The Value of Creative Professionals in the Entertainment Capital of the World: Why Celebrity Goodwill Should be a Divisible Community Property Interest in California Divorces

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Recommended Citation
Available at: http://digitalcommons.lmu.edu/elr/vol28/iss2/3
THE VALUE OF CREATIVE PROFESSIONALS IN THE ENTERTAINMENT CAPITAL OF THE WORLD: WHY “CELEBRITY GOODWILL” SHOULD BE A DIVISIBLE COMMUNITY PROPERTY INTEREST IN CALIFORNIA DIVORCES

1. INTRODUCTION

Film director John McTiernan was recently involved in the high-profile investigation by private investigator Anthony Pellicano, who is charged with crimes including racketeering and wiretapping.¹ In September 2007, a federal judge sentenced Mr. McTiernan to four months in jail for lying to the FBI about hiring Pellicano to wiretap the telephone of a film producer he was collaborating with at the time.² However, this was not Mr. McTiernan’s first foray into a high-profile legal drama. His divorce from second wife Donna Dubrow was, like many celebrity divorces, highly publicized and full of scandal.³ For the legal world, the most fascinating thing to come from this divorce case was its effect on the divorces of celebrities and creative professionals in California,⁴ where many celebrities have made their home.

In re Marriage of McTiernan⁵ was a monumental decision because it was the first case to address the treatment of “celebrity goodwill” in California divorces. Celebrity goodwill refers to the value of the “excess earning capacity attributable to status as a celebrity.”⁶ Goodwill itself is an

2. Id.
3. Id.
4. See Amanda Bronstad, In Splitsville, Reputation Comes With a Price: Director’s Divorce May Set Precedent on Issue, L.A. BUS. J., Nov. 14, 2005, at 8 (discussing the holding that celebrity goodwill should be excluded from consideration in divorce proceedings).
intangible asset, defined under California law as “the expectation of continued public patronage” of a business or a professional practice, often measured as “the advantage or benefit which is acquired by an establishment beyond the mere value of the capital stock, funds or property . . . [including] constant or habitual customers . . . reputation for skill or affluence, or punctuality.” In divorce cases, the court must first determine whether goodwill exists, and if it does, assign it a value and include it in the community property that is divided equally between the spouses at divorce. At the time of McTiernan, it was well established in divorce proceedings that the goodwill of one spouse’s professional practice or business should be taken into consideration in determining the community property award to the other spouse. However, California courts had never discussed this goodwill in the context of a celebrity or other successful creative professional. By holding that there was no goodwill value in Mr. McTiernan’s career as a motion picture director, the court effectively proclaimed that “celebrity goodwill” did not exist in California.

The court’s decision was based on its determination that goodwill can only attach to a business that is a commercial or industrial enterprise with assets, and since McTiernan’s “elite professional standing” was not a commercial enterprise with physical assets, he could not generate goodwill. This narrow interpretation of California’s goodwill law effectively denied Ms. Dubrow the right to share in her husband’s increased earning capacity, which increased during their marriage from $450,000 to $6 million per film. The court reached that decision despite the fact that Ms. Dubrow left her career as a film executive to support Mr. McTiernan’s directing career and therefore, at the time of their divorce, had no real earning capacity of her own. California law designates that “if

12. Foster, 42 Cal. App. 3d at 582.
17. Id.
goodwill exists at the time of divorce, some part of it must be attributable to the resources the marriage put into its development.\textsuperscript{18} According to the court’s construal of goodwill, if Mr. McTiernan had been a doctor, a lawyer, an accountant, or any other professional working in an enterprise with assets and earning a substantial income above that of his peers, his wife would have been entitled to a portion of the increased earning capacity accumulated during their marriage.\textsuperscript{19} However, since Mr. McTiernan’s profession was based on his creative skill for directing movies and not on the existence of a commercial enterprise, Ms. Dubrow was not entitled to share in his increased earning capacity, no matter how much she sacrificed to ensure its existence.

The McTiernan decision is out of line with California precedent and results in unfair treatment of the spouses of celebrities and other creative professionals. The court read the applicable California statutes\textsuperscript{20} very narrowly, straying from the natural evolution of California’s goodwill law up to that point. This Article explores the rationales behind the McTiernan decision and forecasts the detrimental impact the case will have on future California divorces if it is not re-evaluated.

Although “celebrity goodwill” is the term that has been coined for this area of divorce law,\textsuperscript{21} McTiernan extends beyond celebrities. Consider the following hypothetical situation: Henry and Wanda were a young married couple living in Los Angeles when Wanda started to pursue her career as an interior designer. Henry was supportive and worked overtime in his job as a car salesman to support Wanda as she strove to establish her career. Henry was supportive and worked overtime in his job as a car salesman to support Wanda as she strove to establish her career. Wanda went to networking events and did everything she could to get her name out. Her efforts were successful and soon she was making a healthy income designing the homes of the rich and famous. Her services were in high demand and she worked so much that Henry quit his own job to help manage the couple’s home and finances. However, Wanda’s long hours and lifestyle of associating with the rich and famous eventually took their toll on the marriage. Eight years into her career and ten years into their marriage, Wanda filed for divorce. At the time, she earned an average income of $750,000 per year for her services and had a steady and growing clientele, based on her reputation as one of the best interior designers in Los Angeles. Since she worked from home, she had no office, no

\begin{itemize}
\item \textsuperscript{18} Catherine T. Smith, Professional Goodwill: Two Community Property States Differ on Its Characterization and Division, 11 J. CONTEMP. LEGAL ISSUES 246, 249 (1997).
\item \textsuperscript{19} McTiernan, 133 Cal. App. 4th at 1112.
\item \textsuperscript{20} CAL. BUS. & PROF. CODE §§ 14100, 14102 (West 1987).
\item \textsuperscript{21} See Rounick & Riggs, supra note 6, at 17 (using the term “celebrity goodwill” exclusively in the celebrity context).
\end{itemize}
Throughout this Article, McTiernan will be applied to the above hypothetical to illustrate the wide-reaching impact the court's decision will have on divorces involving celebrities, as well as other creative professionals whose careers fall outside of the traditional business structure.

