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'TIL SUCCESS DO US PART: HOW ILLINOIS PROMOTES INEQUITIES IN PROPERTY DISTRIBUTION PURSUANT TO DIVORCE BY EXCLUDING PROFESSIONAL GOODWILL

INTRODUCTION

A vast majority of states revised their divorce laws between 1972 and 1983.¹ In doing so, thirty-eight of the fifty States adopted equitable distribution statutes.² Such statutes treat marriage as a partnership.³ Consequently, marital dissolution resembles partnership dissolution.⁴ Upon divorce, each spouse has an equal claim to property acquired during the marriage.⁵ If property acquired during the marriage includes a business interest, the partnership theory envisions a distribution of that business interest upon divorce.⁶

1. The National Conference of Commissioners on Uniform State Laws triggered massive divorce reform by promulgating a Uniform Marriage and Divorce Act in 1971. UNIF. MARRIAGE AND DIVORCE ACT, § 101, Prefatory Note, 9A U.L.A. 147 (1987) [hereinafter Prefatory Note]. The 1973 amendments to the property disposition section of the Uniform Act provided alternative provisions applicable to either community property or equitable distribution systems to facilitate its adoption nationwide. *Id.* By the middle of 1983, 38 jurisdictions had adopted some form of equitable distribution provisions of the Uniform Act. Carmen Valle Patel, Note, *Treating Professional Goodwill as Marital Property in Equitable Distribution States*, 58 N.Y.U. L. REV. 554, 557 (1983). These jurisdictions included Alabama, Alaska, Arkansas, Colorado, Connecticut, Delaware, Washington D.C., Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Wisconsin, and Wyoming. *Id.* at 557 n.21.

2. See Patel, *supra* note 1, listing 38 jurisdictions that adopted equitable distribution between 1972 and 1983. See also Doris Jonas Freed & Timothy B. Walker, *Family Law in the Fifty States: An Overview*, 24 FAM. L.Q. 309, 336-37 (1991) (listing 49 states, plus the District of Columbia, as equitable distribution jurisdictions as of 1991, adding Florida, South Carolina, Virginia and West Virginia to the list since 1983).

3. Prefatory Note, *supra* note 1, at 149. "The distribution of property upon the termination of marriage should be treated, as nearly as possible, like the distribution of assets incident to the dissolution of a partnership." *Id.*

4. *Id.*

5. *Id.*

6. *In re Marriage of Leon*, 399 N.E.2d 1006, 1009 (Ill. App. Ct. 1980) (discussing the majority of jurisdictions agreeing that marital property includes an interest of a spouse in a partnership business). See also *In re Marriage of White*, 424 N.E.2d 421, 422-23 (Ill. App. Ct. 1981) (holding that business interests acquired subsequent to the marriage, such as a sole proprietorship, or stock in a

The Illinois General Assembly adopted equitable distribution in 1977 with the enactment of the Illinois Marriage and Dissolution of Marriage Act (the "Illinois Dissolution Act").⁷ In enacting the Illinois Dissolution Act, the legislature intended to correct glaring inequities in property distribution that existed under the prior law.⁸ Additionally, the legislature strived for finality of the parties' relationship by distributing all marital property⁹ and avoiding modifiable future payments.¹⁰

Recently, however, the Illinois Supreme Court ignored the legislature's goals in adopting the Illinois Dissolution Act. In the recent decision in *In re Marriage of Zells*,¹¹ the Illinois Supreme Court created formidable inequities in holding that a business interest is not marital property subject to distribution if it consists of professional goodwill.¹² Professional goodwill is an identifiable part of a professional's business that can have significant value.¹³ The effect of *Zells* is that courts will ignore a valuable asset acquired during the marriage, resulting in inequitable property distributions pursuant to divorce.

closely held corporation, are considered marital property); see generally *In re Marriage of Lee*, 398 N.E.2d 126, 133 (Ill. App. Ct. 1979) (upholding the district court's order regarding two businesses owned by the couple, which distributed one business to each spouse).

7. ILL. REV. STAT. ch. 40, para. 101-801 (1991) [hereinafter Illinois Dissolution Act]. Paragraph 503 of the Illinois Dissolution Act regulates the disposition of property pursuant to divorce, and is based on the Uniform Act, as originally promulgated in 1971. ILL. REV. STAT. ch. 40, para. 503 (1991). See also Prefatory Note, *supra* note 1, at 240 (providing the property disposition provision of the Uniform Act in its pre-1973 form); *Kujawinski v. Kujawinski*, 376 N.E.2d 1382, 1386-87 (Ill. 1978) (stating that the legislative purpose behind Illinois' adoption of the Uniform Marriage and Divorce Act was to provide for the equitable distribution of property upon divorce).

8. *Kujawinski*, 376 N.E.2d at 1388. Justice Moran of the Illinois Supreme Court recognized in *Kujawinski* that in adopting the Illinois Dissolution Act, "[t]he primary legislative objective is to create a system of property division upon dissolution of marriage that is more equitable than that which previously existed in this State. It is evident that the legislature recognized glaring inequities in the earlier law and favored change." *Id.*

9. *Lee*, 398 N.E.2d at 133. A court strives for an equitable division of the marital property acquired during the marriage to enable the parties to begin anew. *Id.* See also Max Rheinstein, *Division of Marital Property*, 12 WILLAMETTE L.J. 413, 418 (1976) (pointing out that there is a trend in this country towards the abandonment of the view of marriage as a lifetime commitment, and the desire to treat divorce as a final and complete termination of a relationship enabling the parties to begin new families).

10. Rheinstein, *supra* note 9, at 425. The insufficiency of alimony combined with the growing acceptance of spouses as equals creates a demand for equal sharing of property at divorce. *Id.*

11. *In re Marriage of Zells*, 572 N.E.2d 944 (Ill. 1991).

12. *Id.* at 946.

13. See *infra* notes 115-145 and accompanying text for a detailed explanation of professional goodwill.

This Note discusses the inequities created by failing to value professional goodwill as property subject to distribution upon divorce. Part I of this Note provides a general background of marital dissolution law, first with respect to the changing role of marriage in society, and second with respect to the three systems that provide the foundation for dissolution law in America. Next, Part II generally discusses the treatment in marital dissolution of business goodwill. Part III then focuses specifically on the courts' treatment of professional goodwill. Part III first discusses the treatment of professional goodwill under the majority and minority views nationwide, and then discusses the treatment of professional goodwill by Illinois courts before *Zells*. Next, Part IV analyzes the *Zells* case and the inequitable effect it will have on property distributions in the future. Finally, Part V proposes an amendment to the Illinois Dissolution Act that provides a method of valuation for professional goodwill that will yield an equitable result consistent with the legislative intent underlying the Act.

I. PROPERTY DISTRIBUTION IN MARITAL DISSOLUTION

The evolution of dissolution law in America reflects society's changing attitude about marriage.¹⁴ Three different "systems" exist today as a result of the differing regional attitudes about marriage nationwide.¹⁵ Each state adopted one of these systems as the basis for their dissolution laws. This section first discusses dissolution law as it is affected by the changing role of marriage in society. Second, this section explains the three "systems" of American dissolution law.

A. "Your Fault" to No-Fault: Divorce as Shaped by the Role of Marriage in Society

The history of divorce laws reflects societies' changing attitudes about marriage.¹⁶ In Western societies, marriage served an important economic function.¹⁷ It reflected the expectations of the roles

14. See *infra* notes 16-41 for a discussion of how society's changing attitudes have effected dissolution law.

15. See *infra* notes 42-114 and accompanying text for a discussion of the three American systems on which the states base their dissolution laws.

16. Bea Ann Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 TEX. L. REV. 689, 694-95 (1990); Martha L. Fineman, *Societal Factors Affecting the Creation of Legal Rules for Distribution of Property at Divorce*, 23 FAM. L.Q. 279 (1989). The way in which society perceives marriage shapes the manner in which the laws treat divorce. *Id.* Such societal attitudes are employed by courts to formulate the factors they consider in determining property distribution pursuant to divorce. *Id.* Furthermore, since the actors in the divorce process, such as lawyers, judges and spouses, are part of society, their attitudes shape the manner in which they consider the fairness of factors under consideration in property distribution. *Id.*

17. Rheinstein, *supra* note 9, at 413.

of husbands and wives in a patriarchal society.¹⁸ Men were legally responsible for protecting and providing for their wives, while wives were responsible for taking care of the home and children.¹⁹ Thus, marital roles defined the responsibilities of the parties and allocated the support and property acquisition functions to the husband.²⁰

After the Industrial Revolution, it was more common for wives to work outside the home.²¹ The insufficiency of husbands' earnings required that wives work "to make ends meet,"²² however, employers paid very low wages to women.²³ Therefore, marriage retained its economic function because women remained primarily dependent on their husbands for support.²⁴ Moreover, even though wives began to contribute support and property, severe legal restrictions limited the control they could exercise over their own earnings and property.²⁵ These restrictions contributed to the need for laws addressing the property rights of spouses upon the termination of a marriage.²⁶

18. *Id.*

19. Rheinstein, *supra* note 9, at 413-14 n.4. In France, "[t]he husband owes protection to his wife, the wife owes obedience to the husband." *Id.* (quoting French C. Civ. Art. 213 (1804)). Whereas in Italy, "[t]he husband is the head of the family." *Id.* (quoting Ital. C.C. Art. 131 (1865)).

20. Smith, *supra* note 16, at 694-95.

21. Rheinstein, *supra* note 9, at 414. "With the onset of the industrial revolution, pure housewife marriage was an inaccurate description of the family life." *Id.*

22. *Id.*

23. *Id.*

24. See Rheinstein, *supra* note 9, at 414. Nineteenth century society viewed women as economic dependents of their husbands. *Id.* See also Mary E. O'Connell, *Alimony After No-Fault: A Practice in Search of a Theory*, 23 NEW ENG. L. REV. 437, 459-60 (1988). Indeed, it was culturally desirable for a woman to remain at home and refrain from working. *Id.* If a wife worked outside the home, the presumption was that the family had not yet achieved middle-class status. *Id.*

25. See Rheinstein, *supra* note 9, at 416. Until well after the Industrial Revolution began, husbands solely managed and controlled property. *Id.* This was even true of property owned by the wife separately before the marriage. *Id.* Additionally, it included property acquired by gift or inheritance during the marriage. *Id.* Further, the husband had a legal right to use and dispose of all of the property in the marriage, including his wife's earnings. *Id.* See generally William A. Reppy, Jr., *Major Events in the Evolution of American Community Property Law and Their Import to Equitable Distribution States*, 23 FAM. L.Q. 163, 166-67 (1989) (discussing the importance of the Middle Age's concept of passing land along the male bloodline as impacting women's property rights in marriage).

26. See, e.g., Lawrence M. Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 OR. L. REV. 649, 655 (1988). It was not until 1839 that Mississippi passed the first of the Married Women's Property Acts. *Id.* This entitled married women to have title and control over their own property and earnings. *Id.* With the turn of the twentieth century came a time when a number of countries granted women the legal right to full control over their earnings. *Id.* See also Rheinstein, *supra* note 9, at 415 (stating that some coun-

In 1785, Pennsylvania responded to this need and passed the first law permitting courts to grant divorces and thus determine property rights.²⁷ In reflecting society's social and moral values, the judicial divorce laws began as an adversary system based on fault.²⁸ The fault system reflected society's belief that marriage

tries granted women unrestricted rights over their earnings, including Germany in 1896, Switzerland in 1908, and France in 1907).

