IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO: 74,419

FL BAR NO: 126509

WILLIAM deFOREST THOMPSON,

Petitioner,

vs.

TOBITHA THOMPSON,

Respondent.

_____/

AMENDED BRIEF OF PETITIONER

ON CERTIFIED QUESTION

ESLER & KIRSCHBAUM, P.A.
315 S.E. 7th Street, Suite 300
Ft. Lauderdale, FL 33301-3178
and
EDNA L. CARUSO, P.A.
Suite 4-B/Barristers Bldg.
1615 Forum Place
West Palm Beach, FL 33401
Tel: (407) 686-8010
Attorneys for Petitioner

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CITATIONS OF AUTHORITY

PREFACE

This is a Petition for this Court to review a question certified to be of great public importance in a dissolution of marriage action. Petitioner will be referred to as "the Husband", and Respondent will be referred to as "the Wife". The following symbols will be used:

(R) - Record-on-Appeal

(A) - Petitioner's Appendix

STATEMENT OF THE CASE

The parties separated in May 1983 and were divorced almost four years later in April, 1987. During the parties' four year separation, the Husband voluntarily paid the Wife $6,000 a month, plus he paid other expenses on her behalf, which the Wife claimed totaled an additional $3,000 a month, for a total of $9,000 a month (R93-94,115,129-30,650-51). The Husband paid all the parties' income taxes for those years. Thus, during the parties' four years of separation, the Wife received at least $432,000 in tax-free support.

In November, 1985, the Wife filed a Petition for Dissolution of Marriage (R436-41). The final hearing was not held until one and a half years later, in April, 1987, at which time a Final Judgment of Dissolution of Marriage was entered (R1-435,779-81). The Husband was ordered to pay child support of $700 per month for the parties' 17 year old daughter, and permanent alimony of $11,000 per month. The Wife was awarded the marital home and all of its furnishings, a 1984 Jaguar free and clear, and the

Husband's interest in the following assets: Georgia vacation home and furniture, the boat located at the Georgia vacation home, the Charleston Place townhouse in Boca Raton, the Capital Realty Investors and SLM Entertainment Ltd. Investments, and the balance of the bank account and certificate of deposit with Sun Bank. The Wife was ordered to assume responsibility for the mortgage on the Charleston Place townhouse. The Husband was also ordered to pay lump sum alimony of $250,000 to the Wife in annual installments of $25,000. The Husband was further required to pay attorney's fees of $30,000 and costs of $15,500.62 within sixty days.

The Husband was left with his law practice, a $131,000 interest in his pension and profit sharing plan (present value), tax shelters worth $65,000; and the Fort Lauderdale townhouse he was living in, which had an equity of $49,000. The split of the marital assets, including the lump sum award, gave net assets of $643,450 to the Wife and $239,695 to the Husband, according to the Wife's figures.

The Husband appealed to the Fourth District Court of Appeal contending that the distribution to the Wife was grossly excessive and could only have been achieved by considering goodwill in his sole practitioner law practice, which was improper; that even if goodwill should be considered, the Wife's methods of valuation were improper; that the $11,000 a month permanent periodic alimony award was excessive and that the Wife should not have been awarded $45,000 in attorney's fees and costs in light of the other awards.

The Fourth District affirmed the Final Judgment of Dissolution, and certified the following question as one of great public importance:

> IN MARRIAGE DISSOLUTION PROCEEDINGS TO WHICH AN OWNER OF A PROFESSIONAL ASSOCIATION IS A PARTY, MAY THE VALUE OF THE PROFESSIONAL ASSOCIATION'S GOODWILL BE FACTORED IN IN DETERMINING THE PROFESSIONAL ASSOCIATION'S VALUE?

STATEMENT OF THE FACTS

The parties were married in 1962 and separated initially in June, 1982 and several times thereafter, the last time being May, 1983 (R77). The Wife, who was 47 years of age, was a housewife and mother. The Husband was a 44 year old attorney specializing in plaintiff's personal injury and medical malpractice cases (R88-9). The parties have two children, Bill, Jr., who was 24 years old and a senior in law school, and Caroline, who was 17 years of age and a senior in a private school.

The parties met at the University of Virginia in 1960 where they were both students (R220). The Wife graduated in 1960 and then continued on to obtain her Master's degree (R221). The Husband, who was three years younger, was still in undergraduate school. The parties married in 1962 (R220-1). The Wife taught school during the Husband's last year of undergraduate school and during his three years of law school, for a total of four years (R78, 86, 222, 538). The Husband was on partial athletic scholarship in undergraduate school (R222), and worked during the

summers while going through law school (R78). The Husband's parents paid his tuition (R87).

After graduating from law school in 1967, the Husband spent four years in the army in the Judge Advocate's General Corps (R87-8). As soon as the Husband graduated from law school the Wife ceased working and did not work while the Husband was in the service from 1967 to 1971 (R223).

The parties moved to Fort Lauderdale in 1971 and the Husband went into private practice with a defense firm (R87-8). He remained with that firm for four years or until 1976. The Husband then went with a small plaintiff's firm for several years. He left that firm and opened his own office in 1978 (R88-9, 230). Since that time, the Husband has specialized in personal injury and medical malpractice (R88-9). 65% to 75% of his practice is medical malpractice cases (R231). At the time of the Final Hearing, the Husband testified that he was concerned about the future of his practice in light of the medical malpractice and tort reform movement in Florida (R248).

