A "Little Ditty About Jack and Diane": Why Jackie's Good Name Should Be Considered Community Property in California Under the Concept of "Celebrity Goodwill"

*Ericka Evans**

INTRODUCTION

Every year *Forbes Magazine* releases a list of *The World's Most Powerful Celebrities*.[1] The stars are ranked based on several categories, including income and earnings, television and radio appearances, and press, web, and social media presence.[2] Powerhouse Oprah Winfrey tops the 2013 list due in part to the success of the Oprah Winfrey Network (OWN), her recent and well-received appearance in Lee Daniels' *The Butler*, and her consistent television and Internet popularity.[3] Oprah Winfrey represents a new form of celebrity; as *Forbes* has noted, "it used to be sufficient for a celebrity to be really, really good at what they do – acting or singing. However today, celebs need to be businesses."[4]

California has not so readily recognized this notion of the "celebrity business" when it comes to community asset

* JD Candidate, May 2014, Chapman University Dale E. Fowler School of Law; BA English, 2010, Westminster College of Utah. I would like to thank Professor Jenny Carey for her assistance and feedback, and the members of the *Chapman Law Review* for their comments and support throughout the process.

1 Dorothy Pomerantz, *The World's Most Powerful Celebrities,* FORBES (June 26, 2013), http://www.forbes.com/celebrities/ (2013 rankings).

2 Dorothy Pomerantz, *The Celebrity 100: How We Create The List*, FORBES (June 26, 2013), http://www.forbes.com/sites/dorothypomerantz/2013/06/26/the-celebrity-100-how-we-create-the-list/.

3 *Oprah Winfrey Profile,* FORBES, http://www.forbes.com/profile/oprah-winfrey/ (last visited Nov. 21, 2013); *see also* Dorothy Pomerantz, *Oprah Winfrey Regains No. 1 Slot on Forbes 2013 List Of The Most Powerful Celebrities,* FORBES (June 26, 2013, 6:10 AM), http://www.forbes.com/sites/dorothypomerantz/2013/06/26/oprah-winfrey-regains-no-1-slot-on-forbes-2013-list-of-the-most-powerful-celebrities/.

4 Mfonobong Nsehe, *Thirteen African Celebrities To Watch In 2013,* FORBES (Dec. 30, 2012), http://www.forbes.com/sites/mfonobongnsehe/2012/12/30/thirteen-african-celebrities-to-watch-in-2013/. Singer Justin Bieber has been called "the world's most unconventional venture capitalist," due to his enormous social media popularity and knack for lucrative investments. Zack O'Malley Greenburg, *Justin Bieber, Venture Capitalist: The Forbes Cover Story,* FORBES (May 16, 2012, 9:59 AM), http://www.forbes.com/sites/zackomalleygreenburg/2012/05/16/justin-bieber-venture-capitalist-the-forbes-cover-story/2/.

distribution in divorce situations. "Celebrity goodwill" refers to the enhanced earning capacity of an individual based on his or her status or fame.[5] California currently recognizes goodwill associated with a business as a marital asset, whether the goodwill is related to the name of the business, a brand or product, or the reputation and skill of the individual practitioner,[6] but has yet to recognize celebrity goodwill.[7] California case law criticizes the intangible nature of celebrity goodwill and concludes celebrity goodwill does not fall in line with traditional notions of property and as a result, cannot be divided upon dissolution.[8] However, this argument is not consistent with California's definition of other intangibles, like the analogous right of publicity, which is defined by statute as a transferable property right.[9]

Currently, both New York and New Jersey recognize celebrity goodwill as a divisible marital asset,[10] reasoning that the non-celebrity spouse deserves to be compensated for his or her contribution to the celebrity career in the same way a non-working spouse deserves to be compensated for contributions made to a professional spouse's success.[11] In addition, the New York and New Jersey cases indicate celebrity goodwill can and should be valued in a similar manner to professional goodwill, despite the difficulties that arise.[12]

This article ultimately resolves that California, home to Hollywood and the Walk of Fame, should recognize celebrity goodwill as a divisible marital asset. Part I provides a brief history of the definition of goodwill. Part II provides a general overview of the approaches taken across the nation when it comes to recognizing goodwill in a divorce setting, specifically comparing the approach taken by California to the approaches employed by New York and New Jersey. Part III argues that celebrity goodwill can in fact be considered property, contrary to the analysis provided by the most recent California decision to

5 Laurence J. Cutler & Robin C. Bogan, *Celebrity Goodwill: The Nature of the Beast From Horses to Hedge Funds, Tips on Valuing Businesses*, FAM. ADVOC., Winter 2003, *available at* http://www.americanbar.org/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/celebritygoodwill.html.

6 *See infra* Part II.B and discussion that follows.

7 *In re* Marriage of McTiernan and Dubrow, 35 Cal. Rptr. 3d 287, 296 (Cal. Ct. App. 2005) (expressly declining to extend the notion of professional goodwill to include goodwill associated with celebrity reputation).

8 *Id.*

9 CAL. CIV. CODE § 3344.1 (West 2013).

10 *See, e.g.*, Piscopo v. Piscopo, 557 A.2d 1040, 1042 (N.J. Super. Ct. App. Div. 1989); Elkus v. Elkus, 572 N.Y.S.2d 901, 904 (N.Y. App. Div. 1991).

11 *See infra* Part II.A.

12 *See infra* Part IV.A.

tackle the issue of celebrity goodwill. Part IV explains the current methods employed when valuing professional goodwill, and offers that professional goodwill valuation methods can be extended to celebrity goodwill situations. Part V discusses that the California courts' refusal to recognize celebrity goodwill as a marital asset goes against the equity concerns that underscore the community property system. Finally, part VI concludes with the proposition that California should recognize celebrity goodwill as a divisible marital asset using a "little ditty about Jack and Diane" to illustrate.

I. THE "MOST INTANGIBLE OF THE INTANGIBLES":[13] GOODWILL DEFINED

The legal concept[14] of goodwill ties back to the often-cited Old English case *Cruttwell v. Lye*,[15] which defined goodwill as "nothing more than the probability that the old customers will resort to the old place."[16] California has followed this traditional understanding by defining goodwill as "the expectation of continued public patronage."[17] More concisely, goodwill is understood to be "the increased value of the business, over and

13 ROBERT E. KLEEMAN, JR. ET AL., THE HANDBOOK FOR DIVORCE VALUATIONS 73 (1999) (describing goodwill as "the most intangible of the intangibles").

14 Although this article focuses primarily on the legal concept of goodwill, a brief mention of both the economic and accounting understanding of goodwill may add to the foundational understanding of goodwill and its general application in areas outside of dissolution cases. Alicia Brokars Kelly, *Sharing A Piece of the Future Post-Divorce: Toward a More Equitable Distribution of Professional Goodwill*, 51 RUTGERS L. REV. 569, 577 (1999). The accounting concept of goodwill is based on the measurement of goodwill, rather than the nature of the goodwill, and focuses on the difference between the value of the business and the value of the tangible assets. *Id.* at 579. The economic understanding of goodwill rests on the expectation of future earnings. *Id*. According to the economic concept of goodwill "any rate of return in excess of a normal return is attributable to unidentifiable intangible assets, generally goodwill." Allen Parkman, *The Treatment of Professional Goodwill in Divorce Proceedings*, 18 FAM. L.Q. 213, 214 (1984). From an economic perspective, well-established businesses have the ability to make greater profits than new and less-established businesses because well-established businesses have accumulated goodwill. *Id.*

15 Cruttwell v. Lye, (1810) 34 Eng. Rep. 129.

16 *Id.* at 134; Joseph Story defined goodwill as "the advantage or benefit, which is acquired by an establishment, beyond the mere value of the capital, stock, funds, or property employed therein, in consequence 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." JOSEPH STORY, COMMENTARIES ON THE LAW OF PARTNERSHIP § 99 (4th ed. 1855), *available at* http://archive.org/stream/commentariesonl03benngoog#page/n192/mode/2up/search/§+99.

17 CAL. BUS. & PROF. CODE § 14100 (West 2013).

above the value of its assets, that results from the expectation of continued public patronage."[18]

Four distinct, though not exclusive, categories have emerged in relation to the legal definition of goodwill: professional, commercial, personal, and enterprise goodwill.[19] Depending on the type of business involved, goodwill may be "professional" or "commercial."[20] Commercial goodwill is simply "goodwill that derives from a commercial establishment."[21] Conversely, professional goodwill is distinct from a trade or business, and is instead attached to the individual.[22] In most situations, professional goodwill is dependent on the skills and attributes of the individual practitioner.[23]

Depending on the source, goodwill can be classified as "personal" or "enterprise."[24] Enterprise goodwill is associated with the elements of a business that are separate from the individual owners and is generally intertwined with a recognizable product.[25] Personal goodwill, similar to professional goodwill, is associated with the individual and is based on the relationships, knowledge, and skill of the individual, and the individual's resulting reputation.[26]

---

18 J. THOMAS OLDHAM, DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY §10.03[1] (2012).

19 Helga White, *Professional Goodwill: Is It A Settled Question or Is There "Value" in Discussing It?*, 15 J. AM. ACAD. MATRIM. LAW. 495, 499 (1998).