27. Friedman, *supra* note 26, at 655. Until the end of the 18th century, divorce was solely within the power of the legislature. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 181-82 (1973) [hereinafter HISTORY]. The process was cumbersome, to put it mildly. *Id.* Consequently, divorces were rarely granted. *Id.* Thus, desertion was the commonplace means of terminating a marital relationship. Friedman, *supra* note 26, at 655. This was troublesome, particularly for women, because property rights were left in limbo. *Id.* See e.g. O'Connell, *supra* note 24, at 462 (stating that the English common law regarding property, which carried over to American Law, created legal disabilities on women).

In colonial times, legislative divorces were rare, though cumbersome. Friedman, *supra* note 26, at 655. Virginia granted one such divorce to Mary and William Cloud. *Id.* at 652. This law states that their marriage "is hereby dissolved, the said Mary forever divorced from her husband . . . and the power and authority of the said William over the person and property of the said Mary, shall henceforth cease and determine." *Id.* at 652 n.10 (quoting 1839 Laws Va., ch. 262).

These legislative divorces are better understood when viewed in a historical context. *Id.* at 653. This was also an era when the legislature chartered corporations individually, changed people's names, and handled the affairs of individual communities on an individual basis. *Id.* However, as demand increased, legislatures could not handle the load. *Id.* at 652. Increasingly, they spent more and more time passing laws for private individuals. *Id.* at 652-53. Consequently, lawmakers enacted laws providing for judicial divorce in response to the legal problems surrounding property and inheritance. Friedman, *supra* note 24, at 655.

Pennsylvania led the way in 1785 by enacting its first law providing for court decreed divorce. HISTORY, *supra* at 182. Other states soon followed, although the northern states were quicker to adopt judicial divorce than the more parochial southern states. Friedman, *supra* note 26, at 652. It was not until 1897 that all the states eliminated legislative divorce. *Id.* at 655. In that year Delaware granted 102 legislative divorces. *Id.*

28. Friedman, *supra* note 26, at 653. The first divorce laws reflected moral goals in their respective lists of "grounds." *Id.* In 1822, Rhode Island granted a divorce for "impotency, adultery, extreme cruelty, wilful desertion for five years . . . [or] neglect or refusal . . . of the husband, being of sufficient ability, to provide necessaries for the subsistence of his wife." *Id.* at 654 (quoting REV. STATS. R.I., 368-69 (1822)). The Rhode Island law concluded with a broad provision allowing divorce for "any other gross misbehavior and wickedness . . . repugnant to or in violation of the marriage covenant." *Id.* (quoting REV. STATS. R.I., 368-69 (1822)). Additionally, the divorce laws reflected the societal attitude that marital misconduct warranted punishment. See also Rheinstein, *supra* note 9, at 415. The laws punished a husband shown to be unbearably cruel, or particularly indiscrete as an adulterer by depriving him of the companionship and household services of his wife. *Id.* Moreover, the guilty husband remained responsible for the wife's support. *Id.* At the same time, punishment for a wife who strayed from the marital bed, even once, or was intolerable in any way, was equally severe. *Id.* She was punished with a divorce accompanied by the complete deprivation of home and support. *Id.* See generally Lenore J. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181, 1185 (1981) (stating

was a life-long guarantee of a wife's source of property and support.²⁹ Divorce was difficult to obtain.³⁰ Thus, a husband could not easily leave, taking property and terminating the support obligation.³¹

As marital roles and societal attitudes changed, so too did the laws regarding marital dissolution.³² Marriage gradually evolved from a relationship motivated predominantly by economics, to one in which people sought love and affection.³³ As the stigma of divorce diminished, spouses manipulated the fault system by perjuring themselves or colluding to obtain a consensual divorce.³⁴ Consequently, over the past twenty years, legislators recognized the need for change and enacted laws for marital dissolution that took on a no-fault aura.³⁵ Obtaining a divorce became easier, and the

that the economic consequences of divorce were directly linked to the "guilt" or "innocence" of the respective spouses).

29. Rheinstein, *supra* note 9, at 415; Friedman, *supra* note 26, at 652. Originally, the laws provided for two different types of divorce. Rheinstein, *supra* note 9, at 415. The first type was similar to today's version of a legal separation because spouses remained married, but lived apart and were prohibited from ever remarrying. *Id.* The second type of divorce was an absolute divorce, as we know it today. *Id.* However, the court had the discretion to allow only the innocent spouse the right to remarry. *Id.* Alternatively, the guilty spouse might merely be required to wait a longer period of time before remarrying. *Id.*

30. Rheinstein, *supra* note 9, at 415. See also, Friedman, *supra* note 26, at 653 (stating that divorce statutes were not at all simple, facilitative laws); Jane Rutheford, *Duty in Divorce: Shared Income as a Path to Equality*, 58 FORDHAM L. REV. 539, 541 (1990)(stating that a wife, who was not guilty of marital misconduct, could prevent a guilty husband from obtaining a divorce if the wife was unhappy with the financial settlement).

31. Rutheford, *supra* note 30, at 541.

32. Smith, *supra* note 16, at 694-95.

33. Friedman, *supra* note 26, at 657-58. People now have high expectations of marriage. *Id.* They require spouses to be friends, lovers, companions, and equals. *Id.*

34. Friedman, *supra* note 26, at 659. In New York, where the only ground for divorce was adultery, collusive behavior was particularly wide-spread. *Id.* Proof of adultery was required. *Id.* Consequently, there were people who would arrange adulterous scenes in hotel rooms for a fee. *Id.* The women hired for this purpose would testify to the existence of an adulterous relationship in court. *Id.* These people were sometimes raided and exposed. *Id.* In 1900, Henry Zeimer and Waldo Maisson were arrested for operating such a business. *Id.* Herbert F. Miller's exposure came in the early 1920's. *Id.* Additionally, the New York Times reported a crack down on Jack Berkowitz's divorce ring in 1922. *Id.* Mr. Berkowitz's ring was staffed by actors in financial need waiting for their big breaks on Broadway. *Id.* Similar crack downs continued until as recently as 1948. *Id.*

As an alternative to collusion, some people went to other jurisdictions to avoid strict divorce laws. *Id.* at 661. Mexico and the Virgin Islands were popular, yet somewhat questionable legally. *Id.* at 662. On the legally safer side, North Dakota, South Dakota and Indiana attracted people seeking lenient divorce laws. *Id.* Additionally, Nevada divorces became popular for the rich as far back as 1906. *Id.*

35. Weitzman, *supra* note 28, at 1184-85. California became the first state to pass a no-fault statute in 1969. *Id.* See also Rheinstein, *supra* note 9, at 416. By

resulting consequences became far less severe.³⁶

Moreover, twentieth-century society abandoned the notion of marriage as a promise of never-ending financial support.³⁷ Women became property owners with full legal capacity and were no longer dependent upon men to acquire and retain property.³⁸ Further, dual-career households became increasingly more common and thus women were able to support themselves.³⁹ Now, marriage is viewed more as a partnership between legal equals, under which spouses have equal claims to property acquired during the mar-

1976, "no-fault divorce has become available in the Nordic countries, the socialist countries, the Netherlands, West Germany, Switzerland, Austria, Italy, Portugal, France, Japan, England, Australia, Canada, [and] several Latin American countries." *Id.* Additionally, of the 53 United States jurisdictions, 47 adopted some form of no-fault divorce. *Id.* People began viewing divorce less as the result of fault, and more as the result of disappointed expectations. *Id.* See also Rutherford, *supra* note 30, at 542 (stating that as of 1990, all fifty states had a form of no-fault divorce).

36. Weitzman, *supra* note 28, at 1185. Divorce laws based on fault became outmoded and produced unworkable results. *Id.* Divorce reformers sought to create more rational, fair settlements not based on fault. *Id.* See also Rutherford, *supra* note 27, at 542. See generally Doris Jonas Freed & Timothy B. Walker, *Family Law in the Fifty States: An Overview*, 22 FAM. L.Q. 367-526 (1989) for a categorization of divorce laws in the United States by state. Many no-fault statutes are based on a ground of irreconcilable differences. *Id.* at 385-86. An example of one such statute is The Illinois Dissolution Act, *supra* note 7 at ¶ 401(a). The statute grants a divorce on irreconcilable differences as follows:

(2) That the spouses have lived separate and apart for a continuous period in excess of 2 years and irreconcilable differences have caused the irretrievable breakdown of the marriage and the court determines that efforts at reconciliation have failed or that future attempts at reconciliation would be impracticable and not in the best interests of the family; provided that if the spouses have lived separate and apart for a continuous period of not less than 6 months next preceding the entry of the judgment dissolving the marriage, as evidenced by testimony or affidavits of the spouses, the requirement herein of living separate and apart for a continuous period in excess of 2 years may be waived upon written stipulation of both spouses filed with the court."

Id.

See also Prefatory Note, *supra* note 1, at 149.

The Conference came finally to the conclusion . . . that the legal dissolution of a marriage should be based solely on a finding that factually the marriage is irretrievably broken. This standard will redirect the law's attention from an unproductive assignment of blame to a search for the realities of the marital situation."

Id.

37. Smith, *supra* note 16, at 695. Society's changed views of marriage resulted in an attempt to provide divorce laws that substituted equitable property distributions for the abandoned promise of neverending financial support. *Id.* "In contrast, today spouses are fired when they lose their charm, children have no guarantee of care, and spouses often refuse to continue supporting their families." *Id.*

38. See, e.g., *id.* at 698-703 (discussing the evolution of women's legal rights regarding property and its effect on divorce laws).

39. *Id.* at 695.

riage.⁴⁰ As in the past, the current societal view of marriage has influenced the manner in which property is distributed in divorce proceedings.⁴¹

*B. Yours, Mine and Ours — Property Distribution
in Marital Dissolution*

The manner in which courts distribute property and award maintenance upon marital dissolution depends on the "system" adopted by the jurisdiction.⁴² Today, three such systems exist; common law title, community property, and equitable distribution.⁴³ Although most states originally based their dissolution laws on a system of common law title, all but one state was under a system of equitable distribution by 1991.⁴⁴ This section describes the three systems on which states base their dissolution laws.

1. Common Law Title

In a common law title jurisdiction, the court distributes property to the party in the name in which title is held.⁴⁵ An economically dependent spouse is generally entitled to some form of permanent alimony when that spouse's share of distributed property is insufficient to provide for self-support.⁴⁶ In addition, the court has some power to modify the property distribution by way of special equities⁴⁷ or alimony in gross.⁴⁸

40. Robert J. Levy, *An Introduction to Divorce-Property Issues*, 23 FAM. L.Q. 147, 152 (1989) (stating that the goal of the new divorce laws is to treat spouses like partners).