In 1976 the parties had purchased a lot in the Boca Bath and Tennis Club for $46,000 and subsequently built a home there for $150,000, which they moved into in 1979 (R97, 560,2241).

The Husband testified that their marital problems began in 1980 (R78, 225). According to him the parties had stopped any meaningful communication and sharing (R77, 524). Their relationship became very difficult, actually unbearable, and there was a lot of animosity and acrimony (R77). Finally, the Husband just gave up (R77). The parties first separated in 1982

and did so twice before finally separating in May, 1983 (R77, 225).

The Wife claimed that their marriage broke up because of the Husband's affair with one of their neighbors (R85). While the affair did take place, it occurred primarily after the parties had separated, and ceased two years prior to the final dissolution hearing (R374).

When the parties separated, the Husband borrowed $50,000 from his pension and profit sharing plan as a down payment on a townhouse apartment in Fort Lauderdale which he purchased to live in (R252). At the time of trial he was still living there and was still driving his seven year old Mercedes Benz (R343).

The Husband was generous with the Wife and children (R112,114-15), almost to a fault and clearly to his detriment in retrospect. From the time of the parties' 1983 separation until the final hearing (four years), the parties agreed that the Husband gave the Wife $6,000 a month. The Wife claimed he paid additional expenses which the Wife's financial affidavit indicate were $3,000 a month, for a total of $9,000 a month, tax free (R93). During this period the Husband also bought a sports car for the parties' daughter on her 16th birthday (R95) and bought the Wife a new 1984 Jaguar (R659), while he continued to drive his seven year old car. The Husband had also fully supported the parties' two children during this four year separation. Bill Jr. was not only supported by his father, but his out-of-state undergraduate and law school education were paid for by him (R107, 597). The daughter's schooling was paid for by the

Husband and it was anticipated that she would attend college (R241), the expenses of which the Husband had also agreed to pay (R241).

By the end of 1986, the Husband was required to borrow $125,000 from his P.A. to pay his and his Wife's income taxes for that year (R238-9).

ASSETS AND LIABILITIES

The Wife offered the testimony of her expert CPA, Mary Van Lennep Plum, as to valuation, and the testimony of an alleged expert in valuing law firms, Weston Darbey. The Husband presented his own testimony; that of Whitfield Pressinger, the vice president of Dean Witter Reynolds; and the Husband's expert CPA, Ted Penella. The parties' and their experts disputed the value of the parties' assets, which were testified as having the following net values by the witnesses:

ASSETS	WIFE'S VALUATION	HUSBAND'S VALUATION
Realty		
Marital home	$192,000 (R661)	$315,000[1]
Furniture	6,200 (R661)	6,200
Georgia home	119,932 (net)(R661)	119,932
Furniture	200 (R661)	(No evidence)
Charleston townhouse	-0-	-0-
Ft. Laud. townhouse	49,500 (net) (R502)	49,500 (net)
Furniture	19,900 (R661)	2,000 (R457)
office condo	22,541 (R661)	9,800 (R479)
Cars		
Wife's Jaguar	22,800 (R50)	(No evidence)
Husband's Mercedes	35,000	35,000 (R582)
Wife's jewelry	5,000 (R661)	9,300 (R373)
Tax Shelters Ltd. P.A.		
Capital Realty	(No opinion R25-6)[2]	8,250 (R189)
SLM Entertainment	(No opinion R25-6)[3]	3,000 (R190)
Clinton St Ltd.	(No opinion R25-6)[4]	(-11,000) (R184)
B & D (Duplex	-0- (R659)	(-3,333) (R295-6)
NPI Plant Research	(No opinion R25-6)[5]	20,000 (R188)
Equus Investments	(No opinion R25-6)[6]	45,000 (R186-7)
TLC 200 Partnership	(No opinion R25-6)[7]	-0- (R296)
Visions Four Inc.	(No opinion R25-6)[8]	-0- (R296)
Avalon	(No opinion R25-6)[9]	-0- (R291)

(chart continued on next page)

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[1]/average of $265,000 to $364,000 (R504).

[2]/Although in the list of assets and liabilities prepared by the Wife's expert CPA, Mary Van Lennep Plum, she listed values for the Husband's "Partnership and Sub Corps" (R661), in her testimony she admitted that she had no idea of the value of those assets (R25-26):

> "The partnership and the sub S corporations, those all are valued at cost. And I did that because I do not know what a fair market value for those partnerships would be. It would be my opinion that some of them may be higher than cost, some of them are probably less than cost, but I would not know what the values would actually be on those partnerships."

[3]/See footnote 2.

[4]/See footnote 2.

ASSETS	WIFE'S VALUATION	HUSBAND'S VALUATION
Retirement		
Hus. Pension/PS	192,167 (R668)	131,600[10]
Husband's IRA	4,335 (R661)	4,335
Husband's P.A.	910,281 to 1,063,000 (R698,666-7) [$193,059 was book value]	100,000 book value (R479)
Wife's cash	2,000 (R128)	(No evidence)
Husband's cash	40,873	1,000 (R384-5)
Sun Bank Account	21,682 (R661)	22,780 (R504)
Sun Bank CD	10,000 (R661)	10,000
P.A. loan receivable	48,820	48,820
Husband's Other Liabilities Which Reduce His Award:		
Husband's loan from his P.A.		(-$125,000) (R344)

THE HUSBAND'S P.A.

