to explain that:

[t]he function of equitable distribution is to recognize that when a marriage ends, each of the spouses, based on the totality of the contributions made to it, has a stake in and right to a share of the marital assets accumulated while it endured, not because that share is needed, but because those assets represent the capital product of what was essentially a partnership entity.¹⁷

Therefore, while a medical degree may not comport with the traditional notion of property, it certainly is a valuable property right as reflected in the money, effort, and lost opportunity for employment expended in its acquisition, and in the enhanced earning potential afforded to its holder.¹⁸ Further, a degree cannot be revoked from its owner without due process of law.¹⁹

b. Court's reluctance to consider medical degree in alimony

The Court specifically did not want the medical degree to be considered in an alimony award for several reasons: (i) such an action would be contrary to the underlying economic partnership concept; (ii) an alimony award would continue the uncertain ties of economic dependence that the equitable distribution law sought to extinguish; and (iii) alimony is subject to termination upon remarriage thereby potentially limiting the non-licensed spouse's recovery.²⁰ In his concurring opinion, however, Judge Meyer noted the problems with awarding a part of a

¹⁶ *O'Brien*, 489 N.E.2d at 716 (citations omitted).

¹⁷ *Id.* at 717 (citations omitted).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 717.

professional degree in an equitable distribution. Judge Meyer recognized that, unlike a child support or alimony award, an equitable distribution award cannot be modified at a later time.

This is problematic when awarding a portion of a recently received professional degree because

a professional in training who is not committed to a career choice when the distributive award is made may be locked into a particular kind of practice simply because the monetary obligations imposed by the distributive award made on the basis of the trial judge's conclusion (prophecy may be a better word) as to what the career choice will be leaves him or her no alternative.²¹

3. Criticism of the *O'Brien* Doctrine

O'Brien created a well spring of litigation in New York and fostered commentary throughout the United States. The *O'Brien* progeny have allowed virtually any career enhancement attained during the marriage to be considered marital property divisible upon divorce.²² This trend has not developed without criticism from within the judiciary. In his dissent in *DiCaprio v. DiCaprio*,²³ Justice Lawton criticized the majority for crafting a rule that awarded a portion of a licensed spouse's projected lifetime earnings to the non-licensed spouse whenever the licensed spouse's earnings increased during the marriage. Justice Lawton contended that because increased earning capacity is a typical, if not inevitable result of any career over time, virtually all marriages will result in the division of the projected lifetime

²¹ *Id.* at 720.

²² Kenneth R. Davis, *The Doctrine of O'Brien v. O'Brien: A Critical Analysis*, 13 PACE L. REV. 863 (1994) [hereinafter Davis]; Whitney L. White, Note, *Diploma Dilemma: The Possibility of Double Recovery from Multiple Awards of the Licensed Spouse's Future Earning Capacity*, 35 U. OF LOUISVILLE J. OF FAM. L. 393 (1996/1997) [hereinafter White].

²³ *DiCaprio v. DiCaprio*, 556 N.Y.S.2d 1011 (4th Dep't 1990), *leave for appeal denied*, 566 N.Y.S.2d 587 (N.Y. 1991).

earnings of the principal wage earner under the majority's opinion.²⁴ Such an approach "transmutes the bonds of marriage into the bonds of involuntary servitude."²⁵

4. Extensions of the *O'Brien* doctrine

The excesses of the *O'Brien* remedy can be seen in *Savasta v. Savasta*.²⁶ In that case, because the husband, a doctor, received certification in internal medicine during the parties' marriage, the court awarded the wife a portion of Dr. Savasta's career as an internal medicine doctor, even though he had never actually practiced as an internist. In fact, for the last nine years Dr. Savasta had practiced as a lower paid emergency room physician. The court found that:

the monetary value of this certification in internal medicine is the enhanced earning capacity or potential it affords to the husband, the holder of the certification. While the husband has not to date utilized the potential earning capacity incident to the certification, he did acquire this capacity during the marriage.²⁷

As a result, the court awarded Mrs. Savasta 10% of Dr. Savasta's enhanced earning potential based on the difference between the earnings of a general practitioner and an internist discounted for mortality and multiplied by 25.6 years.²⁸ The courts in New York have stretched the holding even farther in celebrity goodwill cases, as will be discussed later in this article.

²⁴ *DiCaprio v. DiCaprio*, 556 N.Y.S.2d 1011, 1013-14 (4th Dep't 1990), *leave for appeal denied*, 566 N.Y.S.2d 587 (N.Y. 1991).

²⁵ *Id.* at 1013 (citations omitted).

²⁶ *Savasta v. Savasta*, 549 N.Y.S.2d 544 (Fam. Ct. Nassau Cty. 1989).

²⁷ *Savasta*, 549 N.Y.S.2d at 548.

²⁸ *Id.* at 549.