II. THE MCTIERNAN DECISION

The California Court of Appeal decided In re Marriage of McTiernan in 2005. The proceeding involved the divorce of Donna Dubrow and John McTiernan, the film director best known for his work on films such as "Die Hard" and "The Thomas Crown Affair." Mr. McTiernan appealed the trial court's finding that his profession as a film director included goodwill, and since goodwill was community property, it was part of the assets to be divided with his wife upon divorce. Evidence introduced at trial showed that "during and after the marriage and to some extent before, [Mr. McTiernan] was a very successful motion picture director," and the trial court acknowledged that he had become a man with "an enormous earning capacity." During the nine-year marriage, Mr. McTiernan's earnings increased from $450,000 per film to $6 million per film. By the time the proceeding went to trial, his earnings were up to $8.5 million per film. As for Ms. Dubrow, prior to marrying Mr. McTiernan she was earning a yearly salary of $195,000 at a production company. After marrying him, she left her job so she could devote herself to supporting his directing career, and also became his producing partner. At the time of the divorce trial, the court deemed her earning capacity "almost nonexistent." The trial court relied on the California Business & Professions Code, which provides that "[t]he 'good will' of a business is the expectation of

23. Id. at 1094.
24. Id. at 1093.
25. Id. at 1094.
27. Id. at 2.
28. Id. at 5.
31. Id. at 1.
continued public patronage,"32 and "[t]he good will of a business is property and is transferable."33 However, the court of appeal stated that whether McTiernan’s profession as a film director included goodwill required determining the meaning of "a business" in the goodwill statute.34 The court acknowledged two possible definitions.35 First was the possibility that the term includes "a person doing business," the definition the trial court adopted.36 The second possible definition was "a professional, commercial or industrial enterprise with assets."37 The court of appeal adopted the second definition,38 thereby reversing the trial court’s judgment and holding that McTiernan’s profession as a film director contained no goodwill.39 In support of its adopted definition, the court provided three rationales.40

A. The Historical Understanding of Goodwill

First, the McTiernan court found that the chosen definition conformed to "the historical understanding of goodwill," which it understood as incident only to an existing business, and not separable from the physical assets of that business.41 The court further supported the historical foundations by asserting that "[n]o California case has held that a natural person, apart and distinct from a ‘business,’ can create or generate goodwill."42

B. The Interpretation of California’s Goodwill Statutes

The second rationale used by the court was that under the plain meaning of the goodwill statutes, only a business, and not a person, is capable of generating goodwill.43 Asserting that "[t]here is no doubt about the ‘ordinary, everyday meaning’ of the term ‘a business,’” the court said that a business is "a professional, commercial or industrial enterprise with

32. CAL. BUS. & PROF. CODE § 14100 (West 1987).
33. Id. § 14102.
34. McTiernan, 133 Cal. App. 4th at 1096.
35. Id.
36. Id.
37. Id.
38. Id.
39. Id. at 1102.
40. McTiernan, 133 Cal. App. 4th at 1096.
42. Id. at 1098 (emphasis added).
assets,” and claimed that “[i]t is also clear that ‘a business’ is not a natural person.”44 The court also found that to read “a person doing business” into the language of the statute would effectively amend the statute and enlarge its scope “beyond the traditional understanding of goodwill.”45 The court explained this would have wide ramifications; namely, that all natural persons doing business would possess goodwill, which would “create a substantial liability . . . without a guaranty that the liability would be funded.”46

C. Ensuring that Goodwill is Considered “Property”

Finally, the court believed that to restrict the definition of “a business” to a commercial enterprise would ensure that the goodwill was considered “property” for community property purposes.47 Noting that for goodwill to be “divisible as community property, it must be, in the first place, property,” and that transferability is an essential element of property, the court concluded that since Mr. McTiernan’s reputation as a director could not be sold or transferred, his reputation could not properly fall within the statute as “property.”48

III. REFUTING THE RATIONALES OF McTIERNAN

A. The Historical Understanding of “a Business” Includes a Person Doing Business

In support of its first rationale that its definition of “a business” conforms to California’s historical understanding of the term, the McTiernan court referenced a body of case law from the late Nineteenth and early Twentieth centuries.49 The court discussed a Supreme Court case from 1893, which held that goodwill is “tangible only as an incident, as connected with a going concern or business having locality or name, and is not susceptible of being disposed of independently.”50 Another case

44. Id. at 1098.
45. Id. at 1099.
46. Id.
48. Id. at 1100–01.
50. See Metro. Nat’l Bank v. St. Louis Dispatch Co., 149 U.S. 436, 446 (1893) (holding that when a newspaper whose plant and goodwill was mortgaged is consolidated with another newspaper which uses up the mortgaged plant in the course of business, the lien of the mortgage does not apply to the existing plant or the goodwill).
discussed by the *McTiernan* court was from 1882.\(^{51}\) In that case, the court refused to attach goodwill to shares of stock, claiming that it did not make sense to extend goodwill value to something intangible which exists “only in contemplation of law.”\(^{52}\)

After outlining the rules from these turn-of-the-century cases, the *McTiernan* court stated that, with regard to the definition of goodwill, “nothing had changed since these early cases were decided,” and that “[n]o California case has held that a natural person, apart and distinct from a ‘business,’ can generate goodwill.”\(^{53}\) Regarding California’s “professional goodwill” cases, which have found goodwill in professional practices based on an individual’s personal skill and reputation, the court said that “[i]t is the business, i.e., the practice, that generates goodwill, even if the practice is conducted by a sole practitioner.”\(^{54}\)

The cases following these early decisions have actually developed a broader understanding of goodwill than the *McTiernan* court suggested. Although no court has specifically held that a natural person can generate goodwill, courts have found that a commercial enterprise is not a requirement for goodwill: an individual person practicing a profession and generating income from the profession *can* generate goodwill. For example, in *Mueller v. Mueller*, a court of appeal recognized that a business dependent entirely on the skill of one person, and not just a commercial enterprise, could contain transferable goodwill.\(^{55}\) In that divorce proceeding, the husband appealed the trial court’s finding that his dental laboratory was community property and that its value included $25,000 in goodwill.\(^{56}\) The appellate court disagreed with Mr. Mueller’s argument that no goodwill attaches to a business that is dependent “solely on [the business owner’s] personal skill and ability.”\(^{57}\) The court held that goodwill not only exists in commercial or trade enterprises, but “also exists in a professional practice or in a business which is founded upon personal skill or reputation.”\(^{58}\) The court explained that when a person acquires a reputation for skill in a certain profession, “he often creates an intangible but valuable property by winning the confidence of his patrons and

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52. Id. at 118 (affirming the action of the Board of Equalization in raising the assessment of the Spring Valley Water Works franchise from $5,000 to $5 million).
53. McTiernan, 133 Cal. App. 4th at 1098.
54. Id. at 1098 (citing Golden v. Golden, 270 Cal. App. 2d 401, 405 (1969); Todd v. Todd, 272 Cal. App. 2d 786, 792 (1969)).
56. Id. at 250.
57. Id. at 251.
58. Id. at 250–51 (emphasis added).
securing immunity from successful competition."

According to the McTiernan court's construction, Mueller would not stand for the principle that goodwill can attach to a professional because "[i]t is the business, i.e., the practice, that generates goodwill." Although Mueller clearly held that a commercial enterprise is not a requirement for goodwill to be considered property, the husband's dental laboratory did resemble a commercial enterprise with assets and therefore can be aligned with the McTiernan understanding of goodwill. However, this fact does not take away from the basic holding in Mueller, which clearly intended to remove the commercial enterprise constraint on goodwill and to establish that the skill or reputation of a person can generate goodwill. The court specifically disagreed with the old understanding of goodwill as existing "only in commercial or trade enterprises" and found that goodwill could also exist in "a professional practice or in a business which is founded upon personal skill or reputation." Thus, goodwill does not require physical assets of a commercial enterprise, but can also attach when the "asset" is intangible, such as personal skill or reputation. Cases since Mueller have substantiated this view, finding goodwill to attach to a "business" which was less of a commercial enterprise with physical assets and more of a natural person with special skills.

