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IN THE SUPREME COURT OF FLORIDA

WILLIAM DEFOREST THOMPSON,

Petitioner,

vs.

Case No. 74,419

Fourth District Court of Appeal

Case No. 87-1356

TOBITHA THOMPSON,

Respondent.

BRIEF OF
AMERICAN ACADEMY OF MATRIMONIAL LAWYERS,
FLORIDA CHAPTER
AS AMICUS CURIAE

Appeal from the District Court of Appeal
for the Fourth District of Florida

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ISSUE

SHOULD THE VALUE, IF ANY, OF PERSONAL PROFESSIONAL GOODWILL OR ENTERPRISE PROFESSIONAL GOODWILL BE CONSIDERED IN THE CONTEXT OF A MARRIAGE DISSOLUTION, AND IF SO, BY WHAT GUIDELINES SHOULD ITS ECONOMIC VALUE BE MEASURED?

ARGUMENT

SHOULD THE VALUE, IF ANY, OF PERSONAL PROFESSIONAL GOODWILL OR ENTERPRISE PROFESSIONAL GOODWILL BE CONSIDERED IN THE CONTEXT OF A MARRIAGE DISSOLUTION, AND IF SO, BY WHAT GUIDELINES SHOULD ITS ECONOMIC VALUE BE MEASURED?

What is professional goodwill? Does it exist or is it a phantom asset? Is it different than non-professional goodwill, and if so, how? Is there a distinction between personal and enterprise professional goodwill? Should the courts measure and value professional goodwill in the context of a marriage dissolution proceeding, and if so, how, and should it include the value of personal professional goodwill or be limited to only the value of enterprise professional goodwill?

There is little consensus on the appropriate answers to the above questions. The Fourth District Court below called the attention of the Bench and Bar to Miller, Professional Goodwill, The Phantom Asset?, 14 Family Law Commentator (1989), which attempts to provide appropriate answers to the above questions. Although the position of the Academy as Amicus is consistent with the views expressed in the article, for obvious reasons, the article will not be extensively quoted herein. It is placed in the appendix to this Brief for the consideration of this Court should the Court deem it useful and appropriate. It should of course be noted that the article heavily relies upon the wisdom

of Wilson¹, Hanson² and Taylor³, as well as the underlying rationale of Holbrook⁴.

There is ample authority among the jurisdictions which have addressed the issue presented herein to support virtually any conclusion this Court wishes to reach. There are still some states that have not addressed the issue and there are some states still struggling with conflicting decisions regarding the issue. The issue, although simply stated, is not simply resolved. Professional goodwill, the distinction between professional and non-professional goodwill, the distinction between personal and enterprise professional goodwill, as well as the appropriate measure of true economic value, all require the understanding of highly sophisticated and complex principles and concepts.

If this Court concludes that the value, if any, of personal professional goodwill or enterprise professional goodwill should be considered in the context of a marriage dissolution, it is appropriate that this Court also address the difficult task of how to arrive at true economic value. Should

¹741 S.W.2d 640 (Ark. 1987)

²738 S.W.2d 427 (Mo. 1987).

³386 N.W.2d 851 (Neb. 1986).

⁴309 N.W.2d 343 (Wis.App. 1981).

the measure of true economic value be focused on the monetary consequences if the professional were to withdraw from the enterprise, or should the focus of value be simply whether or not goodwill has value to the individual professional without regard to its marketability, salability or transferability in the absence of the individual professional?

Some trial judges are painfully unsophisticated in basic accounting and economics, much less the complex theories and principles which must be comprehended to properly understand, recognize and value intangible professional goodwill, whether "personal" or "enterprise". Compounding the inequities, district courts tend to "rubber stamp" trial court valuations, as discretionary acts, thus foreclosing any meaningful appellate review. Although the existence of personal or enterprise professional goodwill is a determination of fact, reviewable only upon the basis of the Canakeris⁵ reasonable man test, the utilization of a correct method of determining value is a matter of law. In Re: The Marriage Of King⁶.

