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## Professional Corporation May Have Valuable Goodwill, Apart from Person of Individual Member, That Must Me Considered in Property Settlement on Divorce.

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is possible that the California court will uphold a prosecutorial challenge to peremptories based on group bias.<sup>84</sup>

In view of the criticism the *Swain* standard has received from legal scholars and the difficult burden imposed by the test, the *Wheeler* court was not unreasonable in attempting to implement a more workable standard. The long range effect of the decision, however, is to undermine the use of the peremptory challenge so that its use will no longer be consistent with its underlying rationale. Additionally, the *Wheeler* test may prove to be as unworkable as the *Swain* standard that it was designed to improve. The significance of the *Wheeler* decision is that it is the first case to depart from the strict *Swain* standard and, therefore, it revives the issue of the conflict between the use of the peremptory challenge and the right to a representative jury. Other states may be more inclined to adopt their own standards, eventually inducing the Supreme Court to review the issue. Perhaps the Supreme Court will adopt a more workable test that would make it easier to prove discrimination over a long period of time while still allowing the peremptory challenge in a particular case to remain unqualified.

*Karen Angelini*

**DIVORCE—Division of Property—Professional Corporation  
May Have Valuable Goodwill, Apart from Person of  
Individual Member, That Must Be Considered  
in Property Settlement on Divorce**

*Geesbreght v. Geesbreght,*

570 S.W.2d 427 (Tex. Civ. App.—Fort Worth 1978, writ dismissed).

John Geesbreght, a physician, was employed by a professional partnership that provided emergency medical assistance pursuant to contracts with Fort Worth area hospitals. During John's marriage to Mary Lee Geesbreght, the professional partnership was terminated and a corporation was formed that acquired all of the contracts belonging to the partnership. John Geesbreght became a fifty percent owner of the corporation and worked as an employee as well, personally performing services at one of the hospitals under contract with the corporation. Additional physicians were

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808-09 (10th Cir. 1967), *cert. denied*, 394 U.S. 963 (1969). "The concept of fair trial applies to both the prosecution and the defense." *United States v. Tijerina*, 412 F.2d 661, 666 (10th Cir.), *cert. denied*, 396 U.S. 990 (1969).

84. The dissent in *Wheeler* views this possibility, along with the possibility of extension to civil cases, as underscoring "the seriousness of the sweeping procedural changes" worked by the *Wheeler* majority. See *People v. Wheeler*, 583 P.2d 748, 769, 148 Cal. Rptr. 890, 911 (1978) (Richardson, J., dissenting).

employed to administer emergency room services in the other Fort Worth hospitals. As a result of the employees' concerted efforts, the corporation had become extremely profitable by the time John Geesbreght filed suit for divorce from his wife.<sup>1</sup> In the subsequent divorce action, the trial court awarded one-half of the book value of the corporate stock held by John to Mary Lee as her community share in the medical practice. Mary Lee appealed this property decree, alleging error in the court's failure to consider the enhanced value of the corporation's stock resulting from goodwill acquired during her marriage to John.<sup>2</sup> Held—*Affirmed in part, reversed and remanded in part*. A professional corporation may possess goodwill as an asset of worth and value to some extent apart from the person of an individual member that must be considered in the division of marital property upon divorce.<sup>3</sup>

In a divorce proceeding, the value of marital property is usually a critical consideration in the court's division of the marital estate.<sup>4</sup> Often the major asset of a marriage is a business owned or controlled by one spouse, and the value assigned by the court to that business or its stock will consequently have a significant impact on the equitable partition of the marital property. The methods of appraising a business vary depending upon the purpose of the appraisal.<sup>5</sup> Generally a court will consider all material factors affecting the value of a business,<sup>6</sup> placing particular emphasis on any agreement between the owners concerning the value of the business or fixing the value of its stock.<sup>7</sup> A major factor in appraising a business is its net asset value, which represents the total actual worth of business assets.<sup>8</sup>

1. Mary Lee and the Geesbreght children were living in Illinois at the time John brought the divorce action. *Geesbreght v. Geesbreght*, 570 S.W.2d 427, 429 (Tex. Civ. App.—Fort Worth 1978, writ *dism'd*).

2. *See id.* at 433. Overruling a challenge to its jurisdiction, the trial court granted a divorce and awarded custody of the parties' minor children to the father. Mary Lee appealed both of these actions, and both were affirmed on appeal. *Id.* at 429, 433.

3. *Id.* at 436.

4. *Nastrom v. Nastrom*, 262 N.W.2d 487, 491 (N.D. 1978); *see, e.g., Hayutin v. Commissioner*, 508 F.2d 462, 469 (10th Cir. 1974) (court must consider value of estate to be divided in divorce action); *Snyder v. Snyder*, 198 N.E.2d 8, 10 (Ind. Ct. App. 1964) (error to divide property without evidence of its value); *Fuqua v. Fuqua*, 541 S.W.2d 228, 230 (Tex. Civ. App.—Tyler 1976, no writ) (size of estate is factor in dividing estate of parties).

5. *See Comment, Valuation of Dissenters' Stock Under Appraisal Statutes*, 79 HARV. L. REV. 1453, 1454-55 (1966).

6. *See, e.g., Loeb v. Schenley Indus., Inc.*, 285 A.2d 829, 830 (Del. Ch. 1971); *Stewart v. D.J. Stewart & Co.*, 346 N.E.2d 475, 479 (Ill. Ct. App. 1976); *In re West Waterway Lumber Co.*, 367 P.2d 807, 813 (Wash. 1962); *cf. Flarsheim v. Twenty Five Thirty Two Broadway Corp.*, 432 S.W.2d 245, 255 (Mo. 1968) (flexible standard for valuing stock; no one formula conclusive).

7. *See Succession of Jurisich*, 69 So. 2d 361, 363 (La. 1953); *Chaffe v. Murray*, 492 S.W.2d 680, 685 (Tex. Civ. App.—Corpus Christi 1973, writ *ref'd n.r.e.*); *Jones v. Harris*, 388 P.2d 539, 541-42 (Wash. 1964).

8. *See, e.g., Levin v. Midland-Ross Corp.*, 194 A.2d 50, 57-58 (Del. Ch. 1963); *Lipe-*

Book value<sup>9</sup> is an important element of this asset valuation.<sup>10</sup> Although intangible assets of the business are usually excluded from the determination of book value,<sup>11</sup> courts frequently recognize the relevance of intangible assets such as goodwill in contributing to an accurate value for the stock or business.<sup>12</sup> An equally pertinent factor in business and stock appraisal is market value.<sup>13</sup> According to the market value theory, the worth of a business or the value of its stock depends upon what a willing buyer would pay for the business or stock.<sup>14</sup> This method tends to produce a value for the business or share of stock that more closely represents its actual worth because buyers and sellers in the market continually reevaluate the assets of that business.<sup>15</sup> When a business is privately owned or controlled, however, market value is an unsatisfactory measure of the business' worth because its stock is seldom, if ever, traded on the open market.<sup>16</sup> Therefore,

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Rollway Corp. v. Seligson, 300 N.Y.S.2d 478, 481 (Sup. Ct. 1969); Brown v. Hedahl's-Q B & R, Inc., 185 N.W.2d 249, 256, 259 (N.D. 1971).

9. There is no single definition of book value. It generally refers to a theoretical value for the net assets of a business, a value which was originally assigned to those assets according to an agreement between the owners of the business. See Schaffer v. Below, 174 F. Supp. 505, 519 (D.V.I. 1959), *aff'd*, 278 F.2d 619 (3d Cir. 1960); Area, Inc. v. Stetenfeld, 541 P.2d 755, 761 (Alaska 1975); S.C. Pohlman Co. v. Easterling, 27 Cal. Rptr. 450, 451 (Ct. App. 1962).

