Forum

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'Goodwill' Means Bad News in Spousal Cases

By Fred Silberberg

Julia is a well-known actress. She has been a household name for the better part of 15 years. When she started out, she had trouble getting a part. Now, films are produced with her in mind as the star. If she is offered a part, it is at a huge premium in terms of her fee. Having her in a film nearly guarantees its success.

While lucky in film, Julia isn't as lucky in love. She's in the midst of a divorce. Her spouse claims she has "goodwill," and that he should get half the value of it. Julia doesn't agree. She lives in California where, for reasons that are not quite logical or understandable, she has no "goodwill."

Todd is an accountant. He works out of his house, and has developed a practice advising large corporations on the tax implications associated with mergers and acquisitions. He offers his services both by telephone and by traveling to his clients' sites.

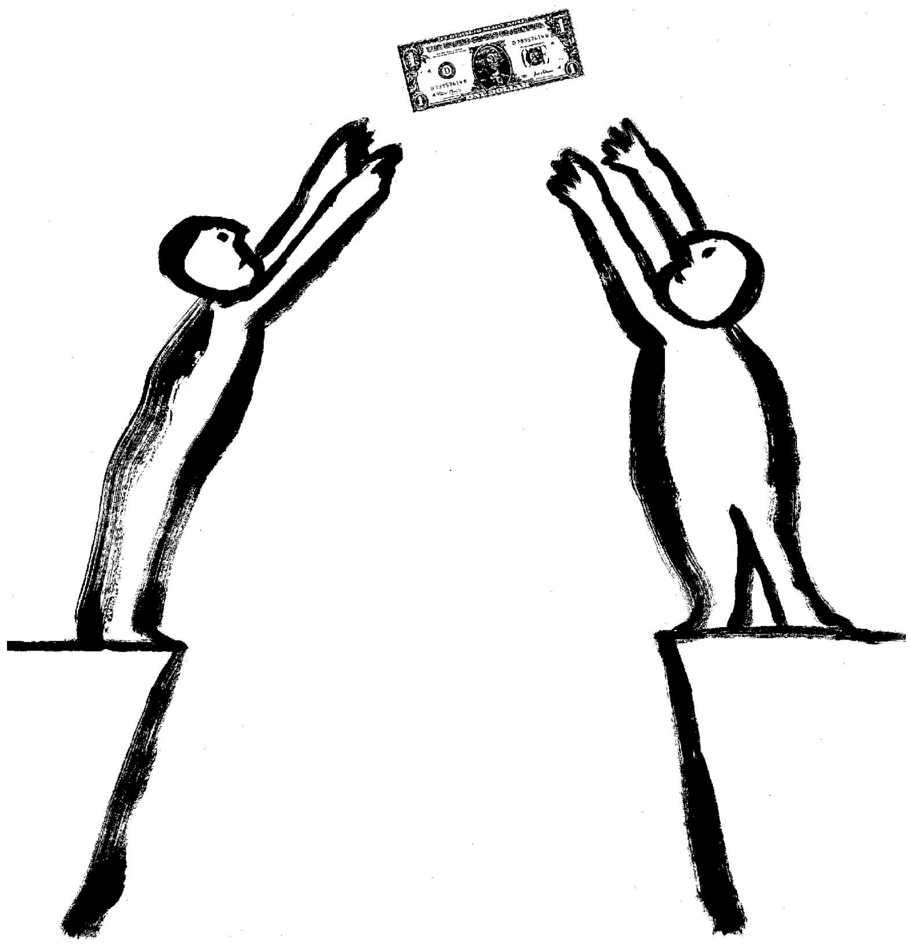
Todd has no staff to speak of — just an off-site answering service that also schedules appointments for him. His clients do not care from where he works. His reputation in the business is stellar and he has more than enough business to keep fully occupied.

For a one-man show, Todd has been very successful. He has worked so hard that his wife is estranged from him, and he, too, is in the midst of a divorce. His wife claims he has "goodwill," and that she should get half the value of it. John doesn't agree. But John lives in California where, for reasons that are not quite logical or understandable, he does, in fact, have "goodwill."

"Goodwill" as defined in our Business and Professions Code is the "expectation of continued public patronage." It is the intangible value of a business associated with one's skill or reputation. In the state of California, "goodwill" is an intangible asset that affects certain types of employment but not others. It is an artificial distinction between a few particular types of careers that results in one spouse being rewarded, unfairly, in a divorce at the expense of the employed spouse.