Should a professional spouse be compelled to "buy-out" the non-professional spouse's interest in the professional spouse's enterprise professional goodwill on the basis of a

⁵382 So.2d 1197 (Fla. 1980).

⁶197 Cal. Rptr. 716 (Cal. 1983).

hypothetical sale, if the professional can never market, sell or transfer that enterprise professional goodwill so as to realize reimbursement for the non-professional spouse's interest? Is not the non-professional spouse only entitled to receive his or her share of any value which could actually be "realized" upon an arms-length sale in the open market?

Marriage dissolution courts must recognize that valuation should focus on what the individual professional or his or her estate could actually realize in the open market if he or she were to retire, withdraw absent restrictive covenant, die or become disabled or scandalized. The only fair and equitable test of true economic value is the consummation of an arms-length sale in the open market. The esoteric testimony of expert witnesses who apply "voodoo economics" and pull "telephone numbers" out of thin air must give way to concrete factual evidence of true market value. If comparable sales, to establish market value, do not exist, the absence of comparables indicates the absence of marketability, salability and transferability in the open market. If it cannot be sold for value in the open market, it should not be considered for purposes of allocation upon marriage dissolution. In the absence of competent evidence of true market value, trial judges can only be presented with adversarial expert opinions, subject to manipulation and speculation, and not necessarily based upon sound economic reality or true value concepts.

Judges should invoke the law of "common sense". Approval of valuation of an intangible "asset" on the assumption of a hypothetical sale, and in the absence of competent evidence of market value, would open the door to the likelihood of grossly excessive valuations. Professional goodwill is an extremely fragile intangible asset. If or when it does exist, it can be easily extinguished by any notoriety or scandal, by death or disability, or by the mere failure to continue a previous level of performance. Once the non-professional spouse receives a non-modifiable compensation, the professional spouse is without any means of obtaining equitable relief.

The Holbrook court observed that once goodwill was believed to exist only in commercial businesses, where favored public patronage would continue regardless of the identity of the owner, and not in professional enterprises where dependent upon the skill and reputation of specific professionals performing personal services. The concept of professional goodwill is elusive. It has no existence as an asset in and by itself, as a distinct entity, and at best is only an incident of a going and continuing professional enterprise. A professional enterprise is frequently nothing more than a mere conduit for the individual professional's stream of personal income derived from the services personally performed by him or her. The enterprise frequently has no identity or reputation independent of the individual. The professional can only realize tangible value in

conjunction with the sale of the entire enterprise. Unlike tangible physical assets which may be sold off separately, enterprise professional goodwill cannot.

Holbrook also observed that there can be no income tax deduction for the loss of goodwill; that the loss of goodwill cannot be compensated for in eminent domain proceedings; that goodwill cannot be used to satisfy debts; that it cannot be depreciated; and that it cannot be subjected to forced sale, execution, garnishment, attachment, lien or be otherwise levied upon, in satisfaction of lawful debts and obligations.

There is an understandable tendency on the part of the non-professional spouse to grossly over inflate the value of the professional spouse's personal or enterprise goodwill in an attempt to obtain a greater share of the "other" property to be divided. The concept of professional goodwill in a marriage dissolution proceeding should not be applied to create "new property" subject to allocation simply to "justify" a greater award of the "real" assets to the non-professional spouse. This is the type of inequity which Holbrook appropriately disapproved.

This is not to suggest that there can never be an allocatable value to the enterprise professional goodwill. If an enterprise has "trade name" and "location" identification, if the nature of the needed professional services performed transcend the identity of the individual professional, and if the continued presence of any specific individual professional is not required

to maintain and preserve favored public patronage, that professional enterprise has enterprise goodwill more in the nature and character of a commercial business, and in all likelihood the enterprise professional goodwill can be marketed, sold and transferred independent of the continued presence of the individual and in the absence of a restrictive covenant or a covenant not to compete. Successful dental practices, HMO's and other enterprises operated as "clinics", with favorable locations, frequently will have enterprise goodwill which can be marketed, sold and transferred. There, favored public patronage will likely continue regardless of the owner, and regardless of the identity of the professional performing the personal services.