10. See Levin v. Midland-Ross Corp., 194 A.2d 50, 54 (Del. Ch. 1963); *In re Shipway*, 29 N.Y.S.2d 590, 599 (Sup. Ct. 1941); *cf.* Lucas v. Pembroke, 135 S.E.2d 147, 151 (Va. Ct. App. 1964)(book value or net asset value, a factor considered in valuing stock). *But see* General Grain, Inc. v. Goodrich, 221 N.E.2d 696, 702 (Ind. Ct. App. 1966)(formula stressing book value of stock was erroneous); Warren v. Baltimore Transit Co., 154 A.2d 796, 801 (Md. Ct. App. 1959)(figure for book value discarded as insignificant).

11. See, e.g., Schaffer v. Below, 174 F. Supp. 505, 517 (D.V.I. 1959), *aff'd*, 278 F.2d 619 (3d Cir. 1960); Minoff v. Margetts, 81 A.2d 369, 372 (N.J. Sup. Ct. 1951); Soechtig v. Amick, 140 N.Y.S.2d 85, 86 (Sup. Ct. 1955).

12. See Nave-McCord Mercantile Co. v. Ranney, 29 F.2d 383, 390 (8th Cir. 1928); Porter v. C. O. Porter Mach. Co., 58 N.W.2d 135, 137 (Mich. 1953); Corry v. Passaic Nat'l Bank & Trust Co., 67 A.2d 486, 487 (N.J. 1949). See also Comment, *Valuation of Dissenters' Stock Under Appraisal Statutes*, 79 HARV. L. REV. 1453, 1457-59 (1966).

13. See, e.g., Gallois v. West End Chem. Co., 8 Cal. Rptr. 596, 600 (Ct. App. 1960); David J. Greene & Co. v. Schenley Indus., Inc., 281 A.2d 30, 34 (Del. Ch. 1971); Whitman v. Whitman, 149 N.W.2d 529, 531-32 (Wis. 1967).

14. See, e.g., Baron v. Pressed Metals of America, Inc., 123 A.2d 848, 854 (Del. Ch. 1956); Tome Land & Improvement Co. v. Silva, 494 P.2d 962, 965 (N.M. 1972); Calvert v. Kattar, 301 S.W.2d 318, 320 (Tex. Civ. App.—Austin 1957, writ *ref'd*). See generally Comment, *Valuation of Dissenters' Stock Under Appraisal Statutes*, 79 HARV. L. REV. 1453, 1460 (1966).

15. Homer v. Crown Cork & Seal Co., 141 A. 425, 432 (Md. Ct. App. 1928); Jones v. Healy, 55 N.Y.S.2d 349, 360 (Sup. Ct. 1945), *aff'd*, 62 N.Y.S.2d 605 (App. Div. 1946); see David J. Greene & Co. v. Schenley Indus., Inc., 281 A.2d 30, 34 (Del. Ch. 1971); *cf.* Wainwright v. Lingle, 109 So. 2d 444, 446 (La. 1959)(fair cash value for stock is proportion of corporation's assets at market value).

16. See, e.g., General Grain, Inc. v. Goodrich, 221 N.E.2d 696, 701-02 (Ind. Ct. App. 1966); Robbins v. Beatty, 67 N.W.2d 12, 19 (Iowa 1954); Aldrich v. Geahry, 80 A.2d 59, 61 (Pa. 1951). See generally Comment, *Valuation of Shares in a Closely Held Corporation*, 47 MISS. L.J. 715, 715 (1976). See also Comment, *Professional Goodwill As Community Property: How Should Idaho Rule?*, 14 IDAHO L. REV. 473, 485-86 (1978).

when considering the worth of a close corporation for purposes of dividing the marital property, many courts have added values for intangible assets to the book value of the close corporation in order to arrive at a fair appraisal of the business and its stock.<sup>17</sup>

Goodwill, a primary element of business intangibles, is the probability that a business' old customers will return to the old place of business because of their satisfaction with, and confidence in that business.<sup>18</sup> It is the intangible advantage acquired as a result of patronage from constant or habitual customers, by reason of its location, local position, and reputation for skill, quality, integrity, or punctuality.<sup>19</sup> Therefore, a principal benefit of business goodwill derives from the privilege of a successor in interest to continue an established business under the old firm name or at a designated location.<sup>20</sup> Since goodwill generally reflects the public's trust in the established, well known, and well conducted business,<sup>21</sup> it may attach to any person, firm, or corporation that offers a commodity or service for sale to the public.<sup>22</sup> The worth of a business in excess of the value assigned to its net assets—the capital stock, funds, and property employed therein—is usually evidence of the existence of goodwill.<sup>23</sup>

Although it is intangible, goodwill is universally recognized as property, constituting a valuable asset of the business of which it is a part.<sup>24</sup> It may

17. See *Corry v. Passaic Nat'l Bank & Trust Co.*, 67 A.2d 486, 487 (N.J. 1949); *cf. Southdown, Inc. v. McGinnis*, 510 P.2d 636, 641 (Nev. 1973)(court should consider all relevant factors affecting value of close corporations).

18. See, e.g., *Winn-Dixie Montgomery, Inc. v. United States*, 444 F.2d 677, 681 (5th Cir. 1971); *Freeling v. Wood*, 361 P.2d 1061, 1063 (Okla. 1961); *Rice v. Angell*, 73 Tex. 350, 354, 11 S.W. 338, 339 (1889). See generally Comment, *Professional Goodwill As Community Property: How Should Idaho Rule?*, 14 IDAHO L. REV. 473, 474-75 (1978); 10 HOUS. L. REV. 966, 966 (1973).

19. J. STORY, COMMENTARIES ON THE LAW OF PARTNERSHIPS § 99, at 157 (7th ed. 1881); see, e.g., *Barran v. Commissioner*, 334 F.2d 58, 61 (5th Cir. 1964); *Noerr Motor Freight, Inc. v. Eastern R.R.*, 155 F. Supp. 768, 810 (D. Pa. 1957), *rev'd on other grounds*, 365 U.S. 127 (1961); *Taormina v. Culicchia*, 355 S.W. 2d 569, 573 (Tex. Civ. App.—El Paso 1962, writ ref'd n.r.e.).

20. See, e.g., *Avery v. City of Lyons*, 331 P.2d 906, 914 (Kan. 1958); *Dodson v. McElreath*, 48 So. 2d 861, 864 (Miss. 1950); *In re Tannenbaum's Will*, 219 N.Y.S.2d 149, 154 (Sup. Ct. 1961).

21. See, e.g., *Des Moines Gas Co. v. City of Des Moines*, 238 U.S. 153, 165 (1915); *Taormina v. Culicchia*, 355 S.W.2d 569, 574 (Tex. Civ. App.—El Paso 1962, writ ref'd n.r.e.); *Spheeris v. Spheeris*, 155 N.W.2d 130, 135 (Wis. 1967).

22. *Sessinghaus Milling Co. v. Hanebrink*, 152 S.W. 354, 357 (Mo. 1912)(goodwill may be acquired by corporation, natural person, or firm); see, e.g., *Akwell Corp. v. Eiger*, 141 F. Supp. 19, 22 (S.D.N.Y. 1956)(corporation may acquire goodwill); *Smith v. Bull*, 325 P.2d 463, 468 (Cal. 1958)(goodwill may attach to partnership); *Evans v. Gunnip*, 135 A.2d 128, 131 (Del. 1957)(goodwill may be present in partnership); *cf. Connor v. Township of Chanhassen*, 81 N.W.2d 789, 797 (Minn. 1957)(goodwill is personal property incident to shop).