B. Archer v. Archer

In almost every other state, however, the courts have arrived at a distinctly different conclusion in considering professional licenses and degrees.²⁹

In 1985, the Maryland Court of Appeals addressed whether a medical degree and license should be considered marital property in *Archer v. Archer*.³⁰ The Archers were married in 1977 when Mr. Archer had completed his first year of medical school. The parties' separated and initiated divorce proceedings in 1982, just after Dr. Archer completed his medical residency. The United States Navy paid for Dr. Archer's medical school expenses, provided him with a monthly tax free stipend during medical school, and paid him during his residency. In that case, the Maryland Court of Appeals followed the majority of jurisdictions and held that a professional degree is:

an intellectual attainment; it is not a present property interest. It is personal to the holder; it cannot be sold, transferred, pledged or inherited. It does not have an assignable value nor does it represent a guarantee of receipt of a set monetary amount in the future, such as pension benefits. . . . At best, it represents a potential for increase in a person's earning capacity made possible by the degree and license in combination with innumerable other factors and conditions too uncertain and speculative to constitute "marital property" within the contemplation of the legislature.³¹

Thus, the Court of Appeals found that a professional degree or license "does not possess any of the basic characteristics of property within the ambit of marital property under 8-201(e) of the Act."³²

²⁹ For further discussion, see Davis, *supra* note 22 at 888.

³⁰ *Archer v. Archer*, 493 A.2d 1074 (Md. 1985).

³¹ *Id.* at 1080.

³² *Id.* at 1079.

II. Goodwill

Another intangible asset that has risen to the forefront of the property debate is goodwill.

Goodwill has been defined as:

the advantage or benefit, which is acquired by an establishment, beyond the mere value of the capital, stock, funds, or property employed herein, in consequences of the general public patronage and encouragement, which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices.³³

More simply stated, goodwill is “the probability that the old customers will resort to the old place.”³⁴

While many states include the *Cruttwell* quotation in defining goodwill, there is no consensus among the states regarding whether goodwill should be considered property to be divided upon divorce, and if so, the method of valuing goodwill. In reviewing the treatment of goodwill throughout the United States, the Maryland Court of Appeals in *Prahinski* summarized the three positions relating to goodwill in the divorce context. The Court found the following: (i) the most prevalent view treats goodwill as marital property in all cases; (ii) the next largest group considers goodwill to be personal to the individual and therefore not marital property; and (iii) a minority of states require a case-by-case analysis to determine how to treat goodwill. Those courts that consider goodwill on a case-by-case basis frequently divide goodwill into two categories, professional goodwill and reputational goodwill.

³³ *Prahinski v. Prahinski*, 540 A.2d 833 (1988), *aff’d*, 582 A.2d 784 (1990) (citations omitted).

³⁴ *Brown v. Benzinger*, 84 A. 79 (1912 (quoting *Cruttwell v. Lye*, 34 Eng.Rep. 129, 134 (ch. 1810)).

Professional goodwill is the distinct “business asset having a value independent of the continued presence or reputation of any particular individual.”³⁵ The majority of states will consider professional goodwill to be property to be divided upon divorce if it fits within the ambit of property that is a separate and distinct asset that is capable of being valued. For instance, the Maryland Court of Appeals has held that to be distributed at divorce, professional goodwill must be “severable from the reputation” of the party and “must be an asset having a separate value from the reputation of the practitioner.”³⁶

Reputational goodwill, on the other hand, relates to an individual’s reputation and depends on the continuing efforts of the individual.³⁷ Reputational goodwill is more closely related to an individual’s future earning capacity as a result of their personal reputation in their field of work. Future earning capacity is often considered by courts in determining alimony, and thus counting it as an asset to be divided would provide the other spouse with a double recovery.³⁸

³⁵ *Prahinski*, 540 A.2d 833, 843 (Md. App. 1988), *aff’d*, 582 A.2d 784 (Md. 1990).

³⁶ *Prahinski*, 582 A.2d at 790.

³⁷ *Richmond v. Richmond*, 779 P.2d 1211, 1213 (Alaska 1989).

³⁸ *Prahinski*, 582 A.2d at 787. The Maryland Court of Special Appeals chose to follow the third approach, which “distinguishes true goodwill from personal reputation and recognizes the former as property.” *Prahinski*, 540 A.2d at 843. *See Sorensen v. Sorensen*, 769 P.2d 820, 829 (Utah Ct. App. 1989), *modified*, 839 P.2d 774 (Utah 1992) (holding that factoring “future earning capacity in the valuation of the professional corporation’s goodwill would have the effect of double counting, as earning capacity is also utilized in determining an appropriate alimony award.”)(citations omitted); *see also White*, *supra* note 22.

A. *Dugan v. Dugan: Goodwill as Marital Property*

One of the hallmark cases finding that goodwill, reputational or professional, is marital property subject to equitable division upon divorce is the New Jersey case *Dugan v. Dugan*.³⁹ In *Dugan*, the Supreme Court of New Jersey held that Mr. Dugan, an attorney practicing as a solo practitioner in a professional corporation, possessed goodwill that was marital property subject to equitable division at divorce. The Dugans were married for twenty years at the time they separated. During the course of the marriage, Mr. Dugan practiced law in a wholly-owned professional corporation and Mrs. Dugan served as his secretary and completed her college education. On appeal, the Supreme Court of New Jersey addressed whether goodwill is a part of Mr. Dugan's law practice; if so, whether it constitutes property subject to equitable distribution; and if so, how it is to be valued.⁴⁰

The Court summarized that goodwill essentially is reputation that will probably generate future business.⁴¹ The Court firmly stated that goodwill exists as a legally protectible right, and to support this conclusion, the Court referenced, among other things, New Jersey inheritance tax law that requires consideration of goodwill.⁴² The Court recognized that although several elements may contribute to goodwill, reputation is at its core.⁴³ The Court held that:

[a] good reputation is earned after accomplishment and performance. . . . Future earning capacity per se is not goodwill. However, when that future earning capacity has been

³⁹ *Dugan v. Dugan*, 457 A.2d 1 (N.J. 1983).