20 *Id.*

21 *Id.* For example, goodwill associated with a retail store is considered a form of commercial goodwill. *Id.*

22 *Id.*

23 *Id.* at 500. For example, a lawyer who owns a successful law practice is considered to have professional goodwill because the reputation and goodwill associated with the business is dependent on his or her legal skills. *See* Gary S. Rosin, *The Hard Heart of the Enterprise: Goodwill and the Role of the Law Firm*, 39 S. TEX. L. REV. 315, 321 (1998) (explaining a lawyer's professional goodwill derives from the lawyer's "intelligence, education, experience, skills, judgment, reputation, and relations[hip] with clients"). It should be noted, however, that a hard and fast distinction between professional and commercial goodwill might not be the best approach. White, *supra* note 19, at 500. In some situations "a definition of professional goodwill may span all the categories . . . in addition to having commonality with commercial goodwill, professional goodwill may include elements of both personal and enterprise goodwill, even though courts generally assert it only includes personal goodwill." *Id.*

24 *Id.* at 499.

25 *Id.* Examples of businesses that have enterprise goodwill include LensCrafters and H&R Block. Michael W. Kalcheim & Norah M. Plante, *Professional Goodwill in Divorce After* Zells, 79 ILL. B.J. 624, 624 (1991).

26 White, *supra* note 19, at 499; *see also* CHRISTOPHER P. CASEY & BRIAN R. POTTER, WHAT CREATES PERSONAL GOODWILL 2 (2010), *available at* http://www.srr.com/assets/pdf/what-creates-personal-goodwill.pdf. The similarities between the definition of professional and personal goodwill sits at the root of the argument that professional goodwill should not be considered a divisible marital asset. White, *supra* note 19, at 501. States that have declined to recognize professional goodwill as a divisible marital asset have found it is difficult to distinguish between the goodwill associated only with the individual and the goodwill associated with the individual's business. *See, e.g.*, Beasley v.

Within the definition of personal goodwill, rests the concept known as "celebrity goodwill."[27] "Celebrity goodwill" is a term used to refer to the "excess earning capacity attributable to one's status or fame," and is sometimes referred to as "human capital."[28] "Human capital" has been defined as the "current value of the increased stream of future earnings that will flow to an individual who has been the recipient of an investment in skills or knowledge."[29] Simply stated, celebrity goodwill refers to the idea that the business and the individual are one and the same and the goodwill value is inherent within the individual's celebrity reputation.

II. CELEBRITY GOODWILL IN DIVORCE: WHEN THE PERSON IS THE BUSINESS

Some states have been reluctant to recognize goodwill as marital property, while others have readily accepted goodwill as marital property, despite its intangible characteristics.[30] The views taken across the nation can generally be separated into three distinct groups.[31] The middle ground view accepts all goodwill associated with a business entity as a divisible marital asset, but finds professional goodwill is divisible as marital

Beasley, 518 A.2d 545, 552–53 (Pa. Super. Ct. 1986); Holbrook v. Holbrook, 309 N.W.2d 343, 354 (Wis. Ct. App. 1981); *In re* Marriage of Zells, 572 N.E.2d 944, 946 (Ill. 1991).

27 Although a lengthy discussion of the term "celebrity" is outside the scope of this article, a basic definition is important to clarify when celebrity goodwill is applicable. One of the most commonly referred to definitions of the term "celebrity" comes from cultural historian Daniel Boorstin, who describes a celebrity as "a person who is known for his well-knownness." DANIEL J. BOORSTIN, THE IMAGE: A GUIDE TO PSEUDO-EVENTS IN AMERICA 217 (1961). A celebrity can also be described as "an individual 'whose name has attention-getting, interest-riveting and profit-generating value.'" Violina P. Rindova et al., *Celebrity Firms: The Social Construction of Market Popularity,* 31 ACAD. MGMT. REV. 50, 50 (2006), *available at* http://www.personal.psu.edu/txp14/pdfs/amr06.pdf (citing IRVING REIN ET AL., HIGH VISIBILITY 15 (1987)). Other social theorists recognize the concept of "celebrity" as a social construct that has emerged as a status-group or class, but unlike historical status groups results from capitalism and the "commodification of reputation." *See* Charles Kurzman et al., *Celebrity Status*, 25 SOC. THEORY, 347, 353 (2007), *available at* http://www.nasaht.com.au/web_images/Kurzmancelebrity.pdf.

28 Cutler & Bogan, *supra* note 5.

29 Allen M. Parkman, *Human Capital As Property in Celebrity Divorces*, 29 FAM. L.Q. 141, 146 (1995) (citing GARY S. BECKER, HUMAN CAPITAL (3d ed. 1993)).

30 *See generally What's Mine is Yours: Goodwill in Divorce,* EISNERAMPER'S LITIG. SERVS. NEWSL. (EisnerAmper Accountants and Advisors, New York, N.Y.), Mar. 23, 2011, *available at* http://www.eisneramper.com/litigation-Business-Valuation/Business-Valuation-Goodwill-Accounting-0311.aspx.

31 *Id.* (labeling the three views as the "majority view," the "all-inclusive view," and the "material view"). A few states have not clearly articulated the view they are inclined to follow when it comes to valuing goodwill in a divorce proceeding. *See, e.g.*, *In re* Marriage of Hogeland, 448 N.W.2d 678, 681 (Iowa Ct. App. 1989) (stating "professional practice is dependent on the ability of the professional to continue to practice his or her profession," but not clearly concluding that professional goodwill is marital property); Endres v. Endres, 532 N.W.2d 65, 69 (S.D. 1995) (declining to consider whether professional goodwill is marital property).

property only to the extent it is separate from the individual's reputation.[32] The second view does not recognize goodwill as marital property, no matter if it is related to the business or the individual.[33] The remaining view recognizes all goodwill, even goodwill related to the individual professional, as property subject to distribution.[34] California generally falls within the latter category,[35] but has stopped short of other states, like New York and New Jersey, that not only accept professional goodwill as a divisible marital asset, but also recognize celebrity goodwill.[36]

---

32 *See, e.g.*, Richmond v. Richmond, 779 P.2d 1211, 1213–14 (Alaska 1989) (law practice); Tortorich v. Tortorich, 902 S.W.2d 247, 250 (Ark. Ct. App. 1995) (oral surgery practice); Eslami v. Eslami, 591 A.2d 411, 418 (Conn. 1991) (medical practice); E.E.C. v. E.J.C., 457 A.2d 688, 693 (Del. 1983) (law practice); McDiarmid v. McDiarmid, 649 A.2d 810, 815 (D.C. 1994) (law practice); Thompson v. Thompson, 576 So. 2d 267, 270 (Fla. 1991) (law practice); Miller v. Miller, 705 S.E.2d 839, 844 (Ga. 2010) (medical practice); Antolik v. Harvey, 761 P.2d 305, 308–09 (Haw. Ct. App. 1988) (chiropractic business); *In re* Marriage of Zells, 572 N.E.2d 944, 946 (Ill. 1991) (law practice); Gaskill v. Robbins, 282 S.W.3d 306, 312–15 (Ky. 2009) (oral surgery practice); LA. REV. STAT. ANN. § 9:2801.2 (2009); Ahern v. Ahern, 938 A.2d 35, 39 (Me. 2008) (dental practice); Hollander v. Hollander, 597 A.2d 1012, 1017 (Md. Ct. Spec. App. 1991) (dental practice); Goldman v. Goldman, 554 N.E.2d 860, 866 (Mass. App. Ct. 1990) (medical practice); Roth v. Roth, 406 N.W.2d 77, 80 (Minn. Ct. App. 1987) (chiropractic practice); Hanson v. Hanson, 738 S.W.2d 429, 434 (Mo. 1987) (oral surgery practice); Taylor v. Taylor, 386 N.W.2d 851, 858–59 (Neb. 1986) (medical practice); *In re* Watterworth, 821 A.2d 1107, 1115 (N.H. 2003) (orthodontic practice); McQuay v. McQuay, 217 P.3d 162, 164 (Okla. Civ. App. 2009) (cement business); *In re* Marriage of Maxwell, 876 P.2d 811, 813 (Or. Ct. App. 1994) (public relations firm); Butler v. Butler, 663 A.2d 148, 155 (Pa. 1995) (accounting practice); Moretti v. Moretti, 766 A.2d 925, 927–28 (R.I. 2001) (landscaping business); Smith v. Smith, 709 S.W.2d 588, 591–92 (Tenn. Ct. App. 1985) (law practice); Guzman v. Guzman, 827 S.W.2d 445, 447 (Tex. App. 1992) (C.P.A. practice); Sorenson v. Sorenson, 839 P.2d 774, 775–77 (Utah 1992) (dental practice); Mills v. Mills, 709 A.2d 79, 81 (Vt. 1997) (law practice); Hoebelheinrich v. Hoebelheinrich, 600 S.E.2d 152, 155–56 (Va. Ct. App. 2004) (medical practice); May v. May, 589 S.E.2d 536, 547 (W. Va. 2003) (dental practice); Root v. Root, 65 P.3d 41, 46–47 (Wyo. 2003) (pathology practice).