23. See, e.g., *Masquelette v. Commissioner*, 239 F.2d 322, 325 (5th Cir. 1956); *Buck v. Mueller*, 351 P.2d 61, 68 (Or. 1960); *Jackson v. Caldwell*, 415 P.2d 667, 670 (Utah 1966).

24. See, e.g., *NAACP v. Overstreet*, 142 S.E.2d 816, 827 (Ga. 1965), *cert. dismissed*, 384 U.S. 118 (1966); *Howell v. Bowden*, 368 S.W.2d 842, 848 (Tex. Civ. App.—Dallas 1963, writ

be bought and sold in connection with the business,<sup>25</sup> but it has no existence as property independent of the business to which it inheres.<sup>26</sup> Consequently, some jurisdictions have not permitted goodwill to be transferred as an asset of a business when the goodwill was found to be personal to an individual member of that business or when it was attached to a member's individual property.<sup>27</sup> Goodwill is personal whenever the success of a business depends solely upon the skill, ability, integrity, or other personal characteristics of its members.<sup>28</sup> Professional practices, such as those of lawyers, doctors, accountants, and persons similarly situated, are representative of businesses in which goodwill accrues to the individual members of the business. Thus, a number of jurisdictions have held that goodwill generated by the professional practitioner as a result of his personal abilities is not to be included as a business asset upon dissolution of the firm.<sup>29</sup>

Many courts, on the other hand, have regarded professional goodwill as an asset of a professional business even though the goodwill was attributable to the personal skill, talent, or reputation of individuals composing the business.<sup>30</sup> Goodwill often attaches as a business asset, and continues with

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ref'd n.r.e.); *In re Glant's Estate*, 356 P.2d 707, 709 (Wash. 1960).

25. See, e.g., *Sporleder v. Swaine*, 456 F.2d 1081, 1083 (9th Cir. 1972); *Texas & Pac. Ry. v. Mercer*, 127 Tex. 220, 225, 90 S.W.2d 557, 560 (1936); *Scott v. Doggett*, 226 S.W.2d 183, 187 (Tex. Civ. App.—Amarillo 1949, writ ref'd n.r.e.). See also 10 Hous. L. Rev. 966, 966-67 (1973).

26. See, e.g., *Miller v. Commissioner*, 333 F.2d 400, 404 (8th Cir. 1964); *Mossler Acceptance Co. v. Martin*, 322 F.2d 183, 185-86 (5th Cir.), cert. denied, 376 U.S. 921 (1964); *First Ala. Bancshares, Inc. v. McGahey*, 355 So. 2d 681, 683 (Ala. 1977); cf. *Alamo Lumber Co. v. Fahrenthold*, 58 S.W.2d 1085, 1088 (Tex. Civ. App.—Beaumont 1933, writ ref'd)(may sell goodwill in connection with property or business to which it is incident). But see *Falstaff Beer, Inc. v. Commissioner*, 322 F.2d 744, 746 (5th Cir. 1963)(may transfer goodwill of business apart from transfer of tangible asset).

27. See, e.g., *Rinke v. Rinke*, 48 N.W.2d 201, 207 (Mich. 1951)(transferee may not benefit from goodwill attributable to individual business of another); *Dwyer v. Jung*, 336 A.2d 498, 499 (N.J. Super. Ct. Ch. Div. 1975)(lawyer's goodwill may not be sold); *Masters v. Brooks*, 117 N.Y.S. 585, 589 (Sup. Ct. 1909)(no goodwill in business which depends on qualities of person carrying it on).

28. See, e.g., *Virgin v. Slatko*, 358 So. 2d 1178, 1179 (Fla. Ct. App. 1978)("business dependent solely upon the personal and professional qualifications of the persons carrying it on does not possess 'goodwill'"); *Magee v. Pope*, 112 S.W.2d 891, 899 (Mo. Ct. App. 1938)(goodwill of business based solely on professional skill, personal ability, integrity, high standing, learning, and repute of owner is personal and not transferable); *Siddall v. Keating*, 185 N.Y.S.2d 630, 633 (Sup. Ct. 1959)("professional partnership whose reputation depends upon the individual skill of its members, has no goodwill to be distributed as a firm asset").

29. See, e.g., *Lyon v. Lyon*, 54 Cal. Rptr. 829, 833 (Ct. App. 1966)(goodwill attaches to individual members of law firm; therefore it has no value upon dissolution); *Cook v. Lauten*, 117 N.E.2d 414, 416 (Ill. Ct. App. 1954)(professional partnership has no goodwill to be distributed as firm asset upon dissolution); *Rice v. Angell*, 73 Tex. 350, 354-55, 11 S.W. 338, 340 (1889)(goodwill personal to partners ceases upon dissolution of firm). See also *Walzer, Divorce and the Professional Man*, 4 FAM. L.Q. 363, 367 (1970).

30. See, e.g., *Rees v. United States*, 187 F. Supp. 924, 926 (D. Or. 1960)(goodwill is

the business even after the individual who created the goodwill has departed.<sup>31</sup> Moreover, a reputation for skill and learning in a particular profession has been said to secure a significant advantage for the business enterprise by engendering the confidence of its patrons.<sup>32</sup> To this extent, a professional business may acquire goodwill that is unrelated to the goodwill possessed by its members.<sup>33</sup>

These diverging views on professional goodwill become most evident in divorce cases, when the existence of goodwill may have an important effect on the division of marital property and the decree of alimony.<sup>34</sup> The few jurisdictions that have dealt with this problem favor the inclusion of professional goodwill as an asset to be considered in determining the value of the parties' property at the time of the divorce.<sup>35</sup> Because in community property states the time, efforts, and skills of the respective spouses are assets of the community,<sup>36</sup> one community property state considers any goodwill of a professional business developed during the marriage through

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property that physicians, surgeons, lawyers, and dentists may own and sell), *aff'd*, 295 F.2d 817 (9th Cir. 1961); *Durio v. Johnson*, 358 P.2d 703, 705 (N.M. 1961)(goodwill exists in professional practice or business founded on personal skill and reputation); *Berg v. Settle*, 425 P.2d 635, 638 (Wash. 1967)(finding of goodwill in medical partnership not erroneous).

31. See *Smith v. Bull*, 325 P.2d 463, 468 (Cal. 1958); *Mackay v. Clark Rig Bldg. Co.*, 42 P.2d 341, 348-49 (Cal. Ct. App. 1935); *cf. Driskill v. Thompson*, 296 P.2d 834, 838 (Cal. Ct. App. 1956)(continuance of business created goodwill regardless of who continued it or in what form). See also *Walzer, Divorce and the Professional Man*, 4 *FAM. L.Q.* 363, 367, 368-69 (1970).

32. See *Mueller v. Mueller*, 301 P.2d 90, 94-95 (Cal. Ct. App. 1956); *Finch Bros. v. Michael*, 83 S.E. 458, 460 (N.C. 1914); *cf. Dillion v. Anderson*, 358 S.W.2d 694, 696 (Tex. Civ. App.—Dallas 1962, writ *ref'd n.r.e.*)(assignor of business must not detract from goodwill by soliciting old customers); *Yeakley v. Gaston*, 111 S.W. 768, 768 (Tex. Civ. App. 1908, no writ)(sale of goodwill obligates professional to not practice in same territory).

33. See *Smith v. Bull*, 325 P.2d 463, 468 (Cal. 1958); *Evans v. Gunnip*, 135 A.2d 128, 131 (Del. 1957); *cf. Rutan v. Coolidge*, 136 N.E. 257, 259 (Mass. 1922)(question of fact whether goodwill can survive death of partner).