⁴⁰ *Id.* at 3.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 6.

enhanced because reputation leads to probable future patronage from existing and potential clients, goodwill may exist and have value. When that occurs the resulting goodwill is property subject to equitable distribution.⁴⁴

New Jersey does not recognize medical degrees or licenses as marital property subject to equitable division⁴⁵ because a degree only represents a “possibility of future earnings.”⁴⁶ The Court distinguished goodwill from a license by explaining that when the “opportunity provided by the license is exercised, goodwill may come into existence.”⁴⁷ Goodwill represents not simply the possibility of future earnings as a license does, but the probability of enhanced future earnings based on the existing circumstances.⁴⁸ Mr. Dugan’s inability to sell his law practice did not eliminate its goodwill and its value as an asset to be considered in equitable distribution.⁴⁹ Finally, the Court found it to be inequitable to ignore Mrs. Dugan’s contributions to the development of Mr. Dugan’s law practice, which was the parties’ most valuable asset.⁵⁰ Therefore, the Court remanded the matter to the trial court to determine the value of the goodwill and to make an appropriate award.⁵¹

⁴⁴ *Id.* at 6.

⁴⁵ It is interesting to note that the *Dugan* Court and the *Prahinski* Court employ several of the same definitions of goodwill, yet arrive at distinctly different conclusions relating to the equitable distribution of the goodwill of a law practice at divorce. *Lynn v. Lynn*, 453 A.2d 539 (N.J. 1982).

⁴⁶ *Dugan*, 457 A.2d at 6.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 11.

B. *Prahinski v. Prahinski: Professional Goodwill as Marital Property*

Like *Dugan*, in *Prahinski v. Prahinski*⁵², the Maryland Court of Appeals addressed the goodwill of a solo law practice. In that case, after the Prahinskis were married, Mrs. Prahinski discontinued her education to maintain the family home while Mr. Prahinski finished his education, including law school. During the marriage, Mr. Prahinski obtained his law degree and opened a solo law practice, where his wife served as secretary and later as the office manager. Factually, the case is very similar to *Dugan*.

When Mrs. Prahinski filed for divorce she sought a portion of the law practice. The trial court held Mr. Prahinski's law practice to be marital property and awarded a portion to Mrs. Prahinski. Mr. Prahinski appealed and the Maryland Court of Special Appeals reversed, holding that the value of the solo practice consisted entirely of the reputation of the husband, and thus was not marital property.⁵³ The Maryland Court of Appeals accepted the wife's writ of *certiorari* on this issue of first impression in Maryland.

Mrs. Prahinski argued that "goodwill is a form of property which the practice acquired during the marriage; hence it fits the definition of marital property, no matter whose name is on the business."⁵⁴ The Court of Appeals reviewed the decisions of numerous other jurisdictions, including the *Dugan* decision in New Jersey, and affirmed the decision of the Court of Special Appeals, concluding that for ethical reasons a solo law practice is not saleable and regardless of the contributions of the non-lawyer spouse, the goodwill of a solo law practice is personal to the

⁵² *Prahinski v. Prahinski*, 540 A.2d 833, 843 (Md. App. 1988), *aff'd*, 582 A.2d 784 (Md. 1990).

⁵³ *Prahinski*, 540 A.2d at 841.

⁵⁴ *Prahinski*, 582 A.2d at 786.

individual practitioner and not severable from his reputation.⁵⁵ Further, the Court held that to be distributed at divorce, professional goodwill must be “severable from the reputation” of the party and “must be an asset having a separate value from the reputation of the practitioner.”⁵⁶

Soon after the decision in *Prahinski*, the Court of Special Appeals considered the issue of goodwill in the context of a solo dental practice in *Hollander v. Hollander*.⁵⁷ Abiding by the *Prahinski* decision, the Court held that the goodwill of a solo dental practice can be characterized as marital property only to the extent that it has goodwill “separate from the reputation of the dentist.”⁵⁸ Noting that Dr. Hollander’s dental practice held “valuable equipment, patient lists, patient records, and other substantial assets,” and the practice could be sold for a value greater than its tangible assets, the Court determined that the difference between the value of the tangible assets and the price the practice could be sold for was goodwill that was subject to equitable distribution.⁵⁹ In subsequent appellate cases in Maryland involving the issue of goodwill in medical practices, the Court has directed the trial courts to “ascertain first, whether in the particular case there exists a personal component, and secondly, if it does exist, determine the value of the personal component in the initial computation so that it can be subsequently excluded from the total valuation for purposes of fashioning an appropriate award.”⁶⁰

⁵⁵ *Id.* at 790.

⁵⁶ *Id.* at 790.

⁵⁷ *Hollander v. Hollander*, 597 A.2d 1012 (Md. App. 1991)

⁵⁸ *Id.* at 1017.

⁵⁹ *Id.* at 1016 n. 1.

