

Fiction and Imagination: Celebrity and Personal Goodwill

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Celebrity goodwill is a fiction. As a colleague from Georgia recently said, celebrity goodwill exists only in the minds of family law attorneys. He is not far from wrong.

Celebrity goodwill is a form of personal or professional goodwill assigned to individuals. Goodwill is the expectation of the continued popularity of a business. Celebrity goodwill generally refers to a person's fame or enhanced earning capacity and assumes that that fame or earning capacity is a property asset. Celebrity goodwill must not be confused with the right to publicity, which is the individual's right to exploit his or her own name and likeness for commercial gain.¹ Although goodwill is dependent on continued patronage by strangers, the right to publicity is entirely within the control of the individual celebrity.

The rejection of celebrity goodwill as an asset requires an examination of professional goodwill, especially with respect to individuals with small and solo professional practices and businesses. The author contends that goodwill should apply neither to solo and small professional practices nor to celebrities.

PROFESSIONAL GOODWILL

Goodwill is an intangible asset that has been called the most intangible of intangibles.² Two hundred years ago, John Scott, Lord Eldon, Chancellor of England, defined goodwill as "the probability that the old customers will resort to the old place."³ Echoing Lord Eldon, several states succinctly define goodwill as "the expectation of continued public patronage."⁴ Goodwill has been more fully defined 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.⁵

Thus, the significant attributes of goodwill are that (1) it is acquired by a business; (2) its value is in excess of hard assets, such as capital, stock, funds, or property; and (3) it is based on the likelihood of continued popularity and patronage resulting from the business' reputation. Note the need for an ongoing business.

California recognizes that goodwill may exist in the individual professional, but over time the limited application of goodwill to the individual is lost. The legal basis for assuming that small and solo professional practices have goodwill is flawed. Early on, when first examining the issue of goodwill in a professional, the California courts distinguished between goodwill in the individual and goodwill in the professional's business.⁶ Some states currently clarify the difference between individual goodwill and business goodwill by using distinct nomenclature: the individual holds "personal goodwill," and the business holds "enterprise goodwill."⁷ Such nomenclature allows for more precise conceptual-

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ization of goodwill—and, ultimately, for more equitable resolution of the issue of goodwill.

In 1958 the California Supreme Court examined whether goodwill could be applied to an advertising agency, a personal services company.⁸ In resolving the question, the court distinguished between the work of a talented individual and the business created by that individual. The court concluded that although the goodwill of a business or company may be the result of the skill or reputation of an individual connected with the company, the resultant goodwill was attached to the company and continued with it even after the skilled individual was no longer associated with the company.⁹ Thus, the court acknowledged the distinction between a personal services organization and the person providing the personal service and allowed that goodwill was attached only to the organization.¹⁰

"Joe who?" demonstrates the fragility of personal goodwill.

Relatively contemporaneously, the California Court of Appeal also examined whether or not goodwill could be attached to a business driven by the skills of its owner.¹¹ In a marital dissolution action, the husband, a dental technician, argued that goodwill could not be attached to his dental laboratory business because, he alleged, the business depended solely on his personal skill and ability. He was suggesting that without him, dentists would not choose his dental laboratory. The court rejected his argument, ironically tracing it to the "early and narrow definition given to good will by Lord Eldon."¹² Yet it is precisely this "narrow definition" that many states embrace in their statutory definitions of goodwill. The court endorsed what it believed was a better doctrine from *American Jurisprudence*, which suggested that goodwill could also exist in a professional practice or in a business founded on personal skill or reputation, because "winning the confidence of his patrons and securing immunity from successful competition for their business" is the species of goodwill that could be the subject of transfer.¹³

Thus, the two early cases recognized goodwill that existed in a company in which the public patronage survived the absence of its founding professional,¹⁴ and goodwill that could be transferred.¹⁵ Transferable goodwill in the business was distinguished from the skill of the individual involved in

the business. This distinction has been developed more fully in decisions by California's sister states, but it became blurred in later California decisions.