41. *Id.*

42. Joseph W. McKnight, *Defining Property Subject to Division at Divorce*, 23 FAM. L.Q. 193, 194-95 (1989).

43. *Id.*

44. See Patel, *supra* note 1, for a listing of the forty-nine states that adopted equitable distribution laws by 1991.

45. Marshall J. Auerbach, *An Introduction to the New Illinois Marriage and Dissolution of Marriage Act*, 66 ILL. B.J. 132 (1977).

46. Rheinstein, *supra* note 9, at 424.

47. ILL. REV. STAT. ch. 40, para. 18 (1975) (repealed 1977). The former law providing for special equities provided that "[w]henver a divorce is granted, if it shall appear to the court that either party holds the title to property equitably belonging to the other, the court may compel conveyance thereof to be made to the party entitled to the same, upon such terms as it shall deem equitable." *Id.* The concept of special equities permits a court to redistribute property owned by one spouse to the other. See *id.* In order to do so, the nontitled spouse must trace some form of financial contribution directly to the acquisition or improvement of the property. *Everett v. Everett*, 185 N.E.2d 201, 205 (Ill. App. Ct. 1962). In *Everett*, the court traced the wife's contributions of cash in both the down payment of the home that was sold, and in construction of the new house to create equitable ownership in the new house. *Id.* Alternatively, the nontitled spouse must show an indirect contribution of services, over and above normal marital services, to acquire equitable ownership. *Id.* However, such direct or indirect contributions are often difficult to prove. *Id.*

Nevertheless, common law title, which was the formerly predominant system, received much criticism because of its discrimination against a dependent spouse.⁴⁹ Since a dependent spouse did not work outside the home, there was little or no opportunity to acquire title to property.⁵⁰ The supporting spouse was the principal titleholder to all the property⁵¹ and consequently received the property upon the dissolution of the marriage.⁵² Nevertheless, the dependent spouse still contributed to the family, albeit in a nonfinancial way.⁵³ The courts, however, ignored the contributions of the dependent spouse upon divorce.⁵⁴

48. ILL. REV. STAT. ch. 40, para. 19 (1975)(repealed 1977). The former law provided for alimony in gross as follows:

The court may order the husband or wife, as the case may be, to pay to the other party such sum of money, or convey to the party such real or personal property, payable or to be conveyed either in gross or by installments as settlement in lieu of alimony, as the court deems equitable."

Id.

Thus, alimony in gross is an award of alimony to be paid in a lump sum, rather than in periodic payments. See *Green v. Green*, 354 N.E.2d 661, 669-70 (Ill. App. Ct. 1976); *Overton v. Overton*, 287 N.E.2d 47, 50 (Ill. App. Ct. 1972).

To award alimony in gross, the court can redistribute property owned by one spouse for the support of the nontitleholding spouse. *Persico v. Persico*, 100 N.E.2d 904, 906 (Ill. 1951). Accordingly, the requesting spouse must first be entitled to alimony. *Id.* Moreover, there must be compelling reasons why periodic payments cannot be made. *Green*, 354 N.E.2d at 669-70. Under a common law title system, courts preferred periodic alimony payments. *Id.* However, where the record showed that periodic payments were not feasible, the court could award alimony in gross. *Id.* Courts typically ordered alimony in gross where the payor spouse was regularly intoxicated, was generally delinquent in paying bills, refused to work, or worked in a hazardous occupation that might make him unable to earn income later. *Id.* Thus, alimony in gross is an alternative to periodic payments, not an addition to them. *Overton*, 287 N.E.2d at 51.

49. See, e.g., Joan M. Krauskopf, *A Theory for a "Just" Division of Marital Property in Missouri*, 41 MO. L. REV. 165, 167-71 (1976) (discussing the inequities of property distribution under common law title); *Symposium on the Uniform Marriage and Divorce Act*, 18 S.D. L. REV. 531, 531-37 (1973) (discussing the need for a more equitable approach to property distribution in divorce).

50. See Rheinstein, *supra* note 9, at 424 (stating that when parties walked away with only property to which they held title under common law title, the housewife took nothing); Joan Pennington, *The Economic Implications of Divorce for Older Women*, 33 CLEARINGHOUSE REV. 488 (1989). Historically, women's economic dependence on men led to disastrous results for women in divorce because the divorce cut off the women's economic resources. *Id.* See also Marsha R. Shelburn & Randall M. Chastain, *Career Assets and the Equitable Apportionment of Marital Property*, 38 S.C. L. REV. 755, 759-60 (1987). Husbands' traditional roles enabled them to build up both tangible assets and career assets, while the traditional housewife received no such opportunities. *Id.*

51. See Rheinstein, *supra* note 9, at 424 (stating that husbands walked away with most property, since they held title).

52. *Id.*

53. See generally Smith, *supra* note 16, at 696-97 (stating that traditional marital roles emphasized the husband's economic contributions when distributing property and awarding alimony to the detriment of a housewife).

54. *Id.* The common law system generally failed to account for the past contributions as homemaker when deciding property interests upon divorce. *Id.*

2. Community Property

The inequities arising from the common law title system of property distribution led some states to adopt the community property scheme.⁵⁵ Modern community property systems provide the foundation for recognizing spouses as equal legal economic partners.⁵⁶ Under this partnership theory, all assets acquired during the marriage are shared by the marital "community."⁵⁷ Thus, when a marriage dissolves, each spouse has a legal claim to all property acquired during the marital partnership, regardless of who holds title.⁵⁸

The community property system actually creates a property interest in both spouses during the marriage.⁵⁹ Community property, therefore, is under the joint control of both spouses.⁶⁰ Either spouse, acting alone, is generally entitled to manage and control

Further, the system failed to recognize the spouse's forbearance of outside earnings opportunities. See Shelburn & Chastain, *supra* note 50, at 760 (discussing how the traditional role of housewife has prevented women from building careers). Ultimately, the spouse was left with only alimony to provide for her support. See *id.* Unfortunately, alimony is usually modifiable by the other spouse, and often is difficult to collect.

Reliance on alimony perpetuated the supported spouse's dependence. See also, Patel, *supra* note 1, at 559. A court retained jurisdiction to modify alimony subsequent to divorce. *Id.* Such modifications could result from a reduced ability of the payor to pay. *Id.* Alternatively, a payor might seek a reduction due to a reduced need of the payee. *Id.* Thus, a spouse who attempted to become self-supporting faced the possibility of an alimony reduction. *Id.* If the husband was the principle titleholder of property acquired during the marriage, he retained such property upon divorce. *Id.* Alimony was likely the means of balancing the marital wealth between the parties upon divorce. *Id.* Thus an early alimony termination or reduction resulted in extreme inequities to the ex-wife. *Id.*

55. Smith, *supra* note 16, at 698-703.

56. *Id.* at 698; Reppy, *supra* note 25, at 163.

57. Smith, *supra* note 16, at 698; Michelle Patterson, Comment, *What's Yours is Mine and What's Mine is Mine: The Classification of the Home Upon Dissolution*, 28 UCLA L. REV. 1365, 1366 (1981). See generally Weitzman, *supra* note 28, at 1199 (stating that community property laws in California treat marriage like a partnership, treating spouses as equal owners of property).

58. See Smith, *supra* note 16, at 698; Patterson, *supra* note 57, at 1366.

59. See Note, *Family Law: Ought a Professional Degree be Divisible as Property Upon Divorce*, 22 WM. & MARY L. REV. 517, 523 (1981) (describing a community property system as one in which both spouses immediately obtain ownership rights in property acquired during a marriage).

60. Rheinstein, *supra* note 9, at 422-23. Additionally, most state statutes provide a comprehensive list of transactions that require joint participation. *Id.* See WASH. REV. CODE § 26.16.030 (1974). Washington's law provides that both spouses must join in the purchase or sale of community real estate, devising or bequeathing property by will, gifting community property, create a security interest in community goods, furnishings, or appliances, encumber community assets, including real estate or business interests where both spouses participate in the management. *Id.*

one-half of the community property during the marriage.⁶¹ Thus, a spouse cannot easily transfer property out of the marital partnership to prevent its distribution to the other spouse in anticipation of divorce.⁶²

However, property brought to the marriage by an individual spouse, and property acquired by gift or inheritance remain outside the marital domain as separate property.⁶³ Upon divorce, the court first divides property into either community property or separate property.⁶⁴ Generally, the court distributes separate property to the titleholding spouse before it distributes community property.⁶⁵ Then in some jurisdictions, such as California, the court must divide community property equally between the spouses according to statute on a fifty-fifty basis.⁶⁶ In other jurisdictions, such as Texas, the court has more discretion over property distribution.⁶⁷ There the court has the discretion to allocate community property and redistribute separate property as equity requires in its judicial discretion.⁶⁸ It is from these later jurisdictions that equitable distribution derived its theoretical foundation.

3. *Equitable Distribution*

Equitable distribution systems resulted from common law title states adopting the equitable principles of community property systems.⁶⁹ Forty-two jurisdictions adopted equitable distribution in response to a need to replace common law title and its glaring inequities.⁷⁰ In creating equitable distribution, legislators borrowed the partnership theory from the community property system⁷¹ and based their laws on the Uniform Marriage and Divorce Act ("Uni-

61. See *supra* note 56 for the Washington Marriage and Dissolution Act as an example of a statute requiring joint decision making as to certain types of community property.

62. See *supra* note 56 for an example of a statute requiring that spouses jointly decide on numerous dispositions of community property, preventing any one spouse from clandestinely disposing of community property.

63. See Smith, *supra* note 14, at 697-98; McKnight, *supra* note 40, at 194-95; J. Thomas Oldham, *Tracing, Commingling, and Transmutation*, 23 FAM. L.Q. 219, 220-21 (1989).

64. See Smith, *supra* note 14, at 698; Oldham, *supra* note 59, at 220-21.

65. Oldham, *supra* note 59, at 219.

66. Weitzman, *supra* note 26, at 1199 (discussing the California Family Law Act, which requires that the court distribute community property equally between the spouses.)

67. Smith, *supra* note 14, at 720-22.

68. *Id.*

69. *Id.* at 696.

70. Prefatory Note, *supra* note 1, at 147.

71. See Smith, *supra* note 14, at 697.

form Act").⁷² Under an equitable distribution law, the objective is to distribute property upon divorce in an equitable manner without regard to who holds title.⁷³

Nevertheless, similar to community property systems, most equitable distribution systems recognize certain property as outside the class of property subject to division.⁷⁴ Thus, prior to distribution, the court characterizes property as marital property or nonmarital property.⁷⁵ Marital property is subject to division between the parties regardless of who holds title.⁷⁶ Unlike a community property system, an equitable distribution system does not purport to create property interests during marriage.⁷⁷ "Marital property" is a classifying term used strictly for purposes of determining what property is divisible in the event of divorce.⁷⁸ Generally, property acquired during the marriage carries a presumption of being marital property.⁷⁹

To overcome the presumption, property must fall within a specifically delineated category of non-marital property.⁸⁰ Nonmarital

72. Prefatory Note, *supra* note 1, Prefatory Note, at 149. Eight states adopted the Uniform Act completely. *Id.* See ARIZ. REV. STAT. ANN. §§ 25-311 to 25-339 (1976 & Supp. 1989); COLO. REV. STAT. §§ 14-2-101 to 14-2-113, §§ 14-10-101 to 14-10-133 (1987 & Supp. 1989); ILL. REV. STAT. ch. 40, ¶¶ 101 - 802 (1989); KY. REV. STAT. ANN. § 403.010, §§ 403.110 to 403.350 (Michie/Bobbs-Merrill 1984 & supp. 1988); MINN. STAT. ANN. §§ 518.002 to 518.66 (West Supp. 1990); MO. ANN. STAT. §§ 452.300 to 452.415 (Vernon 1986 & Supp. 1990); MONT. CODE ANN. §§ 40-1-101 to 40-1-404, §§ 40-4-101 to 40-4-221 (1989); WASH. REV. CODE ANN. §§ 26.09.010 to 26.09.902 (1986 & Supp. 1990).