In Justice Cooper's dissent in McTiernan, he pointed to some California cases that support the idea that an individual, outside of a traditional business with physical assets, can generate goodwill based on his or her personal skill or reputation. First, in Marriage of King, one court of appeal found goodwill in a husband's solo practice as a computer consultant. The difference between the business valued in King and the one in Mueller was that in King, the "husband had no plant, no commercial location, no employees, and did not maintain an office." King refutes the McTiernan assertion that "a business" must be an enterprise with tangible assets or an "entity other than a natural person" under California law. After all, in King, goodwill was based on Mr. King's increased earning capacity as a "recognized authority" in his field. It is true that, in a

59. Id. at 251.
60. McTiernan, 133 Cal. App. 4th at 1098.
61. Mueller, 144 Cal. App. 2d at 251 (emphasis added).
64. King, 150 Cal. App. 3d at 304.
65. Id. at 310.
67. King, 150 Cal. App. 3d at 308.
footnote, the court stated that in "a different factual situation . . . goodwill may be reliant on factors other than the owner." However, *King* recognized that the absence of features of a traditional business entity would "weigh in the total assessment of goodwill valuation" and it still found that goodwill existed. Therefore, under *King*, goodwill may attach to "a business" whose only assets are the personal skill and reputation of its owner.

Justice Cooper's dissent in *McTiernan* also pointed to the 2004 decision of *In re Marriage of Iredale and Cates*. In that case, the Court of Appeal affirmed the trial court's decision, rejecting the husband's assertion that his wife's partnership in a major law firm included $330,000 worth of goodwill. The court reasoned that because she had signed a partnership agreement stating that she did not own any of the accounts receivable, work in progress, or goodwill of the firm, her interest in the firm could not include goodwill. However, the court also upheld the trial court's determination that "Iredale herself possessed goodwill" and upheld the trial court's valuation of that goodwill at $42,318. Since her compensation as an attorney was slightly more than the average compensation of other lawyers in similar firms in the same city, she had goodwill that could be valued. The case indicates once again that finding goodwill is *not* solely dependent upon the existence of a business in the form of an enterprise with assets as *McTiernan* claims, but also can be generated by a natural person who has enhanced earning capacity as a result of his or her skill in a field.

The opinions above demonstrate that the definition of goodwill has been read more broadly than the *McTiernan* court believed and has been expanded to include a person doing business. The understanding of goodwill has evolved beyond the early cases that the *McTiernan* court relied on, and in asserting that California has not recognized goodwill generated by a person, the court ignores this evolution. *Mueller* laid the groundwork for allowing a natural person to generate goodwill, and, since then, California courts have consistently assigned goodwill value based on

68. Id. at 310 n.1.
69. Id. at 310.
71. Id. at 328–29.
72. Id.
73. Id. at 329 (emphasis added).
74. Id.
an individual’s personal skill and reputation. Justice Cooper put it best in his dissenting opinion in *McTiernan* by stating that “[a]ny professional who independently practices his or her profession . . . thereby conducts a business, within the lead opinion’s own unattributed definition, as well as more traditional ones.”

Mr. McTiernan’s “business” may not have had the commercial element or physical assets that the majority thought to be necessary for finding goodwill, but he did have an impressive reputation in the film-making industry, which enabled him to earn far more than the average film director. At trial, executives from two film studios testified that they were working on projects with him and a third studio had just entered a deal with him. It is apparent that he had an established customer base in the studios, but under the *McTiernan* ruling, this would be considered goodwill *only* if he also ran a commercial enterprise with tangible assets. However, because his career was founded on skill, and was not a commercial establishment with physical assets, the court held that he was not able to generate the “expectation of continued public patronage” required by statute.

Applying the *McTiernan* rule to the hypothetical, Wanda would also be denied the valuable property interest of goodwill. This is because she does not have the physical assets of a commercial enterprise, even though she does have an established reputation as an interior designer and her services are in high demand. Because her career would not be assigned goodwill value, she would walk away from the marriage with an increased earning capacity generated during her marriage to Henry. However, Henry would leave the marriage without a share of that earning capacity, even though he contributed to it by sacrificing his own career to support Wanda’s.

The result under *McTiernan*’s ruling is an anomaly because under the correct historical understanding and evolution of goodwill in California, both Mr. McTiernan and Wanda should be deemed to have goodwill based on their reputation and skill as creative professionals. Neither individual may have physical assets or a commercial establishment, but they both

76. See, e.g., *King*, 150 Cal. App. 3d at 308–10; *Golden*, 270 Cal. App. 2d at 404–05.
78. *Id.* at 1094.
80. *McTiernan*, 133 Cal. App. 4th at 1102 (citing CAL. BUS. & PROF. CODE § 14100 (West 1987)).
81. See *King*, 150 Cal. App. 3d at 308–10; *Golden*, 270 Cal. App. 2d at 404–05.
have the asset of talent in their chosen fields. California recognizes that
talent, skill, and reputation are just as capable of generating goodwill as a
commercial enterprise.\(^{82}\)

**B. California's Goodwill Statutes Can Be Interpreted to Include a Person Doing Business**

Principles of statutory interpretation underlie the *McTiernan* court's
second rationale for not assigning goodwill.\(^{83}\) Applying the first step of
statutory interpretation, the court looked to the actual language of the
statute. The court claimed that the term "a business" was not ambiguous or
uncertain, and there was "no doubt" that the ordinary meaning of the term
is "a professional, commercial or industrial enterprise with assets," and
"not a natural person."\(^{84}\) Actual language controls when a term is
unambiguous; therefore, the court stopped interpreting the statute and
adopted this definition without citing to any authority in support.\(^{85}\) The
court defended its interpretation of the statute as though it were the only
possible definition for "a business," even though it had previously
recognized two possible definitions of the term in the goodwill context: "a
person doing business" or "a professional, commercial or industrial
enterprise with assets."\(^{86}\) By the court's own admission, it is possible to
read "a person doing business" into the meaning of "a business," and thus
there is uncertainty or ambiguity as to the statutory meaning.\(^{87}\)

Other California cases have defined "a business" in an entirely
different way than *McTiernan*. For example, in determining whether the
city of Los Angeles could impose a license tax upon an attorney, the
California Supreme Court in *Ex Parte Galusha*, interpreted the phrase "any
lawful business or calling."\(^{88}\) The *Galusha* court looked to the New
Standard Dictionary, which defined a business as "[a] pursuit or occupation
that employs or requires energy, time and thought; trade; profession;
calling."\(^{89}\) The court reasoned that "these terms include those following
the professions as well as those engaged in work of a more purely commercial
nature."\(^{90}\) This statement reflects the *Galusha* court's finding that the term

\(^{82}\) *Id.*
\(^{84}\) *Id.*
\(^{85}\) *Id.*
\(^{86}\) *Id.* at 1096.
\(^{87}\) *Id.*
\(^{88}\) *Ex Parte Galusha*, 184 Cal. 697, 700 (1921).
\(^{89}\) *Id.* at 701.
\(^{90}\) *Id.*
"business" can include a professional *person*, and is not limited to a commercial enterprise. The *McTiernan* court's conclusion that "a person doing business" is not a "business," is therefore not supported by dictionaries or the California Supreme Court. Given the lack of support for the *McTiernan* court's interpretation, and the *Galusha* court's contrary interpretation, it is even more difficult to understand how the court in *McTiernan* could proclaim that there is only one possible definition of "a business."