Blurring in California Decisions

In the 1974 landmark case of *Marriage of Foster*, the California Court of Appeal stated confidently that "it is well-established that the goodwill of a husband's professional practice as a sole practitioner is taken into consideration in determining the community property award to the wife."¹⁶ In fact, it was not so well established. The careful distinction made in the early cases between the individual and the individual's company had been omitted from later opinions; ultimately, in finding the concept of goodwill in the solo practitioner to be "well-established," the *Foster* court had relied on the abbreviated *dictum* of the later cases. Yet none of the cases that *Foster* cited as support held that goodwill exists in the solo practitioner or professional. In one case, the husband had not contested on appeal the finding that goodwill existed in this medical practice; he merely contested the valuation of the goodwill.¹⁷ In a second case, the appellate court did not analyze whether goodwill existed in the husband's medical practice, but it concluded that such goodwill should be considered in determining the property award to the wife.¹⁸ In a third case, the court simply acknowledged that the wife had an interest in her husband's law practice, which had been developed during the marriage. The case included no discussion of goodwill.¹⁹

The assumption that goodwill exists in a professional practice is so ingrained in California law that the legal discussion in published opinions generally centers on valuation of that interest rather than on the existence of the interest.²⁰ In the 30 years since California courts first examined goodwill and distinguished individuals from their businesses or companies, the distinction between personal goodwill and enterprise goodwill has almost disappeared. The claim of celebrity goodwill arose from the long-unexamined assumption that goodwill exists in professionals as individuals.

The Emergence of Celebrity Goodwill

New Jersey was among the first states to use "celebrity goodwill" to refer to reputation and enhanced earning capacity and to assert that celebrity goodwill is a distributable marital asset.²¹ The issue arose in the case of Joe Piscopo, last known for his work on "Saturday Night Live." (Indeed, those

who say "Joe who?" demonstrate the point about the fragility of celebrity goodwill.) The *Piscopo* case, however, is not authority for the legitimacy of the celebrity goodwill concept, because Joe Piscopo conceded at the appellate level that celebrity goodwill could be a distributable marital asset. Thus, the appellate court addressed itself exclusively to valuing the asset; it never examined—or struggled with—the problems inherent in the underlying concept of celebrity goodwill.

New York also sought to characterize a person's talents and popularity. It analogized a person's expertise in a field that allowed him or her to become an exceptional wage earner to that of the goodwill of a business.²² New York focused on a person's "enhanced earning capacity," which it called an asset of the marital estate.²³ (New York did not adopt the nomenclature "professional" or "personal goodwill.") The source of that enhanced earning capacity was not relevant: it could be education, professional license, or fame.

New York's concept of "enhanced earning capacity" as a divisible asset of the marriage is based on its premise that marriage is "an economic partnership to which both parties contribute, as spouse, parent, wage earner or homemaker."²⁴ Focusing on the enhanced earnings capability as the marital asset, New York has continued to expand the various training and professional resources it recognizes as an asset.²⁵ New York has found the enhanced-earning-capacity asset to exist in a supermodel/actress, an opera singer, a stockbroker, and a police lieutenant.²⁶

Evolution of the Concept

Outside of California (which does not recognize celebrity goodwill but nevertheless obscures the distinction between the goodwill in a business and the goodwill in an individual professional) and New York (which sees the enhanced earning capacity of the individual as personal goodwill), the law on the issue of goodwill associated with the individual has evolved more carefully and thoughtfully in other states.

Washington has recognized the distinction between goodwill and earning capacity, and its nuanced analysis exposes the notions of personal and celebrity goodwill as fictions. Goodwill is not the earning capacity itself; it is the asset that supplements the earning capacity of another asset, the business or profession.²⁷ It is a distinct asset of a business or professional practice that may influence or be influenced by earning capacity.²⁸ Goodwill—the expectation of sustained business and continued patronage,

the expectation that "old customers will resort to the old place"—must survive an individual so that patrons continue to go to a store in the absence of the original founders or to a law firm once the founding or named partners are gone. In effect, goodwill requires an ongoing business or professional practice to which it can be attached. In contrast, the earning capacity of an individual who comprises the entire business is diminished or ceases altogether on his or her retirement or death.²⁹ The individual has no earning capacity beyond his or her working hours. As described by the Missouri Court of Appeals, "Appellant is a sole practitioner. Were he to terminate his activity, the lights would go out and the value of his practice would be extinguished."³⁰

Goodwill assumes the continuation of work.

Similarly, celebrities have no earning capacity beyond their individual popularity. Consider the earning capacity of an actor who ages or who has a series of bad films. Or the earning capacity of a popular athlete who is found to have been using steroids or is accused of assault and battery. Celebrity status is unpredictable, but what is certain is that when the klieg lights go out, the extraordinary earning capacity is greatly diminished or is extinguished altogether.