34. Compare *In re Marriage of Lukens*, 558 P.2d 279, 283 (Wash. Ct. App. 1976)(professional goodwill is property subject to disposition and its value may affect alimony) with *Nail v. Nail*, 486 S.W.2d 761, 761 (Tex. 1972)(accrued goodwill of medical practice not property in estate of parties subject to division). See generally *Comment, Settlement of a Community Partnership Interest Upon Separation or Divorce*, 51 *TULANE L. REV.* 700, 711-12 (1977).

35. See *Golden v. Golden*, 75 Cal. Rptr. 735, 737 (Ct. App. 1969); *Stern v. Stern*, 331 A.2d 257, 260-61 (N.J. 1975); *Nastrom v. Nastrom*, 262 N.W.2d 487, 493 (N.D. 1978); *In re Marriage of Goger*, 557 P.2d 46, 47 (Or. Ct. App. 1976); *In re Marriage of Lukens*, 558 P.2d 279, 281 (Wash. Ct. App. 1976). *But see Nail v. Nail*, 486 S.W.2d 761, 764 (Tex. 1972). See also *Comment, Professional Goodwill As Community Property: How Should Idaho Rule?*, 14 *IDAHO L. REV.* 473, 489 (1978); *Comment, Settlement of a Community Partnership Interest Upon Separation or Divorce*, 51 *TUL. L. REV.* 700, 711-12 (1977).

36. See, e.g., *Hammonds v. Commissioner*, 106 F.2d 420, 422 (10th Cir. 1939); *Somps v. Somps*, 58 Cal. Rptr. 304, 307 (Ct. App. 1967); *Norris v. Vaughan*, 152 Tex. 491, 501, 260 S.W.2d 676, 682 (1953).

such efforts as community property subject to division upon marital dissolution.<sup>37</sup>

Texas, however, has yet to adopt the theory that goodwill is an asset of a professional business to be partitioned upon divorce.<sup>38</sup> In *Nail v. Nail*,<sup>39</sup> the first Texas case concerning this issue, the supreme court held that goodwill of a sole medical practice did not qualify as property to be considered in a decree dividing the estate of the parties.<sup>40</sup> The court found that the accrued goodwill of a sole practitioner's medical business did not possess value or constitute an asset separate from the individual practitioner or his ability to practice.<sup>41</sup> The goodwill, insofar as it was dependent only upon the personal skill, experience, and reputation of the sole practitioner, would cease to exist in the event the practitioner withdrew from the business.<sup>42</sup> While the wife had acquired a community interest in the medical practice,<sup>43</sup> she was not entitled to the business' enhanced value attributable to goodwill; that enhanced value was a mere expectancy wholly contingent on the continuation of existing circumstances.<sup>44</sup> Accordingly, the court stated that it was not an earned or vested property right subject to division at the time of divorce.<sup>45</sup>

In *Geesbreght v. Geesbreght*<sup>46</sup> the Fort Worth Court of Civil Appeals was confronted with the issue whether in a division of property upon divorce, goodwill may exist as an asset of a professional partnership or corporation apart from the person of an individual member.<sup>47</sup> The court alluded to the

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37. See *Todd v. Todd*, 78 Cal. Rptr. 131, 135 (Ct. App. 1969); *Brawman v. Brawman*, 19 Cal. Rptr. 106, 109 (Ct. App. 1962); cf. *In re Marriage of Lukens*, 558 P.2d 279, 282 (Wash. Ct. App. 1976)(goodwill included in property division). *But see Nail v. Nail*, 486 S.W.2d 761, 764 (Tex. 1972)(goodwill not property in parties' estate). See also Krauskopf, *Marital Property at Marriage Dissolution*, 43 Mo. L. Rev. 157, 198 (1978).

38. *Nail v. Nail*, 486 S.W.2d 761, 764 (Tex. 1972).

39. 486 S.W.2d 761 (Tex. 1972).

40. *Id.* at 764.

41. *Id.* at 764.

42. *Id.* at 764; accord, *Rice v. Angell*, 73 Tex. 350, 354-55, 11 S.W. 338, 340 (1889). See generally Walzer, *Divorce and the Professional Man*, 4 FAM. L.Q. 363, 367 (1970).

43. *Nail v. Nail*, 486 S.W.2d 761, 762 (Tex. 1972); see *Rompel v. United States*, 59 F. Supp. 483, 486 (W.D. Tex.), *rev'd on other grounds*, 326 U.S. 367, 370 (1945); cf. *Tarver v. Tarver*, 394 S.W.2d 780, 783 (Tex. 1965)(presumption that all property possessed by spouses at dissolution of marriage is community); *Hardee v. Vincent*, 136 Tex. 99, 102, 147 S.W.2d 1072, 1073 (1941)(all property acquired by husband or wife during marriage by onerous title is community). See generally TEX. FAM. CODE ANN. §§ 5.01(b), .02 (Vernon 1975).

44. *Nail v. Nail*, 486 S.W.2d 761, 764 (Tex. 1972); cf. *In re Marriage of Brown*, 544 P.2d 561, 567, 126 Cal. Rptr. 633, 639 (1976)(termination of rights prior to vesting must be considered in valuation). *But see Busby v. Busby*, 457 S.W.2d 551, 553 (Tex. 1970)(contingencies merely make interest in property subject to divestment, but interest is nevertheless a vested property right if accrued during marriage).

45. *Nail v. Nail*, 486 S.W.2d 761, 764 (Tex. 1972). *But see Cearley v. Cearley*, 544 S.W.2d 661, 666 (Tex. 1976)(contingent interest may be settled at time of divorce).

46. 570 S.W.2d 427 (Tex. Civ. App.—Fort Worth 1978, writ *dism'd*).

47. *Id.* at 434. The *Nail* court mentioned this question but specifically refrained from



*Nail* decision, but distinguished it on the ground that *Nail* concerned the goodwill of a sole professional practice whereas the instant case pertained to the goodwill of a multi-member professional corporation.<sup>48</sup> Since the corporation employed ten full-time and many part-time physicians, the corporation could acquire a reputation that would probably not diminish even though a change of personnel occurred within the business.<sup>49</sup> As the court indicated, new employees or management, performing the same personal services, would have an opportunity to preserve the client's confidence in the former operators because the business would continue as before.<sup>50</sup> The court recognized, however, that goodwill in a personal service enterprise such as that of a professional person or corporation could accrue to an individual professional practitioner as well as to a professional firm.<sup>51</sup> If an individual builds a reputation for service, it is personal to him, and consequently, does not constitute an asset apart from his person.<sup>52</sup> To the extent the goodwill is personal in nature, the court in *Geesbreght* stated that it is not a proper consideration in a division of property on divorce.<sup>53</sup> Since a percentage of goodwill attributable to John Geesbreght for his personal services at the hospital was personal to him, it was not subject to division.<sup>54</sup> The court determined, however, that the medical corporation possessed goodwill as a valuable asset of the business, apart from the husband's person as a professional practitioner, which had to be considered in valuing the parties' estate on divorce.<sup>55</sup>

The court's holding, that a professional corporation may possess goodwill that must be included as an asset of the business for purposes of valuing the parties' estate on divorce, is in agreement with the weight of judicial opinion.<sup>56</sup> This decision enables divorce courts to appraise the

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deciding it. *Nail v. Nail*, 486 S.W.2d 761, 764 (Tex. 1972).

48. *Geesbreght v. Geesbreght*, 570 S.W.2d 427, 434-35 (Tex. Civ. App.—Fort Worth 1978, writ *dism'd*).

49. *Id.* at 435; *accord*, *In re Marriage of Foster*, 117 Cal. Rptr. 49, 53 (Ct. App. 1974); *In re Marriage of Lukens*, 558 P.2d 279, 281 (Wash. Ct. App. 1976).

