BVR's Business Valuation in Divorce Case Law Compendium

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BVR

What It's Worth

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Full Text of Court Cases

Available on the included CD

Using the Compendium's Interactive CD

The CD included with this Compendium offers an interactive PDF version of this document, as well as the full text court case documents. The interactive features allow you to easily navigate through the Compendium's 340+ court cases. In order to properly use the CD you will need to have either Acrobat 9 (or later) or the free Adobe Reader 9 (or later) installed and configured as your default PDF viewer. A list of the features in the interactive version of this document follows.

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Section 1

Divorce & Goodwill

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Sanders v. Sanders	02/04/04	Court of Appeals	Arkansas	Goodwill is determined not to be salable or marketable, and therefore constitutes as personal and is not divisible.	158
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Landry v. Simon	03/17/99	Court of Appeals	Louisiana	Court upheld that there is no divisible goodwill in one-man business.	111
Schiro, Elizabeth Plaia v. Joseph Andrew Schiro	01/28/03	Court of Appeals	Louisiana	This tile-laying business is treated as a commercial business not a professional business, making the goodwill a marital asset.	160
Soileau v. Soileau	04/07/04	Court of Appeals	Louisiana	"While goodwill can be included in valuing a commercial business, it is not mandatory."	172
Statham v. Statham	6/11/08	Court of Appeals	Louisiana	Personal goodwill is not divisible.	173
Ahern v. Ahern	1/3/08	Supreme Court	Maine	The Supreme Court determines that personal goodwill is not subject to equitable division.	14
Hess v. Hess	07/05/07	Supreme Court	Maine	The Court confirmed that the goodwill value of the business was an asset that was transferable and divisible. No distinction was made between personal and enterprise goodwill.	90

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Skrabak v. Skrabak	03/28/96	Court of Special Appeals	Maryland	Only “institutional” goodwill considered a marital asset.	171
Champion v. Champion	03/19/02	Court of Appeals	Massachusetts	The Court excludes nontransferable personal goodwill from value.	38
Conger v. Conger	12/26/00	Court of Appeals	Michigan	The Court makes no distinction between personal and business goodwill, and states that they see no reason to.	47
Schiro, Vicki A. v. William A. Schiro	8/25/05	Court of Appeals	Michigan	Productivity adjustment key for private practice valuations.	162
Baker, In re Marriage of	7/3/07	Court of Appeals	Minnesota	Value of non-compete should not be excluded from enterprise goodwill. Enterprise goodwill is divisible, personal is not.	19
Haefele, In re Marriage of	1/17/06	Court of Appeals	Minnesota	Business value must reflect a reasonable owner's salary.	79
Rolfe v. Rolfe	08/15/00	Court of Appeals	Minnesota	Goodwill value must exclude employee compensation, personal goodwill, and non-compete agreement factors.	152
Sweere v. Gilbert-Sweere	07/18/95	Court of Appeals	Minnesota	Non-compete was representative of marital goodwill, not post-marital labor.	180
Fogarty v. Fogarty	02/28/06	Court of Appeals	Mississippi	Lack of valuation evidence results in finding that this body shop’s only asset was non-divisible personal goodwill.	63
Goodson v. Goodson	01/11/05	Court of Appeals	Mississippi	The Court ruled that goodwill cannot be used as a factor in valuing a business for the purpose of dividing marital property.	76
Rhodes v. Rhodes	01/11/11	Court of Appeals	Mississippi	Mississippi Gets Two Chances to Value Business Goodwill	148
Rush v. Rush	08/09/05	Court of Appeals	Mississippi	When the husband is not “essential” and not a sole proprietor, all of the business’ goodwill is enterprise goodwill.	154
Singley v. Singley	06/12/03	Supreme Court	Mississippi	The Supreme Court maintains that goodwill should not be included in the valuation of a professional sole proprietorship.	170
Watson v. Watson	06/24/04	Supreme Court	Mississippi	Neither personal nor business enterprise goodwill may be included in the valuation of a sole practitioner.	192
Hershewe v. Hershewe	10/10/96	Court of Appeals	Missouri	The Court ruled that this law practice had no marital goodwill, and cites Missouri law to establish criteria for determining goodwill.	89
James v. James	06/03/02	Court of Appeals	Missouri	Regarding the goodwill calculation, the probability of “return” customers was “debatable,” but neither side had raised the issue.	102
Kricsfeld v. Kricsfeld	01/05/99	Court of Appeals	Nebraska	Goodwill determined not to be a marital asset.	110