73. McKnight, *supra* note 42, at 194-97.

74. *Id.* at 194-95.

75. *Id.* at 201-206.

76. *Id.* at 194; Illinois Dissolution Act, *supra* note 7, ¶ 503.

77. Kujawinski v. Kujawinski, 376 N.E.2d 1382, 1386 (Ill. 1978) (stating that equitable distribution only resolves property division pursuant to divorce, and does not effect ownership to property during the marriage).

78. *Id.*

79. Illinois Dissolution Act, *supra* note 7, at para. 503(b). Paragraph 503(b) provides:

(b) For purposes of distribution of property pursuant to this Section, all property acquired by either spouse after the marriage and before a judgment of dissolution of marriage or declaration of invalidity of marriage, including non-marital property transferred into some form of co-ownership between the spouses, is presumed to be marital property, regardless of whether title is held individually or by the spouses in some form of co-ownership such as joint tenancy, tenants in common, tenancy by the entirety, or community property. The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection (a) of this Section.

Id.

80. McKnight, *supra* note 42, at 205. See Illinois Dissolution Act, *supra* note 7, at para. 503(a). The Dissolution Act provides:

property is property owned outside the marital partnership.⁸¹ Generally, it consists of property acquired before the marriage, and property acquired by gift or inheritance during the marriage.⁸² In addition, it includes property acquired during the marriage in exchange for clearly traceable nonmarital property.⁸³ A court distributes to each spouse his or her nonmarital property.⁸⁴ Then the court equitably divides marital property between the parties after considering various factors that the statute prescribes.⁸⁵

The Uniform Act prescribes the factors that the court must

(a) For purposes of this Act, "marital property" means all property acquired by either spouse subsequent to the marriage, except the following, which is known as "nonmarital property":

- (1) property acquired by gift, legacy or descent;
- (2) property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, legacy or descent;
- (3) property acquired by a spouse after a judgment of separation;
- (4) property excluded by valid agreement of the parties;
- (5) any judgment or property obtained by judgment awarded to a spouse from the other spouse;
- (6) property acquired before the marriage;
- (7) the increase in value of property acquired by a method listed in paragraphs (1) through (6) of this subsection irrespective of whether the increase results from a contribution of marital property, non-marital property, the personal effort of a spouse, or otherwise, subject to the right of reimbursement provided in subsection (c) of this Section; and
- (8) income from property acquired by a method listed in paragraphs (1) through (7) of this subsection if the income is not attributable to the personal effort of a spouse.

Id.

81. McKnight, *supra* note 42, at 201-205.

82. *Id.*

83. *Id.* at 204.

84. See Illinois Dissolution Act, *supra* note 7, at para. 503(c). The Illinois Dissolution Act provides that "[i]n a proceeding for dissolution of marriage . . . the court shall assign each spouse's nonmarital property to that spouse." *Id.*

85. See *id.* The Illinois Dissolution Act, which is based on the Uniform Act, provides that the court:

(d) . . . shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors, including:

- (1) the contribution or dissipation of each party in the acquisition, preservation, or depreciation or appreciation in value, of the marital and nonmarital property, including the contribution of a spouse as a homemaker or to the family unit;
- (2) the value of the property set apart to each spouse;
- (3) the duration of the marriage;
- (4) the relevant economic circumstances of each spouse when the division of property is to become effective, including the desirability of award-

consider⁸⁶ when exercising its discretion to distribute property in "just proportions."⁸⁷ A just distribution does not necessarily mandate an equal distribution.⁸⁸ Although the Uniform Act requires a court to weigh both monetary and nonmonetary factors, it directs the court not to emphasize the former over the latter.⁸⁹ Thus, homemaking services command consideration in a just property distribution.⁹⁰ Similarly, the court must disregard nonfinancial marital misconduct.⁹¹ The court's primary goal is to distribute marital property to achieve the most equitable result.⁹²

ing the family home, or the right to live therein for reasonable periods, to the spouse having custody of the children;

(5) any obligations and rights arising from a prior marriage of either party;

(6) any antenuptial agreement of the parties;

(7) the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties;

(8) the custodial provisions for any children;

(9) whether the apportionment is in lieu of or in addition to maintenance;

(10) the reasonable opportunity of each spouse for future acquisition of capital assets and income; and

(11) the tax consequences of the property division upon the respective economic circumstances of the parties.

Id.

86. UNIFORM MARRIAGE AND DIVORCE ACT § 307, 9A U.L.A. 238 (1987) [hereinafter UNIF. ACT] The Uniform Act provides:

(a) In a proceeding for dissolution of a marriage, legal separation, or disposition of property following a decree of dissolution of marriage or legal separation by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court, without regard to marital misconduct, shall, and in a proceeding for legal separation may, finally equitably apportion between the parties the property and assets belonging to either or both however and whenever acquired, and whether the title thereto is in the name of the husband or wife or both. In making apportionment the court shall consider the duration of the marriage, any prior marriage of either party, any antenuptial agreement of the parties, the age, health, station, employability, estate, liabilities, and needs of each of the parties, custodial provisions, whether the apportionment is in lieu of or in addition to maintenance, and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution or dissipation of each party in the acquisition, preservation, depreciation, or appreciation in value of the respective estates, and as the contribution of a spouse as a homemaker or to the family unit.

Id.

87. See *In re Marriage of Aschwanden*, 411 N.E.2d 238, 240 (Ill. 1980) (stating that the Illinois Dissolution Act, which derived from the Uniform Act, does not mandate an equal distribution of marital property).

88. *Id.*

89. See *id.* at 240 (stating that the Illinois Dissolution Act requires that the court consider homemaker contributions in property distribution).

90. *Id.*

91. UNIF. ACT, *supra* note 86, at 238. See *supra* note 86 for the complete text of the Uniform Act, § 307.

92. See *Aschwanden*, 411 N.E.2d at 242.

Although nonmonetary factors command equal weight, the Uniform Act still requires a court to give weight to monetary factors in determining a just distribution.⁹³ Thus, a court must consider financial misconduct, such as dissipation of the marital estate by a spouse prior to dissolution.⁹⁴ In addition, a court must consider contributions made to the marital estate by a spouse.⁹⁵ By considering monetary and nonmonetary factors the court can best achieve equitable results in property distribution and sever the marital relationship.

The objective of equitable distribution is to sever the relationship and put the parties in a position of independence to allow them to begin anew.⁹⁶ Justice Perlin of the Illinois Appellate Court clearly stated this sentiment in 1979 in *In re Marriage of Lee*:⁹⁷

The courts should seek a high degree of finality so that the parties can plan their future with some certainty. . . . Property division and spousal support should be considered together in attempting to put the two parties in a position so that they leave the marriage in a self-sufficient status.⁹⁸

Thus, the notion that the court should award temporary maintenance only when the property distribution is inadequate to provide for a spouse's needs furthers the objective espoused in *Lee*.⁹⁹

The effect of the legislature's objective of achieving equitable results is most dramatically illustrated in the situation where one spouse is a homemaker.¹⁰⁰ The contributions of a homemaker, who does not work outside the home, are to be considered in the same manner as monetary contributions of the supporting spouse in property division.¹⁰¹ In this sense, the court recognizes a homemaker as an economic contributor whose contributions serve the well-being of the family.¹⁰² While the court does not assign a spe-

93. See *supra* note 86 for the complete text of Uniform Act, § 307.

94. Illinois Dissolution Act, *supra* note 7, at § 503(c). See *supra* note 82 for the complete text of the Illinois Dissolution Act, § 503(c), which is based on the Uniform Act, requiring the court to consider dissipation of marital assets in property distribution.

95. See *supra* note 83 and accompanying text for a complete explanation of the factors the court considers in distributing property pursuant to divorce.

96. *In re Marriage of Lee*, 398 N.E.2d 126, 133 (Ill. App. Ct. 1979); *In re Marriage of Slauson*, 562 P.2d 604, 607 (Or. Ct. App. 1977).

97. *Lee*, 398 N.E.2d at 133.

98. *Id.*

99. Prefatory Note, *supra* note 1, at 149.

100. *In re Marriage of Swiger*, 531 N.E.2d 858, 860 (Ill. App. Ct. 1988).

101. *In re Marriage of Aschwanden*, 411 N.E.2d 238, 242 (Ill. 1980).

102. *In re Marriage of Grove*, 571 P.2d 477, 482, *reh'g denied*, 280 Or. 769 (Or. 1977). A court considers a homemaker as an economic contributor. *Id.* A homemaker is not merely a passive receiver of economic benefits provided by the supporting spouse. *Id.* See also *LaRue v. LaRue*, 304 S.E.2d 312, 323 (W. Va. 1983), *overruled on other grounds by* *Butcher v. Butcher*, 357 S.E.2d 226 (W. Va. 1987).

cific value to homemaker contributions, it considers such factors as the length of the marriage and the quality of services, and whether the homemaker has been frugal, rather than extravagant.¹⁰³

In determining property distribution, a court may also consider dissipation of the marital estate.¹⁰⁴ Dissipation is usually limited to intentional diminution in, or destruction of, assets by a spouse after the marriage breaks down.¹⁰⁵ Accidental destruction,¹⁰⁶ or business losses,¹⁰⁷ are not considered dissipation.

In addition, a court may also consider negative contributions.¹⁰⁸ Negative contributions include irresponsibility and extravagance in life-style during the marriage.¹⁰⁹ Such extravagance serves to reduce the overall property available for distribution to the non-extravagant spouse.¹¹⁰ In addition, the court considers discordant behavior that is so disruptive as to be the primary cause of marital discord.¹¹¹

Further, because an equitable distribution system seeks finality in dissolving a marriage, the court seeks to sever co-ownerships in property and business relationships between the spouses.¹¹² Even when both spouses are active in a business, the court may grant purchase options to each of the spouses.¹¹³ The option terms may require a public sale if neither exercises the option in order to sever the relationship.¹¹⁴ Consistent with a partnership theory, an equitable distribution system seeks to distribute all assets of the marital

103. *In re Marriage of Caldwell*, 465 N.E.2d 523 (Ill. App. Ct. 1984).

104. UNIFORM ACT, *supra* note 86, at 238; *In re Marriage of Clark*, 538 P.2d 145 (Wash. Ct. App. 1975); *Scherzer v. Scherzer*, 346 A.2d 434 (N.J. Super. Ct. App. Div. 1975).

