



Digital Commons@

Loyola Marymount University
LMU Loyola Law School

Loyola of Los Angeles Entertainment Law Review

Volume 13 | Number 3

Article 7

3-1-1993

Celebrity Goodwill: Nailing Jello to the Wall

Joseph Montes

Follow this and additional works at: <https://digitalcommons.lmu.edu/elr>



Part of the [Law Commons](#)

Recommended Citation

Joseph Montes, *Celebrity Goodwill: Nailing Jello to the Wall*, 13 Loy. L.A. Ent. L. Rev. 615 (1993).
Available at: <https://digitalcommons.lmu.edu/elr/vol13/iss3/7>

This Notes and Comments is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Entertainment Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

NOTE

CELEBRITY GOODWILL: NAILING JELLO TO THE WALL

I. INTRODUCTION

In 1985 Joe and Nancy Piscopo filed for divorce in New Jersey.¹ Summarizing the Piscopo's relationship, the New Jersey Superior Court stated:

Joseph and . . . Nancy Piscopo met in 1970, lived together while students at Jones College, Jacksonville, Florida, married in 1973 and focused themselves on one goal—to facilitate Joseph's rise to stardom. Their arrangement required that [Nancy] attend to [Joe's] every personal special need while keeping house, bearing and raising their child and being a sounding board for [Joe's] artistic ideas. It took them ten years to move [Joe] from penury to celebrity.²

After dividing the tangible assets of the Piscopo estate, the court awarded Nancy monies representing her share of Joe's "celebrity goodwill."³ No court in New Jersey had ever awarded an interest in celebrity goodwill, and no court in the nation had ever used that term.⁴

On appeal, neither party contested Joe's celebrity status; however, Joe argued that even if an asset such as celebrity goodwill did exist, it could not be awarded because it could not be valued.⁵ Nancy argued that Joe did have celebrity goodwill and that any difficulties in valuation were immaterial—equity demanded an award.⁶

The Superior Court of New Jersey, Appellate Division, affirmed the award.⁷ The court held that celebrity goodwill was a divisible asset upon

1. *Piscopo v. Piscopo*, 555 A.2d 1190, 1191 (N.J. Super. Ct. Ch. Div. 1988), *aff'd in part*, 557 A.2d 1040 (N.J. Super. Ct. App. Div. 1989), *cert. denied*, 564 A.2d 875 (N.J. 1989). Joe is probably best known for his work during the early 1980's on the weekly television show *Saturday Night Live*.

2. *Id.*

3. *Id.* at 1193.

4. *Piscopo v. Piscopo*, 557 A.2d 1040, 1040 (N.J. Super. Ct. App. Div. 1989), *cert. denied*, 564 A.2d 875 (N.J. 1989).

5. *Id.*

6. *Id.*

7. *Id.*

marital dissolution.⁸ This ruling very likely caused divorce lawyers across the country to amend both complaints and fee agreements while celebrities with rocky marriages suddenly invested millions in flowers, candy, diamonds, cars, and houses to win back the affection of their non-celebrity spouses.

In his article on goodwill and dissolution, Ira Lurvey described goodwill as "amorphous, ephemeral, elusive; and, by general definition, speculative and uncertain . . ."⁹ Taking the concept one step further, defining "celebrity" goodwill is like trying to nail jello to the wall.¹⁰ The unique qualities of the entertainment industry increase the uncertainty prevalent throughout the goodwill analysis. Popularity, scandal, nepotism, publicity, timing, and luck all contribute unpredictably to the success or failure of a celebrity.

In general, in any goodwill analysis, a court should engage in four stages of analysis.¹¹ First, the court should decide on a definition of goodwill. Then, it should determine whether or not goodwill exists within the parameters of the chosen definition. Once it finds goodwill, the court should next determine whether it is "property" subject to distribution under the applicable laws of the jurisdiction. Finally, if the court gets over all of the preceding hurdles, it should ascribe a value to the goodwill.

8. New Jersey is an equitable distribution jurisdiction, as opposed to a community property state. In a community property state, a court usually strives to divide the assets acquired during the marriage equally. Those assets separately acquired prior to the marriage are not divided. For example, in California, "the court may award any asset to one party on such conditions as it deems proper to effect a *substantially equal division of the property*." CAL. CIV. CODE § 4800(b)(1) (West 1992) (emphasis added).

In an equitable distribution jurisdiction, the court is given broader discretion in making dissolution awards to achieve what it feels is "fair," regardless of the source of the asset. HAROLD E. VERRALL & GAIL BOREMAN BIRD, CALIFORNIA COMMUNITY PROPERTY 3 (5th ed. 1988). The relevant language from New Jersey's equitable distribution statute provides that the court may "effectuate an *equitable distribution of the property*, both real and personal, which was legally and beneficially acquired by them or either of them during the marriage." N.J. STAT. ANN. § 2A:34-23 (West 1992) (emphasis added). The court included Joe Piscopo's celebrity goodwill as property within the meaning of this statute.

9. Ira Lurvey, *Professional Goodwill on Marital Dissolution: Is It Property or Another Name for Alimony?*, 52 CAL. ST. B.J. 27, 30 (1977).

10. By suggesting jello is not easily affixed to a wall using nails, this author does not wish to suggest that jello is in any way an inferior food product, or that jello should be subjected to pointless acts of violence and persecution. This author merely suggests that the unique properties of jello lend themselves to this particular analogy.

11. See, e.g., *Dugan v. Dugan*, 457 A.2d 1 (N.J. 1983).

This Note traces the development of celebrity goodwill and discusses whether or not Joe had it.¹² The Note then discusses whether celebrity goodwill is property subject to dissolution under New Jersey law.¹³ Next, the Note examines the valuation process used by the court.¹⁴ Finally, this Note discusses the equity dilemma surrounding celebrity goodwill and suggests an alternative approach for assessing the celebrity goodwill that more accurately reflects the *Piscopo* court's¹⁵ motivation for finding that celebrity goodwill existed.¹⁶

II. THE DEVELOPMENT OF CELEBRITY GOODWILL

Most courts generally agree that two basic types of goodwill exist—commercial and professional.¹⁷ Commercial goodwill, also known as business goodwill, is usually associated with a company.¹⁸ Professional goodwill is usually associated with individuals engaged in the private practice of a profession, as with a doctor or lawyer.¹⁹ The *Piscopo* court developed celebrity goodwill by analogizing it to professional goodwill.²⁰ Interestingly, the choice of professional goodwill as a basis for celebrity goodwill was more a product of necessity than any profound legal reasoning, since many of the elements necessary for a valuation of commercial goodwill were missing in the *Piscopo* case.²¹ However, even if the court had been able to analyze and value the goodwill of Joe's company under the concept of business goodwill, in all likelihood the result would have been the same.²²

12. See *infra* part II.

13. See *infra* part III.

14. See *infra* part V.

15. Since the appellate decision basically affirmed the decision of the trial court, for the purposes of this Note, the term "*Piscopo* court" will refer both to the New Jersey trial court in *Piscopo v. Piscopo*, 555 A.2d 1190 (N.J. Super. Ct. Ch. Div. 1988), and the New Jersey appellate court in *Piscopo v. Piscopo*, 557 A.2d 1040 (N.J. Super Ct. App. Div. 1989), unless a citation refers specifically to one of the two decisions.