50. *Geesbreght v. Geesbreght*, 570 S.W.2d 427, 435 (Tex. Civ. App.—Fort Worth 1978, writ *dism'd*). *See generally* 38 AM. JUR.2d *Goodwill* §§ 4, 6 (1968).

51. *Geesbreght v. Geesbreght*, 570 S.W.2d 427, 435 (Tex. Civ. App.—Fort Worth 1978, writ *dism'd*).

52. *Id.* at 435; *see, e.g.*, *Magee v. Pope*, 112 S.W.2d 891, 899 (Mo. Ct. App. 1938); *Hunt v. Street*, 184 S.W.2d 553, 555 (Tenn. 1945); *Nail v. Nail*, 486 S.W.2d 761, 763-64 (Tex. 1972).

53. *Geesbreght v. Geesbreght*, 570 S.W.2d 427, 435 (Tex. Civ. App.—Fort Worth 1978, writ *dism'd*); *accord*, *Nail v. Nail*, 486 S.W.2d 761, 764 (Tex. 1972).

54. *Geesbreght v. Geesbreght*, 570 S.W.2d 427, 435 (Tex. Civ. App.—Fort Worth 1978, writ *dism'd*). The court was referring to the corporation's contract with Harris Hospital. Since Dr. Geesbreght performed most of the medical services for that particular hospital, any goodwill acquired because of Harris' satisfaction with John's services would be personal to him. *Id.* at 435.

55. *Id.* at 436.

56. *See, e.g.*, *In re Marriage of Fortier*, 109 Cal. Rptr. 915, 918 (Ct. App. 1973); *In re*

marital property more accurately, and hence, equitably divide that property by considering the true worth of the medical business rather than its mere book value.<sup>57</sup> The book value of corporate assets is seldom indicative of the actual worth of a going business because goodwill is usually not shown on the corporate books.<sup>58</sup> Since goodwill is often a substantial value in a corporation,<sup>59</sup> a serious undervaluing of the corporate stock may result by excluding goodwill from the book value of the business.<sup>60</sup> Therefore, book value is an unsatisfactory measure of the worth of corporate stock.<sup>61</sup>

A concern with the *Geesbreght* decision, however, is the propriety of requiring a professional practitioner to purchase, with a tangible asset such as money, an intangible asset of questionable value,<sup>62</sup> particularly since any existing goodwill may subsequently diminish or be extinguished altogether.<sup>63</sup> Awarding a spouse an amount representing goodwill upon divorce may conceivably force the professional practitioner to liquidate business assets in order to pay the judgment. If the value of the goodwill thereafter declines, the practitioner has realized nothing from the purchase of his spouse's share in the goodwill.<sup>64</sup> Division of the estate in a divorce proceed-

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Marriage of Goger, 557 P.2d 46, 47 (Or. Ct. App. 1976); *In re Marriage of Lukens*, 558 P.2d 279, 281 (Wash. Ct. App. 1976). See also Comment, *Professional Goodwill As Community Property: How Should Idaho Rule?*, 14 IDAHO L. REV. 473, 481 (1978); 10 HOUS. L. REV. 966, 972 (1973).

57. See *Geesbreght v. Geesbreght*, 570 S.W.2d 427, 436 (Tex. Civ. App.—Fort Worth 1978, writ dismissed); cf. *Bell v. Bell*, 504 S.W.2d 610, 611-12 (Tex. Civ. App.—Beaumont) (failure to consider increase in book value of corporation is abuse of discretion), *rev'd on other grounds*, 513 S.W.2d 20 (Tex. 1974). See generally 2 F. O'NEIL, *CLOSE CORPORATIONS* § 7.24a, at 86 (2d ed. 1971); Krauskopf, *Marital Property at Marriage Dissolution*, 43 MO. L. REV. 157, 163-64, 166-67 (1978).

58. See 2 F. O'NEIL, *CLOSE CORPORATIONS* § 7.24a, at 86 (2d ed. 1971); cf. Schaffer v. Below, 278 F.2d 619, 625 (3d Cir. 1960) (appreciation in value of assets need not be shown on books); *S.C. Pohlman Co. v. Easterling*, 27 Cal. Rptr. 450, 450 (Ct. App. 1962) (excess of market value over book value of securities omitted). Book value generally reflects acquisition costs of assets less depreciation. 2 F. O'NEIL, *CLOSE CORPORATIONS* § 7.24a, at 86 (2d ed. 1971).

59. See *Meiselman v. Commissioner*, 300 F.2d 666, 671 (4th Cir. 1962); *In re Marriage of Goger*, 557 P.2d 46, 47 (Or. Ct. App. 1976); Comment, *Professional Goodwill As Community Property: How Should Idaho Rule?*, 14 IDAHO L. REV. 473, 490 (1978).

60. Krauskopf, *Marital Property at Marriage Dissolution*, 43 MO. L. REV. 157, 163 n.50 (1978); cf. *Bell v. Bell*, 504 S.W.2d 610, 611-12 (Tex. Civ. App.—Beaumont) (court should consider increase in value of corporate assets when dividing stock in divorce), *rev'd on other grounds*, 513 S.W.2d 20 (Tex. 1974).

61. See, e.g., *Kelley v. 74 & 76 West Tremont Ave. Corp.*, 198 N.Y.S.2d 721, 727 (Sup. Ct. 1960); *Barsan v. Pioneer Sav. & Loan Co.*, 127 N.E.2d 614, 620 (Ohio 1955); *Bendalin v. Delgado*, 406 S.W.2d 897, 900-01 (Tex. 1966).

62. See *In re Marriage of Lopez*, 113 Cal. Rptr. 58, 68 (Ct. App. 1974); *Nail v. Nail*, 486 S.W.2d 761, 763 (Tex. 1972); cf. *Slack v. Suddoth*, 52 S.W.180, 181 (Tenn. 1899) (can be no forced sale or transfer of goodwill based on professional reputation or standing).

63. See *Nail v. Nail*, 486 S.W.2d 761, 764 (Tex. 1972); Walzer, *Divorce and the Professional Man*, 4 FAM. L.Q. 363, 367 (1970).

64. Perhaps this problem can be resolved by awarding a spouse upon divorce a one-half

ing, however, involves only those assets of the marriage present at the time of divorce;<sup>65</sup> whether the value of these assets decreases or disappears in the future should be of no concern to the court when valuing the parties' estate for partition.<sup>66</sup>

Moreover, it is contrary to settled principles of community property law not to consider in the estate of the parties the entire value of any property wholly acquired by the husband and wife during the existence of their marriage through means other than gift, devise, or descent.<sup>67</sup> Since an essential concern of community property law is the protection of the spouse who, because of his or her preoccupation with domestic duties, has little time to either acquire more property or to increase the value of existing separate property,<sup>68</sup> each spouse is entitled to a half interest in the community assets upon divorce,<sup>69</sup> or to an equitable distribution of these assets.<sup>70</sup> Failure to consider the enhanced value of a professional corporation

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interest in the value of the business goodwill but make payment to that spouse contingent upon the practitioner's realization of profit from the sale of the goodwill. *Cf.* *Cearley v. Cearley*, 544 S.W.2d 661, 666 (Tex. 1976)(contingent interests should be settled at time of divorce even though apportionment takes effect when, if, and as benefits are received).

65. *See In re Marriage of Butler*, 543 S.W.2d 147, 149 (Tex. Civ. App.—Texarkana 1976, writ *dism'd*); *Pritchard v. Estate of Tuttle*, 534 S.W.2d 946, 952 (Tex. Civ. App.—Amarillo 1976, no writ); *cf. In re Marriage of Fortier*, 109 Cal. Rptr. 915, 918 (Ct. App. 1973)(value of goodwill must exist at time of divorce). *See generally* TEX. FAM. CODE ANN. §§ 3.63, 5.02 (Vernon 1975).