Aside from looking at the actual language of the statute, the *McTiernan* court said it would not read "a person doing business" into the statute for fear of enlarging the statute's scope "beyond the traditional understanding of goodwill" as being attributable only to a commercial establishment. This assumes that the traditional understanding of goodwill is the understanding that the *McTiernan* court adopts. As previously indicated, however, courts have found goodwill in professionals practicing outside of a commercial establishment, which indicates that the traditional understanding of goodwill is not necessarily what the *McTiernan* court claims.

In the case of *In re Marriage of Foster*, the court of appeal expanded the definition of goodwill under the California statute. The primary issue before the court in this divorce case was the proper method of evaluating the goodwill of the husband's individual medical practice. It was undisputed by the parties that the goodwill of his practice was community property and thus subject to division at divorce. However, the court still took the opportunity to clarify the meaning of goodwill under the statute by providing a more complete definition of goodwill as:

the advantage or benefit which is acquired by an establishment beyond the mere value of the capital stock, funds or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or

92. See, e.g., *AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, 4TH ED.*, available at http://dictionary.reference.com/browse/business (last visited Oct. 2, 2007) (defining "business" as "[t]he occupation, work, or trade in which a person is engaged," or alternately as "[a] specific occupation or pursuit").
98. *Id.*
habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances, or necessities, or even from ancient partialities or prejudices.\textsuperscript{99}

Not only does Foster interpret the goodwill statute in an expansive manner, but its expansion also indicates that an established enterprise with physical assets is not a requirement for generating goodwill. The McTiernan court expressed concern that if “a person doing business” is read into the goodwill statute, goodwill would be solely reliant on earning capacity, which would be problematic.\textsuperscript{100} The court insisted that since an individual’s earnings are not predictable like the assets of “an established business enterprise,” the result will be that “a person would find him- or herself saddled with a massive liability without the means of satisfying it.”\textsuperscript{101} However, a reading of the Foster definition of goodwill shows that even in an “establishment,” goodwill is nothing more than the vague idea of an “advantage or benefit” that is derived from a consistent flow of customers.\textsuperscript{102} The Foster court specifically did not tie goodwill to anything resembling hard assets like “capital stock, funds, or property.”\textsuperscript{103} Earnings are no less predictable than the consistency of customers frequenting an establishment, so allowing a person to generate goodwill based on their earning capacity carries no particular risk of creating liabilities that cannot be satisfied. Additionally, the court reasoned that basing goodwill on excess earnings would require considering the “expectancy of future earnings,” to determine goodwill, which would violate California community property law.\textsuperscript{104} This concern brings up more in-depth issues of valuing goodwill, which have been resolved by California courts on numerous occasions.\textsuperscript{105} These valuation issues will be discussed in more detail below.\textsuperscript{106}

The McTiernan court was afraid of expanding the statute beyond some “traditional understanding” not followed by modern case law. However, the court failed to realize that the narrow reading of the statute

\textsuperscript{99} Id. at 581–82 (citing In re Lyons, 27 Cal. App. 2d 293, 297–98 (1938)).
\textsuperscript{100} McTiernan, 133 Cal. App. 4th at 1099.
\textsuperscript{101} Id.
\textsuperscript{102} Foster, 42 Cal. App. 3d at 581.
\textsuperscript{103} Id. at 582.
\textsuperscript{104} McTiernan, 133 Cal. App. 4th at 1099 n. 7.
\textsuperscript{106} See infra Part IV.
will have a significant impact on spouses of professionals with enhanced earning capacity based on personal skill. Community property principles dictate that the goodwill of one spouse’s business or professional practice created during marriage is attributable to the marriage and thus considered community property and divided equally between the spouses. However, under the McTiernan rule, Ms. Dubrow, who sacrificed her own career to support her husband’s and also to work alongside him as a producing partner, was not allowed to share in his enhanced earning capacity which was generated during marriage and clearly attributable in part to her investment in his career.

Similarly, in the hypothetical, where Henry gave up his own career in order to manage the family home so that Wanda could have more freedom to develop her career in interior design, the McTiernan rule would prevent him from sharing in her earning capacity, which is substantially higher than that of her peers. These results are based on the court’s fear of the ramifications of reading “a person doing business” into the statute. These fears are not only insignificant compared to the impact of the narrowly-read statute, but they are also unnecessary given the nature of speculation in valuing goodwill.

If the McTiernan court had continued its statutory interpretation beyond the initial step of analyzing the plain meaning of the language, it would likely have concluded that “a person doing business” can be read into the statute. Consequently, Mr. McTiernan’s career as a film director would be considered “a business” under California’s goodwill statutes because he conducted a business based on his personal skill and reputation. In the hypothetical, Wanda would also have “a business” even though she did not have a commercial enterprise with physical assets in the form of an office or employees. Under the McTiernan rule, both Ms. Dubrow and Henry are deprived of their fair share of the excess earning capacity that their spouses’ businesses generated, simply because the court looked no further than what it thought to be the only possible meaning of the word “business.”

C. Goodwill Is Still a Property Interest if it Includes Persons Doing Business

The final rationale for the McTiernan court’s narrow reading of the statute was that limiting businesses to commercial enterprises ensures that goodwill is considered “property” and subject to community property

107. See Smith, supra note 18, at 249 (stating that existing goodwill at time of divorce must be attributable in some part to the efforts made by the marriage).
divorce laws.\textsuperscript{108} The court acknowledged that “property” may be intangible and may take the form of “a right rather than a physical object.”\textsuperscript{109} However, the court believed that “property” must be transferable, reasoning that “[s]omething that cannot be transferred or sold has no value on the market.”\textsuperscript{110} Because the goodwill assigned to Mr. McTieman by the trial court (“earning capacity and reputation in his profession as a motion picture director which greatly exceeds that of most persons involved in that profession”) could not be sold, it could not be considered property and therefore could not truly be goodwill.\textsuperscript{111} Since the court reasoned that goodwill generated by a person doing business was not transferable, this type of goodwill would not conform to California’s goodwill statute, which states that “[t]he good will of a business is property and is transferable.”\textsuperscript{112} Goodwill may only attach to a “professional, commercial or industrial enterprise.”\textsuperscript{113}

Case law dictates the opposite conclusion.\textsuperscript{114} In \textit{Mueller}, the court indicated that when a person acquires a reputation or a skill in a certain profession, that person can create an “intangible but valuable property by winning the confidence of his patrons,” and that it is well settled that this property is transferable.\textsuperscript{115} Thus, even if the goodwill is attached solely to the skill of a natural person, it is still considered transferable. Additionally, in \textit{Marriage of Watts}, the court held that the husband’s medical practice was capable of having goodwill, even though the practice was not capable of being sold.\textsuperscript{116} The court held that “[i]n the dissolution of marriage context, the mere fact that a professional practice cannot be sold, standing alone, will not justify a finding that the practice has no goodwill nor that the community goodwill has no value.”\textsuperscript{117} Additionally, in \textit{Foster}, the court held that “[t]he value of community goodwill is not necessarily the specified amount of money that a willing buyer would pay for such goodwill.”\textsuperscript{118}