16. See *infra* part VI.

17. For a more complete discussion of the differences between personal or professional goodwill and business or enterprise goodwill, see James T. Friedman, *Professional Practice Goodwill: An Abused Value Concept*, 2 J. AM. ACAD. MATRIM. LAW. 23, 24 (1986).

18. Michael E. Davis, *Valuation of Professional Goodwill Upon Marital Dissolution*, 7 SW. U. L. REV. 186, 189 (1975).

19. *Id.*

20. *Piscopo v. Piscopo*, 555 A.2d 1190, 1191-92 (N.J. Super. Ct. Ch. Div. 1988).

21. See *infra* note 103 and accompanying text.

22. See discussion *infra* part V.

A. A Goodwill Definition

Goodwill has never been an easy concept to define.²³ Historically, New Jersey courts have attempted to define goodwill in terms of what it is not. For example, the case law prior to 1988 held that goodwill was not merely enhanced earning capacity.²⁴ The classic case of enhanced earning capacity involves a spouse who works to support the other spouse's further education. Once the "enhanced" spouse has obtained his or her degree, the couple divorces.²⁵ New Jersey has held that a degree or the enhanced earning capacity it represents is not a divisible asset because it is too speculative.²⁶ Thus, in New Jersey, while enhanced earning capacity may be a factor in determining the existence of goodwill, other elements are also required.²⁷

Other jurisdictions have defined goodwill as reputation.²⁸ Unlike the "enhanced earning capacity" jurisdictions, the "reputation" jurisdictions ascribe goodwill based upon a business's reputation, an asset developed over time.²⁹ These jurisdictions adopt the rationale that "[b]roadly defined, a firm's goodwill is its reputation, an asset that allows the firm to generate greater earnings than a firm lacking goodwill."³⁰

23. See *supra* note 9 and accompanying text.

24. "Goodwill is to be differentiated from earning capacity. It reflects not simply a possibility of future earnings, but a probability based on existing circumstances." *Dugan v. Dugan*, 457 A.2d 1, 6 (N.J. 1983).

25. An exhaustive exploration of this scenario can be found in Deborah A. Batts, *Remedy Refocus: In Search of Equity in "Enhanced Spouse/Other Spouse" Divorces*, 63 N.Y.U. L. REV. 751 (1988).

26. See, e.g., *Lynn v. Lynn*, 453 A.2d 539 (N.J. 1982). Along these same lines, Deborah Batts suggests jurisdictions that rely exclusively on enhanced earning capacity as a goodwill definition often fail to consider the ability, diligence, etc. that the enhanced spouse contributed toward his or her own enhancement. Batts, *supra* note 25, at 781.

27. See *infra* notes 31-32 and accompanying text.

28. The State of Wisconsin is one example. See, e.g., *Holbrook v. Holbrook*, 309 N.W.2d 343 (Wis. Ct. App. 1981).

29. "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." *Id.* at 354. Further, "[t]he element of time is usually a very important factor in the determination of and measure of goodwill. Thus, goodwill does not ordinarily come into existence immediately upon the establishment of a business, or even within a few months of its establishment." Joseph R. Wall, *The Recognition and Valuation of Professional Goodwill in the Marital Estate*, 66 MARQ. L. REV. 697, 702 (1983).

30. Reginald A. Emshoff, *Valuation of a Professional Practice*, 55 WIS. B. BULL. 10, 11 (1982).

New Jersey adopts a broader vision of goodwill than either the "enhanced earning capacity" or the "reputation" jurisdictions. "In a broad sense goodwill includes a whole host of intangibles including the quality of management, the ability of the organization to produce and market efficiently, and the existence and nature of competition."³¹ Further, "[g]oodwill is generally regarded as the summation of all the special advantages, not otherwise identifiable, related to a going concern. It includes such items as a good name, capable staff and personnel, high credit standing, reputation for products and services, and favorable location."³²

The *Piscopo* court claimed to adopt its definition of goodwill from *Dugan v. Dugan*, a New Jersey Supreme Court decision.³³ *Dugan* defined goodwill as "essentially reputation that [would] probably generate future business."³⁴ By using the words "essentially reputation," the *Dugan* court distinguished its definition from those that relied exclusively on reputation. Additionally, this definition incorporated the enhanced or future earnings idea by using the "future business" language. Finally, this definition added the requirement of *probability* of future business.³⁵ Thus, in New Jersey, there must be more than mere reputation or enhanced earning capacity to constitute goodwill; there must also be a probability of future business/earnings, not just a possibility.

B. Celebrity Goodwill in New Jersey

Where *Dugan* established the standard for a goodwill definition upon marital dissolution in New Jersey, *Piscopo* established the standard for celebrity goodwill. In Joe Piscopo's case, all of his work was owned by Piscopo Productions, 51% of which was owned by Joe, 48% by Nancy and 1% by Joe's father.³⁶ Joe was paid through this company.³⁷ Due to this business framework, it might have made more sense to value the goodwill

31. *Dugan*, 457 A.2d at 4-5.

32. *Id.* at 4 (citing J.M. SMITH & K.F. SKOUSEN, INTERMEDIATE ACCOUNTING 283 (7th ed. standard vol. 1982)).

33. *Id.* at 1.

34. *Id.* at 3.

35. "Future earning capacity *per se* is not goodwill. However, when that future earning capacity has been enhanced because reputation leads to probable future patronage from existing and potential clients, goodwill may exist and have value." *Id.* at 6.

36. *Piscopo v. Piscopo*, 555 A.2d 1190, 1190 (N.J. Super. Ct. Ch. Div. 1988).

37. *Piscopo v. Piscopo*, 557 A.2d 1040, 1041 (N.J. Super. Ct. App. Div. 1989).

of the business. Nevertheless, as previously mentioned, the *Piscopo* court was probably forced to analogize celebrity goodwill to professional goodwill rather than to commercial goodwill.³⁸ The accountant who calculated the valuation was unable to determine a value for the goodwill of the business because several factors used in the "accepted" valuation formula were missing.³⁹ Since Joe's corporation had no tangible assets, other than Joe himself, and since determining a reasonable compensation for Joe was impossible, the accountant was unable to use any traditional commercial goodwill valuation formulas.⁴⁰ However, had the court been able to value the goodwill of Joe's business using a business goodwill model, the amount of the goodwill award might not have been different from that determined under the professional goodwill analysis.⁴¹

In light of its decision to use professional goodwill as the model for celebrity goodwill, had the *Piscopo* court followed the New Jersey Supreme Court precedent and the *Dugan* definition of goodwill, the *Piscopo* court should have defined celebrity goodwill as essentially Joe's reputation coupled with the probability that he would obtain future business.⁴² Assuming such a definition, Joe argued that although he was a celebrity, the volatile nature of the entertainment industry actually suggested only the possibility, not the probability, of future business.⁴³ Ignoring his argument, the court distinguished *Dugan* by stating the distinction made in *Dugan* between possible and probable earnings referred only to a new professional degree untested in the marketplace.⁴⁴ Here, since Joe had a "track record" of past earnings, the court discounted the argument rather than address the peculiarities of the entertainment world.⁴⁵ What the court failed to explain was why the *Dugan* court included a requirement of probability when the professional involved there also had a "track record" of past earnings.⁴⁶

38. *Id.*

39. Francis W. Donahue & Gary N. Skoloff, *Court Views Celebrity Goodwill As Part of Assets in Divorce Case*, NAT'L. L. J., Aug. 14, 1989, at 18.