The Husband, a plaintiff's lawyer, was the sole shareholder in his P.A. Another attorney worked for him as an independent contractor and was paid a set weekly salary (R245,247,316-17). At the time of the final hearing, the Husband was about to enter into a partnership with that attorney, but no partnership documents had been drafted or executed as yet (R245,247,316-17,364).

In 1986, the Husband had purchased 5,500 square feet of office space to house his PA in a new building in Fort Lauderdale

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[5]/See footnote 2.

[6]/See footnote 2.

[7]/See footnote 2.

[8]/See footnote 2.

[9]/See footnote 2.

[10]/$238,000 minus $50,000 loan, penalties and tax consequences (R252).

for $647,000, and he made $400,000 in improvements (R255). The purchase price and improvements were entirely financed by the developer (R255). The Husband owned the office space and rented it to his P.A. for the amount of his mortgage payment which was $13,650 a month (R32, 695,256).

According to the Husband's CPA, the book value of the Husband's PA was $100,000 (R479). According to the Wife's CPA, the book value was $193,059 (R666). However, the Wife's CPA increased the value of the Husband's PA to anywhere from $910,281 to $1,063,317 by adding in "goodwill" (R659,667).

WIFE'S CLAIMED EXPENSES FOR HERSELF AND DAUGHTER.

The Wife filed three affidavits. The one filed November, 1985 claimed expenses of $7,550 a month (R743-44); the one filed January, 1987 claimed expenses of $12,474 a month (R746-7); and the one filed April, 1987 claimed expenses of $14,332 monthly (R750-1). Per these affidavits, the Wife claimed her expenses increased $6,782 a month over a 1 1/2 year period (November, 1985 to April, 1987). An increase of $6,782 a year would be very questionable. An increase of $6,782 a month is totally unbelievable.

HUSBAND'S MONTHLY EXPENSES FOR HIMSELF AND CHILDREN.

The Husband's financial affidavit lists expenses of $2,425 as housing and related expenses for his townhouse (R646), $375 a month for food and household items, $1,370 a month for other

personal expenses (R471)[11], and $242 a month for insurance, for total personal monthly expenses of $4,412 a month. He additionally paid $2,766 a month for the children's school expenses[12].

THE HUSBAND'S INCOME HISTORY AND THE PARTIES' STANDARD OF LIVING PRIOR TO THEIR SEPARATION.

The parties were married in 1962 when they were in college. The Husband graduated from law school in 1967 (R531). From 1967 to 1971 he was in the service (R87-8). From 1971 to 1976 he was with a defense firm in Fort Lauderdale. He began working there making $14,000 a year and left there making $75,000 a year (R535). The Husband next went with a small plaintiff's law firm for several years making about $75,000 a year (R535).

In 1978 the Husband opened his own law office specializing in personal injury and medical malpractice work (R231). The first year he made over $100,000 was in 1980 (R227-8). In 1981 the Husband made $120,000, in 1982 he made $130,000, and in 1983 he made $127,500 (R673). For those three years the Husband

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[11]/The $1,370 figure excludes the $6,000 listed as monthly alimony payments and the $2,000 listed as legal fees. (See Husband's financial affidavit, R471).

[12]/The parties' son is attending law school and his expenses were entirely paid for by the Husband (R107). While the Husband might have no legal obligation to pay for the son's law school education, he was in fact doing so, thus increasing his monthly expenses by that amount.

consistently made about $2,000 to $2,500 a week (R225-6). The parties lived nicely, but they were far from wealthy (R225-6).

The parties separated in May, 1983 (R77). Subsequently, the Husband had several extraordinary income years because of several large recoveries in plaintiff's cases. In 1984, he made $385,919 after taxes, and in 1985 he netted $551,273 after taxes (R673). But in the P.A.'s 1986 fiscal year, his income dropped back to the range it was previously and he only netted $94,000 (R673). The Wife's expert CPA guestimated that the Husband's income for the first quarter of 1987 would be $460,622 (gross), which was primarily the result of one large case (R51). In fact, at the time of the final hearing in April, 1987, the Husband was only drawing $3,000 a month as salary because he did not know what the balance of the year would bring (R353). The large fee was being used to run the firm, advance costs, etc.

The Husband testified that during his two "extraordinary" years, he had used a large portion of the P.A.'s income to advance costs in more plaintiff's cases in order to stay competitive in the plaintiff's industry (R237-8). A "plaintiff's lawyer" has to be financially able to advance costs up front in order to maintain a plaintiff's practice. The Husband's testimony was borne out by the fact that the P.A. records indicated the P.A. was carrying $477,000 on the books as costs advanced (R356). The Husband testified that at least one-third of that would not be recovered (R358).

The testimony of Al Cone, a plaintiff's lawyer in an old, established West Palm Beach plaintiff's law firm testified that he had been in the plaintiff's business since 1958; that a plaintiff lawyer's income varies so tremendously, it is impossible to predict, and for a sole practitioner it is even worse (R276); that the future income of an individual plaintiff's lawyer has much less regularity than a large firm, where the bad year of one lawyer can be offset by the good year of the firm's other lawyers (R275). Moreover, a sole practitioner may have 2 or 3 cases that look good with a lot of costs invested, and those cases might not materialize, or they might get appealed (R275-6). Because of this, a plaintiff's law firm absolutely must have working capital on hand because plaintiff's attorneys must advance costs in other cases in order to prepare them (R276). In addition, Cone discussed the fact that tort reform, and the assault on the tort system by doctors and the insurance industry, had made it increasingly difficult for plaintiff's lawyers (R272). In his opinion the future of a plaintiff lawyer's income was speculative at best (R274).