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Utter v. Utter	04/09/96	Court of Appeals	Nebraska	The Nebraska Supreme Court is cited and it is determined that the goodwill here is personal and not divisible.	185
Wright v. Wright	09/30/03	Court of Appeals	Nebraska	Practice goodwill calculated using excess earnings method upheld; distinguished from personal goodwill.	211
Watterworth and Watterworth, In the Matter of	04/30/03	Supreme Court	New Hampshire	A shareholder agreement factors into the goodwill calculation for this orthodontist practice.	195
Steneken v. Steneken (I)	03/15/04	Superior Court, Appellate Division	New Jersey	The Superior Court's lack of understanding of excess earnings method leads to a marital award reflecting double dipping. Supreme Court rejects notion that "double counting" occurred when Superior Court used actual income for alimony purposes but a lower "normalized" income amount when valuing a closely held business for equitable distribution purposes.	174
Steneken v. Steneken (II)	05/18/05	Supreme Court	New Jersey		176
McSparron v. McSparron	12/07/95	Court of Appeals	New York	New York Court decides professional licenses have economic value independent of practice.	127
Moll v. Moll	03/21/01	Supreme Court	New York	Financial advisor's book of business represents personal goodwill and should be equitably distributed as a marital asset.	133
Bass v. Bass	09/02/03	Court of Appeal	North Carolina	Company's uniqueness and limited marketability equal zero goodwill.	25
Buzzanell v. Miller	01/14/04	Court of Appeals	North Carolina	The Court shows preference for excess earnings method to determine goodwill value.	34
Carlson v. Carlson	08/05/97	Court of Appeals	North Carolina	Judge calculates goodwill based on physician compensation survey.	35
Conway v. Conway	12/15/98	Court of Appeals	North Carolina	Court deems capitalization of excess earnings method best to value goodwill of new businesses.	50
Pellom v. Pellom	12/02/08	Court of Appeals	North Carolina	Decision includes goodwill in the valuation.	140
Walker v. Walker	07/20/04	Court of Appeals	North Carolina	The Court recognized that goodwill is "implicit" in capitalization of excess earnings method.	191
Wold v. Wold	1/23/08	Supreme Court	North Dakota	Double-dipping rationale may have prompted court to prefer asset approach.	210

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Banchefsky v. Banchefsky	09/09/10	Court of Appeals	Ohio	Divorce Court Limits Professional Goodwill to Value of Non-Compete	22
Bunkers v. Bunkers	02/09/07	Court of Appeals	Ohio	The Court determines that all goodwill of a solo practitioner is subject to equitable division in divorce.	33
Clymer v. Clymer	09/21/00	Court of Appeals	Ohio	This case demonstrates the importance of accounting for reasonable compensation in goodwill calculation.	44
Flauto v. Flauto	05/09/96	Court of Appeals	Ohio	The Court found the goodwill of this CPA practice to be personal, and therefore not divisible.	62
Greene v. Greene	10/18/01	Court of Appeals, Fifth District	Ohio	The Court finds no enterprise goodwill in this one-person organization, the goodwill value is wholly dependant on his efforts.	77
Hamilton v. Hamilton	05/20/02	Court of Appeals	Ohio	Goodwill is ruled to be a marital asset.	80
Masters v. Masters	03/31/03	Court of Appeals	Ohio	Without a non-compete, there is no goodwill drywall business.	116
Pearlstein v. Pearlstein	05/08/09	Court of Appeals	Ohio	Decision includes goodwill in value.	138
Pelanda v. Pelanda	03/13/02	Court of Appeals	Ohio	Court upholds decision that this law practice has no goodwill.	139
Rupert v. Rupert	12/20/04	Court of Appeals, Third District	Ohio	When neither party wish to continue the business and it is liquidated, goodwill value is ignored.	153
Wichman v. Wichman	03/22/96	Court of Appeals	Ohio	Ohio case law allows that goodwill may be properly considered in the valuation of a professional practice, and here is determined to be a marital asset.	203
Denton, In re Marriage of	12/12/96	Court of Appeals	Oregon	Goodwill valuation not “double counting” in this case.	54
McDuffy v. McDuffy	10/16/02	Court of Appeals	Oregon	The Court reversed the determination that the business had goodwill based on a complete lack of evidence. Goodwill may not be attributed to a business if there is no evidence in the record to support it.	120
Triperinas v. Triperinas	12/11/02	Court of Appeals	Oregon	The Court finds that failure to value goodwill is error.	184
Weakley, In re Marriage of	10/31/01	Court of Appeals	Oregon	The husband cites *Lankford* in support that all of the goodwill was personal, but the Court finds flaws in his argument.	196
Gaydos v. Gaydos	05/12/97	Superior Court	Pennsylvania	Going concern value should not be confused with professional goodwill, as professional goodwill is not divisible.	69