If absent the enterprise, professional goodwill continues to exist, the professional goodwill is personal to the individual. If absent the individual, it continues to exist, it is enterprise professional goodwill. Depner⁷. If the removal of the individual only reduces, rather than eliminates, the remaining value of the individual's name after his or her departure, enterprise professional goodwill must be considered.

In the absence of marketable, salable and transferable professional goodwill, the value of a professional enterprise is

⁷478 So.2d 532 (La.App. 1st Cir. 1985).

usually limited to the discounted present value of accounts receivable, loans collectable and the fair market value of its physical assets, less debts and obligations. In determining the discounted present value of accounts receivable, the cost of collecting accounts receivable, the time attributable thereto, the percentage historically collectable, and the tax consequences upon collection must all be considered and reflected. American Institute of Certified Public Accountants (A.I.C.P.A.), Statement Of Position, October 1, 1982, commonly referred to as "G.A.A.P." (Generally Accepted Accounting Principles).

Where a professional enterprise is dependent upon the ability and personal services of the individual professional or owner and the professional enterprise has no legally enforceable right to an individual professional's continued services or to an agreement not to compete if he or she decides to leave it, the individual professional may freely relocate and his or her personal professional goodwill will follow. Under these circumstances, enterprise professional goodwill does not exist for purposes of allocation in a marriage dissolution proceeding. Antolik v. Harvey⁸.

⁸761 P.2d 305 (Hawaii App. 1988).

At first blush, it is difficult to overlook or disregard the rationale of Nail⁹, Powell¹⁰ and Holbrook. In Nail, the Texas Supreme Court reasoned:

It (goodwill) did not possess value or constitute an asset separate from his person or from his individual ability to practice his profession. It would be extinguished in the event of his death, retirement or disability, as well as in the event of the sale of his practice or the loss of his patients, whatever the cause... That it would have value in the future is no more than an expectancy wholly dependent upon the continuation of existing circumstances.

In Powell, the Kansas Supreme Court, following Nail, stated:

We are not persuaded that a professional practice such as Dr. Powell's has a goodwill value. The practice is personal to the practitioner. When he or she dies or retires nothing remains. The professional's files and lists of clients are of no use to others. The very nature of a professional practice is that it is totally dependent upon the professional. We refuse to adopt the theory that goodwill in a professional practice is an asset subject to division in a divorce action.

In Holbrook, the Wisconsin Court of Appeal stated:

In an article criticizing the rather unstable and inconsistent development of the concept of professional goodwill in marital dissolutions in California, Ira Lurvey points out that some view goodwill as something that can only be ascertained upon the actual sale of a business. However, such protection of the real marketplace is missing... from the hypothetical sale ordered on dissolution

⁹486 S.W.2d 761 (Tex. 1972).

¹⁰648 P.2d 218 (Kan. 1982).

of marriage. There is neither a real buyer nor a real seller. Mr. Lurvey asserts that in light of this and the other attributes of goodwill discussed above, it is:

at least arguable that "goodwill", by whatever name designated, is only an entry in an accounting statement arrived at by hindsight to accommodate any amount paid or received on transfer of a going business beyond the value attributable to its tangible assets.

Thus at best "goodwill" is intangible. It is also amorphous, ephemeral, elusive; and, by general definition, speculative and uncertain except to the extent that it has already been established by an arms-length bargaining in the open marketplace.

... We are not persuaded that the concept of professional goodwill as a divisible marital asset should be adopted in Wisconsin. We are not obligated nor inclined to follow the twisted and illogical path that other jurisdictions have made in dealing with this concept in the context of divorce.

The concept of professional goodwill evanesces when one attempts to distinguish it from future earning capacity. Although a professional business's good reputation, which is essentially what its goodwill consists of, is certainly a thing of value, we do not believe that it bestows on those who have an ownership interest in the business, an actual, separate property interest. The reputation of a law firm or some other professional business is valuable to its individual owners to the extent that it assures continued substantial earnings in the future. It cannot be separately sold or pledged by the individual owners. The goodwill or reputation of such a business accrues to the benefit of the owners only through increased salary.