105. *In re Marriage of Sevon*, 453 N.E.2d 866, 869 (Ill. App. Ct. 1983). "Dissipation of marital assets occurs when a spouse uses marital property for his or her own benefit for a purpose unrelated to the marriage while the marriage is breaking down." *Id.*

106. *In re Marriage of Click*, 523 N.E.2d 169, 174 (Ill. App. Ct. 1988).

107. *In re Marriage of Krause*, 654 P.2d 963, 969 (Mont. 1982) (dividing a loss from business property held by both spouses equally between the spouses).

108. *In re Marriage of Clark*, 538 P.2d 145, 147 (Wash. Ct. App. 1975). The appellate court held that the lower court properly considered the husband's "profligate life style" and "negatively productive conduct" in distributing property. *Id.*

109. *Id.*

110. *Id.*

111. *Scherzer v. Scherzer*, 346 A.2d 434, 436 (N.J. Super. Ct. App. Div. 1975). A court can consider discordant behavior of a spouse in determining property distribution. *Id.* Discordant behavior is conduct directed at the other spouse that is so disruptive that it cannot be said to have contributed to a supporting spouse's business success. *Id.* It is conduct that creates a generally disruptive household environment. *Id.*

112. *In re Marriage of Slauson*, 562 P.2d 604, 607 (Or. Ct. App. 1977).

113. *In re Marriage of Banach*, 489 N.E.2d 363, 366 (Ill. App. Ct. 1986).

114. *Id.*

partnership, including a business interest, and terminate the relationship.

II. BUSINESS GOODWILL AS MARITAL PROPERTY

Sometimes marital or community property includes a business interest created or acquired during the marriage.¹¹⁵ Consistent with a partnership theory, courts typically characterize the business interest as marital or community property subject to distribution.¹¹⁶ Thus, regardless of who acquired the business interest, both spouses have an equitable claim to its value in divorce.¹¹⁷ In addition, a court routinely distributes a business to the spouse who is actively involved in its operations.¹¹⁸ In so doing, it resembles a forced buyout of a partnership interest.¹¹⁹ The nonparticipating spouse thereby receives payment in the form of money or other offsetting marital property.¹²⁰

Typically, the value assigned to the business interest derives from generally accepted business valuation methods.¹²¹ Business appraisal experts commonly apply such methods for purposes of es-

115. *In re Marriage of White*, 424 N.E.2d 421, 423 (Ill. App. Ct. 1981); *In re Marriage of Leon*, 399 N.E.2d 1006, 1009 (Ill. App. Ct. 1980); *In re Marriage of Lee*, 398 N.E.2d 126, 133 (Ill. App. Ct. 1979); *Stern v. Stern*, 331 A.2d 257, 260 (N.J. 1975).

116. *White*, 424 N.E.2d at 423; *Leon*, 399 N.E.2d at 1009; *Stern*, 331 A.2d at 260. See also *Olsher v. Olsher*, 397 N.E.2d 488, 493-94 (Ill. App. Ct. 1979) (stating that while a closely held corporation is not marketable, it has value and is subject to distribution in divorce).

117. See generally UNIF. PARTNERSHIP ACT, 6 U.L.A. 324 (1969). In a commercial partnership, all partners have a claim to all assets of the partnership upon dissolution. *Id.* This is so regardless of the degree of direct nonmonetary contribution, if any, each partner had in property acquisition. *Id.* Similarly, equitable distribution and community property systems of divorce contemplate a similar treatment of property distribution pursuant to divorce. See Prefatory Note, *supra* note 1, at 149.

118. See *Stern*, 331 A.2d at 260. See also *Spearman v. Salminen*, 379 N.W.2d 627 (Minn. Ct. App. 1986) (stating that a court cannot confer a partnership interest on one not originally a partner).

119. See *In re Marriage of Lopez*, 113 Cal. Rptr. 58, 68 (Cal. Ct. App. 1974). The valuation of goodwill should be computed with care because in marital dissolution, one spouse is forced to buyout the other spouse's share. *Id.* It occurs at a time not when the buyer desires to make the purchase for strategic business reasons. *Id.* Instead it represents a forced purchase at a price that is judicially determined. *Id.* Furthermore, the buyer is forced to purchase an intangible asset with tangible property. *Id.*

120. *Seiner v. Seiner*, 552 S.W.2d 54 (Mo. Ct. App. 1977). See also *Hammel v. Hammel*, 411 N.E.2d 320 (Ill. App. Ct. 1980) (marital property awarded to one spouse is offset by other property or future payments, generally).

121. *Olsher v. Olsher*, 397 N.E.2d 488, 494 (Ill. Ct. App. 1979) (stating that while a closely held corporation may not be marketable, it has value nonetheless); *Turgeon v. Turgeon*, 460 A.2d 1260, 1265 (Conn. 1983) (stating that while susceptible to being valued, the stock of a closely-held business cannot be valued using an inflexible formula); *Lavene v. Lavene*, 392 A.2d 621, 623-628 (N.J. Super. Ct. App. Div. 1978) (discussing various methods of valuing a closely-held

tate tax, gift tax and buy/sell agreements, as well as divorce.¹²² Such accepted valuation methods include an element of value for business goodwill.¹²³ Goodwill is the intangible aspect of a business enterprise relating to reputation and patronage.¹²⁴ Elements of goodwill include a business' name, proprietary product, location, telephone number and trained work force.¹²⁵ It is "nothing more than the probability that the old customers will resort to the old place."¹²⁶ Additionally, goodwill attaches to, and is inseparable from, the business entity itself.¹²⁷ Thus, goodwill has value only insofar as it attaches to a continuing business.¹²⁸

In order to value the goodwill element of a business, it is important to distinguish between "enterprise" and "personal" goodwill.¹²⁹ It is from this distinction that courts inconsistently treat the goodwill of a professional practice in property distribution pursuant to divorce.¹³⁰ Unlike personal goodwill, enterprise goodwill is commonly marketable.¹³¹ Enterprise goodwill is associated with the business entity.¹³² It includes elements of a business separate and apart from the individual owners.¹³³ A proprietary product, location, client base and work staff are examples of enterprise goodwill.¹³⁴ These elements produce goodwill by creating value in excess of the value of the individual assets.¹³⁵ Further, these elements are capable of being *delivered* to a buyer.¹³⁶ Therefore, it is relatively easy to place a value on enterprise goodwill.

In contrast, personal goodwill is associated with individuals.¹³⁷

business); *Dugan v. Dugan*, 457 A.2d 1, 9-10 (N.J. 1983) (stating that the excess earnings method is an appropriate valuation method for professional practice).

122. SHANNON PRATT, VALUING SMALL BUSINESSES AND PROFESSIONAL PRACTICES 7-8 (1986).

123. See *In re Marriage of Kaplan*, 490 N.E.2d 69, 73 (Ill. App. Ct. 1986) (stating that in valuing a commercial business, goodwill is added to book value); *Lord v. Lord*, 424 A.2d 830 (Me. 1983) (holding that goodwill of an insurance agency has value and is subject to distribution as marital property).

124. PRATT, *supra* note 122, at 393.

125. *Hanson v. Hanson*, 738 S.W.2d 429, 433 (Mo. 1987) (en banc); PRATT, *supra* note 122, at 188.

126. *Cruttwell v. Lye*, 17 Ves. 335, 346, 34 Eng. Rep. 129, 134 (Ch. 1810).

127. *Hanson*, 738 S.W.2d at 433.

128. *Id.*

129. Michael W. Kalcheim & Norah M. Plante, *Professional Goodwill in Divorce After Zells*, 79 ILL. B.J. 624 (1991).

130. See *infra* notes 146-248 and accompanying text for a discussion of the treatment of professional goodwill by various courts.

131. *Id.*

132. See PRATT, *supra* note 122, at 294-95.

133. *Id.*

134. *Id.*

135. *Id.* at 295.

136. See Kalcheim & Plante, *supra* note 129, at 624.

137. PRATT, *supra* note 122, at 294.

It is that part of increased earning capacity that results from the reputation, knowledge and skills of individual people.¹³⁸ Accordingly, the goodwill of a service business, such as a professional practice, consists largely of personal goodwill.¹³⁹ Personal goodwill is often thought not to be marketable.¹⁴⁰ Such a view arises from the misconception that personal goodwill cannot be delivered to a buyer due to its personal nature.¹⁴¹

Unlike personal goodwill, courts commonly include enterprise goodwill in valuing a business interest subject to property distribution in divorce.¹⁴² Nevertheless, varying degrees of both personal goodwill and enterprise goodwill combine to form the goodwill of many businesses.¹⁴³ Such is the case with the goodwill of a professional practice, commonly called "professional goodwill."¹⁴⁴ However, due to the mistaken belief that professional goodwill is composed *solely* of personal goodwill, courts are in disagreement over its treatment in property distribution.¹⁴⁵

138. *Id.*

139. Kalchier & Plante, *supra* note 129, at 624.

140. *Id.* But see PRATT, *supra* note 122, at 295. Methods do exist for the transfer of personal goodwill. *Id.* While more difficult to transfer than enterprise goodwill, all or a portion of personal goodwill is capable of being transferred to an individual with qualifications comparable to the transferor. *Id.* With the cooperation of both the transferor and transferee, clients' trust can be eased over to the acquirer. *Id.* Generally, the transferor makes an announcement to the clients that the transferee has joined the practice. *Id.* After a transition period during which clients learn to trust the new owner, the transferor retires or leaves. *Id.*

141. See *infra* notes 153-179 and accompanying text for a discussion of jurisdictions not recognizing professional goodwill as marital property due to its lack of salability.

142. Note, *Treating Professional Goodwill as Marital Property in Equitable Distribution States*, 58 N.Y.U. L. REV. 554, 562 (June 1983).

143. See generally PRATT, *supra* note 122, at 294-95.

144. See Kalchier & Plante, *supra* note 129, at 624.

145. See generally Hanson v. Hanson, 738 S.W.2d 429, 434-35 (Mo. 1987) (en banc) (holding that goodwill of a professional practice is marital property subject to distribution); Eslami v. Eslami, No. 14183, 1991 WL 82546, at *7 (Conn. May 21, 1991) (stating that goodwill value exists in a medical practice separate and apart from the individual tangible assets); Hurley v. Hurley, 615 P.2d 256, 259 (N.M. 1986) (stating that although not salable, goodwill value exists in a medical practice as long as the doctor maintains the practice); Golden v. Golden, 75 Cal. Rptr. 735, 737 (Cal. Ct. App. 1969) (holding that the goodwill value of a sole professional practitioner is community property subject to distribution upon divorce); *In re Marriage of Stone*, 507 N.E.2d 900, 906-07 (Ill. App. Ct. 1987) (holding that the goodwill value of a law practice is marital property). See also Finn v. Finn, 658 S.W.2d 735, 741 (Tex. Ct. App. 1983) (acknowledging that sometimes goodwill value exists in a law practice when the name includes founding partners who are gone). But see Nail v. Nail, 486 S.W.2d 761, 764 (Tex. 1972) (professional goodwill is not a separate asset); Beasley v. Beasley, 518 A.2d 545, 552-53 (Pa. Super. Ct. 1986) (holding that goodwill of a sole practitioner lawyer is not an element of value for property distribution); Holbrook v. Holbrook, 309 N.W.2d 343, 351, 354-55 (Wis. Ct. App. 1981) (holding that a marital estate does not include the goodwill value of an interest in a law partnership);

III. JUDICIAL TREATMENT OF PROFESSIONAL GOODWILL BEFORE *ZELLS*

The courts agree that, as a business interest, some value of a professional practice is subject to distribution upon divorce.¹⁴⁶ While some courts include only the value of the practice's tangible assets,¹⁴⁷ others also include goodwill value.¹⁴⁸ Jurisdictions recognizing professional practice goodwill in property distribution generally do so in reliance on economic principles and/or the divisibility of professional goodwill.¹⁴⁹ In contrast, courts excluding professional goodwill do so largely on accounting-related principles that refute divisibility.¹⁵⁰ Such courts opine that professional goodwill is not divisible property¹⁵¹ and is not capable of valuation.¹⁵² Therefore, these courts hold the professional goodwill is not property subject to distribution upon divorce.