HUSBAND'S PRESENT ABILITY TO PAY.

At the time of trial, the Husband was paying himself $3,000 a week gross or $156,000 a year gross. In addition, $38,784 of his yearly expenses (accepting the Wife's figures) were paid by his P.A. for such things as insurance, his automobile and its expenses, and club dues (R243,245,663). From the Husband's income he was paying the Wife $6,000 a month, plus

paying other expenses which she claimed totalled another $3,000 a month (R346-50). The Wife was receiving $108,000 a year tax free and that Husband was living on $86,784 a year, before taxes.

SUMMARY OF ARGUMENT

Where a professional association's goodwill is dependent upon the personal skill, effort, reputation and continued presence of the husband, the professional association's goodwill is not a distinct asset to be considered upon divorce. Personal goodwill represents nothing more than future earning capacity, to be considered in determining alimony, but not marital assets. Here, any goodwill the Husband's PA had was personal to him, and should not have been considered in determining the value of the PA. Considering goodwill (future earnings) in determining marital assets and in determining alimony constitutes impermissible double dipping.

The distribution of marital assets to the Wife was excessive and could only have been the result of attributing goodwill to the Husband's law firm, which was awarded to him. If the law firm's book value is considered, the Wife received $643,450 in assets, whereas the Husband received $239,695 in assets, according to the Wife's own figures. That award was grossly unfair. The Wife received close to 75% of the parties' assets. The only way to justify this inequitable split was to attribute a value of $900,000 to one million dollars to the Husband's PA by factoring in goodwill, which was error.

The $250,000 lump sum alimony award was error. At best, only a $50,000 lump sum alimony award should have been made. There should have been an equal division of the marital assets, plus a reasonable alimony award, rather than the excessive award of $11,000 a month. The Wife only needs $6,606 a month. Additionally, the Husband never made more than $140,000 a year when the parties were living together. An alimony award of $11,000 a month is not in keeping with the standard of living established during this marriage. When the Husband did have his few extraordinary years of income, he voluntarily paid the Wife $432,000 in tax free income. A "need" cannot be established by these voluntary payments from extraordinary, rather than normal, years.

The Husband should not be made to pay the Wife attorney's fees and costs in light of the other awards.

ARGUMENT

POINT I

IN MARRIAGE DISSOLUTION PROCEEDINGS TO WHICH AN OWNER OF A PROFESSIONAL ASSOCIATION IS A PARTY, MAY THE VALUE OF THE PROFESSIONAL ASSOCIATION'S GOODWILL BE FACTORED IN IN DETERMINING THE PROFESSIONAL ASSOCIATION'S VALUE?

There are three Florida cases on this issue. VIRGIN v. SLATKO, 358 So.2d 1178 (Fla. 3d DCA 1978) involved an accounting in a partnership dispute. The Third District Court of Appeal stated that:

> ...As a general proposition, a business dependent solely upon the personal and professional qualifications of the persons carrying it on does not possess "goodwill".

The Third District later considered goodwill in a divorce context. In MOEBUS v. MOEBUS, 529 So.2d 1163 (Fla. 3d DCA 1988), the court found that there was a divergency of opinion in other states as to whether goodwill should be considered an asset for purposes of dissolution of marriage. The court concluded that the better view was that goodwill could not be considered. The court quoted from HOLBROOK v. HOLBROOK, 309 N.W. 2d 343 (Ct. App. 1981), which had involved a husband's law practice, as follows:

> The concept of professional goodwill evanesces when one attempts to distinguish it from future earning capacity. Although a professional business' 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.
>
> 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 degree holder 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 another method of liquidity value.

The Third District ruled that the husband's medical practice must be valued at book value.

The Second District followed MOEBUS in HARPER v. HARPER, 14 FLW 1578 (Fla. 2d DCA, 1989). The court held that while the husband's ownership interest in his partnership's real estate was a marital asset, in footnote 1 it also held that the partnership's goodwill was not capable of valuation for distribution purposes.

As applied here, in a key man operation such as in this Husband's law firm, the intangible value of the P.A. (its professional goodwill) cannot be separated from the personal goodwill of the Husband. The P.A. has no value independent of the Husband, other than its book value. When the goodwill of a professional practice attaches to the professional person, as here, it cannot be valued separately. See NAIL v. NAIL, 486 S.W.2d 761 (Tex. 1972); HOLBROOK v. HOLBROOK, 308 N.W.2d 343 (Wis.App. 1981); POWELL v. POWELL, 648 P.2d 218 (Kan. 1982). As applied to professions, the value of goodwill is in reality nothing more than the ability to earn and the increased earnings from the practice of the particular profession because of an enhanced reputation. HOLBROOK v. HOLBROOK, supra. As stated in DEPNER v. DEPNER, 478 So.2d 532 (La.App. 1985), in regard to a medical P.A.:

> Absent the corporation it [goodwill] exists, absent the physician it does not exist. Therefore, it is not an asset of the corporation.

As concluded in WILSON v. WILSON, 741 S.W.2d 640 (Ark. 1987) and HANSON v. HANSON, 738 So.2d 427 (Mo. 1987):

> ...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 <u>not</u> a marketable asset separate and distinct, and should not be allocated upon marriage dissolution.