33 *See, e.g.*, Powell v. Powell, 648 P.2d 218, 223–24 (Kan. 1982) (medical practice); Watson v. Watson, 882 So. 2d 95, 100–01 (Miss. 2004) (veterinary practice); Donahue v. Donahue, 384 S.E.2d 741, 745 (S.C. 1989) (dental practice).

34 *See, e.g.*, Mitchell v. Mitchell, 732 P.2d 208, 211 (Ariz. 1987) (accounting firm); *In re* Marriage of Foster, 117 Cal. Rptr. 49, 52 (Cal. Ct. App. 1974) (medical practice); *In re* Marriage of Nichols, 606 P.2d 1314, 1316 (Colo. App. 1979) (dental practice); Stewart v. Stewart, 152 P.3d 544, 549 (Idaho 2007) (dermatology practice); Kowalesky v. Kowalesky, 384 N.W.2d 112, 115–16 (Mich. Ct. App. 1986) (dental practice); *In re* Marriage of Stufft, 950 P.2d 1373, 1378 (Mont. 1997) (law practice); Ford v. Ford, 782 P.2d 1304, 1310 (Nev. 1989) (medical practice); Dugan v. Dugan, 457 A.2d 1, 6 (N.J. 1983) (law practice); Mitchell v. Mitchell, 719 P.2d 432, 437 (N.M. Ct. App. 1986) (C.P.A. practice); Moll v. Moll, 722 N.Y.S.2d 732, 736–37 (N.Y. Sup. Ct. 2001) (financial advising practice); Poore v. Poore, 331 S.E.2d 266, 271 (N.C. Ct. App. 1985) (dental practice); Sommers v. Sommers, 660 N.W.2d 586, 590 (N.D. 2003) (orthodontic practice); *In re* Marriage of Hall, 692 P.2d 175, 177–78 (Wash. 1984) (medical practice).

35 *See, e.g.*, *In re* Marriage of Rosen, 130 Cal. Rptr. 2d 1, 5–6 (Cal. Ct. App. 2002) (law practice); *In re* Marriage of Fortier, 109 Cal. Rptr. 915, 918 (Cal. Ct. App. 1973) (medical practice).

36 *See, e.g.*, Piscopo v. Piscopo, 557 A.2d 1040, 1042–43 (N.J. Super. Ct. App. Div. 1989); Elkus v. Elkus, 572 N.Y.S.2d 901, 904 (N.Y. App. Div. 1991).

A. Celebrity Goodwill in New York and New Jersey

Thus far, New York and New Jersey are the only states to officially recognize celebrity goodwill as a divisible marital asset.[37] The starting place for the acceptance of celebrity goodwill in New York and New Jersey can be traced[38] to the "landmark"[39] New York case *O'Brien v. O'Brien*.[40] In *O'Brien* the court held the husband's medical license was divisible marital property.[41] The court explained the wife had sacrificed her own education goals and assisted her husband to gain his medical license, which ultimately resulted in his enhanced earning capacity.[42] The court went on to note the wife's contributions to the economic partnership represented an investment for which she had a right of return, and to hold otherwise would go against the underlying goal of equity in divorce proceedings.[43]

In *Golub v. Golub,*[44] the holding in *O'Brien* was extended to include a celebrity career.[45] The court found the increase in the value of the wife's modeling and acting career was marital property,[46] reasoning the wife's income increased during the marriage due to her husband's legal knowledge and business experience.[47] The court stated that when "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."[48] In addition, the court held the increase in the value of the husband's law practice during the marriage was subject to

37 Jack A. Rounick & R. William Riggs, *What's Perk-olating? How Courts are Handling Perks, Fringe, and Other Employment Benefits*, 23 FAM. ADVOC. 12, 15 (Winter 2001).

38 *See* Cutler & Bogan, *supra* note 5 (calling *O'Brien* the "springboard" for celebrity goodwill).

39 *See* Keane v. Keane, 861 N.E.2d 98, 103 (N.Y. 2006) (describing *O'Brien* as a "landmark" case).

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

41 *Id.* at 713. The *O'Brien* holding has also been extended to include academic degrees. *See, e.g.*, Huffman v. Huffman, 923 N.Y.S.2d 583, 586 (N.Y. App. Div. 2011) (holding a master's degree was marital property). California, on the other hand, does not recognize licenses or educational degrees as marital property, but instead provides that the "community shall be reimbursed for community contributions to education or training of a party that substantially enhances the earning capacity of the party." CAL. FAM. CODE § 2641(b)(1) (West 2013). There is a presumption that the couple, or community, has not substantially benefitted from the degree if the contributions were made less than ten years before the divorce proceedings. FAM. § 2641(c)(1). In addition, if the contributions were made over ten years before the dissolution, it is presumed both spouses have already benefitted from the education and there is no need for additional compensation. *Id.*

42 *O'Brien*, 489 N.E.2d at 716.

43 *Id.* at 717–18.

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

45 *Id.* at 949.

46 *Id.* at 949–50.

47 *Id.* at 948.

48 *Id.* at 950.

distribution.[49] The court found both spouses had an equal claim to the goodwill and increased earning capacity of the other party, which occurred during, and presumptively stemmed from, the union.[50]

In *Elkus v. Elkus*,[51] the court held the wife's celebrity opera singing career was marital property.[52] Prior to the marriage, the wife had already embarked on her opera career and had been relatively successful.[53] However, during the marriage, the wife's earnings increased substantially.[54] The court reasoned her increased earning capacity was in part due to the indirect contributions of her husband during the marriage, and held that under an equitable distribution framework the wife's celebrity career and goodwill was a divisible marital asset.[55]

In New Jersey, the path toward accepting celebrity goodwill starts with the case *Dugan v. Dugan*,[56] where the court held the professional goodwill associated with a sole practitioner's legal practice was marital property with an ascertainable value.[57] In *Dugan,* the court found where "future earning capacity has been enhanced because reputation leads to probable future patronage from existing and potential clients, goodwill may exist and have value [and] [w]hen that occurs the resulting goodwill is property" subject to distribution.[58]

From there came the New Jersey case *Piscopo v. Piscopo*,[59] which held the career of a well-known comedian to be marital property.[60] The *Piscopo* court reasoned that a "particular and uncommon aptitude for some specialized discipline whether law, medicine or entertainment" is what transforms the average professional into one with "measurable goodwill."[61] Further, the court stated celebrity goodwill should be valued in the same fashion as the professional goodwill of a professional practice.[62] The decision was affirmed on appeal, where the court compared

49 *Id.* at 948.
50 *Id.* at 950.
51 Elkus v. Elkus, 572 N.Y.S.2d 901 (N.Y. App. Div. 1991).
52 *Id.* at 904.
53 *Id.*
54 *Id.*
55 *Id.* ("[T]he defendant's active involvement in the plaintiff's career, in teaching, coaching, and critiquing her, as well as in caring for their children, clearly contributed to the increase in its value.").
56 Dugan v. Dugan, 457 A.2d 1 (N.J. 1983).
57 *Id.* at 12.
58 *Id.* at 6.
59 Piscopo v. Piscopo, 555 A.2d 1190 (N.J. Super. Ct. Ch. Div. 1988).
60 *Id.* at 1193.
61 *Id.* at 1192.
62 *Id.*

goodwill associated with the celebrity to professional goodwill, which New Jersey had already accepted as marital property.[63]

New York case law advances the reasoning that the enhancement of earning capacity during the marriage indicates the presence of goodwill,[64] and further, the non-celebrity spouse's investment or contribution to the community is the basis for the distribution of celebrity goodwill.[65] New Jersey, on the other hand, recognizes celebrity goodwill as an extension of professional goodwill.[66] Despite such variation, both states have arrived at the same conclusion and not only recognize celebrity goodwill as a marital asset with commercial value, but also that in the interest of equity the commercial value should be considered divisible marital property to the extent it existed during the marriage.