This section discusses the two conflicting positions that the courts take in their treatment of professional goodwill in divorce. First, Part A discusses the minority view that professional goodwill is not a divisible asset in divorce. Next, Part B discusses the majority view that treats some portion of professional goodwill as distributable property in divorce. Finally, Part C discusses the inconsistent treatment that the various districts of the Illinois Appellate Court gave to professional goodwill in divorce prior to the Illinois Supreme Court's decision in *In re Marriage of Zells*.

Moebus v. Moebus, 529 So. 2d 1163, 1164 (Fla. Dist. Ct. App. 1988) (stating that the goodwill value of a medical practice is not marital property subject to distribution).

146. See generally Martin J. McMahon, *Attorney's Goodwill*, 79 A.L.R. 4th 171, 174 (1990) (stating that courts recognize business interests as marital property).

147. See *Beasley v. Beasley*, 518 A.2d 545, 550 (Pa. Super. Ct. 1986) (approving an approach to valuing the husband's law practice, which included work in progress, but refusing to include an element of goodwill value); *Holbrook v. Holbrook*, 309 N.W.2d 343, 353 (Wis. Ct. App. 1981) (stating that since no goodwill value remains for division upon liquidation of a law partnership, there is no goodwill value to distribute in marital dissolution).

148. See *Hanson v. Hanson*, 738 S.W.2d 429, 434 (Mo. 1987) (en banc) (holding that professional practice goodwill is a marital asset subject to division in dissolution proceedings); *Eslami v. Eslami*, No. 14183, 1991 WL 82546, at *1 (Conn. May 21, 1991) (holding that the lower court properly included a goodwill value in the husband's medical practice.).

149. *In re Marriage of Lopez*, 331 Cal. Rptr. 58, 67 (Cal. Ct. App. 1974).

150. See *infra* notes 153-179 and accompanying text for a discussion of the rationales espoused by courts that do not recognize professional goodwill as marital property.

151. *Nail v. Nail*, 486 S.W.2d 761, 764 (Tex. 1972).

152. See *Moebus v. Moebus*, 529 So.2d 1163, 1165 (Fla. Dist. Ct. App. 1988); *Powell v. Powell*, 648 P.2d 218, 223 (Kan. 1982); *Holbrook v. Holbrook*, 309 N.W.2d 343, 354 (Wis. Ct. App. 1981).

A. Professional Goodwill as a Non-divisible Asset

A minority of courts reject the inclusion of professional goodwill in property distribution.¹⁵³ These courts assume that one cannot sell professional goodwill, and thus it is not distributable in divorce.¹⁵⁴ In addition, the minority view asserts that when a court awards maintenance, it effectively considers professional goodwill in the form of future earnings.¹⁵⁵ Thus, to consider it again in property distribution results in distributing it twice.¹⁵⁶ Finally, the minority view asserts that professional goodwill is too difficult to value, thus precluding its consideration in property distribution.¹⁵⁷

Most courts that adopt the minority view rely primarily on an assumption that one cannot sell professional goodwill.¹⁵⁸ These courts assert that goodwill disappears when a professional retires, relocates, or dies.¹⁵⁹ Moreover, some professionals cannot ethically transfer professional goodwill under applicable codes of ethics.¹⁶⁰ In *Holbrook v. Holbrook*,¹⁶¹ a Wisconsin appellate court stressed lack of salability of professional goodwill when it held that professional goodwill is not property divisible in divorce.¹⁶² The *Holbrook* court acknowledged that a professional practice may have goodwill value in the form of reputation; however, such value does not create

153. See, e.g., McMahon, *supra* note 146, at 174 (stating that a majority of jurisdictions recognize professional goodwill as marital property).

154. See Note, *Community Property-Valuation of Professional Goodwill*, 11 N.M. L. REV. 435, 439 (1981).

155. *Holbrook v. Holbrook*, 309 N.W.2d 343, 355 (Wis. Ct. App. 1981).

156. *Id.*

157. *Id.* at 354.

158. *Id.* at 354.

159. See Note, *Community Property-Valuation of Professional Goodwill*, 11 N.M. L. REV. 435, 439 (1981).

160. See, e.g., Prahinski v. Prahinski, 540 A.2d 833, 841 (Md. Ct. Spec. App. 1988). Some codes of ethics restrict transferability by prohibiting the use of transferable corporate names. *Id.* Such codes require the inclusion in the practice's name the name of at least one senior practitioner. *Id.*

However, in 1990 the American Bar Association [hereinafter ABA] changed its Model Code to permit the sale of goodwill in a law practice. Rita Henley Jensen, *Attorney Goodwill Increases*, NAT'L L.J., Dec. 23, 1991, at 1. The ABA fashioned its provision based on changes made in 1989 to California's Rules of Professional Conduct. *Id.* at 38. The California Rules allow one to sell a law practice, including goodwill, to another member of the Bar or another law firm. *Id.* The ABA's change added a requirement that the seller must cease to practice law in the relevant jurisdiction. *Id.* By December 1991, Michigan, Wisconsin and the Virgin Islands amended their codes of ethics to follow the ABA Model Code. *Id.* Further, Missouri and Florida were considering similar amendments. *Id.*

161. *Holbrook v. Holbrook*, 309 N.W.2d 343 (Wis. Ct. App. 1981).

162. See *Holbrook*, 309 N.W.2d at 354. But see Jensen, *supra* note 160, at 38. However, recently, Wisconsin amended its Code of Professional Ethics to allow an attorney to sell a law practice, including goodwill. *Id.* This recent change likely will effect the disposition of future cases involving facts similar to *Holbrook* in Wisconsin.

a valuable property interest that can be sold or pledged by its owners.¹⁶³ Rather, the value accrues to the holder in the form of increased earnings.¹⁶⁴

Further, courts state that the increased earnings are already considered in awarding maintenance and in the overall property distribution.¹⁶⁵ Thus, to again consider increased earnings in goodwill results in double counting.¹⁶⁶ For example, in *Beasley v. Beasley*,¹⁶⁷ the Superior Court of Pennsylvania stated that professional goodwill relates only to future earnings.¹⁶⁸ Therefore, to value this type of goodwill in property distribution would be the same as awarding a lump sum alimony payment.¹⁶⁹ If a court additionally awards alimony based on future earnings, a double charge on earnings results.¹⁷⁰ However, rather than defining a valuation methodology that prevents double counting, the court merely excluded goodwill from the property division.¹⁷¹

Moreover, courts excluding professional goodwill often assert that its value is too difficult to ascertain.¹⁷² Therefore, valuation is

163. See *Holbrook*, 309 N.W.2d at 354 (finding it disturbing to require a professional practitioner to compensate a spouse for an intangible asset at a value that is judicially determined when a practitioner can not realize that value by selling a practice). See also *Powell v. Powell*, 648 P.2d 218, 223-24 (Kan. 1982). In *Powell*, the Supreme Court of Kansas refused to consider the professional goodwill of a medical practice as divisible upon divorce. *Id.* The court considered professional goodwill to be personal in nature. *Id.* at 223. Nothing remains of it if a practitioner dies or retires. *Id.* Thus, the court refused to include it in property distribution pursuant to divorce. *Id.* at 223-24.

164. See *Id.* at 354-55. See also *Moebus v. Moebus*, 529 So.2d 1163, 1165 (Fla. Dist. Ct. App. 1988). In *Moebus*, a Florida appellate court expressly followed *Holbrook*, bolstering its position by referring to the medical corporation's shareholder agreement. *Id.* The agreement specifically excluded goodwill from valuation in the event of a buyout. *Id.* Although acknowledging that the agreement did not bind the wife, the court considered the principals' intentions of excluding goodwill in a sale amongst shareholders as support for its exclusion in the divorce. *Id.*

165. *Holbrook*, 309 N.W.2d at 355.

166. *Id.* In *Holbrook*, the court considered the husband's partnership in a reputable law firm in dividing the community property. *Id.* Additionally, his salary was considered in awarding maintenance. *Id.* The court stated that considering the husband's earning capacity in this way was more direct and reasonable. *Id.*

167. *Beasley v. Beasley*, 518 A.2d 545, 553 (Pa. Super. Ct. 1986).

168. *Id.*

169. *Id.*

170. *Id.* Furthermore, because it is modifiable, alimony may be reduced if the practitioner dies, retires, or suffers a business reversal. *Id.* In contrast, a distribution of goodwill based on future earnings is fixed. *Id.* Thus, a practitioner receives a penalty if changes adversely effect future earnings beyond the control of the practitioner. *Id.*

171. *Id.*

172. *Holbrook v. Holbrook*, 309 N.W.2d 343, 354 (Wis. Ct. App. 1981).

too speculative to consider in property distribution.¹⁷³ The *Holbrook* court stressed that each of several members of a law firm contribute to goodwill.¹⁷⁴ Thus, this court reasoned that it is pure speculation to attempt to value one member's individual contribution to the practice.¹⁷⁵

In sum, a minority of courts exclude goodwill in property distribution based on the rigid notion that it is not property.¹⁷⁶ Their reasoning is based primarily on a refusal to account for it as a separate asset.¹⁷⁷ In addition, rather than define a valuation methodology that prevents double counting, courts completely exclude goodwill value in property distribution.¹⁷⁸ In contrast, a majority of the courts attempt to address the valuation issues, rather than completely exclude professional goodwill in property distribution.¹⁷⁹

B. Professional Goodwill as a Divisible Asset

A majority of courts recognize professional goodwill value as divisible property subject to distribution in divorce.¹⁸⁰ Some of these courts represent a middle ground, recognizing professional goodwill only if the goodwill is related to aspects of the practice separate from the individual practitioner.¹⁸¹ These courts recognize

173. *Id.* Nevertheless, however speculative it may seem, valuation of professional goodwill is no more speculative than damage awards in tort actions. See *Dina v. Naiditch*, 170 N.E.2d 881, 884 (Ill. 1960) (allowing the spouse of an injured or killed person to recover for the loss of marital services); *Leiker v. Gafford*, 778 P.2d 823, 835 (Kan. 1989) (allowing an award for the loss of enjoyment of life). Further, the same uncertainties exist in valuing the stock of a small closely held corporation. See generally *Turgeon v. Turgeon*, 460 A.2d 1260, 1264-65 (Conn. 1983). Yet, the courts routinely except valuations of goodwill in closely held corporations in divorce. *Id.* The *Turgeon* court accepted a valuation of the husband's solely owned machine shop, which included goodwill. *Id.* Similar to a professional practice, the major contribution to the business' growth in *Turgeon* was the husband's know-how and skills. *Id.* See also *Lavene v. Lavene*, 392 A.2d 621, 624-27 (N.J. Super. Ct. App. Div. 1978) (discussing various possible methods of valuing the goodwill of a closely held electronics company pursuant to property division upon divorce).