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Smith v. Smith	07/14/06	Superior Court	Pennsylvania	Personal goodwill is not divisible, especially when an alimony award could result in a "double charge."	172
Moretti v. Moretti	02/09/01	Supreme Court	Rhode Island	Court rules that a distinction must be made between personal and enterprise goodwill; personal goodwill is not divisible.	135
Alsup v. Alsup	07/24/96	Court of Appeals	Tennessee	The professional goodwill of this day-care was not considered a marital asset.	18
Brown v. Brown	12/14/05	Court of Appeals	Tennessee	This case demonstrates the importance of valuing personal goodwill separate from enterprise goodwill.	30
Kerce v. Kerce	08/29/03	Court of Appeals	Tennessee	The Court quotes *Smith v. Smith* and determined that the goodwill was personal and not a marital asset.	107
McKee v. McKee	08/17/10	Court of Appeals	Tennessee	Tenn. Court Excludes Patient Files as Professional Goodwill In Dental Practice Valuation	121
Geaccone v. Geaccone	07/28/05	Court of Appeals, First District	Texas	In this case, the non-piracy agreement theory used to separate personal and professional goodwill.	71
Nowzaradan v. Nowzaradan	02/08/07	Court of Appeals, First District	Texas	Both experts exclude personal goodwill in the valuation of this medical practice.	137
R.V.K. v. L.L.K.	10/30/02	Court of Appeals	Texas	Enterprise value is deemed inappropriate and commercial goodwill is excluded in this case where a minority position is subject to a buy/sell agreement.	156
Von Hohn v. Von Hohn	7/23/08	Court of Appeals	Texas	Enterprise goodwill does not include expected fees from un-settled cases when valuing a law firm interest.	187
Brockbank v. Brockbank	04/08/99	Court of Appeals	Utah	Because most of the business' value was based on the hus-band's "personal reputation and ability to perform," the Court upholds the fixed asset valuation.	29
Hoebelheinrich v. Hoebelheinrich	08/03/04	Court of Appeals	Virginia	Goodwill value upheld (reluctantly) when the issue of whether the amount includes personal goodwill goes unchallenged.	91
Howell v. Howell (I)	09/04/98	Circuit Court	Virginia	The Court includes goodwill in the value of this law firm, but does not specify how personal goodwill was separated out (if at all).	97
Howell v. Howell (II)	01/27/00	Court of Appeals	Virginia	A partnership agreement is not indicative of goodwill value.	98
Ledwith v. Ledwith	10/12/04	Court of Appeals	Virginia	The Court rules that personal goodwill must be accounted for before this orthodontic practice is divided up.	112