⁶⁰ *Skrabak v. Skrabak*, 673 A.2d 732, 738 (Md. App. 1996) (quoting *Strauss v. Strauss*, 647 A.2d 818, *cert. denied*, 651 A.2d 855 (1995)).

C. Goodwill Considered in the Context of a Partnership Agreement

In larger law firms that operate under partnership agreements, goodwill has been treated differently again. For instance, *McDiarmid v. McDiarmid*⁶¹ involved valuing the goodwill factor in a law partnership in the context of a partnership agreement. The partnership agreement in force at the time of the divorce, and every partnership agreement prior to that time, prohibited partners from receiving payment for goodwill upon withdrawal, retirement, disability, death or the firm's dissolution.⁶² Apparently the firm had a history of partners leaving, and no prior transfer of partnership interests involved a payment for goodwill.⁶³ The trial judge, however, found the agreement to be "of help" only and concluded that value of the goodwill attributable to Mr. McDiarmid's share of the firm was \$63,824.⁶⁴

On appeal, the Court found that the trial court erred. The partnership agreement made firm goodwill expressly nonsalable, and thus did not allow Mr. McDiarmid to recoup any goodwill from the firm. Mr. McDiarmid had no way of realizing the value of goodwill upon terminating or selling his interest in the firm. In the absence of any other factors giving value to the goodwill, Mrs. McDiarmid did not meet her burden to justify valuation of the goodwill. The appellate court found that the trial court erred in giving a value to the goodwill when it should be given no value.

⁶¹ *McDiarmid v. McDiarmid*, 649 A.2d 810 (D.C. App. 1994).

⁶² *Id.* at 815.

⁶³ *Id.*

⁶⁴ *Id.*

In *McCabe v. McCabe*⁶⁵, Mr. McCabe was a partner in a large law firm governed by a partnership agreement. At his firm, a partner does not possess the right to sell his partnership interest and cannot continue to receive a share of profits upon retirement. The Superior Court of Pennsylvania found the trial court erred in valuing Mr. McCabe's interest in the firm beyond what was set forth in the partnership agreement because Mr. McCabe does not possess the benefits of true ownership - he cannot sell, liquidate, or otherwise realize the values assigned to his interest in the firm. The Court equated Mr. McCabe to a high paid executive who holds stock under the company's stock option plan.⁶⁶ While he may have some managerial input, under the partnership agreement, his ownership interest is limited.

Thus, it would appear that in some jurisdictions, a buy-sell agreement may negate the existence of transferable goodwill. The agreement must be negotiated at arm's length prior to the parties' separation. Additionally, it is persuasive if the agreement has been employed by others when negotiating their departure from a firm.

III. Celebrity Goodwill

The holdings relating to professional degrees and goodwill formed the foundation for later findings in the New York and New Jersey courts that celebrity goodwill is marital property and distributable upon divorce. Currently, the main reported appellate cases granting a spouse an equitable distribution of celebrity goodwill are restricted to New York and New Jersey.⁶⁷

⁶⁵ *McCabe v. McCabe*, 543 A.2d 558 (Pa. Super. 1988), *aff'd* 575 A.2d 87 (Pa. 1990)

⁶⁶ *McCabe*, 542 A.2d at 561.

⁶⁷ It should be noted that at the time of divorce, Mr. McCabe was 62. The trial court awarded Mrs. McCabe almost all of the marital property including the house and all of Mr. McCabe's pension while Mr. McCabe was awarded his interest in the law firm, a stamp collection, and a nominal life insurance policy. The Court was troubled that Mr. McCabe could retire and leave (Continued...)

A. *Golub v. Golub*

In *Golub v. Golub*⁶⁸, the parties, Marisa Berenson, a renowned film and television actress and model, and A. Richard Golub, a successful attorney, were married amidst media fanfare in 1982. Four years later the parties were before the court seeking a divorce, and Mr. Golub sought equitable distribution of the increase in value of Ms. Berenson's acting and modeling career.

During the marriage, Ms. Berenson's income increased, and in 1987 she earned more than \$150,000.⁶⁹ While Ms. Berenson's career may have advanced for innumerable reasons, the Court concluded that Mr. Golub's legal skills and business acumen were a primary reason for Ms. Berenson's career success.⁷⁰ Neither party made sacrifices for the career of the other and both parties already had established careers when they married.

Ms. Berenson argued that her celebrity status was neither "professional" nor a "license" and therefore was not "an investment in human capital subject to equitable distribution."⁷¹

the firm with \$26,000 of cash and personalty pursuant to the partnership agreement, while Mrs. McCabe would have \$301,000 worth of property.⁶⁷ At least two other cases exist in New York that discussed "celebrity status" with regard to marital property. *Getz v. Getz*, N.Y.L.J., March 2, 1989 (N.Y. Sup. Ct. Westchester Cty.) found that whatever "exceptional earning capacity" that jazz saxophonist Stan Getz once possessed no longer existed due to his deteriorating health. To the extent that Mr. Getz's "celebrity status" has any measurable value, it was reflected in the royalties due from his recordings that were already accounted for in the division of marital property. Likewise, in *Mann v. Mann*, N.Y.L.J., Jan. 10, 1995, at 26 (N.Y. Sup. Ct. N.Y. Cty.), the court held that jazz flutist Herbie Mann's "celebrity status" declined over the course of his nineteen year marriage. Thus, his "celebrity status" was delineated as separate property and not subject to equitable distribution. *See also*, S. David Rosenson, *Celebrity Goodwill - Is It Time?*, 32 BEVERLY HILLS B.A.J. 46 (1997).