In the present case, any goodwill of the Husband's P.A. is not distinct from his reputation, skill and continued presence in his firm. A plaintiff's lawyer must necessarily have the faith and confidence of his clients and referring attorneys to get repeat business. If the Husband leaves his P.A. or dies, those clients and referring attorneys go elsewhere because they only come to the Husband's law firm because of the Husband.

TAYLOR v. TAYLOR, 386 N.W. 2d 851 (Neb. 1986) also held that in order for a professional practice to have goodwill as a business asset, it must have value independent of the presence or reputation of the professional person (husband) in order to be valued for divorce purposes:

> Consequently, where goodwill is a marketable business asset distinct from the personal reputation of a particular individual, as is usually the case with many commercial enterprises, that goodwill has an immediately discernible value as an asset of the business and may be identified as an amount reflected in a sale or transfer of such business. On the other hand, if goodwill depends on the continued presence of a particular individual, such goodwill, by definition, is not a marketable asset distinct from the individual. Any value which attaches to the entity solely as a result of personal

> goodwill represents nothing more than probable future earning capacity, which, although relevant in determining alimony, is not a proper consideration in dividing marital property in a dissolution proceeding.

In line with the above decisions, this Court has held that a single asset cannot be utilized as the basis for both an alimony award and equitable distribution. In DIFFENDERFER v. DIFFENDERFER, 491 So.2d 265 (Fla. 1966), the Court held that retirement benefits could be considered as either marital property subject to equitable distribution, or as a source of payment of permanent periodic alimony, but not both. As the above decisions indicate, goodwill is nothing more than a projection as to increased future earnings. Therefore, contrary to DIFFENDERFER, supra, in this case the Husband's earning capacity is not only being used to justify the $11,000 a month alimony award, but is also being considered as marital property (goodwill or intangible assets of the P.A.). That is double-dipping.

The answer to the Fourth District's certified question is that the goodwill of a husband's professional association can only be considered as marital property in a divorce when it is not dependent upon the husband's skill, effort, reputation and continued presence. Here, the goodwill of the Husband's PA is absolutely inseparable from him. Accordingly, it has no value distinct from the Husband's personal goodwill, which is nothing more than future earning capacity and was considered in the award of alimony, but should not be considered as a marital asset.

The Wife advanced two arguments before the Fourth District Court of Appeal. She first argued that the matter of valuation was a question of fact, and that the appellate court should affirm under the reasonable man test in CANAKARIS v. CANAKARIS, 382 So.2d 1197 (Fla. 1988). Clearly, utilization of the correct method for determining value is a matter of law. In Re: THE MARRIAGE OF KING, 197 Cal. Rptr. 716 (Cal. 1983).

The Wife also argued that this Court had already ruled that goodwill had a value in SWANN v. MITCHELL, 435 So.2d 797 (Fla. 1983). That case is not on point. It was not a dissolution of marriage action. Rather, the son of a deceased partner of Mitchell Motors sought an accounting based upon his father's partnership agreement which provided that upon his death the partnership would pay the personal representative of his estate his share of the undistributed profits of the partnership. The trial court granted summary judgment for the partners, and the District Court reversed. The Florida Supreme Court agreed with the District Court that there were questions of fact to be determined in considering the extent of the deceased partner's unpaid partnership interest.

This Court disagreed, however, with that portion of the District Court's decision which concluded that the goodwill of the business should not be considered. The Court relied upon language in the partnership agreement which gave a deceased partner his share of the "undistributed profits." The Court concluded that goodwill was evidenced by general public patronage and was reflected in the increase in "profits". Therefore, the

Court ruled, goodwill of the partnership should be recognized as an asset taken into consideration in determining the share to which the deceased partner was entitled to upon dissolution.

The obvious distinction between SWANN, as compared to MOEBUS, is that SWANN concerned a car dealership, Mitchell Motors, and not a partnership dependent solely upon the personal and professional services of the person carrying it on, as here. This case involves personal goodwill that is inseparable from the Husband, whereas SWANN involved a business' goodwill that was separable from its partners.

POINT II

THE WIFE'S EXPERTS' METHODS OF VALUATION WERE LEGALLY IMPROPER.

It is the Husband's position that goodwill does not exist in his P.A. for dissolution purposes because it is personal to him. If the Court disagrees, goodwill still cannot be based upon future earnings. That involves double dipping. Goodwill is nothing more than the expectation of future earnings, HOLBROOK v. HOLBROOK, 309 N.W.2d 333 (1981) i.e., the ability to increase future earnings based on an enhanced reputation. MITCHELL v. MITCHELL, 732 P. 2d 203 (Ariz. App. 1985). It is obviously error to use a projection of future earnings to determine both the ability to pay alimony and child support, and also consider it as marital property (goodwill). As stated in MITCHELL v. MITCHELL, supra, at 207:

> Future earnings and/or earning capacity is not an asset to be valued and decided as community property, but is an element that can be considered by the trial court only

> when it determines, along with need, the issue of spousal maintenance and child support.

In MARRIAGE OF FORTIER, 109 Cal. Rptr. 915 (Cal. App. 1973), the court stated that the difficulty with each of the wife's methods of evaluating goodwill was that "future income controls in each method valuing the goodwill". The Court stated that since the philosophy of community property (equitable distribution, here) is that the interest can only be acquired during the marriage, it would be inconsistent with that philosophy to assign a marital interest to the value of post-marital efforts of either spouse. The Court stated that the value of the goodwill must exist at the time of the dissolution and must be separate and apart from the expectation of the spouse's future earnings.