174. *Holbrook*, 309 N.W.2d at 354.

175. *Id.*

176. See *supra* notes 153-175 and accompanying text for a discussion of rationales used by courts that do not recognize professional goodwill as marital property.

177. See *supra* note 161 and accompanying text for an explanation of one court's rationale for not treating professional goodwill as a separate asset.

178. See *supra* notes 165-171 and accompanying text for an explanation of the view that the recognition of professional goodwill as marital property results in the double counting of future earnings.

179. See *infra* notes 180-204 and accompanying text for a discussion of the rationales courts use to recognize professional goodwill as marital property.

180. McMahon, *supra* note 146, at 174; *Hanson v. Hanson*, 738 S.W.2d 429, 434 (Mo. 1987) (en banc) (holding goodwill in a professional practice acquired during marriage is marital property).

181. *Hanson*, 738 S.W.2d at 429.

that one can, and many do, sell certain professional practices at amounts that include the value of goodwill.¹⁸² Other courts recognize goodwill value as a separate property interest strictly on equitable economic principles without regard to its actual salability.¹⁸³ Finally, the majority view recognizes that future earnings are not synonymous with goodwill value.¹⁸⁴ Thus, there is no double counting problem.¹⁸⁵

The Missouri Supreme Court espoused a strict version of the middle ground approach to recognizing professional goodwill in *Hanson v. Hanson*.¹⁸⁶ The *Hanson* court held that professional goodwill is divisible in divorce if a market exists for its sale.¹⁸⁷ The *Hanson* court stated that the existence of goodwill value requires proof that other professionals will pay for the goodwill value.¹⁸⁸ Evidence of such willingness might include a recent sale of a similarly situated practice, or an offer to purchase the subject practice.¹⁸⁹ Alternatively, other forms of acceptable proof consists of expert testimony that goodwill exists in a similarly situated practice in a similar geographical area or professional market.¹⁹⁰

In contrast, many courts espouse a more liberal approach and do not require actual proof of an existing market as a prerequisite to divisibility.¹⁹¹ Such courts recognize that ethics prohibit the sale of goodwill in some professions.¹⁹² However, courts recognize that professional goodwill is transferable in some settings, even though it cannot ethically be sold.¹⁹³ Such a transfer occurs, for example, when law firms admit new partners whose names do not appear in

182. See *Hanson*, 738 S.W.2d at 435 (excluding goodwill value of an oral surgery practice relying on evidence that such practices were commonly sold, but without goodwill value). See also *Eslami v. Eslami*, No. 14183, 1991 WL 82546, at *7 (Conn. May 21, 1991) (holding that the goodwill of a medical practice was subject to valuation and distribution, but rejecting the notion that goodwill could exist absent a consideration of the salability of the practice and the existence of a ready market).

183. See, e.g., *In re Marriage of Lopez*, 113 Cal. Rptr. 58, 67 (Cal. Ct. App. 1974) (stating that because professional goodwill inures value to its owner, it must be recognized as divisible property upon divorce).

184. *Lopez*, 113 Cal. Rptr. at 68.

185. *Id.*

186. *Hanson*, 738 S.W.2d at 434.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Prahinski v. Prahinski*, 540 A.2d 833, 841 (Md. Ct. Spec. App. 1988).

192. See *id.* (stating that ethical considerations may prohibit the sale of goodwill in a law practice). But see *Jensen*, *supra* note 151, at 38 regarding recent changes in the ABA Model Code of Ethics.

193. *Prahinski*, 540 A.2d at 841.

the firm name.¹⁹⁴ In such cases, the right to use the firm name is a large part of the firm's goodwill value, and is clearly separable from the individuals.¹⁹⁵ Moreover, the fact that new partners routinely pay for admittance indicates that it has economic value.¹⁹⁶ Therefore, equity requires consideration of this goodwill based on purely economic principles.

In marital dissolution, the court's concern is primarily to effect an equitable *economic* distribution.¹⁹⁷ For example, a California appellate court in *In re Marriage of Lopez*¹⁹⁸ stated that "the parties are primarily concerned with the existence, value and consequences of the 'goodwill' of a professional business in an *economic sense*, as distinguished from legal or accounting concepts."¹⁹⁹ Thus, as long as goodwill exists, it is divisible.²⁰⁰ It is the *purpose* for valuation of property that controls the recognition of professional goodwill, and not its property characteristics.²⁰¹ Therefore, after the court establishes that goodwill exists in a particular practice, the only remaining issue is one of how much value to assign to it.

In sum, jurisdictions that recognize professional goodwill in property distribution do so largely on equitable economic principles.²⁰² Such principles are consistent with the partnership theory upon which community property and equitable distribution systems are based.²⁰³ Before *Zells*, Illinois inconsistently applied these principles to professional goodwill.²⁰⁴

194. *Id.* When a law firm admits new partners, it transfers goodwill. *Id.* In such situations, professional goodwill often attaches to the firm name, which is separable from the individual partners in the firm. *Id.* In fact, the firm name may bear the name of partners who died long ago. *Id.*

195. *Id.*

196. *See generally id.*

197. *In re Marriage of Lopez*, 113 Cal. Rptr. 58, 67 (Cal. Ct. App. 1974).

198. *Id.*

199. *Id.*

200. *See id.*

201. *See, e.g., In re Marriage of Lopez*, 113 Cal. Rptr. 58, 67 (Cal. Ct. App. 1974). The effect of the purpose for the valuation on the value of goodwill is apparent. *Id.* If the purpose for valuation is the liquidation of a practice, goodwill may have a value of zero. *Id.* Since goodwill has value only when attached to a continuing business, goodwill terminates with the liquidation of the business. *Id.* However, valuation pursuant to divorce contemplates the continuation of the professional spouse in the practice. *Id.* Therefore, goodwill value remains the same after divorce as it did during the marriage and should be divided. *Id.*

202. *See supra* notes 194-201 and accompanying text for an explanation of economic principles supporting the recognition of professional goodwill as marital property.

203. *See supra* notes 55-114 and accompanying text for an explanation of community property and equitable distribution systems of property distribution.

204. *See infra* notes 205-248 and accompanying text for a discussion of the treatment by Illinois courts of professional goodwill in property distribution prior to *Zells*.

C. *Professional Goodwill in Illinois Before
In re Marriage of Zells*

Prior to *In re Marriage of Zells*, the various districts of the Illinois Appellate Court were split in their treatment of professional goodwill in marital dissolution.²⁰⁵ The First District Appellate Court issued several inconsistent judgments.²⁰⁶ In *In re Marriage of Wilder*,²⁰⁷ the court stated that goodwill represents the general ability to generate income.²⁰⁸ The *Wilder* court noted that goodwill is considered in determining an equitable distribution of property under the Illinois Dissolution Act.²⁰⁹ Therefore, the court reasoned that property distribution already accounts for goodwill in the form of income generating ability, and no separate valuation of goodwill is necessary.²¹⁰

However, two years later, the First District remanded in *In re Marriage of Davis*,²¹¹ for a redetermination of the value of the husband's law practice after originally failing to include goodwill.²¹² The *Davis* court stated that although valuation of the practice "is not an exact science", this does not mean that such entities are incapable of being appropriately [valued]."²¹³ Further, the *Davis* court stated that valuation of the practice is essential to the achievement of fair and equitable results.²¹⁴

Subsequent to *Wilder* and *Davis*, the First District Appellate Court addressed the issue of valuation methodology, rather than the issue of the divisibility of professional goodwill.²¹⁵ In *In re*

205. See, e.g., Michael W. Kalcheim, *Problems in Valuing Professional Goodwill in Divorce Proceedings*, 78 ILL. B.J. 80, 84 (1990) (discussing the conflicting views of the Illinois appellate courts prior to *Zells*).

206. See *In re Head v. Head*, 523 N.E.2d 17 (Ill. App. Ct. 1st Dist. 1988) (rejecting only the particular valuation methodology applied, but not the inclusion of professional goodwill as marital property); *In re Marriage of Davis*, 476 N.E.2d 1137 (Ill. App. Ct. 1st Dist. 1985) (recognizing professional goodwill as marital property); *In re Marriage of Wilder*, 461 N.E.2d 447 (Ill. App. Ct. 1st Dist. 1983) (holding professional goodwill is not marital property).

207. *In re Marriage of Wilder*, 461 N.E.2d 447 (Ill. App. Ct. 1st Dist. 1983).

208. *Id.* at 454.

209. *Id.* In determining an equitable property distribution, the Illinois Dissolution Act requires the court to consider the "relevant economic circumstances of each spouse. . . [the] occupation, amount and sources of income, vocational skills, employability [and] the reasonable opportunity of each spouse for future acquisition of capital assets and income." See Illinois Dissolution Act, *supra* note 7, ¶ 503(d). See *supra* note 85 for the complete text of the Illinois Dissolution Act.

210. *Wilder*, 461 N.E.2d at 454.

211. *In re Marriage of Davis*, 476 N.E.2d 1137 (Ill. App. Ct. 1st Dist. 1985).

212. *Id.*

213. *Id.* at 1140.

214. *Id.* at 1141.

215. *In re Head v. Head*, 523 N.E.2d 17 (Ill. App. Ct. 1st Dist. 1988).

Head v. Head,²¹⁶ the court rejected a method that included future earnings in its valuation of professional goodwill.²¹⁷ It appears that in reviewing the lower court, the *Head* court solely addressed the question of whether the particular valuation methodology applied by the lower court was appropriate.²¹⁸ Thus, the court implied that, properly valued, professional goodwill may be divisible as marital property.²¹⁹

The Second District Appellate Court in *In re Marriage of Leon*²²⁰ held that the goodwill of an insurance sole proprietorship was marital property and subject to distribution.²²¹ In so doing, the court analogized the proprietorship to a medical or law practice.²²² The court noted that the weight of authority in other states supported the proposition that the goodwill of such practices constituted marital property.²²³

However, within days of each other, the Third and Fourth Dis-

216. *Id.*

217. *See id.* at 19-20 (rejecting the inclusion of a stream of future earnings in professional goodwill valuation).

218. *See id.* at 20 (stating that the valuation method was erroneous because it included projected future income).