⁶⁸ *Golub v. Golub*, 527 N.Y.S.2d 946 (Sup. Ct. N.Y. Co. 1988).

⁶⁹ *Id.* at 948.

⁷⁰ *Id.*

⁷¹ *Id.* at 949.

Moreover, she argued that her celebrity status is subject to substantial fluctuation and should not be considered on that basis. The Court rejected her arguments after considering *O'Brien* and its progeny, and concluded that “[i]t is the enhanced earning capacity that the license affords the holder that is of value. In this respect, all sources of enhanced earning capacity become indistinguishable.”⁷² The progeny of *O'Brien* gave the term “enhanced earning capacity” an expansive meaning, and the court determined that the *O'Brien* remedy should be applied evenhandedly to include “a spouse who is married to a nonprofessional who may nevertheless become an exceptional wage earner.”⁷³ Digressing from their original theory, the court noted that “[w]hen a person’s expertise in a field has allowed him or her to be an exceptional wage earner, this generates a value similar to that of the goodwill of a business.”⁷⁴ In conclusion, the court held that “any person whose expertise in his or her career has enabled him or her to become an exceptional wage earner should be valued as marital property subject to equitable distribution.”⁷⁵

One criticism of *Golub*, and *O'Brien* and its progeny has been that these cases are leading to an expansive notion of valuing and distributing almost any skill a spouse uses or could potentially use in his or her career. Pursuant to the holding in *Golub*, any career that accords a spouse enhanced earning capacity, as a result of joint spousal efforts, can be considered marital

⁷² *Id.*

⁷³ *Id.* at 949-50.

⁷⁴ *Id.* at 950.

⁷⁵ *Id.*

property upon divorce.⁷⁶ A continuation of this trend will lead to an increase in litigation because soon courts will be required to value and distribute the careers of both spouses in almost every divorce case.

Another criticism of the *Golub* decision raised by Allen M. Parkman is the perplexity it raises regarding the distinction between an increase in income and an increase in income potential.⁷⁷ The court relied on Ms. Berenson's increased income during the marriage. For Mr. Golub's efforts to result in an enhanced earning capacity for Ms. Berenson, her *post* divorce income should have continued to increase due to her husband's efforts during the marriage. In Ms. Berenson's case, it does not appear that her income continued to expand. As Mr. Parkman explains "[b]y associating marital property with past income increases rather than with an increase in anticipated future income, this decision could easily result in substantial injustice."

B. *Piscopo v. Piscopo*

New Jersey became involved with the issue of celebrity goodwill during the 1980s with the case of *Piscopo v. Piscopo*.⁷⁸ Joe and Nancy Piscopo met in 1970 and lived together as college students before getting married in 1973. Mr. Piscopo's career as a comedian was the parties' primary focus during their marriage, and Mr. Piscopo found his greatest fame in 1980 as a cast member of the television show "Saturday Night Live." In 1984, both Mr. Piscopo and fellow cast member, Eddie Murphy, left "Saturday Night Live." While Eddie Murphy's career

⁷⁶ See White, *supra* note 22 at 406; Rosen, *supra* note 1.

⁷⁷ See White, *supra* note 22 at 404; see also Allen M. Parkman, VALUING PROFESSIONAL PRACTICES AND LICENSES, Ch. 25A, *Valuing and Allocating Celebrity Status at Divorce* (1996 Supplement) [hereinafter PARKMAN].

⁷⁸ *Piscopo v. Piscopo*, 557 A.2d 1040, *cert. denied*, 564 A.2d 875 (N.J. 1989).

met with success in the ensuing years, Mr. Piscopo was not so fortunate; he made a few unsuccessful movies and then faded into relative obscurity. Meanwhile, in 1985 Mr. Piscopo filed for divorce.

The only disputed asset in the divorce proceeding was Mr. Piscopo's "celebrity goodwill." Mr. Piscopo argued that his celebrity goodwill was personal and reputational and "could not be related to probable future earnings, but only to possible future earnings."⁷⁹ He also contended that professional goodwill has educational and regulatory prerequisites that any diligent person can attain while celebrity goodwill depends on talent that has no "average" to measure against.⁸⁰ The Chancery Court responded by noting that in New Jersey, the value of a medical degree or license is not considered marital property subject to division, but "it is the person with particular and uncommon aptitude for some specialized discipline whether law, medicine or entertainment that transforms the average professional or entertainer into one with measurable goodwill."⁸¹

The New Jersey courts take an expansive view of goodwill as set forth in *Dugan v. Dugan*⁸², and in its analysis, the Court noted that in *Dugan*, they had determined that "business goodwill existed although the business depended entirely upon the skill of one person and had no book value."⁸³ The *Dugan* court set forth some findings that would be precedent to a finding

⁷⁹ *Piscopo*, 557 A.2d at 1040.

⁸⁰ *Piscopo*, 555 A.2d at 1191-92.

⁸¹ *Piscopo*, 555 A.2d at 1192.

⁸² *Dugan v. Dugan*, 457 A.2d 1 (N.J. 1983).