While the court agreed in MARRIAGE OF FORTIER, supra, that goodwill of a medical practice is marital property, it held that goodwill could not be evaluated by any method that was dependent upon post-marital efforts. The court concluded that the value of goodwill was simply the market value at which the goodwill could be sold upon dissolution of the marriage and must exist at the time of the dissolution. That value could not include the expectation of future earnings. The court specifically stated in footnote 3 that its opinion was limited to the evaluation of goodwill as a marital asset, and that the court expressed no opinion as to whether the wife's valuation methods may or may not be legitimate accounting tools for evaluating goodwill for other non-marital purposes. See also, IN MARRIAGE OF FOSTER, 117 Cal.

Rptr. 49 (Cal. App. 1974) and IN MARRIAGE OF KING, 197 Cal.Rptr 716 (Cal. App. 1983), which followed IN MARRIAGE OF FORTIER, supra.

The type valuation methods that were rejected in MARRIAGE OF FORTIER, supra, are the same type methods of valuation which the Wife's experts used in the present case. They involved consideration of future earnings or profit, which was improper. The Wife's expert CPA (Plum) used a cash flow capitalization method and an excess earnings capitalization method (R666-67), whereas her expert, Darbey, simply determined the PA's average income over three and a half years. None of these methods are true indicators of the value of goodwill. They ignore the threshold issue of whether the goodwill exists independent of the individual, or whether it is dependent on his skill, effort, reputation and continued presence. These type formulas were used in this case by the Wife's experts as a means of assigning an arbitrarily large number to the Husband's business, so as to justify awarding all the parties' other assets to the Wife, or at least the lion's share of them. That is obvious here, since the Wife's CPA admitted that the book value of the Husband's PA was $193,059 (R666), but she valued the PA at anywhere from $910,281 to $1,063,317 because of its supposed goodwill (R659,667).

The Husband agrees with the brief of the Amicus that, if the goodwill of the business is independent of the Husband, then the fairest indicator of goodwill is the market approach, supported by competent evidence of comparable sales. Here, however, the Husband's law practice has no goodwill independent of him.

Therefore, his law practice should be valued solely at book value, which the Wife admitted was $193,059 (R666).

POINT III

THE DISTRIBUTION OF MARITAL ASSETS TO THE WIFE WAS EXCESSIVE AND COULD ONLY HAVE BEEN THE RESULT OF ATTRIBUTING GOODWILL TO THE HUSBAND'S LAW FIRM, WHICH WAS IMPROPER, AND NOW REQUIRES A REVERSAL OF THE $250,000 LUMP SUM ALIMONY AWARD.

The trial court's distribution of the parties' assets was grossly unfair. The Wife received net awards of:

WIFE'S ASSETS[13]	WIFE'S VALUATION	HUSBAND'S VALUATION
Marital Home	$191,288	$315,000 net
Furniture	6,200	6,200
Jaguar	22,800	22,800
Jewelry	5,000	9,300
1/3 interest in GA home	119,932 net	119,932 net
Furniture	200	200
Georgia Boat	2,000	2,000
Capital Realty Investors	no opinion[14]	8,250
SLM Entertainment Ltd	no opinion[15]	3,000
Sun Bank Account	22,780	22,780
Sun Bank CD	10,000	10,000
Cash	2,000	2,000
Charleston Townhouse	-0-	-0-
Lump Sum Alimony	+250,000	+$250,000
TOTAL	$643,450	$771,462

If the book value of the Husband's CPA is considered, he received net awards of:

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[13]/Record references to support these values are deleted here as they are set forth in the Statement of the Facts.

[14]/Footnotes 14 through 21 - Where the Wife's CPA had no opinion, the Husband's values are added in.

HUSBAND'S ASSETS	WIFE'S VALUATION	HUSBAND'S VALUATION
PA loan receivable	$ 48,820	$ 48,820
Ft. Ldl. townhouse	49,500	49,500
Furniture	19,900	2,000
Clinton St. Ltd.	no opinion[16]	(- 11,000)
B&D Duplex	-0-	(- 3,333)
NPI Plant Research	no opinion[17]	20,000
Equus Investments	no opinion[18]	45,000
TLC 200 Partnership	no opinion[19]	-0-
Visions Four Inc.	no opinion[20]	-0-
Avalon	no opinion[21]	-0-
Pension & P/S	192,167	131,600
IRA	4,335	4,335
Husband's office condo	22,541	9,800
Cash	40,873	40,873
Mercedes	35,000	35,000
Husband's PA	193,059	100,000
Lump sum alimony	(-250,000)	(-250,000)
Loan from P.A.	(-125,000)	(-125,000)
Attorney's Fees & Costs	(- 45,500)	(- 45,500)
TOTAL	$239,695	$ 52,095

It is obvious that if the book value of the Husband's PA is considered, the Wife's own figures showed that she received $643,450 whereas the Husband received $239,695. The Husband's figures show that the Wife received $771,462 in marital assets, whereas he received $52,095. Regardless of whose figures are accepted, the distribution of marital assets is grossly unfair. The Wife received close to 75% of the assets, according to her own figures. The only way to justify this inequitable split, even accepting the Wife's figures, is to attribute a value of $900,000 to $1,000,000 to the Husband's P.A., by factoring in goodwill,[22] instead of considering its book value. This resulted

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[22]/Before the Fourth District, the Wife added in a value of
(Footnote Continued)

in the $250,000 lump sum award to the Wife, which was error. If a $50,000 lump sum award had been made, the marital assets would have been split about equally:

Wife	Husband
$643,450	$239,695
- 200,000	+ 200,000
$443,450	$439,695

The $250,000 lump sum alimony award should be reversed, and the Wife should be awarded a reasonable, rather than excessive amount of permanent alimony under Point IV.