40. See *infra* note 102.

41. See discussion *infra* part V.

42. See *supra* notes 33-35.

43. *Piscopo v. Piscopo*, 557 A.2d 1040, 1040 (N.J. Super. Ct. App. Div. 1989). Interestingly, if Joe were making this argument today, the court may be persuaded. Since his divorce, Joe has all but dropped from the limelight.

44. *Piscopo*, 557 A.2d at 1042.

45. *Id.*

46. See generally *Dugan v. Dugan*, 457 A.2d 1 (N.J. 1983).

Thus, in *Piscopo*, the court appeared to rely on New Jersey precedent by reciting the definition of goodwill from *Dugan*, but then emasculated the definition to accommodate the new concept of celebrity goodwill. Strict adherence to the New Jersey definition of goodwill would have required a finding of *probable*, not merely *possible*, future earnings. In an industry where artist Andy Warhol estimated the duration of the average person's fame at fifteen minutes,⁴⁷ a finding of probable future earnings would seemingly be impossible.

Joe argued that only a "superstar" would have probable future earnings within the meaning of the *Dugan* definition.⁴⁸ A celebrity of Frank Sinatra's status, for example, would have deferred compensation agreements, royalties, residuals, and long term contracts, thereby facilitating a more accurate prediction of probable future earnings.⁴⁹ Even though Joe had none of these assets, and presumably then, no probable future earnings, the court found that Joe had celebrity goodwill.⁵⁰

C. The Peer Problem

After choosing a definition for celebrity goodwill and stretching that definition to include Joe, the *Piscopo* court knocked down another hurdle posted by the *Dugan* court. The court in *Dugan* implied an additional test for determining the existence of goodwill in the court's valuation analysis. This determination is based upon a peer assessment—a comparison between the income of the professional involved in the divorce and the incomes of his peers to arrive at an equitable valuation.⁵¹

In *Dugan*, the court valued the goodwill of an attorney.⁵² In determining whether or not goodwill existed and as part of the valuation analysis, the court measured Mr. Dugan's income for the past five years and subtracted the average income of an attorney of similar age, experience, and capability.⁵³ These excess earnings were capitalized—multiplied by an "equitable" fraction—to determine the value of the goodwill.⁵⁴ Apparently then, if Mr. Dugan had no "peers," the court either would not

47. DR. LAURENCE J. PETER, PETER'S QUOTATIONS: IDEAS FOR OUR TIME 183 (1977).

48. See Donahue, *supra* note 39, at 21.

49. *Id.*

50. *Piscopo v. Piscopo*, 557 A.2d 1040, 1043 (N.J. Super. Ct. App. Div. 1989).

51. *Dugan v. Dugan*, 457 A.2d 1, 9 (N.J. 1983).

52. *Id.*

53. *Id.*

54. *Id.*

have found goodwill, or would not have been able to value it. Granted, the determination of who exactly is one's peer gives the court a lot of leeway in determining whether or not goodwill exists. By choosing a sufficiently impoverished "equal" the court can, in furtherance of equity, find goodwill in almost any instance. Nevertheless, to use this capitalization method, one still needs a peer.⁵⁵

In the *Piscopo* case, arguably Joe had no peer. Success in the entertainment industry is a combination of a variety of factors that may be totally unrelated to the entertainer's experience, education, and capability. Should Joe's peer be taken from the pool of all actors, employed or unemployed, that have similar characteristics? Is his peer a comedian or an actor/comedian? Obviously, the court had great leeway in selecting a peer that would yield the existence of goodwill. Predictably, it held that Joe had excess earnings, although it did not identify who his peers were.⁵⁶

III. BUT IS CELEBRITY GOODWILL PROPERTY?

Whether or not Joe had celebrity goodwill would be irrelevant to the dissolution proceedings if such an "asset" was not property. New Jersey's equitable distribution statute allows New Jersey courts to make awards "to effectuate an equitable distribution of the property, both real and personal, which was legally and beneficially acquired by them or either of them during the marriage."⁵⁷ The *Piscopo* court relied on two previous *New York* cases in making its determination that Joe's celebrity goodwill was property, and therefore, a divisible marital asset.⁵⁸

55. "[C]apitalization . . . computes excess earnings by comparing the average income of the independent professional to the average income of a salaried professional of equivalent stature." Eve Barrie Masinter, *Professional Goodwill in Louisiana: An Analysis of its Classification, Valuation, and Partition*, 43 LA. L. REV. 119, 145 (1982).

56. In *Piscopo v. Piscopo*, 555 A.2d 1190 (N.J. Super. Ct. Ch. Div. 1988), the trial judge was not satisfied that enough evidence had been introduced at the trial describing a "peer," and ordered that "[t]he parties shall have 60 days to supplement the record or to accept the figures reached by the court in its oral decision." *Id.* at 1193. The appellate court did not address the issue of who Joe's peers might be. See generally *Piscopo*, 557 A.2d 1040 (N.J. Super. Ct. App. Div. 1989). Presumably then, either Nancy was able to sufficiently identify Joe's peers after the trial, or the *Piscopo* courts effectively ignored the precedent established in *Dugan* by abandoning the peer assessment valuation method described in *Dugan*.

57. N.J. STAT. ANN. § 2A:34-23 (West 1992).

58. *Piscopo*, 555 A.2d at 1190 (The court cites to *Golub v. Golub*, 527 N.Y.S.2d 946 (N.Y. Sup. Ct. 1988), and since *Golub* is based upon *O'Brien v. O'Brien*, 489 N.E.2d 712 (N.Y. 1985), the *Piscopo* court impliedly adopts *O'Brien*).

In *O'Brien v. O'Brien*,⁵⁹ the Court of Appeals of New York held that a doctor's newly acquired license to practice medicine was marital property, and it made a distributive award accordingly.⁶⁰ The New York court found that a medical license, despite not fitting within the traditional common law definitions of property, was within the scope of marital property.⁶¹ The court relied on the legislative purpose behind New York's Equitable Distribution Law⁶² and stated:

[T]he New York Legislature deliberately went beyond traditional property concepts when it formulated the Equitable Distribution Law. . . . [O]ur statute recognizes that spouses have an equitable claim to things of value arising out of the marital relationship and classifies them as subject to distribution by focusing on the marital status of the parties at the time of acquisition. Those things acquired during marriage and subject to distribution have been classified as "marital property" although, as one commentator has observed, they hardly fall within the traditional property concepts⁶³

In *O'Brien*, the only significant asset the couple possessed was the husband's medical license.⁶⁴

The second case the *Piscopo* court relied upon was *Golub v. Golub*.⁶⁵ In *Golub*, the court generalized the *O'Brien* holding to include *all sources* of enhanced earning capacity.⁶⁶ *Golub* involved a model whose earning capacity had been increased during the course of the marriage due in part to contributions made by her husband.⁶⁷ The court expanded the definition of marital property to include "a spouse's unique ability to commercially exploit his or her fame."⁶⁸ The New York court held that the

59. 489 N.E.2d 712 (N.Y. 1985).