⁸³ *Piscopo*, 557 A.2d at 1041 (citation omitted).

that goodwill exists: the practitioner's demonstrated capacity, over several years prior to filing the complaint, to earn a net income in excess of the average practitioner of similar age, experience, education, and expertise, who expends a similar number of work hours.⁸⁴ Mr. Piscopo distinguished his situation from that in *Dugan* by noting that a professional has a reliable future income, whereas show business is volatile.⁸⁵ The Court retorted that the value of goodwill is not measured by future earnings, but by past earning capacity and the probability that such capacity will continue.⁸⁶ The Court held that

[t]he noncelebrity spouse should be entitled to a share of the celebrity spouse's fame, limited, of course, by the degree to which that fame is attributable to the noncelebrity spouse. The source of the fame must still be traced to the marital efforts.⁸⁷

One criticism of the holding in *Piscopo* lies in the Court's financial analysis. As Allen Parkman notes:

The injustice that would have occurred under preexisting law would not have been the court's ignoring Mr. Piscopo's success, but it would have been because the court ignored Mrs. Piscopo's sacrifices. Mrs. Piscopo had a potential career at marriage. She limited that career for their benefit. At divorce, she can expect to earn less and potentially have poorer marriage prospects than she had at the time that she married Mr. Piscopo. She sacrificed her human capital for the benefit of the marriage. . . . [T]he reduction in the value of her human capital should be treated as an implied indemnification contract resulting in a debt of the marriage to her.⁸⁸

⁸⁴ This is the first instance of the term "celebrity goodwill." The terminology lends itself to an application of the *Dugan* doctrine. In *Golub*, the focus was on "enhanced earning capacity." *Dugan*, 457 A.2d at 10; see also PARKMAN, *supra* note 75 at 25A-25.

⁸⁵ *Id.*

⁸⁶ *Id.* (citing *Dugan*).

⁸⁷ *Piscopo*, 557 A.2d at 1042.

⁸⁸ Parkman, *supra* note 75; see also Katherine Wells Meighan, *For Better or For Worse: A Corporate Finance approach to Valuing Educational Degrees at Divorce*, 5 GEO. MASON L. REV. 193 (1997) [hereinafter Meighan].

This discussion of how the noncelebrity spouse's contributions should be analyzed has only been cursorily addressed by the courts. Other commentators suggest viewing the noncelebrity spouse's contributions in either a debt or equity context depending on the length of marriage and contributions of the noncelebrity spouse.

C. *Elkus v. Elkus*

More recently in *Elkus v. Elkus*, Frederica Von Stade Elkus appealed a finding that her career as an opera singer and celebrity status are marital property.⁸⁹ The parties were married in 1973 when Ms. Von Stade had just begun her opera career performing minor roles with the Metropolitan Opera Company.⁹⁰ During the first year of their marriage, Ms. Von Stade earned \$2,250 and in 1989 she earned \$621,878.⁹¹ Now, she is a renowned recording artist and concert and television performer.⁹²

During the marriage, Mr. Elkus traveled with his wife, critiquing her performances, coaching her, photographing her for magazines and album covers, and caring for their two young children.⁹³ Mr. Elkus suggested that he sacrificed his own career as a singer to support Ms. Von Stade's career. Mr. Elkus argued that his effort and sacrifices allowed Ms. Von Stade to become

⁸⁹ *Elkus v. Elkus*, 572 N.Y.S.2d 901 (1991), *motion for leave to appeal dismissed*, 580 N.Y.S.2d 201 (N.Y. 1992).

⁹⁰ *Elkus*, 572 N.Y.S.2d at 901-02.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

a celebrated opera singer, and because her celebrity status increased in value during the marriage, he was entitled to equitable distribution of this marital property.⁹⁴

The trial court declined to extend the holding in *O'Brien* to include Ms. Von Stade's career, but instead found that "since [Mr. Elkus] enjoyed a substantial life style during the marriage and since he would be sufficiently compensated through distribution of the parties' other assets, the plaintiff's career was not marital property."⁹⁵

On appeal, the Supreme Court, Appellate Division relied on the holdings in *O'Brien* and *Golub*. The Court agreed with Mr. Elkus that his efforts contributed to the increase in value of Ms. Von Stade's career and

to the extent the appreciation in the plaintiff's career was due to the defendant's efforts and contributions, this appreciation constitutes marital property.

In sum, we find that it is the nature and extent of the contribution by the spouse seeking equitable distribution, rather than the nature of the career, whether licensed or otherwise, that should determine the status of the expertise as marital property.⁹⁶

Under this analysis, the Court emphasized Mr. Elkus' contributions to his wife's career for determining that he should share in her enhanced earning capacity. This analysis leaves open the possibility that a spouse that has not made substantial contributions to the celebrity spouse's career may not share in the rewards upon divorce.

Like the *O'Brien* court, the Supreme Court placed great weight on section 236(B)(5)(d)(6) of the New York Domestic Relations Law in finding that the appreciation in Ms.

⁹⁴ *Id.*

⁹⁵ *Id.* at 902.

⁹⁶ *Id.* at 904.