The Missouri Supreme Court also considered goodwill and held that the concept's hallmark is that it is an asset—albeit an intangible one—that can be sold.³¹ As such, it cannot be attached to an individual but only to a business. Goodwill has value only as an incident of a continuing business.³² Thus, the reputation of the professional as an individual and the reputation of the professional practice as a business entity are separate and distinct attributes. It is the goodwill of the professional practice that is the marital asset and that is subject to valuation and division. In the context of a professional practice, the Missouri Supreme Court defined goodwill to mean "the value of the practice which exceeds its tangible assets and which is the result of the tendency of clients [or] patients to return to and recommend the practice *irrespective of the reputation of the individual practitioner.*"³³

This theme—that goodwill in a professional practice must survive the individual professional—is reflected in the thinking of the Maryland courts as well. The Maryland Court of Appeals noted that if a professional practice's goodwill is marketable, it

could be divided as a marital asset.³⁴ If the value of the practice is dependent on the continued presence of the individual, however, the goodwill is personal to the individual and has no separate value.³⁵ From this, the court concluded that the goodwill of a solo law practice is personal to the individual practitioner. It is not severable from the individual regardless of the contributions made to the practice by a spouse of the professional or employees of the practice. Absent the individual, the practice has no value. This is not the kind of asset that can be divided as marital property.³⁶

Most Recent Cases

It is the most recent cases that have moved the discussion about professional goodwill—and its fabricated cousin, celebrity goodwill—forward by naming the two types of goodwill separately: “enterprise goodwill,” also called “commercial goodwill” or “professional goodwill,” and “personal goodwill,” also called “professional goodwill.”³⁷ (Ironically, some calling enterprise goodwill “professional goodwill” and others calling personal goodwill “professional goodwill” can lead to confusion and muddled references. The author suggests that “professional goodwill” should refer only to the individual or should be recognized as a broad category of goodwill with two separate components, personal goodwill and enterprise goodwill.)

As noted earlier, enterprise goodwill becomes associated with a business entity and is separate from the reputation of the owners. This asset has a determinable value because the enterprise goodwill of an ongoing business will transfer upon sale of the business to a willing buyer.³⁸ It will also survive the absence of any individual. In contrast, personal goodwill is part of the increased earning capacity “that results from the reputation, knowledge and skills of individual people. Accordingly, the goodwill of a service business, such as a professional practice, consists largely of personal goodwill.”³⁹ Personal goodwill, which is intrinsically tied to the attributes or skills of an individual, is not a divisible asset subject to equitable distribution. “Assets that are ‘uniquely personal’ to the holder cannot, by their very nature, be held jointly with another person and, consequently, cannot be classified as marital property.”⁴⁰ The majority of states now differentiates between enterprise goodwill and personal goodwill and hold that enterprise goodwill is an asset of the marital estate while personal goodwill is not.⁴¹

Similarly, the uniquely personal skills of a celebrity cannot, by their very nature, be shared with another person. Thus, recognizing the distinction between personal goodwill and enterprise goodwill underscores the fact that celebrity goodwill is not a marital asset.

VALUATION FURTHER UNDERMINES CELEBRITY GOODWILL

Goodwill presupposes continued patronage and continued popularity. The concept of celebrity goodwill must, therefore, presuppose that the celebrity will continue working and being popular (as defined by box-office success) into the future.

Goodwill, however, cannot be valued in any way that incorporates future earnings because future earnings are the separate property of the earning spouse.⁴² (Future earnings may be relevant on non-marital issues, such as punitive damages, but they are not relevant to *property* issues between spouses.⁴³) Future earnings represent the future effort and work of the individual and no longer belong to the community.⁴⁴ (In California, a community property state, earnings are separate property after date of separation. In other states, whether date of separation or date of judgment marks the beginning of separate property earnings, still a value that incorporates future earnings would be relying on separate property earnings.) Although future earnings are relevant to determining spousal support and alimony, they are not a proper consideration for dividing marital assets.⁴⁵

Indeed, as the Missouri Supreme Court noted, “the concept of professional [personal] goodwill evanesces when one attempts to distinguish it from future earnings.”⁴⁶ The distinction cannot be made, because goodwill assumes the continuation of work. Additionally, maintaining personal or celebrity goodwill requires the individual to continue nurturing or honing and marketing his or her skills. Those efforts are necessarily post-separation, giving rise to post-separation earnings.

The concept of personal or celebrity goodwill as an asset further evaporates as one attempts to value it. Without a recent actual sale of the professional practice or a real offer to purchase it or evidence of the goodwill value in a similar practice in a relevant geographic and professional market, the existence and value of goodwill is entirely speculative.⁴⁷

It is remarkable that some states, including California, have held that personal goodwill can be valued *even if it cannot be sold*.⁴⁸ The fiction of val-

ue, however—notwithstanding the magic working of numbers by forensic accountants—has not been lost on some courts. Following the lead of its supreme court, the Missouri Court of Appeals held that “a professional practitioner is not required to pay a spouse a share of intangible assets at a judicially determined value that could not be realized by a sale or other method of liquidating value.”⁴⁹ In even stronger language, the District of Columbia Court of Appeals called this forced purchase of an intangible asset at a judicially determined value a “disturbing inequity.”⁵⁰ It is indeed disturbing, for no professional or celebrity should be forced to pay a speculative price for the privilege of using his or her own talents.