60. *Id.* at 712.

61. *See generally id.*

62. N.Y. DOM. REL. LAW § 236[B][1][c] (McKinney 1992).

63. *O'Brien*, 489 N.E.2d at 715.

64. *Id.* at 714.

65. 527 N.Y.S.2d 946 (N.Y. Sup. Ct. 1988).

66. Extending *O'Brien*, the court said: "In *O'Brien*, the fact that the professional license itself had no market value was irrelevant. It is the enhanced earning capacity that the license affords the holder that is of value. In this respect, all sources of enhanced earning capacity become indistinguishable." *Id.* at 949.

67. *Id.* at 947-48.

68. *Id.* at 949.

husband was entitled to a share of his spouse's fame.⁶⁹ The court also suggested that goodwill exists with any "exceptional wage earner."⁷⁰

Relying on these precedents, the *Piscopo* court held that Joe's celebrity goodwill was marital property.⁷¹ This reliance, however, is problematic. First, the *O'Brien* case involved a situation where no goodwill would have been found under New Jersey law.⁷² Since the husband's medical license was "newly acquired," the reputation element the *Piscopo* court (using the *Dugan* definition of goodwill) would require, was absent. Additionally, in *O'Brien*, the medical license was the only significant asset the family possessed.⁷³ The *Piscopos* had several other assets, therefore the equitable motivations behind the *O'Brien* finding would not be as persuasive in the context of the *Piscopo* case.

Turning to the *Golub* case, the definition of goodwill *Golub* used also contradicted the *Dugan* definition upon which the *Piscopo* court relied. The *Golub* court treated enhanced earning capacity alone as sufficient evidence to establish goodwill.⁷⁴ Both the *O'Brien* and the *Golub* courts relied upon the legislative intent behind New York's Equitable Distribution statute. They did not consider arguments from courts of other states that had equitable distribution statutes.⁷⁵ The *O'Brien* and *Golub* courts recognized that decisions of other states relied principally on their own statutes and the legislative history underlying them, and should therefore not control in New York.⁷⁶ The *Piscopo* court opted to do the reverse, incorporating the *intent* of the New York legislature into the New Jersey statute, while discounting the case law of its own state.⁷⁷ The *Piscopo*

69. *Id.* at 950.

70. *Golub*, 527 N.Y.S.2d at 950.

71. See generally *Piscopo*, 555 A.2d 1190.

72. See generally *O'Brien*, 489 N.E.2d 712.

73. *Id.* at 714.

74. See generally *Golub*, 527 N.Y.S.2d 946.

75. *O'Brien*, 489 N.E.2d at 715; *Golub* impliedly recognizes this through its adoption and citation of *O'Brien*. *Golub*, 527 N.Y.S.2d at 950.

76. *O'Brien*, 489 N.E.2d at 715.

77. "[A] person's earning capacity, even where its development has been aided and enhanced by the other spouse, as is here the case, should not be recognized as a separate, particular item of property' within the meaning of the New Jersey statute. Potential earning capacity is a factor in determining what distribution of marital property will be 'equitable' and is obviously relevant on the issue of alimony, but the court held it should not itself be deemed property." Grier H. Raggio, Jr., *Professional Goodwill and Professional Licenses as Property Subject to Distribution upon Dissolution of Marriage*, 16 FAM. L. Q. 147, 156 (1982) (quoting *Stern v. Stern*, 331 A.2d 257, 260 (N.J. 1975)).

See also *Lynn v. Lynn*, 453 A.2d 539 (N.J. 1982) (A medical license is not marital property subject to distribution in New Jersey.).

court's only comment was that "[p]laintiff's reliance on [the New Jersey cases was] misplaced."⁷⁸

IV. THE TALENT ARGUMENTS: A DANGEROUS TREND

It was within this framework of *O'Brien* and *Golub* that the *Piscopo* court decided its case. *O'Brien* had held that the enhanced earning capacity represented by a professional degree untested in the marketplace was a divisible asset upon marital dissolution.⁷⁹ *Golub* held that any enhanced earning capacity developed during the marriage could be valued and divided upon dissolution.⁸⁰ The *Piscopo* court extended these two cases, holding that Joe's increased celebrity status and enhanced earning capacity constituted celebrity goodwill, subject to valuation and division upon dissolution.⁸¹

Joe argued that this increased celebrity status was due exclusively to his own innate talent.⁸² As such, the status was not subject to valuation and division upon dissolution. He first argued that since his talent was not alienable, it was not divisible.⁸³ While not directly addressing this talent argument, the court sidestepped the issue by holding that Joe's right of publicity—his right to exploit himself and his likeness—was alienable.⁸⁴

Subsequent to the *Piscopo* case, a New York superior court decided *Elkus v. Elkus*,⁸⁵ and discussed the talent arguments. *Elkus* involved opera singer Frederica von Stade.⁸⁶ Prior to her marriage, she worked with New York's Metropolitan Opera Company and was only paid \$2,250 per year.⁸⁷ She married Peter Elkus, who gave up his own singing career to train Frederica and raise their children.⁸⁸ Upon dissolution, Frederica was making \$621,878 per year.⁸⁹ The court held that the enhanced earning

78. *Piscopo v. Piscopo*, 557 A.2d 1040, 1043 (N.J. Super. Ct. App. Div. 1989).

79. *O'Brien v. O'Brien*, 489 N.E.2d 712 (N.Y. 1985).

80. *Golub v. Golub*, 527 N.Y.S.2d 946, 950 (N.Y. Sup. Ct. 1988).

81. *Piscopo v. Piscopo*, 555 A.2d 1190, 1193 (N.J. Super. Ct. Ch. Div. 1988), *aff'd*, 557 A.2d 1040 (N.J. Super. Ct. App. Div. 1989).

82. Appellant's Brief at 33, *Piscopo v. Piscopo*, 557 A.2d 1040 (N.J. Super. Ct. App. Div. 1989) (portions ordered sealed).

83. *Id.*

84. See *infra* notes 117-130 and accompanying text.

85. *Elkus v. Elkus*, 572 N.Y.S.2d 901 (N.Y. App. Div. 1991).

86. *Id.*

87. *Id.* at 902.