Von Stade's career was marital property.⁹⁷ In relevant part, that statute stated that "in determining an equitable distribution" the court shall consider "any equitable claim to, interest in, or direct or indirect contribution. . . made to the career or career potential of the other party." As Kenneth Davis concluded, "the court misinterpreted section 236 (B)(5)(d)(6), which does not define marital property, but rather prescribes the factors relevant to dividing it."⁹⁸

IV. The Right of Publicity and Celebrity Goodwill

In discussing celebrity goodwill we are talking about a celebrity's enhanced earning potential, but another valuable right, the right of publicity, also needs to be considered. In their seminal article *The Right of Privacy*, Samuel D. Warren and future Supreme Court Justice Louis D. Brandeis were among the first to touch on the principles that inform the right of publicity as it now exists.⁹⁹ Warren and Brandeis noted, for example, that as early as 1888, a Court in England had rested a decision restraining a photographer from exhibiting or selling copies of a woman's picture without her permission, in part, upon her property right in her image.¹⁰⁰ This early recognition that individuals have an enforceable right to control the commercial use of their image that is based in the legal rights associated with property provides the foundation upon which much of the subsequent "right of publicity" jurisprudence is based.

The right of publicity is the celebrity's exclusive ability to sell her/his name and likeness through advertising, product endorsement, and other economic ventures. An early case

⁹⁷ See Meighan, *supra* note 88; see also Davis, *supra* note 22 at 877.

⁹⁸ N.Y. Dom. Rel. Law 236(B)(5)(d)(6) (McKinney 1986). Davis, *supra* note 22 at 877.

⁹⁹ Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 5 (1890).

¹⁰⁰ Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 5 (1890) (citing *Pollard v. Photographic Co.*, 40 Ch. Div. 345 (1888)).

recognizing this right of publicity was *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*¹⁰¹

There, the Court found that

many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, buses, trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures.¹⁰²

Since *Haelan*, numerous states have recognized the right of publicity, either through common law or statute.¹⁰³ Now, a right to publicity suit can secure for a celebrity

the exclusive right to exploit the commercial value that attaches to their identities by virtue of their celebrity. The right to publicity protects that value as property, and its infringement is a commercial, rather than a personal tort. Damages stem not from embarrassment but from the unauthorized use of the plaintiff's property.¹⁰⁴

This right to publicity has been mentioned in some of the celebrity goodwill cases set forth above, but never explicitly valued as a separate asset. For instance, the court in *Golub* found that the theory of *O'Brien* and its progeny could be used "to include as marital property a spouse's unique ability to commercially exploit his or her fame."¹⁰⁵

In *Piscopo* the Chancery Court briefly addressed Mr. Piscopo's right to publicity. The Chancery Court questioned if Mr. Piscopo's argument that celebrity goodwill is not a distinct asset with a monetary value would change if someone appropriated his work product without his

¹⁰¹ *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 806 (2d Cir. 1953).

¹⁰² *Id.* at 868.

¹⁰³ Jonathan L. Kranz, *Sharing the Spotlight: Equitable Distribution of the Right of Publicity*, 33 CARDOZO ARTS & ENT. L.J. 917, 918 (1995).

¹⁰⁴ *Jim Henson Prods. v. John T. Brady & Assocs.*, 867 F. Supp 175, 188 (S.D.N.Y. 1994).

¹⁰⁵ *Golub*, 527 N.Y.S.2d 946, 949 (N.Y. Sup. Ct. 1988).

consent.¹⁰⁶ The Court surmised that goodwill is a component of a celebrity's right to commercially exploit his identity for monetary compensation, which is protected by the courts.

¹⁰⁷ In sum, the Court found that it could not:

countenance the anomaly that would result if one branch of Chancery vigorously protected plaintiff's person and business from another's "unjust enrichment by the theft of [his] goodwill," *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 729 (S.D.N.Y. 1978), while another branch deprived a spouse from sharing in that very same protectible interest.¹⁰⁸

In *Piscopo*, the Court did not squarely address a celebrity's right to publicity as a separate property right, but incorporated it as another reason for valuing celebrity goodwill. As a result, the concept of a celebrity's right to publicity has been raised in the context of a divorce, but it has not been addressed in any meaningful way.

V. Contracts of Professional Athletes, an Interesting Contrast

Professional athletes are generally compensated differently than other celebrities. Generally, professional athletes sign a contract with their team that extends for several years. At divorce, the question becomes whether future payments accorded to an athlete in a professional contract are marital property subject to distribution. For example, in *In re Marriage of Anderson*¹⁰⁹ the Court held that only the money already received by Richard Anderson pursuant to his basketball contract was marital property distributable at divorce, but the remaining

¹⁰⁶ *Piscopo*, 555 A.2d 1190, 1192 (N.J. Super. Ct. Ch. Div. 1988), *aff'd* 557 A.2d 1040 (N.J. Super. Ct. App. Div. 1989).

¹⁰⁷ *Piscopo*, 555 A.2d at 1192.

¹⁰⁸ *Id.*

¹⁰⁹ *In re Marriage of Anderson*, 811 P.2d 419 (Colo. 1990).

payments contracted for the following two years were future income and would not be considered marital property.¹¹⁰

*In re Marriage of Sewell*¹¹¹ again involved whether future payments under Mr. Sewell's contract with the Denver Broncos were marital property subject to distribution. The parties were divorced mere days before Mr. Sewell's final regular season game in 1989. As a result, the trial court awarded the wife a portion of his earnings for the final regular season game and the ensuing playoff bonus. Following the holding in *Anderson* that "compensation which is either received or fully earned during a marriage is marital property subject to equitable distribution," the Court of Appeals reversed.¹¹² The money from the final regular season game and the playoffs had not been earned by Mr. Sewell on the date of divorce, and thus the Court determined those funds were not marital property subject to distribution.