The Wife's argument to the Fourth District was that her expert CPA gave values for the limited partnership and tax shelters and, therefore, it is error to reflect "no opinion" in the charts for her value, and then add in the Husband's value. In fact, the Husband's value was the only current value presented. The Wife claimed that her CPA valued the tax shelters and limited parrnerships, purchased years ago, at cost. In fact, she did not. The Wife's CPA testified that although she listed the value for the limited partnerships and tax shelters at cost, she admitted that that was probably not their value now many years later (R25-26). She further admitted: "I do not know what a fair market value for those partnerships would be" (R25-26).

The Wife also argued below that the Husband's witness, Pressinger, who was a Vice President of Dean Witter, testified

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(Footnote Continued)
$981,640, which was the mid-range between her experts' values of $910,281 to $1,063,000.

that Dean Witter's records listed the limited partnerships and tax shelters at their original cost, and that it is impossible to determine any other value. That was not Pressinger's testimony at all. He testified that Dean Witter's records automatically reflect the original cost of a limited partnership/tax shelter as its value, unless or until there is some reason to determine an up-to-date value (R186,201). Then Dean Witter would consider what had occurred since the original purchase, and would determine the present value. Pressinger valued the Husband's tax shelters and limited partnerships at the time of trial, and those values are included as the Husband's valuations in the charts (R181). Pressinger's testimony unequivocally demonstrated that the tax shelters and limited partnerships were not presently valued at cost by Dean Witter. The Wife's contention to the contrary totally ignores Pressinger's testimony. The only current value of the tax shelters and limited partnerships presented by either the Husband or the Wife was Pressinger's testimony.

POINT IV

THE $11,000 A MONTH PERMANENT, PERIODIC ALIMONY AWARD IS CLEARLY EXCESSIVE, AND CONSTITUTES DOUBLE DIPPING.

The affidavits filed by the Wife reflected an increase in expenses from $7,550.28 a month in November, 1985 (R743-75) to $12,474 a month in January, 1987 (R746-48), to $14,332 a month in expenses (R750-52). The latter figure is grossly inflated. First, the $845 a month listed as the daughter's expenses should

be deducted because the court awarded $700 in child support, which it found to be the appropriate amount. The $4,445 figure for taxes should also be deducted because the Wife simply took one-half of her $9,000 in claimed personal expenses. She failed to take into account the tax write-offs she would be receiving for the interest and tax payments on the marital home and Georgia home that she was awarded, plus other deductions and write-offs.

The following should also be deducted: $299 in monthly expenses for the Georgia vacation home; $892 in expenses for the rental property the Wife was awarded, since the Husband is not required to maintain her non-residential real estate in the future; and $1,007 listed as a monthly payment on her car, since the Husband purchased for the Wife a new Jaguar during their separation and the Wife was awarded that free and clear (R751,780). The Wife has no car payment. It is error to include automobile expenses that are non-existent. SCHUBOT v. SCHUBOT, 523 So.2d 661,662 (Fla. 4th DCA 1988).

The Wife also does not have a $113 a month expense for the Lauderdale Yacht Club, or $125 a month expense for the Sea Gate Club, since she was not awarded those memberships. Just these deductions alone reduce the Wife's claimed monthly expenses from $14,332 to $6,606. Yet, the Wife was awarded $11,000 a month, which was clearly excessive.

It is wrong to award the Wife more than she needs, regardless of what the Husband makes. In GORDON v. GORDON, 335 So.2d 321 (Fla. 4th DCA 1976), this Court held that the enormity of the ability to pay does not dictate a corresponding need to

receive an amount commensurate with that ability. That is particularly true here where the parties' standard of living during their marriage from 1962 until the parties separated in 1983 was much less. Case law is clear that when looking at the needs of a wife, the court must take into consideration the standard of living established by the parties during the marriage. FINLEY v. FINLEY, 374 So.2d 1105 (Fla. 1st DCA 1979). WENZEL v. WENZEL, 512 So.2d 275 (Fla. 4th DCA 1987). Here, during the 21 years the parties lived together, the Husband had never made more than $140,000 a year and that was only in one year. From 1962 until 1983, when the parties separated, the parties and their two children lived on that income, and for four of those years in the same home the Wife lives in today.

It was only after the parties separated that the Husband had two extraordinary years beginning in 1984. The trial court erred in failing to take that fact into consideration. TEMPLE v. TEMPLE, 519 So.2d 1054 (Fla. 4th DCA 1988). The income made in those years unequivocally did not represent the standard of living of the parties while they lived together. And when the Husband did experience those extraordinary years, even after the parties separated, he voluntarily shared that with the Wife by paying her $6,000 a month, plus the Wife claimed he paid an additional $3,000 in expenses or $108,000 a year (not that much less than what the entire family of four had lived on while they were together as a family). The payments to the Wife amounted to $432,000 in tax free income during the parties' four years of separation. While these voluntary payments were used at trial

against the Husband, they cannot "create" a need where there is none, nor can they "create" a need beyond the standard established during this marriage.