66. *See Verbal v. Verbal*, 567 S.W.2d 898, 900 (Tex. Civ. App.—San Antonio 1978, no writ)(retirement pay which wife will receive in future not determinable); *Ables v. Ables*, 540 S.W.2d 769, 770 (Tex. Civ. App.—Waco 1976, no writ)(possibility of forfeiture does not destroy property character for division purposes). *See generally* Comment, *Professional Goodwill As Community Property: How Should Idaho Rule?*, 14 IDAHO L. REV. 473, 482 (1978); 10 HOUS. L. REV. 966, 970-71 (1973).

67. *See, e.g., Free v. Bland*, 369 U.S. 663, 664 (1962)(in Texas property acquired during marriage belongs to community of husband and wife; each owns one-half undivided interest); *Roberson v. U-Bar Ranch, Inc.*, 303 F. Supp. 730, 731 (D.N.M. 1968)(in Texas and New Mexico property acquired after marriage other than by gift, devise, or descent is community property); *Arnold v. Leonard*, 114 Tex. 535, 540, 273 S.W. 799, 801-02 (1925)(property acquired during coverture other than by gift, devise, or descent becomes community property).

68. *See In re Holloway's Estate*, 175 F.2d 672, 674 (9th Cir. 1949); *cf. Haugeberg v. Haugeberg*, 258 N.W.2d 657, 667 (N.D. 1977)(dissenting opinion)(wife gets no compensation "for cooking, cleaning, and caring for children"; allowance must be made for her small earning power); *Norris v. Vaughan*, 152 Tex. 491, 502-03, 260 S.W.2d 676, 683 (1953)(husband had duty to provide for community well-being). *See generally* W. DE FUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY § 11.1, at 26-27 (2d ed. 1971); 6 TEX. TECH L. REV. 259, 261 (1974).

69. *See In re Marriage of Fonstein*, 552 P.2d 1169, 1175, 131 Cal. Rptr. 873, 879 (1976); *Perry v. Perry*, 282 So. 2d 752, 754 (La. Ct. App. 1973); CAL. CIV. CODE § 4800 (Deering Supp. 1978); LA. CIV. CODE ANN. art. 2406 (West 1971). *See generally* Comment, *Division of Marital Property on Divorce: A Proposal to Revise Section 3.63*, 7 ST. MARY'S L.J. 209, 219-21 (1975).

70. *See, e.g., Bell v. Bell*, 513 S.W.2d 20, 22 (Tex. 1974); *Wilkerson v. Wilkerson*, 515 S.W.2d 52, 55 (Tex. Civ. App.—Tyler 1974, no writ); *In re Marriage of McCurdy*, 489 S.W.2d

in which the husband and wife own an equal interest frustrates this community property function.<sup>71</sup> The inequitable results of excluding goodwill from the valuation of a business for purposes of dividing property upon divorce are manifest when the only significant asset of a business is its goodwill.<sup>72</sup> Furthermore, the contribution that a husband or wife makes to the earnings and accumulations of a spouse's professional practice is just as great as the contribution a husband or wife makes to any other business; consequently, he or she is entitled to be compensated for that contribution.<sup>73</sup>

These equitable principles of community property should be equally applicable to the consideration of goodwill in a sole professional practice.<sup>74</sup> In holding in *Nail v. Nail* that the goodwill of a medical practice, which is based on the personal skill, ability, or integrity of its owner, is not property belonging to the estate of the parties on divorce,<sup>75</sup> the Texas Supreme Court was seemingly unaware that income derived from a professional practice is also a result of the personal attributes of its owner.<sup>76</sup> Nevertheless, this income is included in the community estate.<sup>77</sup> Merely because goodwill is intangible should not preclude its inclusion in the parties' estate for divorce purposes because courts frequently consider intangible items such as earning capacity or income potential when equitably dividing the marital property.<sup>78</sup> The contention that goodwill is not an earned

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712, 717 (Tex. Civ. App.—Amarillo 1973, writ *dism'd*); TEX. FAM. CODE ANN. § 3.63 (Vernon 1975).

71. See *Todd v. Todd*, 78 Cal. Rptr. 131, 135-36 (Ct. App. 1969); *Brawman v. Brawman*, 19 Cal. Rptr. 106, 109 (Ct. App. 1962); *cf. Bell v. Bell*, 504 S.W.2d 610, 611-12 (Tex. Civ. App.—Beaumont) (failure to consider increase in book value of corporation is abuse of discretion), *rev'd on other grounds*, 513 S.W.2d 20 (Tex. 1974); 6 TEX. TECH L. REV. 259, 268-70 (1974).

72. See *Meiselman v. Commissioner*, 300 F.2d 666, 671 (4th Cir. 1962); Comment, *Professional Goodwill As Community Property: How Should Idaho Rule?*, 14 IDAHO L. REV. 473, 490 (1978).

73. *E.g., In re Marriage of Foster*, 117 Cal. Rptr. 49, 54 (Ct. App. 1974); *In re Marriage of Lopez*, 113 Cal. Rptr. 58, 67 (Ct. App. 1974); *Golden v. Golden*, 75 Cal. Rptr. 735, 738 (Ct. App. 1969); see *Wilberscheid v. Wilberscheid*, 252 N.W.2d 76, 80 (Wis. 1977).

74. See, *e.g., Brawman v. Brawman*, 19 Cal. Rptr. 106, 109-10 (Ct. App. 1962); *Mueller v. Mueller*, 301 P.2d 90, 94-95 (Cal. Ct. App. 1956); *In re Marriage of Lukens*, 558 P.2d 279, 281 (Wash. Ct. App. 1976).

75. *Nail v. Nail*, 486 S.W.2d 761, 764 (Tex. 1972).

76. *Cf. Meyer v. Commissioner*, 383 F.2d 883, 891 (8th Cir. 1967) (income is gain derived from capital or labor); *Wells v. Wells*, 148 P.2d 126, 128 (Cal. Ct. App. 1944) (income is return in money from business, labor, or capital invested); *Towne v. Towne*, 159 P.2d 352, 357 (Mont. 1945) ("income is something derived from property, labor, skill, ingenuity, or sound judgment").

77. See, *e.g., Poe v. Seaborn*, 282 U.S. 101, 111 (1930); *Todd v. Commissioner*, 153 F.2d 553, 555 (9th Cir. 1945); *Beam v. Bank of America*, 490 P.2d 257, 260 (Cal. 1971); *cf. Frame v. Frame*, 120 Tex. 61, 65, 36 S.W.2d 152, 154 (1931) (personal earnings of wife not her separate property).

78. See *Nastrom v. Nastrom*, 262 N.W.2d 487, 493 (N.D. 1978); *In re Marriage of Goger*,

or vested property right at the time of divorce, moreover, is contrary to an evident trend in Texas law that a property right vests whenever a person is entitled to that right.<sup>79</sup> Since a person has the right to dispose of his business assets at any time, all assets of the business in existence at the time of divorce should be considered a vested property right of that person. Furthermore, several recent Texas Supreme Court decisions indicate that the question of vesting is immaterial. These cases require non-vested or contingent property interests to be considered along with other property in the division of the parties' estate.<sup>80</sup> In addition, no satisfactory explanation exists for the supreme court's differential treatment of goodwill of a sole practice as the individual property of the sole practitioner for purposes of divorce, while recognizing it as business property in the event of a sale.<sup>81</sup> The decisive factor in determining if a value for goodwill should be included in the estate of the parties is not whether the professional can sell his practice; goodwill has value despite its unmarketability as an asset by itself.<sup>82</sup>

While the *Geesbreght* court tacitly approved the *Nail* decision,<sup>83</sup> it seemingly restricted the supreme court's broad holding by recognizing that goodwill can attach either to an individual medical practitioner, or to a

557 P.2d 46, 47 (Or. Ct. App. 1976); *cf.* *Wilcox v. Wilcox*, 365 N.E.2d 792, 796 (Ind. Ct. App. 1977)(greater probability of husband's high earnings warranted awarding wife all marital assets).