In *Chambers v. Chambers*¹¹³ the parties had been married for approximately nine (9) years when Mrs. Chambers filed for divorce. During the marriage, Mr. Chambers signed his first professional basketball contract, and at the time of divorce he had completed two seasons of a five year contract with the Phoenix Suns.¹¹⁴ The Court relied on case law stating that "the right to future income is a marital asset where that right is derived from efforts or products produced

¹¹⁰ *Id.* at 420.

¹¹¹ *In re Marriage of Sewell*, 817 P.2d 594 (Colo. 1991).

¹¹² *Id.* at 596.

¹¹³ *Chambers v. Chambers*, 840 P.2d 841 (Utah 1992).

¹¹⁴ *Chambers*, 840 P.2d at 842.

during the marriage.”¹¹⁵ The critical measure “is whether a right to the benefit has accrued in whole or in part during the marriage. To the extent that the right has so accrued it is subject to equitable distribution.”¹¹⁶ The Court affirmed the trial court’s holding that future income to be derived from the basketball contract is not marital property.¹¹⁷ The Court agreed that the future income will be earned and accrue as Mr. Chambers plays basketball during the term of his contract.¹¹⁸ The Court also noted that this focus on future payment was especially accurate “in light of the fact that the contract payments will only be made provided that Mr. Chambers does not suffer injury, illness, disability or death as a result of participation or involvement in any one of a number of off-court activities.”¹¹⁹

None of these sports figure cases raised the issue of goodwill. All three of these sports contracts involve forecasted income that held some guarantees. Certainly, at least in *Chambers*, it could be argued that Mr. Chambers’ earning capacity increased over the course of the marriage, as he obtained his first professional basketball contract and then subsequent contracts. That enhanced earning capacity was even conveniently reduced to a sum as represented in the contract held by Mr. Chambers with the Phoenix Suns. Nonetheless, the courts held this to be future income that was not marital property.

¹¹⁵ *Id.* at 844 (citations omitted).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 844-45.

The contrast of these sports figure contract cases with the celebrity goodwill cases set forth in New York and New Jersey is stark. In the sports cases there is a clear enhanced earning capacity with a future sum predicted by a contract, and yet because the money will be earned after the date of divorce and due to the inherent risks in the contract, the courts will not award a portion to the spouse. In the celebrity goodwill cases of New York and New Jersey, the celebrities do not have any prediction regarding their future income and the risks inherent to show business are the same as, if not greater than those involved in sports. Yet the New York and New Jersey courts readily granted the former spouse's a share of future income, not yet earned and not yet known.

V. Valuing Celebrity Goodwill

Due to the volatility of celebrity status, it is a challenging asset to accurately value. Unlike professional degrees, there are no statistical analyses that estimate the expected earning potential of a celebrity. Moreover, unlike a professional with a legally protectible interest, a celebrity's career, and thus enhanced earning capacity, is related to his or her good-standing with the public and critics, which can change in a moment.

The specific factors that can demonstrate celebrity goodwill include: (i) the extent and duration of the professional career; (ii) the nature and trend of earnings; and (iii) the financial aspects of contracts and agreements.¹²⁰ These considerations can disclose whether a celebrity is only related to a single character or program or if the celebrity has had success with

¹²⁰ See Stuart Walzer and Jan C. Gabrielson, *Celebrity Goodwill*, 2 J. AM. ACAD. MATRIMON. L. 35, 38-39 (1986) (citing to the deposition of a Hollywood agent noting that the public's desire to see a particular actor in a film, as measured by previous box office returns, determines the demand on and thus the compensation of an actor); Donald L. Gurse and Michael T. Miskei, VALUING PROFESSIONAL PRACTICES AND LICENSES, *Proving the Existence and Value of Celebrity* (Continued...)

numerous characters and programs and his or her career will likely have greater endurance.

Analyzing a celebrity's earnings history can indicate whether the celebrity is on the rise or in decline.¹²¹

Celebrity goodwill has been so infrequently valued in court proceedings that there is not one standard practice. There are several suggestions for valuing celebrity goodwill, which include: (1) excess earnings approach, (2) capitalization of earnings, (3) capitalization of cash flow, (4) multiples of gross or net income. All of these methods are problematic; for instance, how does one determine what the standard rate of compensation is for an entertainer? If the issue of celebrity goodwill is to remain afloat in the legal community, however, then standards need to be developed to adequately and fairly determine its value. For, if celebrity goodwill is to be considered marital property, then courts need to provide a more thorough analysis to allow for a fair result to both parties and a consistent determination of the value of goodwill.

k:\data\clients\08055\FORM-U1300-sain-02.doc

Goodwill, 26-11 [hereinafter GURSEY]; Donald L. Gurse and Michael T. Miskei, *Celebrity Goodwill*, C720 ALI-ABA 99 (1991) (discussing valuation techniques in the equitable distribution of celebrity goodwill)[hereinafter Gurse & Miskei].

¹²¹ GURSEY, *supra* note 120 at 26-16.