B. California's Refusal to Recognize Celebrity Goodwill

For decades, California has acknowledged the value of professional goodwill associated with a medical practice, law practice, or other comparable professional practice, as divisible marital property.[67] One of the first cases to reach such a conclusion is *Golden v. Golden*.[68] In *Golden*, the court held the value of the goodwill of a professional practice should be considered marital property because "[u]nder the principles of community property law, the wife, by virtue of her position of wife, made to that value the same contribution as does a wife to any of the husband's earnings and accumulations during marriage."[69] The court further reasoned the wife was entitled to be compensated for her contributions in the same manner she would be for the "increased value of stock in a family business."[70]

Five years later in *In re Marriage of Lopez*,[71] the court held the goodwill attributable to the husband's law practice was

63 Piscopo v. Piscopo, 557 A.2d 1040, 1042 (N.J. Super. Ct. App. Div. 1989).

64 Golub v. Golub, 527 N.Y.S.2d 946, 950 (N.Y. Sup. Ct. 1988); Elkus v. Elkus, 572 N.Y.S.2d 901, 904 (N.Y. App. Div. 1991); *see also* ROBERT D. FEDER, VALUATION STRATEGIES IN DIVORCE 8-68–8-69 (Charles T. Rosoff & Aleza T. Friedman eds., 4th ed. 2013) (citing Mann v. Mann, N.Y. L.J., Jan. 10, 1995, at 5) (finding there are many methods available to value celebrity goodwill, but factual evidence must be presented to show the celebrity career value increased, rather than decreased, during the marriage).

65 *Golub,* 527 N.Y.S.2d at 949; *Elkus*, 572 N.Y.S.2d at 901.

66 *Piscopo*, 557 A.2d at 1041–42.

67 *See, e.g.*, Brawman v. Brawman, 19 Cal. Rptr. 106, 109 (Cal. Dist. Ct. App. 1962) (law practice); Todd v. Todd, 78 Cal. Rptr. 131, 136 (Cal. Ct. App. 1969) (law practice); Fortier v. Fortier, 109 Cal. Rptr. 915, 918 (Cal. Ct. App. 1973) (medical practice); *In re* Marriage of Rosen, 130 Cal. Rptr. 2d 1, 6 (Cal. Ct. App. 2002) (law practice).

68 Golden v. Golden, 75 Cal. Rptr. 735 (Cal. Ct. App. 1969).

69 *Id.* at 738.

70 *Id.*

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

community property.[72] The court, citing *Brawman v. Brawman*,[73] compared the wife's interest to that of a "silent partner" who should be entitled to fair compensation for her share in the professional goodwill upon dissolution of the partnership.[74] The *Lopez* court also set forth several factors that, when present, indicate the existence of goodwill and a probability the goodwill of the business will continue to exist after the dissolution process, including the professional's age, health, past demonstrated earning power, professional reputation in the community, skill, knowledge, comparative professional success, and the nature and duration of the professional's business.[75] These factors have been used in later cases to determine whether professional goodwill exists.[76]

Other California decisions followed the pattern set forth by *Golden* and *Lopez* by reiterating that professional goodwill is a divisible marital asset and seem to indicate a natural progression towards the acceptance of celebrity goodwill.[77] However, in *In re Marriage of McTiernan and Dubrow*,[78] California had an opportunity to deal directly with the issue of celebrity goodwill, but the court declined to classify celebrity goodwill as a divisible marital asset.[79] Although the trial court held the husband's motion picture career, which was dependent on his skill, experience, and knowledge, was comparable to that of a lawyer, physician, or dentist,[80] on appeal it was held an individual could not generate goodwill that could be valued and divided as a community asset.[81]

---

72 *Id.* at 69.

73 Brawman v. Brawman, 19 Cal. Rptr. 106, 110 (Cal. Dist. Ct. App. 1962) (finding that, where only one spouse is entitled to the benefits of the professional practice developed during the marriage after a divorce, "it is the case of a silent partner withdrawing from a going business . . . such partner is to receive fair compensation for her share, on her enforced retirement").

74 *Lopez,* 113 Cal. Rptr. at 65 (quoting *Brawman*, 19 Cal. Rptr. at 109).

75 *Id.* at 68.

76 *See, e.g.*, *In re* Marriage of Iredale, 16 Cal. Rptr. 3d 505, 510 (Cal. Ct. App. 2004) (noting the factors set out in *Lopez* are generally applicable to the valuation of professional goodwill, but the specific circumstances of each individual case should still be taken into account). Courts in other states have also used the *Lopez* factors to determine the value of a professional practice. *See, e.g.*, *In re* Marriage of Hall, 692 P.2d 175, 179 (Wash. 1984).

77 *See* Paloma Peracchio, Comment, *The Value of Creative Professionals in the Entertainment Capital of the World: Why "Celebrity Goodwill" Should Be A Divisible Community Property Interest in California Divorces*, 28 LOY. L.A. ENT. L. REV. 129, 156 (2008) (arguing that California case law seemed to indicate that celebrity goodwill could also be seen as a divisible marital asset).

78 *In re* Marriage of McTiernan and Dubrow, 35 Cal. Rptr. 3d 287 (Cal. Ct. App. 2005).

79 *Id.* at 306.

80 *Id.* at 290.

81 *Id.* at 306.

In *McTiernan*, the court distinguished the present circumstances from previous California case law by arguing that prior cases involved an individual who was conducting a business and thus, the goodwill could be attributed to the business entity and separated from the individual.[82] The court found the goodwill associated with the director's career could not be adequately divided from the individual.[83] The court further found the reputation, or celebrity goodwill of the director, could not be sold or transferred, which was a necessary quality in order to classify goodwill as property.[84] If goodwill could not be classified as property to begin with, it was not appropriate to consider it as community property to be divided upon dissolution.[85] In addition, the court noted celebrity goodwill must be transferrable[86] in order to fit within California's statutory definition of goodwill.[87]

The case law in California regarding celebrity goodwill largely ends with the *McTiernan* decision. Therefore, in California the leading criticisms against recognizing celebrity goodwill as a divisible marital asset are first, celebrity goodwill cannot adequately be separated from the individual, and second, celebrity goodwill does not carry the general characteristics of property and thus cannot be classified as divisible community property.[88]

III. CELEBRITY GOODWILL AS A PROPERTY INTEREST

The *McTiernan* decision found the goodwill associated with the director's reputation could not be transferred and as a result could not be characterized as property.[89] But, this conclusion is inconsistent not only with the previous trend in the California case law,[90] but also with the modern understanding of property,[91]

82 *Id.* at 292–93.

83 *Id.* at 295.

84 *Id.*

85 *Id.* at 296.

86 *Id.* Justice Cooper dissented from the idea that goodwill must be transferable in order to constitute a community property asset, stating that "goodwill is not a commodity in the marketplace, but rather 'a portion of the professional practice as a going concern on the date of the dissolution of the marriage.'" *Id.* at 308 (Cooper, J., concurring in part and dissenting in part) (quoting *In re* Marriage of Foster, 117 Cal. Rptr. 49 (Cal. Ct. App. 1974)). Justice Cooper went on to say the majority's attempt to limit goodwill to only businesses and not the individual is "semantic" in that "[a]ny professional who independently practices his or her profession, for profit—be it lawyer, doctor, computer consultant, or film director—thereby conducts a business, within the lead opinion's own unattributed definition, as well as more traditional ones." *Id.* at 307–08.

87 CAL. BUS. & PROF. CODE § 14102 (West 2013).

88 *McTiernan*, 35 Cal. Rptr. 3d at 295–96.

89 *Id.*

90 *See* Peracchio, *supra* note 77, at 156; DONALD L. GURSEY & MICHAEL T. MISKEI, *Proving the Existence and Value of Celebrity Goodwill*, *in* VALUING PROFESSIONAL PRACTICES AND LICENSES: A GUIDE FOR THE MATRIMONIAL PRACTITIONER 26-8 (Ronald L.

especially when viewed in light of analogous concepts like the right of publicity.[92]

Currently, certain intangibles are divisible upon dissolution in many different jurisdictions.[93] For instance, California recognizes certain intellectual property rights[94] and pension benefits[95] as community property. Further, California recognized at common law,[96] and now by statute, that celebrity status is property that can be transferred in the context of the "right of publicity."[97]

Brown, ed., 2d ed. 1997) (arguing that California case law dictates that "[g]oodwill exists and has value if its owner can derive financial benefits from his or her business in the future even if he cannot transfer that business to another").