We think this case is analogous to the situation in DeWitt v. DeWitt* in which this court determined that a professional education or the increased earning capacity that it confers on the

spouse who holds it is not a divisible marital asset, even though the acquisition of the degree is partly attributable to the earnings and efforts of the other spouse...

...

It was further explained in DeWitt that valuing a professional degree as a marital asset necessarily requires division of the post-divorce earnings of the degree-holding spouse, which is inconsistent with the requirement that only assets acquired during the marriage can be divided.

Like an educational degree, a partner's theoretical share of a law firm's goodwill cannot be exchanged on an open market: It cannot be assigned, sold, transferred, conveyed or pledged. Although we recognize the factual distinction between a degreeholder and a partner or shareholder in a law firm, we think the similarities compel analogous treatment in a divorce setting. In both cases, the "asset" involved is not salable and has computable value to the individual only to the extent that it promises increased future earnings.

There is a disturbing inequity in compelling a professional practitioner to pay a spouse a share of intangible assets at a judicially determined value that could not be realized by a sale or other method of liquidating value.

*296 N.W.2d 761 (Wis.App. 1980).

The rationale of these cases is appropriately applied to prohibit the division or allocation of personal professional goodwill. Although these cases make no distinction between personal and enterprise professional goodwill, all of the injustices and inequities to which they refer apply, for the most part, solely to personal professional goodwill. By acknowledging and understanding the distinction between personal and enterprise professional goodwill, the rationale of these cases may and

should be applied to extract the personal from the enterprise professional goodwill to enable consideration of whether or not there is enterprise professional goodwill, separate and apart from the individual. Many states which have subjected professional goodwill to distribution upon marriage dissolution require that enterprise professional goodwill be valued independent of the continued presence of the professional spouse. See for example Rives¹¹, Sorensen¹² and Antolik, in addition to Wilson, Hanson and Taylor.

The Holbrook court concluded that the enterprise's goodwill was reflected in the husband's salary and that the wife's contribution to the furtherance of her husband's legal career was reflected in the family assets awarded to her. Holbrook also distinguished between a law practice and other professional enterprises by explaining that ethical considerations limit a lawyer's ability to exchange or sell goodwill on the open market. In Lewis¹³, the husband was a veterinarian and the same court which decided Holbrook distinguished Holbrook to the extent that Holbrook involved a law practice subject to ethical considerations prohibiting sale and

¹¹181 Cal. Rptr. 572 (Cal. 1982).

¹²769 P.2d 820 (Utah App. 1989).

¹³336 N.W.2d 171 (Wis.App. 1983).

noted that in Holbrook the court held that professional goodwill is not divisible as a marital asset where the value of the goodwill can only be set by judicial determination and can never be "realized by a sale or another method of liquidating value". The Lewis court concluded that Holbrook does not bar a trial court from considering a cross-purchase formula in a partnership agreement as evidence of the value that should be assigned to a partner's interest for the purpose of determining the marital estate.

The same court again addressed the distinguishing features of Holbrook in the recent case of Peerenboom¹⁴, decided subsequently to Moebus¹⁵, wherein the husband was a dentist and the court determined, again, that there were no ethical or contractual barriers to the husband's disposing of his interest in the practice and that to the extent the evidence showed that goodwill existed, was marketable, and had value over and above the value of the practice's assets and the husband's personal skills and services, it could be allocated upon marriage dissolution. Peerenboom construed Holbrook as stating that goodwill is speculative and uncertain except to the extent that it has already been established by an arms-length bargaining in

¹⁴433 N.W.2d 282 (Wis.App. 1988).

¹⁵529 So.2d 1163 (Fla. 3d DCA 1988), rev.den. 539 So.2d 475 (Fla. 1989).

the open marketplace. Peerenboom concluded, consistent with Wilson, Hanson and Taylor, that to the extent the evidence shows that goodwill exists, is marketable, and that its value is something over and above the value of the practice's assets and the professional's skills and services, it may be included as an asset in the marital estate and be subject to division.