CONCLUSION

A celebrity's talents and popularity are unique to the individual and are intrinsically personal to the person. As personal goodwill, celebrity goodwill has no market and thus no valid, ascertainable value. As with personal goodwill in the professional, any judicially determined value of celebrity goodwill would be speculative and fictitious.

For these various reasons—the absence of a market and the absence of a value for personal goodwill—the law can sustain neither the concept of personal goodwill in the individual nor the concept of celebrity goodwill in the famous and extraordinary earners. All that glitters may not be gold—for all individuals, celebrity and noncelebrity alike.

ENDNOTES

1. Cal. Civil Code § 3344; *KNB Enters. v. Matthews* (2000) 78 Cal. App. 4th 362, 366–367, 92 Cal. Rptr. 2d 713, 717; *Eastwood v. Superior Court* (National Enquirer, Inc.) (1984) 149 Cal. App. 3d 409, 419–420, 198 Cal. Rptr. 342, 348, superseded by statute on other grounds, as stated in *KNB Enters. v. Matthews*, 78 Cal. App. 4th at 367, n.5.
2. *Travis v. Travis*, 1990 OK 57, 795 P.2d 96, 97, citing *D. Kieso & J. Weygandt*, *Intermediate Accounting* 570 (3d ed. 1980).
3. *Crutwell v. Lye* (1810) 17 Ves. 335, 346, 34 Eng. Rep. 129, 134.
4. See, e.g., Cal. Bus. & Prof. Code § 14100; Oklahoma, 60 O.S. § 315; Montana, MCA 30-13-121; South Dakota, S.D.C.L. § 43-35-6.
5. *Marriage of Foster*, 42 Cal. App. 3d 577, 581–582, 117 Cal. Rptr. 49, 52 (1974); *May v. May*, 214 W.Va. 394, 589 S.E.2d 536, 541 (2003); see also Wyoming statutes, W.S. 1977 § 1-26-713 (“Goodwill consists of the benefits that accrue to a business as a result of its location, reputation for dependability, skill or quality and any other circumstances resulting in probable retention of old or acquisition of new patronage.”).
6. See *Mueller v. Mueller* 144 Cal. App. 2d 245 (1956); *Smith v. Bull* 50 Cal. 2d 294 (1958).
7. See, e.g., *May*, *supra* n.5.
8. *Smith*, *supra* n.6 at 301.
9. *Id.* at 302.
10. *Id.*
11. *Mueller*, *supra* n.6.
12. *Id.* at 251, citing 24 American Jurisprudence 808.
13. *Id.* Ultimately, the court rejected Mr. Mueller's claim that the business depended solely on his personal skill and abilities, noting that the business employed five technicians in addition to Mr. Mueller.
14. *Smith*, *supra* n.6.
15. *Mueller*, *supra* n.6. This concept of transferability is especially important in any discussion of professional goodwill involving an attorney. In some states, law practices cannot be bought and sold, as can other professional practices. See *Hersheve v. Hersheve*, 931 S.W.2d 198, 201 (Mo. App. 1996); *Travis*, *supra* n.2.
16. *Marriage of Foster*, *supra* n.5 at 582.
17. *Marriage of Fortier*, 34 Cal. App. 3d 384, 109 Cal. Rptr. 915 (1973).
18. *Golden v. Golden*, 270 Cal. App. 2d 401, 405, 75 Cal. Rptr. 735, 737 (1969).
19. *Brawman v. Brawman*, 199 Cal. App. 2d 876, 882, 19 Cal. Rptr. 106, 109–110 (1962).
20. See, e.g., *Marriage of Watts*, 171 Cal. App. 3d 366, 217 Cal. Rptr. 301 (1985); *Marriage of Kilbourne*, 232 Cal. App. 3d 1518, 284 Cal. Rptr. 201 (1991); *Marriage of Rosen*, 105 Cal. App. 4th 808, 130 Cal. Rptr. 2d 1 (2002); *Marriage of Iredale and Cates*, 121 Cal. App. 4th 321, 16 Cal. Rptr. 3d 505 (2004).
21. *Piscopo v. Piscopo*, 232 N.J. Super. 559, 557 A.2d 1040 (1989).