Our courts have had the opportunity to remedy this anomaly but they have not. In fact, on Oct. 28, the 2nd District Court of Appeal, having a chance to impose equal treatment upon divorcing spouses in this area, decided to maintain an artificial distinction on the issue of goodwill in *McTiernan v. Dubrow,* 2005 DJDAR 12855.

John McTiernan is a successful motion picture director who was found, by the trial court, to have goodwill associated with his business. McTiernan is the director of numerous blockbuster films who earned "six to high seven compensation" for his work per picture. The trial court assessed "goodwill" at $1.5 million, and ordered McTiernan to pay half to his wife.



There is no legitimate basis to distinguish the application of goodwill. It is time for the courts to take a position and apply it uniformly.

The appellate court reversed, finding that no goodwill applied in this situation. The primary basis for the court's distinction was the contention that McTiernan did not have a "business," in that a "business" refers to "an establishment, a thing, and not a person."

California has long been reluctant to assess goodwill in numerous situations, such as those concerning a celebrity. Yet, as the dissenting opinion of Justice Candace Cooper in *McTiernan* points out, prior decisions have found goodwill to exist in any business that is associated with someone's skill or reputation.

While the *McTiernan* court refused to apply goodwill in this instance (where there was, in fact, a corporation), courts have applied goodwill in other situations where no such assets existed — including the case of *Marriage of Rosen*, 105 Cal.App. 4th 808 (2002), where an attorney worked at home on appointed criminal appeals.

There is no legitimate basis to distinguish the application of goodwill. It is time for the courts to take a position and apply it uniformly. It either exists in any income-generating endeavor associated with reputation, or it does not. The law as it now stands certainly does not afford equal protection. If the courts do not see this, then the legislature certainly should.

This takes us back to Julia and Todd. In both instances, their earning power is enhanced because of their reputations. People make movies for Julia to star in because they know that Julia is a big box-office draw, and because having her in a film in and of itself makes the film more likely to be profitable.

People hire Todd because they know that his business acumen and reputation for giving sound advice will assist them in making the right decisions on an acquisition. While Julia has a "loan-out" corporation that provides her services, owns certain assets, receives her income and pays her expenses, Todd does not. By itself, Julia's name draws millions of dollars into her corporation each year, just because of who she is. The amount of money that Julia earns per year as a result of having this reputation is at least 25 times what Todd earns each year.

Yet, when it comes to their respective California divorces, Todd has to pay goodwill to his spouse, and Julia does not. Adding insult to injury, Todd put himself through school to earn his accounting degree and get his CPA license, neither of involved his wife as she did not enter the picture until afterward.

Julia dropped out after a year of college and got her first break by happenstance a few years later. If she has to pay her husband for goodwill, the net effect on her will be minimal. With one more upcoming picture, Julia will have earned more than enough money to pay her husband half of the goodwill value, with no impact at all on her lifestyle. Todd, on the other hand, will have to not only pay off the goodwill assessment from other assets, his ability to maintain a lifestyle anywhere near what he had before the split will be impossible.

The majority opinion in *McTiernan*, theorizes that a "business" is something saleable, and that is why goodwill should attach. The court points to doctors and lawyers as individuals who are capable of selling their practices. This is a nonsequiter as well. While some such practices are saleable, many are not. In the aforementioned *Rosen* case, clearly Mr. Rosen had nothing to sell. It is unlikely that anyone would buy a practice consisting of the handling of court-assigned criminal appeals.

By the same token, many lawyers and doctors are patronized because of their individual reputations, not those of their practice. Seriously ill patients seek out a certain renowned specialist because of his or her reputation. That specialist cannot always sell his practice, nor can many lawyers, because once he or she is gone there is no practice. By the same token, Julia cannot sell her movie career to a third party because she is her own movie career.

Todd cannot sell his practice either, because he is hired only because he is Todd. Yet, in a divorce situation, Julia walks without paying anything while Todd, the doctor and the lawyer all have to pay more to get out of their marriages for goodwill than they would if they were successful actors or sports celebrities.

There is that adage that "the law is an idiot" and in California, when it comes to the issue of "goodwill" that certainly seems to be the case.

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