Some states have held that in valuing enterprise professional goodwill only past earning results of the enterprise may be considered, not post-separation or post-dissolution efforts of the professional spouse. Poore¹⁶. This, of course, requires exclusion of the past earnings of the individual professional because the possibility of his or her voluntary continued presence must be disregarded. However, this too is fallacious and inequitable because the basic premise is that past earnings are reflective of the likelihood of future earnings. This basic premise is not necessarily correct, but in any event, future earnings are not and should not be considered marital property. Furthermore, past earnings have already been reflected in the maintaining of the lifestyle of the marriage and in the accumulations of the marriage, except to the extent of any retained enterprise earnings, which are considered part of the physical assets of the enterprise, and which are reflected in

¹⁶331 S.E.2d 266 (N.C. 1985).

valuing the enterprise. Therefore, to count past earnings again would be impermissible "double-dipping". In Beasley¹⁷, the court noted:

To assess a value on future productivity and to award a proportionate amount to the spouse is akin to making a lump sum alimony payment since it is based on future earnings of the paying spouse. If, in addition to this payment, alimony is awarded, there is, in effect, a double charge on the future income of the paying spouse. Even without an alimony award, a fixed sum, not having the designation as alimony, carries none of the flexibility of an alimony award derived from its modifiability and, therefore, may penalized the payor if he suffers reverses, unemployment or dies.

Insofar as a professional education and professional license reflect future earnings, they are properly treated only as considerations effecting periodic support and not as allocatable marital property. Hernandez¹⁸, Hughes¹⁹ and Severs²⁰. However, true goodwill reflects not simply a possibility of future earnings, but a probability based upon existing circumstances. That is what distinguishes it from the professional education and professional license, to which is attached a mere prospect of enhanced future earnings that are too

¹⁷ 518 A.2d 545 (Pa. 1986).

¹⁸ 444 So.2d 35 (Fla. 3d DCA 1983).

¹⁹ 438 So.2d 146 (Fla. 3d DCA 1983).

²⁰ 426 So.2d 992 (Fla. 5th DCA 1981).

remote and too speculative for the education or license itself to be deemed property. Unlike the education and license, there are some circumstances where goodwill may be marketable, salable and transferable. But only to the extent that goodwill is divisible and independent of the individual professional.

Valuing enterprise professional goodwill by capitalization of the enterprise's adjusted excess earnings, as favored by the New Jersey Supreme Court in Dugan²¹, represents, at best, nothing more than a formula for guesstimating the enterprise's future earning capacity, and it is not necessarily an asset that may be marketed, sold and transferred. Capitalization of adjusted excess earnings is fundamentally unfair in that it seeks to measure the reasonableness of the individual professional's earnings, not on the basis of that individual's specific skill and efforts, but rather by comparison with what an employee professional of similar credentials earns. That the individual professional may work harder or longer hours or may be more highly motivated or may be more capable is not factored in. Thus, the industrious professional is penalized and the lazy professional rewarded upon marriage dissolution.

The capitalization approach to value should only be utilized in states recognizing a professional education and a

²¹457 A.2d 1 (N.J. 1983).

professional license as divisible property on marriage dissolution.

Enterprise earnings should not be capitalized on the assumption that the professional spouse will continue to contribute his talent and services. Rogers²².

A finding that a professional practice has no enterprise professional goodwill is proper in the absence of evidence of market value or evidence concerning sales or offers for sale of similar practices within the relevant market area. Taylor. It is not fair or equitable to value intangible enterprise professional goodwill on the basis of its guesstimated worth to the professional who operates the practice. The non-professional spouse should not be compensated for an interest in an illusory "asset" which in reality is not separate and independent of the individual professional, which is not marketable, salable or transferable, and which cannot be valued by market value evidence in lieu of speculative esoteric expert opinion.

The market value approach does not rely upon the individual's future earning capacity or post-dissolution earning capacity. It is the most objective, equitable and accurate measure of both the existence and true economic value of the

²²296 N.W.2d 849 (Minn. 1980).

professional goodwill of the enterprise, and it is the approach most likely to avoid the "disturbing inequity" recognized in Holbrook.