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Zasler v. Zasler	09/09/03	Appeals Court	Virginia	Personal goodwill value not included.	214
Brumback v. Brumback	07/08/04	Court of Appeals	Washington	The Court finds no goodwill in law practice where partner lacks experience.	31
Chesterfield v. Nash	06/14/99	Court of Appeals	Washington	Increase in goodwill was considered community property in the case of this unmarried couple who were cohabitating.	41
Crosetto, In re Marriage of	07/12/96	Court of Appeals	Washington	Professional goodwill is recognized in Washington as intangible property subject to division in a divorce.	51
Field, In re Marriage of	03/12/02	Court of Appeals	Washington	Court upholds use of only two years' past income to value professional goodwill.	61
Grim, In re Marriage of	08/24/01	Court of Appeals	Washington	The *Fleege* factors are considered in the goodwill valuation and the practice valuation is reduced by 10%.	78
Monaghan, In re Marriage of	08/09/95	Court of Appeals	Washington	Non-compete covenant not a marital asset, but allocation of value to it must be fair.	134
Porter, In re Marriage of	5/21/07	Court of Appeals	Washington	Court accepts double-dipping argument from BV analyst.	141
Potter v. Potter	09/09/96	Court of Appeals	Washington	The Court looked to the precedential *Hall* decision and to the *Fleege* factors in considering goodwill.	142
Seiler v. Seiler	08/26/03	Court of Appeals	Washington	The Court affirms that practice goodwill is a marital asset under Washington law.	166
Sims, In re Marriage of	01/23/03	Court of Appeals	Washington	The Court upheld the trial court's goodwill valuation, even though it lacked "mathematical exactness."	167
Wicheta, In re Marriage of	12/19/02	Court of Appeals	Washington	The Trial Court analyzed the *Fleege* factors, and concluded that the practice had no goodwill. The decision was upheld.	202
Wilson, In re Marriage of	12/09/03	Court of Appeals	Washington	The expert's goodwill value is upheld when he relies on the valuations methods listed in *Hall* and the factors set forth in *Fleege*.	206
Helfer v. Helfer (I)	11/8/07	Court of Appeals	West Virginia	It is an error not to address enterprise goodwill.	86
Helfer v. Helfer (II)	09/09/09	Supreme Court	West Virginia	Supreme Court upholds zero enterprise goodwill determination in professional practice.	87
May v. May	11/10/03	Supreme Court	West Virginia	The Court surveys the case law of other jurisdictions before deciding to distinguish between between personal and enterprise goodwill.	117

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Wilson v. Wilson	09/21/10	Supreme Court	West Virginia	Contingency Contract Fees Are Separate Consideration From Business Goodwill	208
Huebner, In re Marriage of	03/12/97	Court of Appeals, Second District	Wisconsin	The asset based approach was considered best here when the business was uniquely dependent on owner's services.	100
Kehrin v. Kehrin	09/14/10	Court of Appeals	Wisconsin	More Confusion re: Goodwill Warrants Correction by Court	105
McReath v. McReath	07/29/10	Court of Appeals	Wisconsin	Wisconsin Appellate Court Articulates New Standard on Division of Goodwill in Divorce	123
Moser v. Moser	07/17/01	Court of Appeals	Wisconsin	Court rules that goodwill is not included in fair market value as a matter of law, it is determined on a case-by-case basis. With health concern and absent a non-compete, there is no goodwill in this veterinary practice.	136

Ackerman v. Ackerman

Type of case: marital dissolution
Citation: 2006 Cal. App. LEXIS 2056
Court: Court of Appeal, Fourth Appellate District
State/Jurisdiction: California
Date of decision: December 27, 2006
Judge: Rylaarsdam

VIEW FULL TEXT

Key to Reasonable Compensation: Relate the Surveys to the Specific Professional

Ackerman reminds appraisers that in reasonable compensation cases, salary surveys are relevant only to the extent they account for professionals similarly situated to the subject practitioner.

One survey too big, other too small

The Ackerman husband was a successful plastic surgeon practicing in the highly affluent Newport Beach, CA community. When the Ackermans divorced, the only significant property issue became the value of goodwill in the husband's profession practice. Although both party experts used the capitalization of excess earnings method, each relied on different professional compensation surveys—and neither turned out to be very satisfactory to the trial court.