88. *Id.*

89. *Id.*

capacity was a divisible asset for the purpose of dissolution.⁹⁰ Unlike *Golub*, where the enhanced earning capacity of the celebrity spouse, Marisa Berenson, was due in large part to the marketing and managerial skills of her husband,⁹¹ here Frederica's enhanced earning capacity was a product of Frederica's voice, albeit refined by Peter.⁹²

One commentator, Janine Menhennet, in her article *Elkus v. Elkus: A Step in the Wrong Direction*,⁹³ criticizes the decision of the *Elkus* court, articulating many of the talent arguments made by Joe in his appellate brief.⁹⁴ However, the *Elkus* court rejected these arguments, holding that, "[w]hile it is true that [Frederica] was born with talent . . . [d]uring the course of the marriage, [her husband's] active involvement in [Frederica's] career, in teaching, coaching, and critiquing her, as well as in caring for their children, clearly contributed to the increase in its value."⁹⁵

Thus, in New York, "the enhanced skills of an artist . . . , albeit growing from an innate talent, which have enabled her to become an exceptional earner, may be valued as marital property subject to equitable distribution."⁹⁶ The import of this statement by the *Elkus* court cannot be overemphasized. What the *Elkus* court has essentially done is to extend the holdings of *O'Brien* and *Golub* from valuation of enhanced earning capacity to valuation of enhanced skills.⁹⁷

Returning to the *Piscopo* case, the New Jersey court rejected the talent arguments without discussion and gave no explanation for the absence.⁹⁸ Because the *Piscopo* court relied so heavily on New York precedent in its decision, if the talent arguments were again raised in New Jersey, most likely the court would simply rely on *Elkus* as precedent, rather than address the talent arguments. *Elkus*' valuation of "enhanced skills" would completely fly in the face of the New Jersey definition of goodwill taken from *Dugan* and cited by *Piscopo*.

90. *Elkus*, 572 N.Y.S.2d at 905.

91. See generally *Golub v. Golub*, 527 N.Y.S.2d 946 (N.Y. Sup. Ct. 1988).

92. *Elkus*, 572 N.Y.S.2d at 901.

93. Janine R. Menhennet, *Elkus v. Elkus: A Step in the Wrong Direction*, 12 LOY. L.A. ENT. L.J. 561 (1992).

94. Appellant's Brief at 32-35, *Piscopo v. Piscopo*, 557 A.2d 1040 (N.J. Super. Ct. App. Div. 1989) (portions ordered sealed).

95. *Elkus*, 572 N.Y.S.2d at 904.

96. *Id.*

97. *Id.*

98. *Piscopo*, 557 A.2d at 1040.

Dugan held that goodwill was reputation coupled with the probability of future earnings.⁹⁹ *Piscopo* seemingly altered that definition to encompass Joe, requiring only the possibility of future earnings.¹⁰⁰ Reliance on *Elkus* by a New Jersey court would radically alter the definition of celebrity goodwill, reducing it to a mere requirement of "enhanced skills." Thus, if New Jersey continues to follow New York case law, the definition of celebrity goodwill will likely continue to erode. Perhaps in the very near future, any "skilled" celebrity divorcing in New Jersey will automatically be found to have celebrity goodwill, regardless of the status of his career, and be forced to pay an "equitable" share to his non-celebrity spouse.

V. THE VALUATION MYSTERY

After determining that celebrity goodwill existed and it was property subject to distribution within the New Jersey statute, the *Piscopo* court was next confronted with the question of valuation.¹⁰¹ Numerous courts and commentators have suggested various valuation methods for celebrity goodwill.¹⁰² Because of the way Joe's finances were structured, the method that probably would have made the most sense would have been to value the goodwill of Joe's business. However, two of the variables in the business valuation formula were missing in *Piscopo*'s case, so the court-appointed expert was unable to use any traditional business/commercial goodwill valuation formulas.¹⁰³

Undaunted, Irwin Marks, the court-appointed expert, did calculate a value of Joe's celebrity status based upon an "accepted" formula.¹⁰⁴ Mr. Marks took 25% of Joe's average gross earnings for three of the past five

99. *Dugan v. Dugan*, 457 A.2d 1, 3 (N.J. 1983).

100. See *supra* notes 48-50 and accompanying text.

101. *Piscopo v. Piscopo*, 557 A.2d 1040, 1041 (N.J. Super. Ct. App. Div. 1989).

102. For a thorough coverage of the various valuation methods used see, e.g., Batts, *supra* note 25, at 776-99; Mervyn B. Frumkes, *Valuation of Professional Practices*, 2 J. AM. ACAD. MATRIM. LAW. 1, 16-22 (1986); Stuart B. Walzer & Jan C. Gabrielson, *Celebrity Goodwill*, 2 J. AM. ACAD. MATRIM. LAW. 40-43 (1986).

103. According to the accountant who valued *Piscopo*'s celebrity goodwill, the fact that the corporation had no tangible assets other than Joe and the impossibility of determining a reasonable compensation for Joe precluded the use of the business goodwill formula. Donahue, *supra* note 39, at 18.

However, had the court been able to use one of the "traditional" business goodwill valuation formulas, the valuation analysis and resulting award might not have been different from what took place here. See *infra* notes 113-14 and accompanying text.

104. Donahue, *supra* note 39, at 18.

years, eliminating two of the years because they were "abnormal."¹⁰⁵ The court approved the formula with one small change—it included all five years, presumably because New Jersey precedent required a minimum of five years in its "traditional" capitalization formula, although New York precedent probably had a similar requirement.¹⁰⁶

No precedent existed in New Jersey or New York for the exact capitalization method Mr. Marks used. The capitalization method of valuation, which Mr. Marks' "accepted" formula most closely resembled, requires three steps.¹⁰⁷ First, the average earnings for the past five plus years are taken. Second, a reasonable return on the investment is deducted, or in the case of an individual professional, the average income of a similar practitioner is deducted. Finally, the remainder, or excess earnings are capitalized using a higher percentage for riskier businesses and a lower percentage for safer businesses.¹⁰⁸

The capitalization method of valuation has been criticized for being over-inclusive.¹⁰⁹ Since the capitalization is based upon excess earnings, critics argue that factors not properly classified as goodwill may contribute to the excess earnings, thus causing inaccuracies.¹¹⁰ Mr. Marks' solution to this problem was to remove the excess earnings element altogether. By his own admission, a figure representing a reasonable income for Joe was incalculable.¹¹¹ Thus, Mr. Marks assessed the goodwill based upon Joe's average gross income without deducting a reasonable compensation,¹¹² in effect grossly overvaluing the goodwill by attributing all of Joe's earnings to celebrity goodwill.

105. *Piscopo v. Piscopo*, 557 A.2d 1040, 1041 (N.J. Super. Ct. App. Div. 1989).

106. *Donohue*, *supra* note 39, at 18.

107. *See, e.g., Stern v. Stern*, 331 A.2d 257 (N.J. 1975); *Dugan v. Dugan*, 457 A.2d 1 (N.J. 1983).

108. The higher percentage is assessed with a riskier business because the formula assumes that the riskier the business, the more likely goodwill contributed to the success of the business. In such a business, the goodwill would thus be more valuable and the monetary award of goodwill should therefore be a higher percentage of the average excess earnings. *See Masinter, supra* note 55, at 144-45.

109. *Emshoff, supra* note 30, at 12; *see also, Davis, supra* note 18, at 188.

110. "An analysis of fair compensation for an individual must take into account the character of the practice and the hours and commitment that produce the earnings; the appraiser cannot simply accept total earnings that are above average to have been the product of goodwill." *Emshoff, supra* note 30, at 12; *see also Davis, supra* note 18, at 188.

111. *See Donahue, supra* note 39, at 18.