The specially concurring opinion of Judge Schwartz, in Villaverde²³, states in reference to the value of the husband's medical practice:

I would point out, however, as is apparent from the very nature of the "asset" in question, that the bulk of its tradable, market value relates to the professional ability and service of the husband in his capacity as a physician. In large measure, it therefore represents the capitalization of the income from his personal efforts and to that extent should not be distributed to the wife.

The only true measure of the existence of enterprise professional goodwill is its existence, separate, divisible and independent of the individual and its ability to be marketed, sold and transferred in the open market to another in the absence of the individual and without any restrictive covenant or covenant not to compete. The economic realities of the marketplace establish that unless the seller's advantage in the enterprise can be conveyed to the buyer, the buyer will not buy goodwill. The buyer is only willing to pay for those advantages of the seller's enterprise which inure to the buyer from holding himself out

²³ So.2d ____ (Fla. 3rd DCA 1989) (14 FLW 1531, Opinion filed June 13, 1989).

as the succeeding owner. If it cannot be sold for value, it should not be allocated upon marriage dissolution. The non-professional spouse should not be compensated for forcing the sale of an asset that cannot otherwise be sold. The non-professional spouse is only entitled to receive his or her share of any value which could be realized upon an arms-length sale in the open market.

Only if an individual professional is free to start a new practice and to compete in the same market does the value and marketability of the existing enterprise focus directly and entirely on the true economic value of the enterprise, absent the individual. Requiring a restrictive covenant or a covenant not to compete reduces the professional's ability and freedom to earn a living. It is inequitable and unjust to hypothetically reduce income in order to enhance the value of an enterprise and then to utilize the actual income for purposes of the other financial awards. A professional spouse should not be compelled to "retire" through the court imposition or assumption of a restrictive covenant or covenant not to compete. Both spouses have an equal right to use the standard of living enjoyed during the marriage as a goal for post-dissolution living. The professional spouse, therefore, should not be required to suffer a substantially

lesser standard in order to maintain the non-professional spouse at a higher standard.

Most individual professionals do not enjoy earnings that exceed the value of their personal skill and effort. Accordingly, most professional enterprises have no enterprise goodwill. Trial courts must bear in mind that zero goodwill value may be an appropriate finding. In Re: The Marriage Of Lopez²⁴.

The Third District in Moebus recognized the divergence of opinion as to whether or not professional goodwill should be considered as an asset in the context of a marriage dissolution proceeding and determined that the better view appeared to be that expressed in Holbrook. The Third District was aware that Holbrook had been criticized by other courts in other jurisdictions, but, notwithstanding, apparently agreed with Holbrook that the so called "majority" view represented a "twisted and illogical path... in dealing with the concept (of professional goodwill) in the context of divorce".

The Second District recently relied upon Moebus in determining that professional goodwill was not capable of valuation for distribution purposes in a marriage

²⁴113 Cal. Rptr. 58 (Cal. 1974).

dissolution proceeding and accordingly refused to disturb the lower court's non-recognition of the professional goodwill in an accounting partnership. See Harper²⁵, where the Second District also noted, inexplicably, that the husband's twenty-three percent (23%) share of the partnership's capital account could arguably be considered a source of income for future alimony payments rather than a component of the value of the husband's interest in the accounting partnership.

Although the Florida Chapter of the American Academy of Matrimonial Lawyers agrees with the underlying rationale of Moebus, it believes that Moebus, which articulates no distinction between personal and enterprise professional goodwill, should not be construed as holding that there can never be a value for enterprise professional goodwill in the context of a marriage dissolution proceeding. The courts should not foreclose any possibility whatsoever that there might be a professional enterprise somewhere that has separate and distinct enterprise professional goodwill which might be marketed, sold and transferred independent of the presence of the individual professional and without restrictive covenant or a covenant

²⁵ ___ So.2d ___ (Fla. 2d DCA 1989) (14 FLW 1578, Opinion filed June 30, 1989).

not to compete. Canakeris instructs us that appellate courts must avoid establishing inflexible rules that make the achievement of equity between the parties difficult, if not impossible.