The wife's accountant, Glenn Mehner CPA-PFS (D&M Capital Management, Inc.; Costa Mesa, CA), had relied on a survey by the MGMA (Medical Group Management Association), because he believed it the most comprehensive, containing breakdowns by region as well as specialty and years in practice. Mehner chose the Pacific region—which encompassed the western states. Based on this data, he calculated reasonable annual median compensation to be $291,000 and $355,000 at the 75th percentile.

Husband's expert, James Christensen (affiliation unknown), used AMA (American Medical Association) data for four years prior to the divorce to calculate total revenue for self-employed surgeons as well as their professional expenses and net income; he then calculated net income as a percentage of total revenue. As a "sanity check," he applied this percentage to the husband's gross revenue, to calculate the husband's reasonable compensation as a percentage of his gross compensation. In addition, in answer to the trial court's request, Christensen conducted an informal survey of local plastic surgeons, revealing an average of $551,000 per year, slightly more than Christensen's ultimate conclusion of $515,000 for the husband's reasonable compensation.

Court applies its own quality control

But both surveys were problematic. The MGMA data encompassed too wide an area; the trial court was troubled by relating a national survey of physicians in the western states to a plastic surgery practice in Newport Beach, where the per capita discretionary income (upon which plastic surgery relies) "is remarkably different...than in such places as Pocatello, Idaho...or Little Rock, Arkansas."

Similarly, the trial judge had difficulty accepting the compensation statistics for employees in the AMA survey, as "it 'just boggles the mind' to think anyone making as much money as [the] husband would work for an employer and receive 'a third of what he was actually making.'" As a result, the informal survey of local practitioners might have provided the sole source of a "quality control check."

Instead, the trial court applied its own quality control, observing that the husband had made substantial income based on his particular talent, training and expertise as a self-employed professional; and because he had a "special reputation in the community." Given the court's "common sense" view of the husband's track record, it determined his reasonable compensation to be $544,000 per year.

When asked by the wife how it had reached this number, the court explained that the compensation data from both surveys were not "sufficiently fine-tuned and honed to our area here to be particularly valuable." Moreover—neither party had presented a vocational or compensation expert, "a medical head hunter or economist," who would have been more familiar with the Newport Beach market and could have supplemented the survey data.

Nevertheless, the trial judge had not picked its final number "out of the air," but had grounded it in the "curbstone" of the methodology used by the husband's expert, and as such, his common sense finding was confirmed on appeal.

Ahern v. Ahern

Type of case: Marital Dissolution
Citation: 2008 Me. LEXIS 1
Court: Supreme Court
State/Jurisdiction: Maine
Date of decision: January 3, 2008
Judge: Levy

Following its decision in *Hess v. Hess*, the Supreme Court of Maine once again sought to clarify the state's position on the personal versus enterprise goodwill debate in marital dissolution cases. Up to this point, Maine remained one of only several states that had yet to determine whether the enterprise goodwill of a professional practice constitutes marital property.

Failure to explain components of goodwill

During the Ahern's twenty-one year marriage, the husband was the sole principal of a dental practice. At their divorce trial, the wife's expert assigned the dental practice a fair market value of $538,000, of which $184,000 constituted the "hard assets" and approximately $173,000 constituted goodwill. (According to the trial court, the appraiser "failed to explain the character of the remaining balance" of more than $181,000.) The wife's expert used an excess earnings method to arrive at his value, averaging earnings of the practice over the previous five years. These earnings figures were skewed by at least one other dentist working in the practice during these years, in

addition to the husband. As to the goodwill component, the expert attributed it to the husband's "reputation and skill as a dentist," and admitted that to realize its value, the husband would have to sell the practice.

By contrast, the husband's expert arrived at a fair market value for the practice of $366,000. While acknowledging that the practice had goodwill value—its realization contingent on the husband's participation for a considerable time after the potential sale of the practice—the expert did not specify how much of the $366,000 was goodwill.

The trial court concluded that the hard assets were worth $116,773. It expressly declined to include the wife's expert's goodwill value of $173,000, stating that this amount "represented personal goodwill of [the husband] as opposed to any 'enterprise good will.'" Any excess value in the expert's appraisal, after deducting the hard assets and personal goodwill, could be "deemed the value of 'enterprise goodwill,'" the trial court said. But given the lack of supporting evidence or explanation from the appraiser, it could not draw that conclusion, and the trial judge assigned a total value to the practice of $116,773. The wife appealed.