112. "He [Marks] calculated [Joe's] celebrity goodwill by taking 25% of his average gross earnings He applied no further discount. He said that by using the figure of 25%, he had already discounted the applicable percentage based upon his experience and training." *Piscopo v. Piscopo*, 557 A.2d 1040, 1041 (N.J. Super. Ct. App. Div. 1989).

Mr. Marks admitted that he had never been involved in the purchase or sale of a business where the sole source of income was a show business celebrity.¹¹³ Nevertheless, the court found the formula used by Mr. Marks represented an equitable valuation.¹¹⁴

Had the court been willing to value the goodwill of Joe's corporation, the result might not have been any different. Using the capitalization method, the court would first have subtracted the tangible assets, such as office furniture, machinery, and product on hand. Theoretically, the remainder would be the goodwill, and this figure would be capitalized.¹¹⁵ Joe's corporation had no tangible assets.¹¹⁶ Thus, the court would most likely have looked to gross annual income anyway.

Had Joe not been in an equitable distribution jurisdiction, he could have tried to limit the valuation of his celebrity goodwill to his right of publicity. By characterizing some aspects of his celebrity goodwill as separate property, Joe could have limited Nancy's total award.¹¹⁷ The *Piscopo* court derived celebrity goodwill in part from a celebrity's right of publicity.¹¹⁸ The court pointed out that: "In modern times, tort law founded in privacy and right of publicity has protected infringement upon 'the celebrity's pecuniary interest in commercial exploitation of his identity' Goodwill is, and always has been, a component of this interest."¹¹⁹ Further, "[t]he court cannot countenance the anomaly that would result if one branch of Chancery vigorously protected plaintiff's person and business from another's 'unjust enrichment by the theft of [his] goodwill' . . . while another branch deprived a spouse from sharing in that very same protectable interest."¹²⁰

113. Mr. Marks also admitted that: (1) he had no knowledge of such a business ever being bought or sold, nor had he previously valued such a business; (2) the entertainment industry is fraught with uncertainty and fluctuations in income; (3) one cannot predict or project from year to year an entertainer's level of income absent a deferred compensation agreement, royalties, residuals or long-term contract (none of which Joe Piscopo had); and (4) because the business of being a celebrity is personal in nature, celebrity status itself cannot be transferred. Donahue, *supra* note 39, at 18.

114. "We accept the accountant's [Marks] analysis which conforms to ours and to that of the majority of states" *Piscopo*, 557 A.2d at 1043.

115. See, e.g., *Stern v. Stern*, 331 A.2d 257 (N.J. 1975); *Dugan v. Dugan*, 457 A.2d 1 (N.J. 1983).

116. See *supra* note 103.

117. See *supra* note 8.

118. *Piscopo v. Piscopo*, 555 A.2d 1190, 1192 (N.J. Super. Ct. Ch. Div. 1988).

119. *Id.*

120. *Id.*

The court did not enumerate exactly what constituted the "commercial exploitation of identity."¹²¹ Some commentators draw a distinction between representations of a celebrity's identity, and performances by the celebrity himself.¹²² Rosemarie Reed, a certified public accountant and frequent expert in marital dissolution litigation, divides the exploitation into "active" and "passive" categories.¹²³ She argues that income from the celebrity's performances is separate property, while income from exploitation of his name and likeness represents a return on the community investment in his career.¹²⁴ This avoids the problem of dividing future earnings,¹²⁵ while still awarding an interest in established property rights.¹²⁶

Similarly, Harold Stanton, a former senior editor of the *UCLA Law Review* and a member of the American Academy of Matrimonial Lawyers, divides a celebrity's rights into a right of publicity and a right of privacy.¹²⁷ Stanton argues that a celebrity has a right to exploit his persona, as well as a right not to exploit his persona.¹²⁸ He argues that the problem with assessing the right of publicity upon dissolution is that it does not factor in the right of privacy. The share in the right of publicity is based on the potential value with full exploitation—use of and exposure in all media.¹²⁹ The celebrity's right to exercise his right of privacy is thereby limited, since he is then forced to fully exploit himself or suffer economic detriment.¹³⁰ The celebrity must, in effect, pay to exercise his right of privacy.

Since the *Piscopo* court analogized to the right of publicity to establish celebrity goodwill, it may have been open to an argument dividing the goodwill into public and private elements. Analogizing to Reed's theory, Joe could have asserted that only the potential earnings from the exploitation of his likeness should have been considered in the division of

121. *Id.*

122. *See, e.g.,* Rosemarie Reed, *Valuation of Celebrity Goodwill*, BEVERLY HILLS B. ASS'N J., Spring 1990, at 67; Harold J. Stanton, *Community Property and the Celebrity's Right of Publicity*, L.A. LAW., Apr. 1986, at 38.

123. Rosemarie Reed, *supra* note 122, at 67.

124. *Id.*

125. *See infra* part VI.B.

126. A celebrity's property interest in his or her likeness and the assignability of that interest is well established. *See, e.g.,* Estate of Presley v. Russen, 513 F. Supp. 1339 (D.N.J. 1981); Ali v. Playgirl, Inc. 447 F. Supp. 723 (S.D.N.Y. 1978).

127. Stanton, *supra* note 122, at 38.

128. *Id.* at 44-45.

129. *Id.* at 46.

130. *Id.*; *see also infra* part VI.B.

marital property. Then, factoring in Stanton's view, Joe could have asserted that only those methods of exploitation previously utilized by Joe should have been assessed in the valuation of his future earning potential for the purposes of property division. This argument would limit celebrity goodwill to a valuation based solely on earnings derived from past exploitations of Joe's likeness. The court would then have averaged and capitalized these past earnings, as opposed to Joe's gross earnings for the five years, which would have theoretically reduced the award. In effect, Joe could have turned the court's analogy to his benefit, assuming, of course, that the court would have been open to such an argument.

VI. CELEBRITY GOODWILL AS AN EQUITABLE DILEMMA

Whether the court is defining, identifying, valuing, or distributing goodwill, the central issue is equity. In performing these tasks, a court seeks to remedy a perceived inequity between a professional, or as here a celebrity spouse, and a non-celebrity spouse.¹³¹ The situation before the *Piscopo* court is not an uncommon one, where one spouse supports the other spouse for multiple years, sacrificing a higher standard of living in anticipation of an even greater standard down the road; the couple then divorces, and the court is limited to an award of alimony based on the current standard of living. One can just imagine the celebrity spouse hobnobbing¹³² with the rich and famous at Spago's¹³³ while the former supporting spouse huddles in some tenement eating macaroni and cheese.¹³⁴

Since goodwill began with commercial transactions, some courts and commentators have analogized the married couple to business partners.¹³⁵ In such a model, the couple works together to maximize their mutual economic benefit. Upon divorce: "Effectually, it is the case of the silent partner withdrawing from a going business. And, if such partner is to receive fair compensation for her share, on her enforced retirement, it

131. See, e.g., *Golub v. Golub*, 527 N.Y.S.2d 946, 950 (N.Y. Sup. Ct. 1988).

132. What the rich and famous do. See generally, e.g., Robin Leach's *Lifestyles of the Rich and Famous*.

133. A restaurant in Hollywood where the rich and famous hobnob.

134. This author does not intend to suggest that macaroni and cheese possesses any culinary deficiencies. The author has merely noted an economic correlation between income and food choice and has chosen to use that relationship for the purposes of illustration.