As Justice Cooper points out in his dissent in \textit{McTiernan},

\begin{itemize}
  \item \textsuperscript{108} In \textit{re} Marriage of McTiernan, 133 Cal. App. 4th 1090, 1096 (2005).
  \item \textsuperscript{109} Id. at 1100 (citing Navistar Int'l Transp. Corp. v. State Bd. of Equalization, 8 Cal. 4th 868, 875 (1994)).
  \item \textsuperscript{110} Id. at 1101.
  \item \textsuperscript{111} Id. at 1100.
  \item \textsuperscript{112} CAL. BUS. & PROF. CODE § 14102 (West 1987).
  \item \textsuperscript{113} McTiernan, 133 Cal. App. 4th at 1101.
  \item \textsuperscript{114} See, e.g., Mueller v. Mueller, 144 Cal. App. 2d 245, 251 (1956).
  \item \textsuperscript{115} Mueller, 144 Cal. App. 2d at 251.
  \item \textsuperscript{116} In \textit{re} Marriage of Watts, 171 Cal. App. 3d 366, 372 (1985).
  \item \textsuperscript{117} Id. at 372.
  \item \textsuperscript{118} In \textit{re} Marriage of Foster, 42 Cal. App. 3d 577, 584 (1974).
\end{itemize}
marketability is not relevant to the existence of goodwill in divorces, since in this context goodwill is not a product to be sold in the marketplace, but is "a portion [of the community value] of the professional practice as a going concern on the date of the dissolution of the marriage." 119 Finding goodwill in marital dissolutions does not require a market value for the goodwill, unlike the sale of a commercial establishment. 120 The policy behind dividing goodwill as community property is that after divorce, "the practice of the sole practitioner husband will continue, with the same intangible value as it had during the marriage," and community property principles dictate that "the wife, by virtue of her position of wife, made to that value the same contribution as does a wife to any of the husband's earnings and accumulations during marriage." 121 Therefore, "[s]he is as much entitled to be recompensed for that contribution as if it were represented by the increased value of stock in a family business." 122

The McTiernan decision requiring that goodwill be marketable is inconsistent with the majority of case law as well as the policies of community property, and it is incorrect to conclude that simply because Mr. McTiernan's career cannot be sold, it cannot have goodwill. 124 Mr. McTiernan had greater earning capacity based on his reputation as a film director among studio executives and moviegoers. 125 The Mueller court, by contrast, had no problem recognizing a valuable intangible property interest based on excess earning capacity generated from winning the confidence of patrons. 126 This property is transferable community property, pursuant to statute and case law, because his wife is entitled to be recompensed for the value that she contributed to his increased earning capacity by supporting him in his career. Similarly, in the hypothetical, Wanda has established a practice that is entirely dependent on her personal skill, and she has secured a consistent flow of clients based on this skill. Because heightened reputation or skill would be considered a valuable intangible property interest for a doctor or lawyer, it should also be considered a valuable property interest for a creative professional like Wanda, and Henry should be entitled to compensation for his contribution

119. McTiernan, 133 Cal. App. 4th at 1118 (Cooper, J., concurring and dissenting).
120. Id. at 1117–18.
122. Id.
123. McTiernan, 133 Cal. App. 4th at 1101.
124. Id.
to this value.

1. The Right of Publicity and Celebrity Goodwill

The right of publicity also supports the idea that a celebrity’s “goodwill” or reputation is property. This principle recognizes that a celebrity has a right to exploit his or her likeness for commercial purposes and financial gain and can prevent others from using the likeness without permission. Over time, this right has grown into an intangible property interest, with courts assigning it characteristics of property such as descendibility. The right of publicity and celebrity goodwill are not identical principles, but they are comparable principles that have often been discussed together by commentators. The Supreme Court recognized the close tie between the right of publicity and goodwill in 1977, when it said that “[t]he rationale for [protecting the right of publicity] is the straightforward one of preventing unjust enrichment by the theft of goodwill.” The principles of the right of publicity are relevant in this instance because they acknowledge the property interest created by a celebrity’s fame and support the idea that people who have established a profession based on fame or reputation have a valuable property right.

California’s right of publicity doctrine is created by common law and statute. These laws allow a celebrity to bring legal action against another person who exploits or attempts to exploit the celebrity’s name or likeness. A common law right of publicity action requires that the celebrity prove: “(1) the defendant’s use of the plaintiff’s identity; (2) the appropriation of plaintiff’s name or likeness to defendant’s advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.” The statutory cause of action differs from common law in that it requires a “knowing” use of the celebrity’s identity, whereas the common law allows inadvertence or mistake as a defense. Despite their differences in

129. Id. at 83.
130. See Rosenson, supra note 96, at 47, 51; Westfall & Landau, supra note 128, at 99–101.
133. Michaels, 5 F. Supp. 2d at 836.
135. CAL. CIV. CODE § 3344(a) (West 1997).
application, both the common law and statutory cause of action for right of publicity embody the policy that when a celebrity’s likeness has value, and that likeness is being used by someone other than the celebrity to sell a product, the celebrity should be compensated for the use.\(^\text{137}\)

California is the leader in expanding protection for the right of publicity.\(^\text{138}\) First, the Ninth Circuit expanded the right of publicity to include the protection of a celebrity’s voice in *Waits v. Frito-Lay, Inc.*, when it upheld the jury verdict awarding singer Tom Waits over two million dollars in damages after Frito-Lay ran a radio advertisement featuring a singer mimicking Mr. Waits’ voice.\(^\text{139}\) Then, in what has been referred to as the “ultimate expansion of [the right of publicity] law,”\(^\text{140}\) the Ninth Circuit case *White v. Samsung Electronics America, Inc.* allowed Vanna White, the “Wheel of Fortune” game show host, to recover under the common law right of publicity when defendants used a robot that resembled Ms. White in an advertisement. This holding expanded the reach of the right of publicity doctrine beyond simply the name or likeness, all the way to the vague limits of a celebrity’s “identity.”\(^\text{141}\)

Examining the right of publicity cases demonstrates that there are other ways to define a creative professional or celebrity’s goodwill as “property” without tying it to the existence of a business with tangible assets. Though the *McTiernan* majority asserts that Mr. McTiernan’s celebrity goodwill is not an asset that is divisible community property,\(^\text{142}\) other decisions demonstrate that courts have often found that reputation is a valuable asset when someone is trying to appropriate another person’s identity or reputation without consent.\(^\text{143}\) As the New Jersey Superior Court explained when it made a similar observation in the case of *Piscopo v. Piscopo*, “[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 protectible interest.”\(^\text{144}\)

\(^{137}\) Westfall & Landau, supra note 128, at 93.

\(^{138}\) Id. at 91.


\(^{142}\) See *McTiernan*, 133 Cal. App 4th 1090.

\(^{143}\) See *White*, 971 F.2d 1395; *Waits*, 978 F.2d 1093.