Maine stakes a clear position

The Maine Supreme Court recognized that it was among the minority of jurisdictions that has not specifically addressed how a divorce court should treat the goodwill of a professional practice. The Court referred to the frequently cited *May v. May* (W. Va. 2003), which collects "cases from the forty-two states that have addressed the issue and the three different approaches" that the majority states have developed. "Most jurisdictions embrace a framework that distinguishes between 'enterprise' goodwill and 'personal' goodwill," the Court said.

Despite its presence among the minority, however, "our prior decisions have implicitly recognized the distinction." For instance, Maine cases found that insurance agencies (as distinct from professional firms) have a transferable, divisible goodwill value, which does not attach to a principal agent or founder. By comparison, other cases recognized that the enhanced earning capacity a professional enjoys due to academic credentials, licenses, experience, and reputation is the "essence of 'personal' goodwill." (In a footnote, the Court expressly declined to follow the *Hess* framework, which found that the investment business had transferable goodwill value, but failed to distinguish its specific components.)

"We now adopt the enterprise/personal framework for the purpose of evaluating the goodwill of a professional practice in the context of an equitable distribution of property," the Court held. In this case, the experts "unequivocally" testified that the goodwill value of the dental practice resulted from the husband's skill and reputation. "As such, it was not readily transferable or realizable," but depended on such contingences as the husband willingly selling the practice. Further,

> Neither appraiser treated it as a component of the value of the practice arising from the practice's generally marketable established relationships, name, and business reputation, which are the earmarks of enterprise goodwill.

"Although we do not presume to address all possible permutations of the enterprise/personal goodwill distinction—and we caution that these categories could prove overly simplistic when applied to the circumstances of other cases," the Court added, it had "no difficulty" concluding that the personal goodwill value of the husband's dental practice was "not a species of property subject to equitable division." Accordingly, it affirmed the trial court's valuation in all respects.

In re Marriage of Alexander

Type of case: Marital Dissolution
Citation: 2006 Ill. App. LEXIS 836
Court: Appellate Court, Fifth Division
State/Jurisdiction: Illinois
Date of decision: September 7, 2006
Judge: Welch

'Multiattribute Utility Model' Accepted in Allocating Enterprise/Personal Goodwill

In this Illinois case concerning goodwill, valuation expert David Wood, CPA, CVA, ABV (Wood Forensic Valuation Service; Mt. Vernon, Illinois) offered a "novel" method for calculating the enterprise and personal components of goodwill in the valuation of a professional practice.

MUM's the model

Illinois follows the majority of states by recognizing the distinction between personal and enterprise goodwill, excepting the latter from the marital estate but including the former.

However, most if not all of the country's reported cases fail to provide specific guidance on how to calculate the separate components. Wood responded to this breach by developing the Multiattribute Utility Model (MUM); and the Alexanders' divorce provided a first test case.

The issues weren't complex: The doctor-husband owned a modest medical practice, which had grossed $842,000 and $950,000, respectively, in the two years prior to the parties' divorce. While the husband maintained the practice was worth only $20,000, the wife—based on Wood's valuation—argued that it was worth closer to $600,000. Of this, Wood had determined that approximately $350,000 was attributable to goodwill. Applying the MUM model, Wood calculated that 70% (or $245,000) consisted of enterprise goodwill, and the remaining 30% ($105,000) was personal.

At trial, the husband objected to MUM, arguing that as a scientific method, it did not pass the *Frye* test (*Frye v. United States,* 293 F. 1013 [D.C. Cir., 1923]). The trial court disagreed, finding that Wood's methodology—while novel—was not scientific, and therefore was subject only to the general rules regarding the admissibility of expert testimony. Further, the court found the MUM approach to be "thoughtful and persuasive," and though it reduced the total value of goodwill to $160,000, the court applied Wood's percentages, allocating approximately two-thirds to enterprise goodwill, and one-third to personal.