91 *See* Llewellyn Joseph Gibbons, *Love's Labor's Lost: Marry for Love, Copyright Work-Made-for Hire, and Alienate at Your Leisure*, 101 KY. L.J. 113, 115 (2013) (noting that historically issues of the economic rights were addressed by looking to the tangible assets of both spouses, but that today the focus is not only on tangible assets, but also intangible rights and other new forms of property). New forms of property, like the right of publicity, essentially emerged in relation to a demand for economic efficiency and in order to help maximize wealth. David Westfall & David Landau, *Publicity Rights as Property Rights,* 23 CARDOZO ARTS & ENT. L.J. 71, 73 (2005) (describing differing theoretical views relating to the emergence of modern property rights).

92 The right of publicity was first recognized as a form of property in the case *Haelen Labs., Inc. v. Topps Chewing Gum, Inc.*, which found "a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture." 202 F.2d 866, 868 (2d Cir. 1953). The right of publicity has since been extended to include nicknames, signatures, physical poses, singing and performance styles, gestures, and even body parts. Ann Bartow, *Intellectual Property and Domestic Relations: Issues to Consider When There is an Artist, Author, Inventor, or Celebrity in the Family*, 35 FAM. L.Q. 383, 420 (2001).

93 *See* Kelly M. Haggar, Comment, *A Catalyst in the Cotton: The Proper Allocation of the "Goodwill" of Closely Held Businesses and Professional Practices in Dissolution of Marriages*, 65 LA. L. REV. 1191, 1200 (2005) (explaining valuation of intangibles, like goodwill, associated with a professional practice or family business has proved to be problematic in the context of divorce); *see also* Robin P. Rosen, Note, *A Critical Analysis of Celebrity Careers as Property upon Dissolution of Marriage*, 61 GEO. WASH. L. REV. 522, 532–38 (1993) (discussing valuation difficulties that arise in the dissolution process relating to pension rights, closely held corporations, intellectual property rights, professional degrees, and professional goodwill).

94 California law clearly indicates certain intellectual property rights are considered community property assets. *See In re* Marriage of Worth, 241 Cal. Rptr. 135, 140 (Cal. Ct. App. 1987) (holding copyrights for trivia books written during the marriage were a community property asset). Similarly, California has long since recognized patents as community property. *See, e.g.*, Lorraine v. Lorraine, 48 P.2d 48, 55 (Cal. Dist. Ct. App. 1935) (holding both parties substantially contributed to the husband's business during the marriage, and therefore the patents for his business inventions were community property).

95 *See, e.g.*, *In re* Marriage of Brown, 544 P.2d 561, 562–63 (Cal. 1976) ("Pension rights, whether or not vested, represent a property interest; to the extent such rights derive from employment during coverture, they comprise a community asset subject to division in a dissolution proceeding.").

96 Neil Caulkins, *A Fiduciary's Duties When A Celebrity Persona Is the Asset*, 24 COLUM.-VLA J.L. & ARTS 235, 238 (2001).

97 CAL. CIV. CODE § 3344.1 (West 2013). Although California has not yet recognized the right of publicity as a community asset, the reasoning in *In re Marriage of McTiernan and Dubrow*, 35 Cal. Rptr. 3d 287 (Cal. Ct. App. 2005), would fall flat if the non-celebrity spouse claimed a community property interest in the celebrity's right of publicity. *See*

The "right of publicity" refers to the "right of an individual, especially a public figure or a celebrity, to control the commercial value and exploitation of his name and picture or likeness and to prevent others from unfairly appropriating this value for their commercial benefit."[98] Unlike celebrity goodwill, which focuses on the celebrity's reputation and the effect of the celebrity's reputation on future patronage or employment, the right of publicity focuses primarily on the right to capitalize on the celebrity name.[99] In California, an individual's publicity rights are a property right that can be transferred to a successor in interest.[100] In addition, celebrities can also sell their name and *goodwill* outright.[101] This suggests the value of a celebrity's goodwill can be transferred and quantified,[102] and that it is being quantified in other contexts.

The right of publicity generally comes up in terms of celebrity endorsements, where the name or likeness of the celebrity is bought for the commercial benefit of the purchaser,[103] but is also an issue when managing the estate of celebrities whose name continues to carry commercial value, for example Marilyn Monroe or Elvis Presley.[104] In either scenario, the celebrity's reputation, or goodwill, is a contributing factor to the

Jonathan L. Kranz, Note, *Sharing the Spotlight: Equitable Distribution of the Right of Publicity*, 13 CARDOZO ARTS & ENT. L.J. 917, 955 (1995) (arguing the right of publicity should be considered a divisible marital asset, separate from the concept of celebrity goodwill).

98 Kranz, *supra* note 97, at 934 (quoting Estate of Presley v. Russen, 513 F. Supp. 1339, 1353 (D.N.J. 1981)).

99 *Id.* at 918; *see also* GARY N. SKOLOFF & FRANCIS W. DONAHUE, *Peace and Goodwill to Celebrities*, *in* VALUING PROFESSIONAL PRACTICES AND LICENSES: A GUIDE FOR THE MATRIMONIAL PRACTITIONER 25-8 (Ronald L. Brown, ed., 2d ed. 1997) (stating although the two terms have some similarities, they are not interchangeable). *Golub v. Golub,* 527 N.Y.S.2d 946, 949 (N.Y. Sup. Ct. 1988), noted that "[t]here is an analogy to be made between the right of publicity and professional goodwill. In both rights, there is a secondary meaning generated by a name and benefits derived therefrom. In either case, the right becomes an income producing source."

100 *See* CAL. CIV. CODE §§ 3344, 3344.1 (West 2013).

101 *See* MARK A. ROESLER, CELEBRITIES' GOODWILL AND RIGHT OF PUBLICITY (Sept. 13, 2010), *available at* http://www.markroesler.com/pdf/speaking/MRChicagoBVRpresentation_Sept10.pdf.

102 GURSEY & MISKEI, *supra* note 90, at 26-9–26-10. Some commentators find both the right of publicity and celebrity goodwill should be seen as a transferrable property right. *Id.* The right of publicity and celebrity goodwill "may be personal and unique, but . . . can be used by others for economic benefit. This would seem . . . to be a transfer." *Id.* at 26-10.

103 *Id.* at 26-9.

104 Caulkins, *supra* note 96, at 253–55. At the time of Elvis Presley's death his estate was valued at 4.9 million dollars, but his estate continues to earn nearly fifteen million dollars annually, due in part to the licensing of his right of publicity. *Id.* at 253–54. Similarly, Marilyn Monroe's estate earns over one million dollars annually from the licensing of the star's right of publicity. *Id.* at 255.

celebrity's commercial value.[105] In other words, a celebrity's right of publicity is valuable only because of the increased earning capacity and marketability of his or her reputation.[106]

Although celebrity goodwill and the right of publicity are not interchangeable concepts,[107] the similarities between the two lend to the conclusion that a celebrity's reputation, in the context of celebrity goodwill, can be seen as a property interest. In fact, some draw little distinction between celebrity goodwill and the right of publicity in a divorce setting.[108] This line of thinking further conflates California's argument in *McTiernan*,[109] in that if the similarities between the two exist then the notion that one is a property right, while the other is not, seems counterintuitive. California's willingness to recognize the right of publicity as a property right shows celebrity goodwill could, and should, be seen as valuable community property.

IV. THE VALUE OF CELEBRITY GOODWILL

A. Professional Goodwill Valuation and the Celebrity

One of the major criticisms against accepting celebrity goodwill as marital property is that substantial difficulties arise when it comes time for valuation.[110] California has not endorsed a single method of valuation when it comes to professional goodwill, but rather has found goodwill is a question of fact to be determined on a case-by-case basis.[111] California case law has made it clear, however, that goodwill cannot be valued according to any method that takes into account post-marital efforts, but instead, "a proper means of arriving at the value of such goodwill

105 David Tan, *Affective Transfer and the Appropriation of Commercial Value: A Cultural Analysis of the Right of Publicity,* 9 VA. SPORTS & ENT. L.J. 272, 278 (2010) (stating commercial use of an individual's name, reputation, or publicity value is intended to increase the sales or value of a particular product).

106 *Id.* at 277–78 ("[T]he more well-known – and more well-liked – an individual, the greater will be the potential commercial value of that identity.").

107 SKOLOFF & DONAHUE, *supra* note 99, at 25-8. The right of publicity can also be an indicator that celebrity goodwill in fact exists. GURSEY & MISKEI, *supra* note 90, at 26-9–26-10.

108 GURSEY & MISKEI, *supra* note 90, at 26-13 (explaining that as "a practical matter the distinction between the two seems arbitrary").

109 *In re* Marriage of McTiernan and Dubrow, 35 Cal. Rptr. 3d 287, 296 (Cal. Ct. App. 2005).