IV. Valuation Issues

The McTiernan court expressed concern about the "wide ramifications" of allowing "a person doing business" to have the capacity to create goodwill, stating that it would create liability "without a guarant[ee] that the liability would be funded." The court feared that since the goodwill would be based on earning capacity, the unpredictability of earnings could create a liability that potentially could not be funded. Noting also that community property law dictates that "the expectancy of future earnings may not be considered in determining goodwill," the court claimed that the "excess earning" method used by the trial court to calculate goodwill was "not far removed from a prediction about future earnings." Therefore the court reasoned that injecting the notion of "a person doing business" into the statute creates an asset that is actually a prediction of future earnings, which is a violation of California community property law.

The court is unjustified in its contention that assigning goodwill to an individual would create liabilities that cannot be funded because of the unpredictability of earnings. First, whether goodwill is assigned to a film director, a lawyer, or a doctor, its valuation is always somewhat speculative and carries with it some risk. In Mueller, when presented with a wide range of evidence regarding the goodwill value of the husband's solo practice, the trial court conceded that the value was "an estimate only," but nonetheless proceeded to apply a variant of the excess earnings approach to assign the practice a goodwill value of $25,000. As an accounting expert testified in the Foster case regarding valuing goodwill, it is "always just somebody's opinion." Despite this, as one commentator noted, "if it does exist, a value should be placed on it." California courts have repeatedly placed a value on professional goodwill, regardless of the unpredictability of such a value. Additionally, as the dissenting opinion in the McTiernan case points out, valuations of goodwill "take into account

146. Id.
147. Id. at 1099 n.7.
148. Id. at 1099.
152. Tiso, supra note 149, at 68.
the individual or other business's apparent prospects, negative as well as positive.\textsuperscript{*}\textsuperscript{154} The factors that a court may look to in valuing goodwill are varied, and include such considerations as "the amount of patronage" and "the personality of the parties engaged in business."\textsuperscript{*}\textsuperscript{155} Each case is determined on its own facts, with no rigid rules for determination of how to value the goodwill.\textsuperscript{*}\textsuperscript{156} The court will look for a method which accounts for all the circumstances and will attempt to determine a goodwill value that is as realistic as possible. The fact that valuing goodwill based on earnings is merely an educated estimate has not stopped courts from doing so for other professionals,\textsuperscript{*}\textsuperscript{157} so it certainly should not prevent a professional film director's goodwill from being valued.

One approach that is commonly used for valuing goodwill is the excess earnings method. This method, also known as the "capitalized excess earnings method," requires taking the average net income of the professional, subtracting the annual salary of an average practitioner or employee with like experience, and capitalizing the difference over a period of years.\textsuperscript{*}\textsuperscript{158} The \textit{McTiernan} court disagreed with the lower court's use of the excess earnings method for valuing Mr. McTiernan's goodwill, saying the method was "not far removed from a prediction about future earnings," which is not allowed under community property principals.\textsuperscript{*}\textsuperscript{159} However, California courts have consistently used the excess earnings approach as a primary method of valuing a professional's goodwill,\textsuperscript{*}\textsuperscript{160} which leads one to believe that the \textit{McTiernan} court's assessment of the method is inaccurate. Even if the end result of the method does forecast future earnings, this speculation is necessary to determine goodwill itself, which is based on the "expectation of continued public patronage."\textsuperscript{*}\textsuperscript{161} The excess earnings approach does not take \textit{speculated} future earnings into account when determining goodwill, but instead takes into account prior earnings, with consideration toward the expectancy that the profession or business will continue.\textsuperscript{*}\textsuperscript{162}

\textsuperscript{*}\textsuperscript{154} \textit{McTiernan}, 133 Cal. App. 4th at 1117 n.2 (2005) (Cooper, P.J., concurring and dissenting).
\textsuperscript{*}\textsuperscript{155} \textit{Foster}, 42 Cal. App. 3d at 583 (affirming the trial court's use of these factors to assign husband's solo medical practice a goodwill value of $27,000).
\textsuperscript{*}\textsuperscript{156} People ex rel. Dep't of Trans. v. Muller, 36 Cal. 3d 263, 271 n.7 (1984).
\textsuperscript{*}\textsuperscript{158} \textit{McTiernan}, 133 Cal. App. 4th at 1095 n.1.
\textsuperscript{*}\textsuperscript{159} \textit{Id.} at 1099 n.7.
\textsuperscript{*}\textsuperscript{161} \textit{Cal. Bus. \\& Prof. Code} § 14100 (West 1987).
\textsuperscript{*}\textsuperscript{162} \textit{See Foster}, 42 Cal. App. 3d at 581 (affirming the trial court's use of the excess
Valuing goodwill is often considered problematic, and California courts have attempted to strike a balance between not tampering with the professional’s future earnings and not depriving the spouse of his or her share of goodwill that was created during the marriage. In Foster, the court recited the importance of choosing a valuation method that does not require a prediction about future income. The court said that because community property is only that which is acquired during the marriage, “the value of the goodwill must exist at the time of the dissolution and that value must be established without dependence on the potential or continuing net income of the professional spouse.” The Foster court noted that the valuation of goodwill is not determined by a bright line rule, but instead by taking into account all the facts and circumstances on a case-by-case basis. The court held that the proper manner for valuing community goodwill is by “any legitimate method” which does not account for “the post-marital efforts of either spouse,” but which “measures its present value by taking into account some past result.” The excess earnings method clearly met these requirements. Consequently, the Foster decision undermines the McTiernan court’s claim that the excess earnings method fails the requirement that valuation of goodwill not include predictions of future earnings.

The hypothetical scenario of Henry and Wanda can serve as a rudimentary example of how an accountant may determine Wanda’s goodwill value upon their divorce using the excess earnings method. The accountant would first take Wanda’s average pre-tax annual net earnings at the time of divorce, subtract a “fair return” on the net tangible assets, and then subtract the salary of an average designer with similar qualifications. So, if $750,000 is Wanda’s average pre-tax income after deducting the fair return, and $500,000 is the salary of the average designer, the difference would be $250,000. The accountant would then capitalize this amount over a number of years. This is done by multiplying the amount by a factor that represents a period of years, discounted to reflect present value of the excess earnings.
capitalized over a period of four years, we arrive at a value of one million dollars. Therefore, one million dollars would be placed in Henry and Wanda’s community property pot as Wanda’s goodwill, and it would be divided equally between them. It is clear that this method does not entail a prediction about any increased earnings in the future. Rather, it calculates Wanda’s enhanced earning capacity at the time of the divorce and projects that amount a few years into the future, without attempting to account for any increases over those years.

Reading “a person doing business” into the goodwill statute would not have the effect on valuation of goodwill that the McTiernan court claims. The court’s fear of creating liabilities that cannot be paid is no greater in the case of a film director than it is in the case of any sole practitioner—assigning value to the expected continued public patronage of any professional is speculative and risky. Despite this risk, there are people who make their living “appraising celebrity ‘brand value’ during divorce litigation,” which indicates that value does exist there. To deny the goodwill value of a celebrity or creative professional, who carries the same intangible asset of “what they can earn based simply on who they are” as any established doctor or lawyer, would be unfair. The accepted methods for valuing goodwill in professional practices founded on personal skill and reputation have been upheld as consistent with community property laws. The fact that someone is a film director, rather than an attorney or doctor, does not change the effect that the excess earnings method has on the valuation of his or her goodwill.