79. *See, e.g.*, *Herring v. Blakeley*, 385 S.W.2d 843, 845-46 (Tex. 1965); *Davis v. Davis*, 495 S.W.2d 607, 612 (Tex. Civ. App.—Dallas 1973, writ *dism'd*); *Mora v. Mora*, 429 S.W.2d 660, 662 (Tex. Civ. App.—San Antonio 1968, writ *dism'd*). *See also* Comment, *Professional Goodwill As Community Property: How Should Idaho Rule?*, 14 IDAHO L. REV. 473, 480-82 (1978); 10 Hous. L. Rev. 966, 970-72 (1973).

80. *See* *United States v. Stelter*, 567 S.W.2d 797, 798-99 (Tex. 1978)(court has discretion to divide future payments); *Taggart v. Taggart*, 552 S.W.2d 422, 423 (Tex. 1977)(retirement benefits subject to division as contingent community property right even though not matured at time of divorce); *Cearley v. Cearley*, 544 S.W.2d 661, 666 (Tex. 1976)(retirement benefits prior to accrual and maturity constitute contingent interest in property and are community assets subject to division with estate of parties); *cf.* *Stern v. Stern*, 331 A.2d 257, 261-62 (N.J. 1975)(concept of vesting has no place in equitable distribution of marital assets on divorce).

81. *See In re Marriage of Fortier*, 109 Cal. Rptr. 915, 917 (Ct. App. 1973)(goodwill of medical practice cannot mean one thing on divorce and another upon sale of business). *Compare* *Nail v. Nail*, 486 S.W.2d 761, 764 (Tex. 1972)(goodwill not property in estate of parties on divorce) *with* *Taormina v. Culicchia*, 355 S.W.2d 569, 573 (Tex. Civ. App.—El Paso 1962, writ *ref'd n.r.e.*)(goodwill is property subject to sale) *and* *Texas & Pac. Ry. v. Mercer*, 127 Tex. 220, 225-26, 90 S.W.2d 557, 560 (1936)(goodwill may be sold and damaged). *See also* *Castleberry, Constitutional Limitations on the Division of Property Upon Divorce*, 10 ST. MARY'S L.J. 37, 59 (1978); Comment, *Professional Goodwill As Community Property: How Should Idaho Rule?*, 14 IDAHO L. REV. 473, 483 (1978).

82. *See* *Nastrom v. Nastrom*, 262 N.W.2d 487, 493 (N.D. 1978); *In re Marriage of Lukens*, 558 P.2d 279, 282 (Wash. Ct. App. 1976); *Stern v. Stern*, 331 A.2d 257, 261 n.5 (N.J. 1975). *See also* 6A CORBIN, CORBIN ON CONTRACTS § 1393, at 83 (2d ed. 1962).

83. *See* *Geesbreght v. Geesbreght*, 570 S.W.2d 427, 433 (Tex. Civ. App.—Fort Worth 1978, writ *dism'd*).

medical practice itself, depending upon the circumstances of the business.<sup>84</sup> Goodwill need not accrue exclusively to a professional individual merely because of his personal skill and attributes, but may attach to other tangible assets of the practice as well, such as records and files of the physician's patients, or a business office.<sup>85</sup> These assets would be valuable resources to a person desiring to purchase the practice and enter the identical field of operations as his predecessor in business, because these assets usually afford an opportunity for the successor to retain the goodwill of the prior practice.<sup>86</sup> Consequently, even a sole practice can have goodwill, apart from the goodwill attributable to the practitioner's own personal skills, that must necessarily be considered in determining the aggregate worth of the professional practice.<sup>87</sup>

The anomalous distinction between the sole medical practice and the medical corporation, which now exists as a result of the *Nail* and *Geesbreght* decisions, is inequitable. The goodwill of a sole practitioner will not be considered in appraising the worth of his business in a divorce partition,<sup>88</sup> but the goodwill of a professional corporation will be accounted for in evaluating a practitioner's interest in the corporate business though it may have fewer assets to which goodwill attaches than does the sole practice.<sup>89</sup> Moreover, this disparity complicates the inevitable question whether goodwill in a professional partnership is includable in the estate of the parties.<sup>90</sup> A partnership, unlike a corporation, is not a legal entity

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84. *Id.* at 435. The court indicated that the name of the business may have a significant effect on the determination whether goodwill attached to the practitioner or the business. *Id.* at 435-36.

85. See, e.g., *Hunt v. Phinney*, 2 Cal. Rptr. 57, 59 (Ct. App. 1960)(customer list is goodwill and valuable property right of business); *Lerner v. Stone*, 252 P.2d 533, 536 (Colo. 1952)(chief advantage of goodwill accrues to vendee from use of old business stand); *W. Walley, Inc. v. Saks & Co.*, 41 N.Y.S.2d 739, 743 (Sup. Ct. 1943)(names of business' customers constitute goodwill).

86. See *In re Brown*, 150 N.E. 581, 584 (N.Y. 1926); cf. *Winn-Dixie Montgomery, Inc. v. United States*, 444 F.2d 677, 681 (5th Cir. 1971)(transfer enables purchaser to step into shoes of seller); *Slate Co. v. Bikash*, 177 N.E.2d 780, 782 (Mass. 1961)(goodwill attached to sale of business; relates to name, location, and reputation enabling successor to retain patronage).

87. See, e.g., *In re Marriage of Foster*, 117 Cal. Rptr. 49, 52 (Ct. App. 1974); *Mueller v. Mueller*, 301 P.2d 90, 94-95 (Cal. Ct. App. 1956); *In re Marriage of Lukens*, 558 P.2d 279, 281 (Wash. Ct. App. 1976). *But see* *Nail v. Nail*, 486 S.W.2d 761, 764 (Tex. 1972)(medical practice does not possess goodwill separate and apart from individual practitioner). Conversely, according to *Geesbreght*, a multi-member professional practice may have goodwill that is personal to an individual member. See *Geesbreght v. Geesbreght*, 570 S.W.2d 427, 435 (Tex. Civ. App.—Fort Worth 1978, writ dismissed); cf. *In re Marriage of Lopez*, 113 Cal. Rptr. 58, 67 (Ct. App. 1974)(goodwill may be separate or community property, or both).

88. See *Nail v. Nail*, 486 S.W.2d 761, 764 (Tex. 1972); *Geesbreght v. Geesbreght*, 570 S.W.2d 427, 436 (Tex. Civ. App.—Fort Worth 1978, writ dismissed).

89. *Geesbreght v. Geesbreght*, 570 S.W.2d 427, 436 (Tex. Civ. App.—Fort Worth 1978, writ dismissed).