110 *See* GURSEY & MISKEI, *supra* note 90, at 26-7 (stating that the controversy surrounding celebrity goodwill begins with the question of whether celebrity goodwill exists, and ends with the difficulty in valuation). For a more comprehensive analysis of goodwill valuation, see Randall B. Wilhite, *The Effect of Goodwill in Determining the Value of A Business in A Divorce*, 35 FAM. L.Q. 351, 358–71 (2001) (describing valuation techniques employed by a sampling of states); *see also* White, *supra* note 19, at 521 (discussing common valuation approaches employed by courts that recognize professional goodwill as a marital asset).

111 *See In re* Marriage of King, 197 Cal. Rptr. 716, 719 (Cal. Ct. App. 1983).

contemplates any legitimate method of evaluation that measures its present value by taking into account some past result."[112]

Several common approaches for valuing professional goodwill have emerged in the states that recognize professional goodwill as a divisible marital asset. The first, and arguably most frequently used, is known as the "capitalization of excess earnings approach."[113] According to this approach, the normal earnings of the professional practice must first be established, excluding any earning value attributable to the tangible assets of the business.[114] From there, the compensation given for the services of the individual professional is subtracted from the normalized earnings.[115] If the professional's earnings exceed those of a comparable practitioner,[116] excess earnings exist.[117] The excess earnings are then divided by a capitalization rate to reach the goodwill value.[118]

Another valuation approach that has been used to value professional goodwill is referred to as the "straight capitalization approach."[119] In the straight capitalization approach, the practice's annual profit is determined and then a straight capitalization rate is applied.[120] The capitalization rate is determined by looking to the nature of the practice, the risk involved, and the continuity of clients and patients.[121] The value of the practice's assets is then subtracted from the total value of the practice.[122]

---

112 *In re* Marriage of Foster, 117 Cal. Rptr. 49, 54 (Cal. Ct. App. 1974).

113 *See* Christopher C. Melcher, *Valuing of a Professional Practice in a California Divorce Action*, HG.ORG (July 30, 2009), http://www.HG.org/article.asp?id=6785; Kelly, *supra* note 14, at 610. This approach has been criticized for being too closely related to a measurement of future earnings, which is prohibited in California. *See, e.g.*, *McTiernan*, 35 Cal. Rptr. 3d at 294 n.7. But, California courts have frequently used this method to establish the value of professional goodwill, claiming the excess earnings method considers *prior* earnings with the expectation the business will continue. *See, e.g.*, *Foster,* 117 Cal. Rptr. at 51.

114 Kelly, *supra* note 14, at 610–11. Generally, the normal earnings are established by looking at the average business earnings over the past five years. *Id.* at 611.

115 *Id.*

116 *In re* Marriage of Rosen, 130 Cal. Rptr. 2d 1, 6 (Cal. Ct. App. 2002) (explaining the excess earnings method and its use in other California cases that have dealt with professional goodwill).

117 Kelly, *supra* note 14, at 611.

118 *Id.* One criticism of the capitalization of excess earnings method is generally the capitalization rate is based on subjective factors and thus no clear standard can be applied in all situations. *Id.*

119 *See, e.g.*, *In re* Marriage of Hall, 692 P.2d 175, 179–80 (Wash. 1984) (explaining common professional goodwill valuation approaches, including the straight capitalization approach).

120 *Id.* at 179.

121 Kelly, *supra* note 14, at 611; *see also* White, *supra* note 19, at 528–59 (discussing the role of buy-sell agreements in goodwill valuation methods).

122 *Hall*, 692 P.2d at 179.

Partnership and buy-sell agreements have previously been used as evidence of goodwill in a business,[123] and some courts have applied an IRS formula that measures how much the net earnings of a business exceed a fair return on the business's tangible assets.[124] Courts have also looked to the fair market value[125] of the business, considering how much the business would sell for, or what comparable businesses have recently sold for, to determine the goodwill value.[126]

Not all of these approaches may be appropriate when it comes to valuing celebrity goodwill, but the idea behind each serves as a starting point. The discussion provided in the New York and New Jersey cases, which have already recognized celebrity goodwill as a divisible marital asset, indicates valuation methods used to measure professional goodwill can be molded to fit the specific situation in order to determine the value of celebrity goodwill.[127]

When applying the capitalization of excess earnings method to measure the value of celebrity goodwill, the earning power of the celebrity must first be determined.[128] Determining the earning power of the celebrity requires looking to the celebrity's historical gross earnings and then adjusting the gross earnings in order to account for expenses.[129] Although traditionally this method requires the value of the professional practice's tangible assets be subtracted from the total earnings,[130] it is generally not necessary to subtract the value of tangible assets in the case of the celebrity because tangible assets are rarely involved.[131] The gross earnings number then is capitalized by a percentage, determined by looking to factors such as the duration of the celebrity's career, past earning power, and the expected life of the celebrity status,[132] ultimately resulting in the celebrity goodwill value.[133]

123 Kelly, *supra* note 14, at 606.

124 *Hall*, 692 P.2d at 180.

125 White, *supra* note 19, at 521–22 (explaining the fair market value approach is beneficial in that it does not take into account any post-divorce efforts).

126 *Id.* at 521.

127 *See* Caulkins, *supra* note 96, at 237 (discussing that "valuation of celebrity personas is quite similar to valuation of more traditional assets" as both rely on expert testimony and records of like transactions).

128 ROBERT D. FEDER, VALUING SPECIFIC ASSETS IN DIVORCE, § 29.04 (Charles T. Rosoff & Aleza T. Friedman eds., 2014), *available at* Westlaw VALSA s 29.04.

129 *Id.* Expenses include travel and compensation for the celebrity. *Id.*

130 Kelly, *supra* note 14, at 610–11.

131 *See generally id.*

132 FEDER, *supra* note 128.

133 Kelly, *supra* note 14, at 610–11. The traditional capitalization of excess earnings method relies on a comparison between the professional and other similar professionals to determine if there is in fact excess earnings. *Id.* However, in the context of the celebrity, it

In *Piscopo v. Piscopo*,[134] the court seemed to value the celebrity's goodwill by looking to the gross earnings or revenue method.[135] This method is similar to the fair market value approach for professional businesses, in that the value of the celebrity's goodwill is considered to be a fraction or percentage of the gross earnings or revenues accumulated by the celebrity.[136] Factors used to determine the proper percentage include the duration of the celebrity's career, past earning power, and the expected life of the celebrity status.[137]

The fact that California cases have already recognized professional goodwill as a divisible marital asset, despite obvious valuation issues, shows courts are not opposed to confronting difficult valuation methods.[138] Further, valuation of community property is disputed in any divorce where valuable assets are at issue, and generally requires extensive discovery and expert testimony.[139] The valuation of celebrity goodwill is a difficult task to undertake, but that does not provide an excuse to shy away from providing an equitable result in California celebrity divorce cases.

B. "Hot to Not": When Should Celebrity Goodwill be Valued?

It goes without saying, in today's commercial arena one day you can be "hot" and the next "not." The same can be said for businesses. A professional practice or business entity could enjoy several successful years and due to a change in circumstances, or maybe a tarnished reputation, take a dive in value.[140] With swift

is difficult to establish an appropriate proxy, as the only comparable individual would be one in equal stature to the celebrity and thus would be earning the same, or close to the same, as the celebrity. FEDER, *supra* note 128. This problem is the basis for much of the criticism against using the capitalization of excess earnings method to determine celebrity goodwill. *Id.*

134 Piscopo v. Piscopo, 555 A.2d 1190, 1193 (N.J. Super. Ch. Div. 1988).

135 FEDER, *supra* note 128.

136 *Id.*

137 *Id.* The issue with this approach is the difficulty that arises in determining what percentage should be applied to adequately value celebrity goodwill. *Id.* Generally the percentage would be determined by looking to the sales of other comparative businesses, however, the celebrity "business" is rarely sold. *Id.*

138 *In re* Marriage of Lopez, 113 Cal. Rptr. 58, 67 (Cal. Ct. App. 1974) (noting the fact that professional goodwill may be difficult to "evaluate and will ordinarily require special disposition, is not reason to ignore its existence in a proper case").

139 *See generally* Carol S. Bruch, *The Definition and Division of Marital Property in California: Towards Parity and Simplicity,* 33 HASTINGS L.J. 769, 782–83 (1982) (discussing the difficulties that arise when valuing separate and community property in California divorces); *see also* Caulkins, *supra* note 96, at 237.