V. CELEBRITY GOODWILL IN NEW YORK AND NEW JERSEY

Currently, New Jersey and New York are the only states that recognize “celebrity goodwill” as a divisible asset at divorce. New York and New Jersey treat the marital status of property differently than California because they follow the “equitable distribution” approach, whereas California subscribes to the community property approach. However, the difference is irrelevant here. The reasoning underlying

172. Id.
174. See McGowan v. McGowan, 518 N.Y.S.2d 346, 348 (App. Div. 1987) (holding that “[t]he function of equitable distribution is to recognize that when a marriage ends, each of the spouses, based on the totality of the contributions made to it, has a stake in and right to a share of the marital assets accumulated while it endured, not because that share is needed, but because those assets represent the capital product of what was essentially a partnership entity”).
California’s goodwill law is “almost identical to” the reasoning found in the most current New Jersey and New York cases,175 which makes it difficult to understand the McTiernan decision preventing celebrity goodwill from existing in California.

A. New York Recognizes “Enhanced Earning Capacity” as Marital Property

New York’s present recognition of celebrity goodwill sprung from the holding in O'Brien v. O'Brien, which recognized a professional license as marital property subject to distribution at divorce.176 However, the doctrine evolved and the state eventually recognized that enhanced earning capacity created during marriage has value that should be distributed upon divorce.177 The first time New York recognized a form of celebrity goodwill based on enhanced earning capacity was in 1988 when the Supreme Court held in Golub v. Golub that “the skills of an artisan, actor, professional athlete or any person whose expertise in his or her career has enabled him or her to become an exceptional wage earner should be valued as marital property subject to equitable distribution.”178 In Golub, the wife was an actress and model and the husband was an attorney who managed the couple’s home and finances while supporting his wife in advancing her career.179 The husband contended that the increased value of his wife’s career was marital property that should be divided at divorce, and the court agreed.180 The Golub court proclaimed that the O'Brien holding regarding licenses as marital property was based on the value of the “enhanced earning capacity that the license affords the holder” and therefore should be extended beyond licenses to “any other special skill that generates substantial income.”181 The court reasoned that “[w]hen a person's expertise in a field has allowed him or her to be an exceptional wage earner, this generates a value similar to that of the goodwill of a business.”182 Therefore, even though the wife’s “celebrity status is neither ‘professional’ nor a ‘license,’ its increase in value is marital property, despite the difficulties presented in valuing such property.”183

175. Rosenson, supra note 96, at 49.
178. Id.
179. Id. at 947–48.
180. Id. at 949–50.
181. Id.
182. Id. at 950.
Elkus v. Elkus\textsuperscript{184} solidified New York's position on the issue, as it linked the enhanced earning capacity found in past cases to the concept of "celebrity goodwill," as found by New Jersey's Piscopo v. Piscopo a few years earlier.\textsuperscript{185} The Elkus divorce case involved a wife whose career as an opera singer escalated from performing minor roles to earning praise as a famous international performer, all during the course of the marriage.\textsuperscript{186} The court held that "to the extent the [husband's] contributions and efforts led to an increase in the value of the [wife's] career, this appreciation was a product of the marital partnership, and, therefore, marital property subject to equitable distribution."\textsuperscript{187} The court further severed the tie the O'Brien case had created between enhanced earning capacity and professional licenses, stating that limiting marital property to licensed professions "would only serve to discriminate against the spouses of those engaged in other areas of employment."\textsuperscript{188} The Elkus court agreed with the idea that goodwill can be generated by a person who has a "particular and uncommon aptitude" for some specialized skill.\textsuperscript{189} Therefore, the court held that "the enhanced skills of an artist such as the plaintiff, 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."\textsuperscript{190}

The main argument against California following in the footsteps of New York is that where New York recognizes professional degrees and licenses as marital property, California does not consider them community property.\textsuperscript{191} Yet it is apparent from the main New York cases on the subject that celebrity goodwill as a marital asset is not closely tied to the recognition of professional licenses as marital property. Instead, New York has recognized that it is not the license or degree which has value, but the enhanced earning capacity that one spouse generates because they have the special skill which the license affirms.\textsuperscript{192} In Golub, the court explicitly expanded the reach of O'Brien beyond professional licenses and said that all income-generating assets should be considered in determining the value of marital property, including "any other special skill that generates


\textsuperscript{185} Id. at 904 (citing Piscopo v. Piscopo, 555 A.2d 1190 (N.J. Super. Ct. App. Ch. Div. 1988)).

\textsuperscript{186} Id. at 901-02.

\textsuperscript{187} Id. at 901.

\textsuperscript{188} Id. at 903.

\textsuperscript{189} Id. at 904 (citing Piscopo, 555 A.2d 1190).


\textsuperscript{191} Rosenson, supra note 96, at 52.

\textsuperscript{192} See Golub, 527 N.Y.S.2d at 950.
substantial income.“ Similarly, California recognized in Mueller that when a person has a reputation or skill in a specific profession, he or she generates the intangible property value of goodwill which, in the divorce context, is divisible community property. Both California and New York recognize the importance of compensating the spouse who supports another spouse in the pursuit of the career which generates this value. New York courts dictate that “an increase in the value of separate property of one spouse, occurring during the marriage...which is due in part to the indirect contributions or efforts of the other spouse as homemaker and parent, should be considered marital property." Similarly, California courts state that “if goodwill exists at the time of divorce, some part of it must be attributable to the resources the marriage put into its development.”

Although not binding on California, New York's celebrity goodwill law is founded on similar principles and serves as an example to California courts. It demonstrates how a traditional understanding of goodwill can develop into a more modern understanding that encompasses less traditional professions. California must recognize what New York already has—by limiting the existence of goodwill to professionals engaged in more traditional professions, the law isolates those people who support their spouses' less traditional careers, causing an imbalanced and unfair result.

B. New Jersey Recognizes “Celebrity Goodwill” as a Derivative of “Professional Goodwill”

The evolution of celebrity goodwill in New Jersey began with the recognition of professional goodwill in the case of Dugan v. Dugan, when the Supreme Court of New Jersey held that a husband’s solo law practice could generate goodwill, and that goodwill is subject to equitable distribution upon divorce. The court defined goodwill as “essentially reputation that will probably generate future business” and discussed the development of the doctrine with regards to businesses. However the

193. Id.
196. Price, 503 N.E.2d at 685.
197. Smith, supra note 18, at 249.
198. See Elkus, 572 N.Y.S.2d at 903.
200. Id. at 3.
201. Id. at 3–6.
court expanded the reach of goodwill beyond businesses to encompass individual professionals.\textsuperscript{202} It stated that in solo professional practices, goodwill is created when “future earning capacity has been enhanced because reputation leads to probable future patronage from existing and potential clients.”\textsuperscript{203} The court reasoned that it would be inequitable to ignore the non-attorney spouse contributions to the development of the “economic resource” that is the attorney spouse’s goodwill.\textsuperscript{204}