It is suggested that this Court should adopt the "flexible approach", on a case-by-case basis, approved by the Supreme Courts of Arkansas in Wilson; of Missouri in Hanson; and of Nebraska in Taylor. These courts collectively considered the opinions of almost every jurisdiction addressing the issue of professional goodwill in the context of a marriage dissolution proceeding, carefully and thoroughly analyzed all of those opinions, and soundly concluded that

where professional goodwill is a marketable and transferable asset, separate and distinct from the reputation of the individual, professional goodwill has a discernible value, but if it is dependent on the skill, effort, reputation and continued presence of the individual, it is not a marketable asset separate and distinct, and should not be allocated upon marriage dissolution.

These courts strongly favor valuation by the market approach and have adopted what appears to be the best approach because they recognize common sense and the economic realities of the marketplace. They also recognize that any notion that professional goodwill may exist and be subjected to division or allocating upon marriage dissolution, even if it cannot be sold or transferred, must be rejected.

In Hanson, the Missouri Supreme Court stated a strong preference for fair market valuation as both evidence of the existence of the goodwill and of its true value. The Court also rejected capitalization formulae as evidence of the value of goodwill because of the speculative nature of such formulae within a professional context, because of their focus on placing a present value on the future earning capacity of the individual professional, and because of the "disturbing inequity", recognized in Holbrook, "in compelling a professional practitioner to pay a spouse a share of intangible assets at a judicially determined value that could not be realized by a sale or another method of liquidating value". The Hanson court observed:

Proof of the existence of goodwill is particularly troublesome in a professional context. This difficulty is a product of the fact that the reputation of the individual practitioner and the goodwill of his enterprise are often inextricably interwoven. Because of the difficulties inherent in separating the reputation of the professional from that of his enterprise, evidence that other professionals are willing to pay for goodwill when acquiring a practice is, in our view, the only acceptable evidence of the existence of goodwill. Thus, as a matter of proof, the existence of goodwill is shown only when there is evidence of a recent actual sale of a similarly situated professional practice, and offer to purchase such a practice, or expert testimony and testimony of members of the subject profession as to the existence of goodwill in a similar practice in the relevant geographic and professional market. Absent such evidence, one can only speculate as to the existence of goodwill*. Divisions of marital property may not be based on speculation as to the very existence of the property being divided.

(Emphasis Added).

*Courts which have employed capitalization formulae often appear to mix concepts of value with concepts of proof. Expert testimony concerning the value of goodwill based on capitalization formulae is not tantamount to proof of the existence of goodwill. An expert can simply assume the existence of goodwill and, using a capitalization formulae, produce a value.

(Emphasis Added, Citation Omitted).

The Fourth District below has acknowledged the important distinction between personal and enterprise professional goodwill. The question certified asks if the "professional association's goodwill" should be a factor in determining the association's value. This question should be answered, with caution, in the affirmative. The question of whether or not enterprise professional goodwill has marketable and transferable value should be considered in each and every marriage dissolution case in which an owner of a professional enterprise is a party. However, in determining the value of the enterprise professional goodwill many factors and circumstances must be carefully considered and weighed. In In Re: The Marriage Of Lopez, the court warned that valuation of professional goodwill must be done with considerable care and caution.

This Amicus agrees with Hanson that the market approach, based upon factual evidence of comparable sales of similar practices in the relevant geographic area is the only fair and equitable measure of and the only way to determine true value, in the absence of an actual sale of the enterprise in question or a bona fide contract or offer for the purchase and

sale of the enterprise in question. The market approach is the only method which has the built-in safeguards of common sense and the reflection of the realities of the marketplace. True value of enterprise professional goodwill can only actually be ascertained upon the consummation of an arms-length sale in the open market.

Only in the real marketplace do the necessary safeguards exist to determine at what price property will change hands between a willing buyer and a willing seller when neither is under any compulsion to buy or sell and both have reasonable knowledge of all relevant facts. Professional goodwill has no separate independent existence outside the context of ongoing professional enterprise. The profession can only actually realize tangible value in conjunction with a sale of the entire enterprise. Unlike tangible physical assets which may be sold off separately, enterprise professional goodwill cannot.