135. For an exhaustive examination of this approach, see Joan M. Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 86 HARV. L. REV. 54 (1984).

should be so evaluated."¹³⁶ Critics of this model argue that unlike a business, couples often do not act in a business-like manner.¹³⁷ Often, behavior within the marriage is motivated by other than economic reasons and may in fact be economically detrimental to the "business."¹³⁸ Further, critics also point out that traditional partnership and joint venture law do not recognize investment in human capital as an asset.¹³⁹ The marriage-business model also creates problems in terms of assessing future earnings.¹⁴⁰ Thus, the analogy to a business partnership, while convenient, is not without its flaws.

Other courts have resorted to rhetoric to justify goodwill awards.¹⁴¹ Still other courts have utilized a "shotgun" approach, suggesting numerous equitable theories simultaneously to justify a goodwill award: "The three-judge dissent . . . suggested that the wife who supported her husband through professional school should have a remedy at divorce 'based on implied contract, quasi-contract, unjust enrichment or some similar theory.'"¹⁴² More likely than not, the rationale used by the majority of courts, including the *Piscopo* court, is simply perceived unfairness. Regardless of the motivation, caution must be taken to avoid the inadvertent creation of greater inequities in the pursuit of a "fair" remedy.

A. The Intangible Problem

All goodwill inquiries seek to identify an intangible asset that a court will then translate, using some valuation method, into a tangible asset for division. "Goodwill should be valued with great care, for the individual . . . will be forced to pay the ex-spouse 'tangible' dollars for an intangible asset at a value concededly arrived at on the basis of some uncertain elements."¹⁴³ Despite this caution, courts place a higher value on

136. *Brawman v. Brawman*, 19 Cal. Rptr. 106, 109 (1962).

137. See, e.g., *Batts*, *supra* note 25 at 762-63.

138. For example, Deborah Batts discusses the unbusinesslike role love can play in a marriage. *Id.* at 762-63.

139. *Id.* at 756 n.21.

140. See *infra* part VLB.

141. "[W]here one spouse had devoted years to an 'investment' in 'future family prosperity' through supporting the other through professional school . . . it might 'work the grossest inequity' not to give the supporting spouse a property interest in the 'increased earning potential . . .'" *Raggio*, *supra* note 77, at 157-58 (quoting *Inman v. Inman*, 578 S.W.2d 266, 268 (Ky. Ct. App. 1979)).

142. *Id.* at 157 (quoting *Graham v. Graham*, 574 P.2d 75, 78 (Colo. 1978)).

143. *Dugan v. Dugan*, 457 A.2d 1, 7 (N.J. 1983).

remedying the perceived inequities than on the speculative nature of valuation.¹⁴⁴ The important point here is that courts do not *eliminate* the speculative valuation problems; they just reprioritize them. Thus, while uncertainty in valuation is not a bar to goodwill awards, it presents great opportunities for the over or under valuation of such an asset, thereby resulting in unfairness to one of the two parties.

Arguably, with celebrity goodwill, as shown in the *Piscopo* case, the transition from intangible to tangible asset creates more uncertainties than in other goodwill cases. Because the court in *Piscopo* did not strictly adhere to the elements of the New Jersey goodwill definition, the "great care" espoused by the *Dugan* court seemed to be lacking.¹⁴⁵ Driven more by policy than caution, the *Piscopo* court adopted a valuation method that lacked precedent, offered by an expert that lacked experience, the end result of which may have created a greater inequity than the one the court sought to remedy.

B. The Future Earnings Problem

In *Professional Good Will in Dissolution Proceedings: The Personification of Property*,¹⁴⁶ Tom Scribner discusses the theory of goodwill valuation in terms of a right based upon a spouse's expectation:

SEBE [spousal economic benefit expectancy] is not a synonym for professional good will. . . . Rather it recognizes good will for what it is—potential future income based on an expectation of continued public patronage. . . . A SEBE award requires the court to consider the right of the non-professional to share in future economic benefits of the professional.¹⁴⁷

Since the future earning capacity of the professional, celebrity, or enhanced spouse seems to be the source of the goodwill dilemma, logically, the most equitable solution would seem to be to divide up the future earnings—award each spouse a percentage share in the future earnings. Since the probability of the celebrity's future earnings is uncertain at best, this type of arrangement is analogous to awarding a share in a vested pension. When one spouse has worked a sufficient number of years to obtain a

144. See, e.g., *id.* at 7-8; *Stern v. Stern* 331 A.2d 257 (N.J. 1975); *Green v. Bittner*, 424 A.2d 210 (N.J. 1980).

145. *Dugan*, 457 A.2d at 7.

146. Tom Scribner, *Professional Good Will in Dissolution Proceedings: The Personification of Property*, 17 GONZAGA L. REV. 303 (1982).

147. *Id.* at 311.

pension upon retirement, but is not yet eligible to collect the pension, the pension has vested. When a divorce occurs at this juncture, courts will often award a share in the pension, either payable in one lump sum, or as a percentage share in the pension when it becomes collectable.¹⁴⁸

Arguably, in a celebrity goodwill situation, the non-celebrity spouse has a "vested" interest in the future earning potential of the celebrity spouse by virtue of her contributions to his career. However, this interest cannot be collected yet, because the future earnings have not been realized. Awarding a percentage share of the future earnings eliminates much of the speculation surrounding a celebrity goodwill valuation. Unfortunately, such an arrangement comes closer to indentured servitude than equity, and thus these types of awards are usually rejected on Thirteenth Amendment grounds.¹⁴⁹

To avoid Thirteenth Amendment problems, goodwill valuations must be based on past earnings.¹⁵⁰ The *Piscopo* court adopted this rationale and used the past five years of Joe's income to determine a "present" value for his celebrity goodwill.¹⁵¹ While this formula would seem to remove future earnings from consideration, in reality, goodwill requires future earnings for two purposes: as part of the valuation analysis and as payment for the goodwill award. The first is most readily seen by analogizing to the valuation of commercial goodwill.

Courts frequently use a "fair market value" measurement for goodwill in commercial goodwill cases—the figure a reasonably informed purchaser would pay for the business less the tangible assets yields the goodwill.¹⁵² In such a valuation, "determination of fair market value necessarily involves taking into account the future earning potential of the professional goodwill; otherwise, the goodwill would attract a deflated price or suffer a valuation of 'zero.'"¹⁵³ Further, with respect to goodwill in general, "future earnings bear significantly on the present value of goodwill. Valuation based on

148. See, e.g., *Majauskas v. Majauskas*, 463 N.E.2d 15 (N.Y. 1984); *Kikkert v. Kikkert*, 427 A.2d 76 (N.J. Super. Ct. App. Div. 1981), *aff'd*, 438 A.2d 317 (N.J. 1981).

149. The Thirteenth Amendment to the Constitution provides that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1.

150. "Goodwill should be measured by arriving at a present value based upon past results and not by speculating upon the postmarital effort of the professional spouse." Wall, *supra* note 29, at 697.