140 *See The 25 Worst Business Failures in History*, BUSINESS PUNDIT, (Jan. 14, 2009), http://www.businesspundit.com/the-25-worst-business-failures-in-history/ (describing twenty-five businesses that failed despite substantial success previously, including the famous downfalls of Enron, DeLorean, and Pan Am). Enron, one of the most famous businesses to suffer a substantial and public downfall, in some ways reached celebrity

market changes, especially in terms of celebrity name value,[141] a standard date of valuation would provide stability within an already difficult to ascertain concept.

In California, all community property must be valued as close to the trial date as "practicable."[142] California case law has recognized, however, good cause exists to value professional practices that rest on the knowledge and skill of the individual practitioner closer to the date of separation than the date of the trial.[143] The rationale behind this exception is that the value of a professional practice, "including goodwill, is primarily a reflection of the practitioner's services . . . and not capital assets," and continues to change after the date of separation, when only one party is contributing to its value.[144]

If California were to recognize celebrity goodwill as a divisible marital asset, the date of valuation exception may follow.[145] In the context of celebrity goodwill, where the object of the distribution is to compensate the other spouse for his or her contribution to the value of the celebrity's reputation, it seems appropriate to value the worth of the celebrity closer to the date of separation, or in other words, the date at which the non-celebrity spouse stops contributing to the value of the celebrity career. Any swift movement in the celebrity's earnings or reputation after the date of separation would then be left out of the resulting value.

Conversely, applying the date of valuation exception may not be the best approach to breed an amicable divorce proceeding.[146]

status. Rindova, et al., *supra* note 27, at 50. However, "as Enron's current predicament suggests, achieving celebrity is not necessarily indicative of the long-term effectiveness and success." *Id.*

141 For example, Tiger Woods, once the world's highest grossing athlete, suffered substantial financial setbacks after news broke of his extramarital affairs. *See* Ruth Houston, *Tiger Woods net worth since the infidelity scandal and his divorce settlement*, EXAMINER.COM (Feb. 9, 2011), http://www.examiner.com/article/tiger-woods-net-worth-since-the-infidelity-scandal-and-his-divorce-settlement.

142 CAL. FAM. CODE § 2552 (West 2013).

143 *See In re* Marriage of Duncan, 108 Cal. Rptr. 2d 833, 838–39 (Cal. Ct. App. 2001) (citing *In re* Marriage of Kilbourne, 284 Cal. Rptr. 201, 204 (Cal. Ct. App. 1991)). However, a valuation date close to trial may still be appropriate where the post-separation efforts of the working spouse have a "minimal impact" on any increase in value of the business. *Id.* (citing *In re* Marriage of Green, 261 Cal. Rptr. 294, 297 (Cal. Ct. App. 1989)).

144 *Id.* (quoting *In re* Marriage of Stevenson, 24 Cal. Rptr. 2d 411, 412–13 (Cal. Ct. App. 1993)).

145 The date of valuation exception applies in situations where the business relies on the skill and industry of the working spouse. *Id.* at 839. Similarly, the celebrity "business" derives from the skill and the reputation of the celebrity.

146 California recognizes the importance of fostering a collaborative divorce process to solve familial disputes. CAL. FAM. CODE § 2013 (West 2013). The collaborative law process seeks to foster cooperative negotiations and amicable discussions, instead of sticking to

If the date of valuation were set at the date of separation, there would be no incentive for the non-celebrity spouse to remain agreeable during the time period preceding the trial; a spiteful spouse would have no reason not to publicize the celebrity's dirty laundry to potentially destroy the celebrity spouse's future career, while he or she suffers few consequences.[147] However, it can also be argued that in an already contentious setting, it is unlikely that the date of valuation exception would substantially change the behavior of either party. It is a natural extension of the current date of valuation exception to include celebrity goodwill as an asset that should be valued closer to the date of separation than the date of trial.

V. EQUITABLE CONSIDERATIONS: THE "SILENT PARTNER'S" COMPENSATION

The community property system is based on the presumption that marriage should be viewed as an economic partnership and each partner deserves to be compensated for his or her contribution to the value of the marital estate.[148] California's failure to recognize celebrity goodwill in divorce settings, while still accepting professional goodwill, represents an inequity in the application of community property ideals. California has historically been a spearhead in promoting community property principles and more equitable approaches to dissolution,[149] but fails to follow its own example by refusing to recognize celebrity goodwill as a community asset.

---

the traditional adversarial system. Andrew Schouten, *Breaking Up Is No Longer Hard to Do: The Collaborative Family Law Act*, 38 MCGEORGE L. REV. 125, 126 (2007).

147 *See* Michelle Fabio, *Nastiest Celebrity Divorces*, LEGALZOOM (Aug. 2008), http://www.legalzoom.com/marriage-divorce-family-law/divorce/nastiest-celebrity-divorces (describing several "nasty" celebrity divorce cases, claiming that "[c]elebrities are known for excess and exaggeration, and . . . their divorces are often extreme as well").

148 Alan Newman, *Incorporating the Partnership Theory of Marriage into Elective-Share Law: The Approximation System of the Uniform Probate Code and the Deferred-Community-Property Alternative*, 49 EMORY L.J. 487, 489 (2000) (discussing that the contemporary view of marriage recognizes the marital relationship as an economic partnership, and partnership theory is the foundation of the community property system); *see also* Michael J. Vaughn, *The Policy of Community Property and Inter-Spousal Transactions*, 19 BAYLOR L. REV. 20, 41 (1967) (stating the policy behind a community property system is to "treat the spouses as equals because of the actual contribution of each to the accomplishment of the partnership purpose").

149 For example, California was the first to enact the no-fault divorce law. Kelly, *supra* note 14, at 153. Today, every state provides a no-fault divorce option, and this emergence of no-fault divorce largely led to the partnership theory of marriage. *Id.*

A. Community Property Goals and the Partnership Theory

California's community property system is based on a partnership model.[150] The partnership model recognizes both spouses as equals because of the contribution each makes to the marriage; both are "equally devoting their lives and energies to furthering the material as well as the spiritual success of the marriage."[151] The nation's general shift towards the partnership theory occurred during the 1970s,[152] and California acted as a leader in the movement by enacting the Family Law Act in 1972, which required the equal division of property between both spouses upon dissolution.[153]

Generally, the partnership theory of marriage uses a "shared-earnings rule."[154] Under the partnership theory, a non- or low-wage earning spouse is found to contribute to the other partner's earnings and career "both directly, by serving as informal consultan[t]and adviso[r], and indirectly, by managing the household and raising children."[155] The partnership theory requires this form of labor, or contribution, be compensated through the shared earnings of both parties.[156]

In re Marriage of Lopez,[157] one of the leading authorities for the acceptance of professional goodwill in California, adopted a similar notion by comparing the non-working spouse to that of a "silent partner."[158] *Lopez* explained that a divorce situation is similar to the "case of a silent partner withdrawing from a going business. And if such partner is to receive fair compensation for her share, on her enforced retirement, it should be so evaluated."[159]

The "silent partner" concept supports the notion that the non-working spouse contributed something to the union, or in some way enhanced the union.[160] This is true in the scenario

150 *See, e.g.*, *In re* Marriage of Brigden, 145 Cal. Rptr. 716, 722–23 (Cal. Ct. App. 1978) (claiming the "distinctive feature of California marital property law is that the marital community is viewed as a partnership in which the spouses are equal partners").

151 Vaughn, *supra* note 148, at 40–41.

152 Rosen, *supra* note 93, at 526–27.

153 *Id.* at 526 n.20.

154 Shari Motro, *Labor, Luck, and Love: Reconsidering the Sanctity of Separate Property,* 102 NW. U. L. REV. 1623, 1631–32 (2008).

155 *Id.* at 1632–33.

156 *Id.*

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

158 *Id.* at 65.

159 *Id.* (quoting Brawman v. Brawman, 19 Cal. Rptr. 106, 109 (Cal. Dist. Ct. App. 1962)).

160 *Id.;* Motro, *supra* note 154, at 1633. Similar to California, many states have used the partnership theory of marriage as the underlying foundation and reasoning for the

where the "silent partner" supports his or her spouse through medical school or law school, or to gain notoriety in the entertainment world as an actor or singer. In order to keep in line with the community property idea that marriage should be viewed as a partnership,[161] the non-working spouse deserves to be compensated for his or her contribution, whether the working spouse is a working professional or celebrity figure.