New Jersey’s professional goodwill doctrine engendered celebrity goodwill in 1989 with the \textit{Piscopo v. Piscopo} decision.\textsuperscript{205} First, the trial court was called upon to decide whether the husband (comedian Joe Piscopo) had “celebrity goodwill” similar to the “professional goodwill” already established in New Jersey.\textsuperscript{206} The court held that he did have celebrity goodwill, which it defined as “a distinct asset susceptible of evaluation which is distributable if acquired during the marriage.”\textsuperscript{207} The court cited \textit{Dugan}, which said that reputation is the “cornerstone” of the legally protectible interest that is goodwill.\textsuperscript{208} The \textit{Piscopo} court explained that very few “of those who choose professional or entertainment careers... have the talent to generate above-average earnings,” but these earnings, based on a “particular and uncommon aptitude for some specialized discipline whether law, medicine or entertainment”\textsuperscript{209} are measurable goodwill subject to equitable distribution at divorce.\textsuperscript{210}

Piscopo appealed the trial court’s decision, and although he conceded that celebrity goodwill is a marital asset, he argued that his reputation should not be considered goodwill because the earnings based on his reputation were “possible” instead of “probable” and were thus unpredictable and difficult to value.\textsuperscript{211} The appellate court disagreed with Piscopo and affirmed the trial court’s decision that his celebrity goodwill was a distributable marital asset.\textsuperscript{212} The court reasoned that “business goodwill” exists even if the business is entirely dependent upon the skill of one person and has no market value\textsuperscript{213} and that it could be valued based on

\textsuperscript{202} Id. at 6.
\textsuperscript{203} Id. at 5–6.
\textsuperscript{204} Id. at 6.
\textsuperscript{207} Id. at 1193.
\textsuperscript{208} Id. at 1191 (citing \textit{Dugan}, 457 A.2d at 6).
\textsuperscript{209} Id. at 1192.
\textsuperscript{210} Id. at 1193.
\textsuperscript{211} \textit{Piscopo}, 557 A.2d at 1040, 1042.
\textsuperscript{212} Id. at 1043.
\textsuperscript{213} Id. at 1041.
“past earning capacity and the probability that such past earnings will continue.”\textsuperscript{214} Therefore, even though celebrity goodwill is difficult to value, the court asserted that the “difficulty would not affect its includability in the marital estate.”\textsuperscript{215}

New Jersey’s development of celebrity goodwill was similar to the progression of California goodwill up until the decision in \textit{McTiernan}. In New Jersey, \textit{Dugan} expanded the understanding of goodwill as something generated not only by a typical “business” but also by an individual practitioner based on reputation.\textsuperscript{216} Similarly in California, \textit{Mueller} and its progeny expanded the understanding of goodwill, establishing that it does not require the existence of a commercial or trade enterprise, but can be generated by an individual professional’s practice founded on personal skill and reputation.\textsuperscript{217} However, New Jersey took the next logical step, recognizing that goodwill in an individual practice is not premised \textit{only} on the physical assets of a business but also on the intangible assets of a person’s “particular and uncommon aptitude for some specialized discipline whether law, medicine or entertainment.”\textsuperscript{218} This aptitude is reflected by an earning capacity that exceeds that person’s peers.\textsuperscript{219} New Jersey grounded the decision to expand goodwill on the policy that “[i]f one spouse has sacrificed and assisted the other in an effort to increase that other spouse’s earning capacity, it should make no difference what shape or form that asset takes so long as it in fact results in an increase [sic] earning capacity.”\textsuperscript{220} New Jersey courts therefore expanded the concept of goodwill beyond the original understanding of it as attached to a business enterprise and allowed it to apply to a natural person practicing a profession with no ties to any commercial enterprise.

The \textit{McTiernan} court had an opportunity to expand the understanding of goodwill for California but instead narrowed the concept to ensure that goodwill was only generated by professionals practicing in a commercial or trade enterprise. This decision overlooked the principle of California community property law which dictates that a spouse has contributed to the increased earning capacity of the other spouse generated during marriage,

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\item \textsuperscript{214} \textit{Id.} at 1042 (citing \textit{Dugan}, 457 A.2d 1).
\item \textsuperscript{215} \textit{Id.} at 1042.
\item \textsuperscript{216} \textit{Dugan}, 457 A.2d at 6.
\item \textsuperscript{218} \textit{Piscopo}, 555 A.2d at 1192.
\item \textsuperscript{219} \textit{Id.}
\item \textsuperscript{220} \textit{Piscopo}, 557 A.2d at 1042.
\end{itemize}
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simply because of his or her position as the supporting spouse.\textsuperscript{221} Because of McTiernan, the policy of compensating a supporting spouse for contributing to the other spouse’s increased earning capacity is defeated when the professional spouse’s career is creative and is not tied to a commercial enterprise.

VI. CONCLUSION

As the foregoing discussion illustrates, celebrity goodwill is not only about celebrities. It is about value based on an established reputation, which is manifested in an earning capacity that surpasses that of competitors.\textsuperscript{222} To say that a professional person cannot generate this value because his or her career exists apart from a commercial establishment makes no sense, because the existence or absence of a commercial establishment should have no effect on that person’s ability to earn more than his or her competitors. A successful career is just that, no matter what form it comes in. In the divorce context, the limitation of goodwill prevents the spouse of a creative professional from being compensated for the contribution he or she made to the successful career of the other spouse, while allowing the spouse of a doctor or lawyer to be compensated simply because those professions attach to a commercial enterprise. This result not only deviates from the evolved California goodwill doctrine, but it is also inconsistent with generally accepted principles of community property.

In 2005, California seemed to be progressing toward a broader understanding of goodwill in divorce proceedings, based largely on the community property policy of compensating the spouse who invested in the goodwill by supporting the spouse who earned the goodwill.\textsuperscript{223} This progression was cut short by the McTiernan decision, which presented a holding inconsistent with California’s established rules and policies on goodwill, as can be seen by the foregoing analysis of the court’s rationales. The result is confusing and begs the question as to whether a slightly different fact pattern would have precipitated a different holding. Here, Ms. Dubrow was obviously a capable career woman who earned a substantial income before marrying her husband and also worked alongside him as a producing partner during their marriage. But what would the result have been if she had no career of her own? Would the court have been able to deny her any share of her husband’s substantial earning capacity with a straight face if she was a “housewife” without any career

\textsuperscript{221} Golden, 270 Cal. App. at 405.
\textsuperscript{223} See Golden, 270 Cal. App. at 405.
prospects? Would the court have reached the same decision if Wanda from the hypothetical was in Mr. McTiernan’s position in the courtroom, and the issue concerned extending goodwill to an ordinary creative professional instead of a celebrity film director? These questions are important. The McTiernan decision represents an alarming departure from the development of the law in this area. Even more alarming is the potential impact the court’s decision not to recognize “celebrity goodwill” will have on the spouses of creative and unorthodox professionals in California.

_Paloma Peracchio*

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* Thank you to the editors and staff of the Entertainment Law Review for all their hard work on my article, Professor Goldberg for her advice throughout the writing process, Mom and Bill for their love and support, and most importantly, my husband Joe for relentlessly loving and believing in me – I could never do any of this without him.