151. Donahue, *supra* note 39, at 18.

152. Davis, *supra* note 18, at 198-200.

153. Masinter, *supra* note 55, at 143.

past earnings and performance is primitive. The asset's value is really a function of its present and future earning potential. Historic earnings are of little real significance other than as predictors of future earnings."¹⁵⁴ Thus, even though courts may not explicitly award a share of future earnings, the possibility that courts consider future earnings in developing a goodwill award seems very real.

Future earnings are inextricably wound up with goodwill in another way. Arguably, unless already extremely wealthy, the celebrity or professional will need future earnings to pay for the goodwill award distributed to the spouse. Since goodwill is an award, not a form of maintenance, it cannot be adjusted at a later time. Any award of goodwill will require funds from future earnings simply to make the payments. Thus, a goodwill award traps a professional into a particular line of work and assumes success—which may make sense in a more stable profession, such as medicine or law, but may not make sense in a volatile industry like entertainment. Such an award again raises Thirteenth Amendment issues as well.

Therefore, the big problem with awarding celebrity goodwill is that in the entertainment world, the average celebrity's future, if there is such a thing as an average celebrity, is basically a "crap shoot." The *Piscopo* court seems to have resolved the matter in favor of the supporting spouse, perhaps rationalizing that the enhanced spouse has more control over this possible future success on which the couple gambled their marital resources. But can equity really be achieved in an industry where success is a complete gamble, and where, after dissolution one spouse can walk away with a share of the winnings, while the celebrity spouse is not only forced to continue gambling, but now has a huge gambling debt? The New Jersey decision suggests that if courts wish to award celebrity goodwill, the celebrity must bear the burden of the inequity.

C. Other Solutions

Recognizing that an equity problem exists, some courts have found other solutions in the form of rehabilitative and reimbursement alimony.¹⁵⁵ Rehabilitative alimony recognizes that the non-celebrity spouse has enhanced the earning capacity of the celebrity spouse and forces the

154. Bryan Mauldin, *Identifying, Valuing, and Dividing Professional Goodwill as Community Property at Dissolution of the Marital Community*, 56 TUL. L. REV. 313, 333 (1981).

155. Batts, *supra* note 25, at 766-70.

celebrity spouse to now aid the other spouse in attaining a higher income capacity.¹⁵⁶ Reimbursement alimony seeks to repay the financial support that the supporting spouse contributed to the enhanced spouse.¹⁵⁷

Both types of alimony have shortcomings. Rehabilitative alimony often stops short of achieving true equity. For example, a person who forgoes a teaching credential to put the spouse through medical school will receive the funds necessary to complete perhaps eighteen months worth of school, after supporting nine years of the spouse's education. Reimbursement alimony looks like an easy way to make the supporting spouse financially whole, but it does not yield any kind of return on the investment on which the supporting spouse relied.

The most equitable solution would seem to be a combination of rehabilitative and reimbursement alimony. The married couple anticipated some reward for years of sacrifice, and now the supporting spouse will not reap that reward. Fully reimbursing the spouse, not merely for financial contribution, but also for not enjoying a higher standard of living, missed opportunity costs, and any other costs the supporting spouse's attorney can define, seems a more equitable method of valuing the celebrity goodwill.¹⁵⁸ Granted, the value of these types of contributions would be extremely speculative, but no more than the valuation formula used by the *Piscopo* court. Further, such a method could yield larger awards than that arrived at in *Piscopo*, but if the amount of the award seemed inequitably high, a court could simply adjust the "value" of various contributions. Regardless, such an award certainly makes more sense than the *Piscopo* award.

VII. CONCLUSION

In *Piscopo v. Piscopo*, the New Jersey appellate court recognized an inequity that existed between a celebrity and his supporting spouse.¹⁵⁹ After examining the relevant New Jersey law, the court labeled this inequity "celebrity goodwill" and sought to divide this newly created "asset" to resolve the inequity. Despite the presence of New Jersey Supreme Court precedent defining goodwill for the purposes of marital dissolution,¹⁶⁰ the

156. *Id.*

157. *Id.*

158. This type of award is known as a "cost acquisition" award and is developed and described in detail. *Id.* at 784-98.

159. *Piscopo v. Piscopo*, 555 A.2d 1190 (N.J. Super. Ct. Ch. Div. 1988).

160. *Dugan v. Dugan*, 457 A.2d 1 (N.J. 1983).

appellate court chose to rely on New York precedent to support its holding, even though the New York precedent was grounded in New York statutory law.¹⁶¹

After trying to make celebrity goodwill seem a logical extension of existing common law, despite the contrary supreme court precedent in its own state, the court resorted to an entirely speculative and irrational valuation formula to arrive at a figure it deemed equitable.¹⁶² The formula was developed by an expert witness who had little or no experience in the entertainment industry.¹⁶³ Further, the formula was unprecedented and most likely resulted in a gross overvaluation of the celebrity goodwill.¹⁶⁴

Joe argued that celebrity goodwill, if it existed, was a product of his innate talent and therefore not subject to valuation and division upon marital dissolution.¹⁶⁵ The court side-stepped Joe's arguments on this issue.¹⁶⁶ Further, Joe could have made arguments to try to limit the amount of the celebrity goodwill valuation by using the court's own analogy to Joe's right of publicity limited by his right of privacy.¹⁶⁷ However, given the court's treatment of his talent arguments, this court very likely would have ignored the rights of publicity/privacy arguments as well.

In the situation facing the court, complete equity was impossible. The intangible nature of goodwill makes any award upon dissolution inherently speculative.¹⁶⁸ Further, the hazards associated with assessing and awarding future earnings,¹⁶⁹ coupled with the unpredictable nature of Joe's chosen career,¹⁷⁰ did not yield a simple solution. Nevertheless, the *Piscopo* court should have explicitly stated its equitable objectives, addressed the contradictory supreme court precedent, and granted an award that was rationally related to the ends the court sought to achieve.

Given that the Supreme Court of New Jersey denied Joe certiorari,¹⁷¹ thus allowing the appellate decision to stand, it does not seem that

161. See *supra* notes 75-78 and accompanying text.

162. See *supra* notes 103-12 and accompanying text.

163. See *supra* note 113.

164. See *supra* note 112 and accompanying text.

165. See *supra* notes 82-84 and accompanying text.

166. See *supra* note 84 and accompanying text.

167. See *supra* notes 117-30 and accompanying text.

168. See *supra* notes 143-45 and accompanying text.

169. See *supra* notes 146-54 and accompanying text.

170. See *supra* note 56 and discussion part III.B.

171. *Piscopo v. Piscopo*, 564 A.2d 875 (N.J. 1989).

the inequities and inconsistencies present in the *Piscopo* case will be addressed anytime soon. Thus, a celebrity who divorces in New Jersey should expect a claim from the non-celebrity spouse for a share in the celebrity goodwill. The celebrity should also expect the New Jersey court to find that celebrity goodwill exists. Further, the celebrity should expect the court to use a completely irrational formula to value the celebrity goodwill, and the celebrity should be prepared to shoulder the burden of an award based on such a formula. In short, any married celebrity living in New Jersey should move his or her family out of the state before the honeymoon is over.

*Joseph Montes**

* Ironically, this author would like to dedicate this Note to his wife, Sarah, for her love, dedication, and support.