The burden is on the non-professional spouse to produce substantial competent evidence of marketability, salability and transferability as an enterprise asset independent of the presence of the professional spouse and without restrictive covenant or a covenant not to compete. Wilson.

It is important for the courts to distinguish between professional and non-professional goodwill and between personal

and enterprise professional goodwill. In Swann v. Mitchell²⁶, where the actual, not hypothetical, sale of a non-professional enterprise was involved, in a commercial, not marriage dissolution, context, this court defined the non-professional goodwill of a business as the advantage or benefit a business has beyond the mere value of its property and capital, and which is usually evidenced by general public patronage resulting in increased profits beyond those that may be expected from the mere use of capital. Generally, the profit of a professional enterprise is not related to its capital position, and the rate of return on capital is not a fair measure of enterprise value. The success of a professional enterprise is not so much a function of capital as it is a function of the skill and effort of the individual professional(s) performing the personal services. Professional enterprise profit is usually directly related to the ability and effort of the individual professional performing the personal services and the personal skill and effort of the owner professional(s) must be extracted from the equation before any analysis of enterprise value on the basis of return on capital. Robertson²⁷.

²⁶435 So.2d 797 (Fla. 1983).

²⁷206 N.W.2d 347 (Minn. 1973).

It is crucial for the courts to understand that the cumulative life experiences and attributes of the individual professional are reflected and merged into the skill, talent, competence and efforts of the individual professional. These experiences and attributes are personal to the individual professional and cannot be attributed to the enterprise. Goodwill is a cumulative, intangible asset which does not accrue at a constant rate. Any goodwill accruing prior to marriage would be separate, non-marital property, and it may well be impossible to determine at the time of marriage dissolution what, if any, value pre-existed the marriage and what, if any, accrued during the marriage.

CONCLUSION

In reality, the true economic value of enterprise professional goodwill is only ascertainable upon the consummation of an arms-length sale in the open market. A determination of value by any other measure is less than certain. The present value of enterprise professional goodwill must be distinguished from the post-dissolution future earnings of the professional spouse. The expectation of the professional spouse's future efforts is not a property right in the context of a marriage dissolution.

A professional enterprise which can provide and maintain the demand for a needed or desired service, in the absence of the individual professional, which has a convenient or desirable location, and has firm or trade name recognition, beyond the identity and presence of the individual professional, may well have enterprise professional goodwill of ascertainable market value. If it is marketable, salable and transferable, and there is competent evidence of market value, then marriage dissolution courts should allocate that value upon marriage dissolution, to the extent that that value accrued during the marriage. The courts should not foreclose any possibility whatsoever that there might be a professional enterprise somewhere that has separate and distinct enterprise professional goodwill which might be marketed, sold and transferred

independent of the presence of the individual professional and without restrictive covenant or a covenant not to compete.

If professional goodwill is inextricably intertwined with the individual professional and cannot be separated from the individual's continued presence, and cannot be marketed, sold and transferred in the absence of a restrictive covenant or a covenant not to compete, it has minimal or no true economic value in any practical or realistic sense, and therefore, should not be allocated upon marriage dissolution.

This Court should adopt the conclusion and "flexible approach", on a case-by-case basis, approved in Wilson, Hanson and Taylor.

Respectfully submitted,

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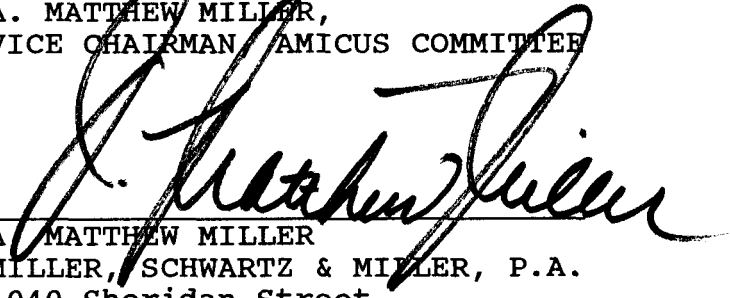
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CERTIFICATE OF SERVICE

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