While the Wife will undoubtedly argue her CPA testified that she anticipated the Husband would make $460,622 gross for the first quarter of 1987, that was the result of one large fee (R682). At the time of trial, it was unknown whether there would be any more big fees for the remaining eight months of that year. Accordingly, that money was being used to run the law firm, advance costs on cases, etc., until the end of the year.

To summarize, the excessive $11,000 a month permanent alimony award, in addition to the child support and in addition to the equitable distribution, are without question so unfair, unwarranted and oppressive under these facts as to require reversal. The alimony award also constitutes double dipping, as discussed supra.

POINT V

THE HUSBAND SHOULD NOT HAVE BEEN MADE RESPONSIBLE FOR THE WIFE'S ATTORNEY'S FEES AND COSTS TOTALLING $45,500.62, NOR FOR HER APPELLATE ATTORNEY'S FEES.

Circuit Court Attorney's Fees

The purpose in awarding fees in marital dissolution proceedings is to ensure that both parties have a similar ability to secure competent legal counsel, CANAKARIS v. CANAKARIS, 382 So.2d 1197 (Fla. 1980); KEISTER v. KEISTER, 458 So.2d 32 (Fla.

4th DCA 1984). The court is to consider the financial resources of both parties. DROUBIE v. DROUBIE, 379 So.2d 1331 (Fla. 2d DCA 1980). An award of attorney's fees and costs is made only upon a demonstrated need of one party and ability of the other party to pay. TURNER v. TURNER, 383 So.2d 700 (Fla. 4th DCA 1980). Before the court is justified in awarding the wife attorney's fees, a necessity therefor must appear on the wife's part, from want of sufficient means to pay her counsel. JACOBS v. JACOBS, 50 So.2d 169 (Fla. 1951).

A wife should not be awarded attorney's fees where there is a lack of evidence in the record of the wife's inability to pay fees, PATTERSON v. PATTERSON, 348 So.2d 592 (Fla. 1st DCA 1977); KOZLICH v. KOZLICH, 416 So.2d 481 (Fla. 4th DCA 1982). WOODWORTH v. WOODWORTH, 385 So.2d 1024 (Fla. 4th DCA 1980). When a party to a divorce action has been shown to have the ability to pay for the services of his or her attorney, it is improper to require the other party to pay for those services, even though he or she may have the ability, ANDREWS v. ANDREWS, 409 So.2d 1135 (Fla. 2d DCA 1982); TURNER v. TURNER, supra.

This has been held to be true where the wife was awarded substantial assets as here. BUTTS v. BUTTS, 362 So.2d 349 (Fla. 1st DCA 1980); PATTERSON v. PATTERSON, supra. And in ROSS v. ROSS, 341 So.2d 833 (Fla. 3d DCA 1977), the court stated:

> Where substantial wealth is possessed by each party, there is no need to require one party to pay the attorney's fee for the other. We, therefore, reverse the award of attorney's fees to the wife.

And case law holds that where the wife has extensive assets, an award of attorney's fees to the wife will be reversed where the husband is burdened with the payment of periodic alimony. BUCCI v. BUCCI, 350 So.2d 786 (Fla. 3d DCA 1977). In this case the Wife has substantial assets with which to pay her attorney's fees. Her assets under the Final Judgment are far more than the Husband's. And the Wife should not complain that she has no employment income. Under the Final Judgment she is receiving $11,000 a month in alimony, plus $700 a month in child support.

Clearly an abuse of discretion is shown here in awarding attorney's fees to the Wife. She was awarded the majority of the parties' assets which has resulted in her having a greater net worth than the Husband. As stated in WINSTON v. WINSTON, 362 So.2d 149 (Fla. 3d DCA 1978), it is error to require a husband to pay his wife's attorney's fees where the need for shifting that burden to the husband has not been demonstrated. In conclusion, the remarks of the Second District in GARY v. GARY, 467 So.2d 362 (Fla. 2d DCA 1985) are relevant to this point:

> As to the wife's final contention, we adhere to the principle recognized in CONNER v. CONNER, 439 So.2d 887 (Fla. 1983), that the award of attorney's fees is a matter to be determined by the trial court. Because the wife was awarded funds [property] from which attorney's fees may be paid, the trial court did not abuse its discretion in refusing to award such fees to the wife.

Appellate Attorney's Fees

The Husband also contends that the Fourth District erred in awarding the Wife appellate attorney's fees for the same reasons argued above.

POINT VI

ALL THE AWARDS TOGETHER ARE SO EXCESSIVE AS TO CONSTITUTE PUNISHMENT FOR THE HUSBAND'S ADULTERY.

The awards considered as a whole are so excessive and oppressive that it can only be concluded that the trial court punished the Husband for his adultery. The law in Florida does not support punishment for adultery where there are adequate assets and income, as here, NOAH v. NOAH, 491 So.2d 1124 (Fla. 1986); GREEN v. GREEN, 501 So.2d 1306 (Fla. 4th DCA 1986) (en banc), and where there was no diminution of the marital assets and income as a result of the adultery.

CONCLUSION

Based upon the foregoing, this Court should rule that while under some circumstances a business or profession may have goodwill that must be considered in distributing marital assets in a divorce, that is not true where the goodwill is personal to the Husband, as here. Accordingly, the trial court's distribution of assets, which necessarily considered goodwill, must be reversed. So must the award of $11,000 a month in permanent alimony, which is not only excessive, but constitutes double dipping. Likewise, the attorney's fees and cost awards must be reversed.