90. Compare *id.* at 435 (individual and corporation can each acquire goodwill) with *Rice v. Angell*, 73 Tex. 350, 354-55, 11 S.W. 338, 340 (1889)(upon dissolution of partnership no

distinct from the individuals who compose it, although it is treated in legal fiction as a quasi-entity for purposes of marshalling assets.<sup>91</sup> Based on the *Nail* decision, the goodwill of a professional partnership would not be deemed an asset of that partnership, because any goodwill must necessarily attach to the person of each firm member.<sup>92</sup> Therefore, upon dissolution of the partnership, goodwill would no longer have any value.<sup>93</sup> According to the reasoning in *Geesbreght*, however, the goodwill of the same professional partnership would be considered an asset of the firm since it is possible for a partnership or corporation to acquire goodwill that is separate from that attributable to each of its members.<sup>94</sup> Inclusion of goodwill as an asset of the business naturally results in a higher valuation of the business. Consequently, a member of a professional partnership may be subject to a greater dispossession of property in a divorce proceeding than would a sole practitioner of equal worth.<sup>95</sup>

As the *Geesbreght* court intimated, the better procedure in a divorce action is for the court to make a specific determination concerning the existence of goodwill in a professional business, be it that of a sole practice, partnership, or corporation, depending upon the circumstances of the case.<sup>96</sup> Whether a professional or his business has acquired any goodwill, or whether goodwill is still present at the time of divorce, is a question of

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goodwill remains). Similar difficulties have arisen in another community property jurisdiction in which professional goodwill has received different treatment according to the business entity involved. Compare *Golden v. Golden*, 75 Cal. Rptr. 735, 737-38 (Ct. App. 1969)(goodwill of sole practice considered in determining award to wife) with *Lyon v. Lyon*, 54 Cal. Rptr. 829, 833 (Ct. App. 1966)(no goodwill in professional partnership). See generally *Turley, A Wife's Right to Support Payments in Texas*, 16 S. Tex. L.J. 1, 14-15 (1974).

91. See, e.g., *Randolph Prods. Co. v. Manning*, 83 F. Supp. 857, 859 (D.N.J. 1948)(partnership possesses some attributes of legal entity for limited purposes); *Sorenson v. Sutherland*, 27 F. Supp. 44, 49 (S.D.N.Y. 1939)(partnership treated as entity for some purposes); *McElhinney v. Belsky*, 69 A.2d 178, 181 (Pa. Super. Ct. 1949)(partnership not recognized as entity as is corporation, but treated as quasi-person for keeping accounts and assets).

92. See, e.g., *Lyon v. Lyon*, 54 Cal. Rptr. 829, 833 (Ct. App. 1966); *Cook v. Lauten*, 117 N.E.2d 414, 416 (Ill. Ct. App. 1954); *Nail v. Nail*, 486 S.W.2d 761, 763-64 (Tex. 1972).

93. See, e.g., *Barron v. Koenig*, 324 P.2d 388, 397 (Idaho 1958); *Hunt v. Street*, 184 S.W.2d 553, 555-56 (Tenn. 1945); *Rice v. Angell*, 73 Tex. 350, 354, 11 S.W. 338, 340 (1889).

94. See, e.g., *Smith v. Bull*, 325 P.2d 463, 468 (Cal. 1958)(personal service partnership has goodwill); *Evans v. Gunnip*, 135 A.2d 128, 131 (Del. 1957)(can be goodwill in professional partnership); *Geesbreght v. Geesbreght*, 570 S.W.2d 427, 435-36 (Tex. Civ. App.—Fort Worth 1978, writ dismissed)(goodwill can attach to professional person or firm).

95. See *Turley, A Wife's Right to Support Payments in Texas*, 16 S. Tex. L.J. 1, 15 (1974); cf. 6 TEX. TECH L. REV. 259, 267 (1974)(for same effort, community gets greater return from partnership than corporation).

96. See *In re Marriage of Lopez*, 113 Cal. Rptr. 58, 68 (Ct. App. 1974)(existence of goodwill in sole professional practice, professional firm or corporation is determined on facts of each case); *Geesbreght v. Geesbreght*, 570 S.W.2d 427, 435-36 (Tex. Civ. App.—Fort Worth 1978, writ dismissed)(goodwill may belong to professional person or firm; error not to consider evidence of goodwill under circumstances of each property division).

fact.<sup>97</sup> It is not a proper reason to ignore the existence of professional goodwill in a particular business merely because the goodwill is intangible and difficult to evaluate.<sup>98</sup>

The *Geesbreght* decision is clearly the preferable rule regarding goodwill in a professional business.<sup>99</sup> It induces an equitable distribution of property on divorce by considering the entire value of the parties' estate. Although the holding in *Geesbreght* is seemingly restricted by the court's recognition of *Nail*, it should be applied to all divorce situations in which the issue of professional goodwill is raised. The *Nail* decision is viable to the extent that *Nail* is limited to situations in which goodwill is clearly personal,<sup>100</sup> and provided the goodwill of a sole practitioner is acknowledged as a valuable asset of the practice in certain instances.<sup>101</sup> A categorical designation of goodwill as exclusively personal to the practitioner is highly objectionable.<sup>102</sup> Whenever the issue of professional goodwill arises in a divorce proceeding the court should make a finding concerning its existence and value irrespective of the form of the business entity.<sup>103</sup> If goodwill is determined

97. See, e.g., *Miller v. Commissioner*, 333 F.2d 400, 404 (8th Cir. 1964); *In re Marriage of Foster*, 117 Cal. Rptr. 49, 52 (Ct. App. 1974); *Sanderfur v. Beard*, 249 S.W. 274, 277 (Tex. Civ. App.—San Antonio 1923, no writ).

98. See *In Re Marriage of Lopez*, 113 Cal. Rptr. 58, 67 (Ct. App. 1974); *In re Marriage of Lukens*, 558 P.2d 279, 282 (Wash. Ct. App. 1976); cf. Castleberry, *Constitutional Limitations on the Division of Property Upon Divorce*, 10 ST. MARY'S L.J. 37, 60 (1978)(difficulties should not prevent classification of goodwill as property).

99. See, e.g., *In re Marriage of Fortier*, 109 Cal. Rptr. 915, 918 (Ct. App. 1973); *Mueller v. Mueller*, 301 P.2d 90, 94-95 (Cal. Ct. App. 1956); *In re Marriage of Lukens*, 558 P.2d 279, 281-82 (Wash. Ct. App. 1976). See generally Comment, *Professional Goodwill as Community Property: How Should Idaho Rule?*, 14 IDAHO L. REV. 473, 489 (1978); Comment, *Settlement of a Community Partnership Interest Upon Separation or Divorce*, 51 TUL. L. REV. 700, 712 (1977); 10 Hous. L. Rev. 966, 972 (1973).

100. Conceivably, a sole professional practitioner may possess goodwill that is uniquely personal, and therefore, the goodwill would be properly omitted from the value of the business for divorce purposes. If the professional conducts a sole business practice from his residence, for example, it is unlikely that any goodwill would attach to the practice itself since the business would probably not continue from that residence upon the practitioner's retirement or death. Consequently, the goodwill would not be a transferable asset of the business and should not have a value apart from the professional practitioner's person. Cf. Walzer, *Divorce and the Professional Man*, 4 FAM. L.Q. 363, 367 (1970)(sole medical practice intensely personal commodity that cannot be sole or transferred).

101. Cf. *Golden v. Golden*, 75 Cal. Rptr. 735, 737 (Ct. App. 1969)(goodwill of sole professional practice should be considered in valuing community estate); *In re Marriage of Lukens*, 558 P.2d 279, 281 (Wash. Ct. App. 1976)(goodwill is asset of sole practice whose value should be accounted for on divorce).

102. See *Lockett v. Lockett*, 558 S.W.2d 387, 388 (Mo. Ct. App. 1977); *Seiner v. Seiner*, 552 S.W.2d 54, 56 (Mo. Ct. App. 1977).

103. See *In re Marriage of Lopez*, 113 Cal. Rptr. 58, 68 (Ct. App. 1974).