B. Investment and Sacrifice

Professor Allen Parkman, a commentator on the subject of celebrity goodwill in marital dissolution, argues:

> Since celebrity status is a form of human capital, it should result in an adjustment in the divorce settlements in two situations: when significant investments were made in human capital during the marriage to acquire celebrity status (celebrity investments) or when the noncelebrity spouse sacrificed human capital for the benefit of the celebrity spouse (sacrificed career).[162]

Professor Parkman further explains that celebrity investments can either produce marital property that should be divided upon dissolution, or may instead require that the supporting spouse be reimbursed for separate property funds provided to further the celebrity career.[163] In the case of a sacrificed career, the supporting spouse requires compensation because he or she contributed separate property, or perhaps the right to an individual career, in order to support the celebrity spouse.[164]

As discussed above, the courts in New York and New Jersey that have recognized celebrity goodwill have used reasoning that emulates Professor Parkman's investment and sacrifice argument.[165] The cases that have recognized celebrity goodwill have picked up on the underlying inequity that exists if celebrity

acceptance of professional goodwill in divorce proceedings. *See* Kelly, *supra* note 14, at 598.

161 Vaughn, *supra* note 148, at 40–41.

162 Parkman, *supra* note 29, at 151–52.

163 *Id.* at 152.

164 *Id.*

165 *See supra* Part II.A. In Elkus v. Elkus, 572 N.Y.S.2d 901, 904 (N.Y. App. Div. 1991), the court recognized the enhancement of both careers as a product of both party's contributions and as a result, "to the extent the appreciation in the [wife's] career was due to the [husband's] efforts and contributions, this appreciation constitutes marital property." Golub v. Golub, 527 N.Y.S.2d 946, 950 (N.Y. Sup. Ct. 1988), used similar reasoning in stating, "if a spouse devotes himself or herself to the family throughout the marriage, giving up career opportunities . . . the court should compensate this spouse for his or her contribution enabling him or her to pursue his or her career and not just a terminable maintenance award."

goodwill is not recognized as a marital asset.[166] In addition, the investment and sacrifice theory parallels the partnership theory of marriage, which requires each spouse be compensated for investments made to the marital estate.[167] In order to exemplify the partnership rationale that serves as the foundation for California's current community property system, celebrity goodwill should be considered a divisible marital asset. In cases where the non-celebrity spouse provides some sort of contribution, whether it is through personal investment, the sacrifice of a career, or in some other form, the non-celebrity spouse deserves a piece of the celebrity goodwill pie.[168]

VI. CELEBRITY GOODWILL AS A COMMUNITY ASSET IN CALIFORNIA DIVORCES

This article ultimately proposes California extend its recognition of professional goodwill in divorce proceedings to include celebrities and other public figures that reap a commercial benefit from the value of their name or reputation. In an attempt to better illustrate this proposal and the above concepts in a real life situation, this section will focus on a "[l]ittle ditty about Jack and Diane."[169]

Jack and Diane started out as "two American kids growing up in the heartland."[170] Jackie grew up to be a "football star"[171] . . . while Diane stayed home and cared for the couple's three kids. Jack and Diane married right out of high school and quickly started a family, but down the road hit a rough patch and decided to go their separate ways.

At the time of the divorce, Jack is under contract with Nike, who employs him not only because of his successful football career and status as a well-known athlete, but also because he

166 *See supra* Part II.A.

167 Motro, *supra* note 154, at 1632–33.

168 Notably, some commentators suggest that by recognizing goodwill associated with the individual professional or celebrity as a property right, the court will essentially "double dip" if it later orders a spousal or family support award. *See* White, *supra* note 19, at 503. In other words, the same income will be counted for twice, which could result in an inaccurate measure of the actual ability for the spouse to pay the ordered amount. *See id.* Some courts have used this "double-dipping" notion as reason not to recognize goodwill as a marital asset, and have instead deferred to support awards as reasonable compensation for the non-working spouse. *See, e.g.*, *In re* Marriage of Zells, 572 N.E.2d 944, 946 (Ill. 1991). However, California courts have already sidestepped the issue by recognizing professional goodwill as a marital asset, despite possible "double-dipping" concerns. *See supra* Part II.B. In addition, recognizing goodwill as divisible property may eliminate the need for ongoing support and thus breeds a clean break between the two parties. *See* White, *supra* note 19, at 505.

169 JOHN COUGAR MELLENCAMP, JACK & DIANE, (Criteria Studios 1982).

170 *Id.*

171 *Id.*

has a shiny reputation as a family man. At the start of the marriage, Jack was juggling college football and work at a local diner, but at the time of the divorce, Jack has an estimated annual income of twenty million dollars.[172] On the other hand, Diane worked to support Jack during college, but since then has been the primary caretaker of the children. Diane originally had plans to attend college and pursue a career of her own, but instead supported Jack throughout his career. Assume that upon divorce, Diane claims Jack's "celebrity goodwill" is community property because Jack's celebrity reputation was established during the marriage.[173]

Under this proposed hypothetical, Jack's celebrity goodwill would first be classified as a community property asset,[174] and the value of his celebrity goodwill would then be ascertained.[175] The court would recognize that Jack's public image as a family man and talented athlete helped increase his celebrity reputation, and further, that Diane contributed to Jack's success by caring for the children and sacrificing her own career.

Realistically, the parties would hire an accountant who would then determine the financial figures at issue and apply an appropriate valuation method.[176] Assuming the accountant employed the capitalization of excess earnings method, Jack's earning power would first be determined by looking to his historical gross earnings. Suppose Jack, after taking into account expenses, has earned roughly ten million dollars over the past five years. Under the capitalization of excess earnings method, this ten million dollar figure would then be compared to the net earnings of other comparable football players in the league with similar fame and endorsement deals. Assuming the average earnings for a player similar to Jack is six million dollars, the

172 For example, top earning NFL quarterback Tom Brady reaps an annual salary of roughly 26.5 million dollars per year. *Tom Brady Net Worth*, CELEBRITY NET WORTH, http://www.celebritynetworth.com/richest-athletes/nfl/tom-brady-net-worth/ (last visited Oct. 10, 2013).

173 Arguably, Diane may also have an interest in Jack's right of publicity. *See* Kranz, *supra* note 97, at 955 (arguing that the right of publicity should be a divisible marital asset). However, this is not the argument advanced in this article.

174 *See supra* Part II.B. This proposal assumes celebrity goodwill is considered a community property asset in California. *Id.* In every divorce, the court must first classify the property interest as separate or community. CAL. FAM. CODE § 2551 (West 2013).

175 The factors listed in *In re* Marriage of Lopez, 113 Cal. Rptr. 58, 68 (Cal. Ct. App. 1974) could serve as a starting place to determine if goodwill exists, including looking to Jack's age, health, past demonstrated earning power, professional reputation, skill, knowledge, and comparative professional success.

176 Under California's current goodwill valuation approach, the expert could employ any of the above-mentioned valuation techniques to reach a number that represents the value of Jack's celebrity goodwill. *See supra* Part IV.A. For illustrative purposes, the capitalization of excess earnings method is discussed.

resulting difference would be four million dollars. A capitalization rate would then be applied to the four million dollar figure, determined according to Jack's past earning power and the projected length of his celebrity career.[177] Assuming the capitalization rate is applied for a period of four years, the resulting value of the celebrity goodwill would be sixteen million dollars. This value would then be split equally between both Jack and Diane as community property attributable to celebrity goodwill.

Jack and Diane's situation illustrates the equitable considerations that come into play in celebrity divorce proceedings where the celebrity spouse has an increased earning power as a result of his or her reputation or goodwill. Diane supported Jack through his entire career, not only sacrificing her own career, but also providing constant support as a confidant, wife, and mother to the couple's three children. Diane's situation illustrates the argument advanced by Professor Parkman that celebrity goodwill should be considered a divisible marital asset when there has been investment or sacrifice.[178] As a result, Diane should have a community property interest in Jack's celebrity goodwill upon dissolution.

CONCLUSION

California's refusal to recognize celebrity goodwill as a divisible marital asset represents an inconsistency in the application of community property goals. In the *McTiernan* decision, California had an opportunity to extend the concept of professional goodwill to include celebrity goodwill,[179] but declined to follow prior case law.[180] In addition, the rationale employed in *McTiernan* is not consistent with California's recognition that other intangibles, including the right of publicity, are a transferable property right.[181] The underlying premise of the community property system favors the acceptance of celebrity goodwill as a divisible marital asset and it is clear that valuation techniques are available to value celebrity goodwill.[182] In the interest of treating both the non-celebrity and celebrity spouse as equal business partners, California should recognize celebrity

177 Peracchio, *supra* note 77, at 148–49 (stating that generally the capitalization rate must reflect the celebrity's current earnings in order to avoid taking into account future earnings).

178 *See supra* Part V.B.

179 *In re* Marriage of McTiernan and Dubrow, 35 Cal. Rptr. 3d 287, 296 (Cal. Ct. App. 2005).

180 *See* Peracchio, *supra* note 77, at 156.

181 *See supra* Part III.

182 *See supra* Part IV.A.

goodwill as a community asset to be distributed evenly between both parties upon dissolution.