219. *Id.* *See also In re Marriage of Foley*, 516 N.E.2d 455 (Ill. App. Ct. 1st Dist. 1987). The implication that valuation was the only real issue in *Head* is clarified by comparing it to *In re Marriage of Foley*, a First District Appellate Court case involving the goodwill of a manufacturing business. *Id.* The *Foley* court noted that the existence of goodwill depends on the particular facts and circumstances, rather than on the type of business in question. *Id.* at 458. The husband's expert asserted that the husband's electronic wire harness manufacturing business did not have goodwill. *Id.* at 458-59. The expert's conclusion derived from facts peculiar to that particular business. *Id.* The court agreed after finding that the wife's expert lacked credibility. *Id.* Further, her expert erroneously applied an inappropriate valuation methodology. *Id.* Thus, the court's objection was on valuation methodology, rather than on the correctness of considering goodwill at all. *Id.* Therefore, one can fairly imply that, absent a definitive statement to the contrary, the same court's objection to valuation methodology in *Head* was not a rejection of professional goodwill as marital property *per se*; rather, the First District Appellate Court objected to the erroneous valuation of an asset, whose value affected an equitable distribution of marital property.

220. *In re Marriage of Leon*, 399 N.E.2d 1006, 1009 (Ill. App. Ct. 2d Dist. 1980).

221. *Id.*

222. *Id.*

223. *Id.* *In re Marriage of Rubinstein*, 495 N.E.2d 659, 663 (Ill. App. Ct. 2d Dist. 1986). Six years after *Leon*, the Second District Appellate Court reaffirmed its previous position that professional goodwill is subject to property distribution in *Rubinstein*. *Rubinstein*, 495 N.E.2d at 663. In so doing, the court criticized the inconsistent treatment of the matter by the First District Appellate Court. *Id.* In addition, the *Rubinstein* court stated that an equitable property distribution *required* consideration of professional goodwill. *Id.* It stated that "to ignore the intangible asset of goodwill could result in undervaluing the practice . . . and thereby lead to an inequitable distribution of the property." *Id.*

tricts issued contradicting opinions.²²⁴ The Third District Appellate Court in *In re Marriage of Courtright*²²⁵ refused to consider professional goodwill in property distribution.²²⁶ The court agreed with the holding in *Wilder* that goodwill is equivalent to income-producing ability, and is thus already considered as a factor in property distribution under the Illinois Dissolution Act.²²⁷

However, in *In re Marriage of Stone*,²²⁸ the Fourth District Appellate Court recognized professional goodwill and clearly articulated the issues that were brushed over by the other districts.²²⁹ First, the *Stone* court clearly asserted that a professional practice is a business interest, the value of which is included in property distribution.²³⁰ The court acknowledged the hesitancy of some Illinois courts to recognize professional goodwill for fear of double counting future earnings.²³¹ However, the court clearly stated that professional goodwill is not synonymous with future earnings.²³² Rather, professional goodwill represents a potential for earnings in excess of normal earnings.²³³ Further, regardless of its intangible nature, it has real value to the spouse who owns the goodwill, both during and after the marriage.²³⁴ Thus, to ignore goodwill in property distribution would yield inequitable results.²³⁵ Furthermore, the *Stone* court noted that the trend in Illinois is to recognize professional goodwill in property distribution pursuant to divorce.²³⁶ However, it also acknowledged that the Illinois courts failed to clearly establish guidelines for its valuation.²³⁷ Thus, valuation methodology was at the crux of the controversy.²³⁸

Finally, the Fifth District Appellate Court followed the holding of *Leon* in deciding *In re Marriage of White*,²³⁹ and remanded the

224. See *In re Marriage of Courtwright*, 507 N.E.2d 891 (Ill. App. Ct. 3d. Dist. 1987) (holding that professional goodwill is not marital property); *In re Marriage of Stone*, 507 N.E.2d 900 (Ill. App. Ct. 4th Dist. 1987) (holding that professional goodwill is marital property).

225. *Courtright*, 507 N.E.2d at 894-95.

226. *Id.*

227. *Id.* at 894.

228. *In re Marriage of Stone*, 507 N.E.2d 900, 906-08 (Ill. App. Ct. 4th Dist. 1987).

229. *Id.*

230. *Id.* at 906-07.

231. *Id.* at 907.

232. *Id.*

233. *In re Marriage of Stone*, 507 N.E.2d 900, 907 (Ill. App. Ct. 4th Dist. 1987).

234. *Id.*

235. *Id.*

236. *Id.* at 907.

237. *Id.*

238. *In re Marriage of Stone*, 507 N.E.2d 900, 907 (Ill. App. Ct. 4th Dist. 1987).

239. *In re Marriage of White*, 424 N.E.2d 421, 424 (Ill. App. Ct. 5th Dist. 1981).

case merely for a determination of the value of a professional dental corporation.²⁴⁰ The *White* court noted that there were no public policy or economic reasons for ignoring professional goodwill in property distribution.²⁴¹ A court can offset the value of professional goodwill distributed to the professional spouse with marital property, or installment payments, to the nonprofessional spouse.²⁴² Thus, the relationship terminates and each spouse receives an equitable share of marital property.²⁴³ Such an outcome is consistent with the legislative intent of the Dissolution Act.²⁴⁴

In commenting on the inconsistencies among the various districts of the Illinois Appellate Court, the *Stone* court explained that the real issue in the controversy over whether to recognize professional goodwill in property distribution is valuation.²⁴⁵ A clearly established valuation methodology could eliminate the potential for the double counting of future earnings.²⁴⁶ Thus, the major concern of those courts not recognizing professional goodwill would be alleviated.²⁴⁷ Further, accounting for its value, even if small in a particular case, recognizes economic reality.²⁴⁸ Thus, courts can achieve equitable results by distributing all things of value acquired during the marriage, including professional goodwill.

IV. *IN RE MARRIAGE OF ZELLS*: A CASE STUDY IN INEQUITABLE DISTRIBUTION

The Supreme Court of Illinois ignored the opportunity in *Zells* to address the valuation issue identified by the *Stone* court.²⁴⁹ Rather, the *Zells* court rejected the recognition of professional goodwill in property distribution altogether.²⁵⁰ In so doing, the court created formidable inequities in property distribution upon divorce. Moreover, the *Zells* holding is unjustified²⁵¹ because it is

240. *Id.*

241. *Id.* at 423.

242. *Id.*

243. *In re Marriage of White*, 424 N.E.2d 421, 424 (Ill. App. Ct. 5th Dist. 1981).

244. See *supra* note 8 and accompanying text for a discussion of the legislative intent to seek finality in divorce.

245. *Cf. In re Marriage of Stone*, 507 N.E.2d 900, 907 (Ill. App. Ct. 4th Dist. 1987) (pointing out that although the trend in Illinois is to recognize that professional goodwill is marital property, "no guidelines exist for a determination of value thereof").

246. *Id.*

247. *Id.*

248. *Id.*

249. *In re Marriage of Zells*, 572 N.E.2d 944, 946 (Ill. 1991).

250. *Id.* at 946.

251. See *infra* notes 276-304 and accompanying text for a discussion of why the *Zells* holding is unjustified.

contrary to the mandates of the Illinois Dissolution Act.²⁵² In addition, it is contrary to the legislative intent behind the Act.²⁵³ Moreover, the court erroneously concluded that distributing professional goodwill results in a double counting of future earnings.²⁵⁴ Part A of this section discusses the *Zells* case, and Part B analyzes its unjustified holding.

A. *In re Marriage of Zells*

In 1964, Myra and Martin Zells were married.²⁵⁵ Mrs. Zells had one year of college education, and no significant work experience outside the home.²⁵⁶ She was a homemaker and the primary caretaker of the couple's two children during the twenty year marriage.²⁵⁷ Mr. Zells was an attorney in private practice during the marriage, and he continued to practice law after the couple's separation in May 1983.²⁵⁸

After protracted proceedings, the court distributed property valued at \$194,000 to Mrs. Zells.²⁵⁹ Mr. Zells received property valued at \$224,000, including his law practice.²⁶⁰ The trial court stated that it attempted to divide the marital property equally; however, the difference resulted primarily from the non-liquid nature of Mr. Zells' law practice.²⁶¹ Both parties appealed the decision of the trial court to the First District Appellate Court.²⁶² Among other matters, both parties challenged the value assigned to the law practice.²⁶³

Much of the valuation problem stemmed from the treatment of

252. See *infra* notes 280-283 and accompanying text discussing why the *Zells* holding is contrary to the mandates of the Illinois Dissolution Act.

253. See *infra* notes 284-300 discussing why the *Zells* holding is contrary to the legislative intent behind the enactment of the Illinois Dissolution Act.

254. See *infra* notes 301-304 and accompanying text discussing why including professional goodwill in property distribution does not result in a double counting of future earnings.

255. *In re Marriage of Zells*, 554 N.E.2d 289, 290 (Ill. App. Ct. 1st Dist. 1990).

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.* at 291.

260. *In re Marriage of Zells*, 554 N.E.2d 289, 291 (Ill. App. Ct. 1st Dist. 1990). In addition, the court awarded Mrs. Zells maintenance of \$250 per week, reviewable on June 1, 1988, and reviewable again in six years. *Id.*

261. *Id.* In addition, the trial court stated that a higher maintenance award of \$2,000-\$3,000 per month was appropriate based on all considerations. *Id.* However, after suffering a heart attack in March 1984, Mr. Zells worked fewer hours. *Id.* Consequently, his earnings fell to \$3,000 per month before taxes. *Id.* Therefore, Mr. Zells had a reduced ability to pay maintenance. *Id.*

262. *Id.* at 291-92.

263. *Id.* at 292-93. Mr. Zells' valuation expert valued the tangible assets of the law practice at \$25,000. *Id.* at 290. In addition, the expert asserted that the practice had no goodwill value. *Id.* The expert relied on the fact that fifty to

two major contingent fee cases being handled by the law practice.²⁶⁴ Due to their highly speculative nature, the trial court ordered that they be separated from the value of the law practice, and divided only if and when received.²⁶⁵ However, the appellate court disagreed.²⁶⁶

Most of the court's opinion focused on the treatment of contingent fees.²⁶⁷ However, reflecting the view of a majority of jurisdictions nationwide, the court did recognize the value of professional goodwill in property distribution.²⁶⁸ The appellate court's major concern was merely with the *amount* of value assigned to goodwill.²⁶⁹ The court did not question the validity of considering pro-

sixty percent of Mr. Zells' income came from two clients who would not remain if Mr. Zells sold the practice. *Id.*

In contrast, Mrs. Zells' valuation expert assigned a value of \$150,000 to the law practice. *Id.* The expert assigned a range of value for goodwill of \$66,000 to \$131,000. *Id.* The trial court valued the law practice at \$92,010 identifying \$77,000 as goodwill. *Id.*

In addition to challenging the value of the law practice, both parties challenged the maintenance award of \$250 per week. However, the appellate court upheld that maintenance award. *Id.* The appellate court reasoned that the trial court properly balanced Mr. Zells' reduced ability to pay against the expectancy that Mrs. Zells would become self-supporting in arriving at the \$250 per week award. *Id.*

264. *Id.* at 293.

265. *In re Marriage of Zells*, 554 N.E.2d 289, 292 (Ill. App. Ct. 1st Dist. 1990).

266. *Zells*, 554 N.E.2d at 292-93. On appeal, the *Zells* court stated that contingent fees are not assets of a law practice at all. *Id.* at 293. Thus, the court held that they are not assets of the marital estate and are not subject to property distribution. *Id.* The court relied on three factors to support its conclusion that contingent fees are not marital property. *Id.* First, an attorney has no legal claim to the fees until there is a final disposition of the case. *Id.* at 292. Thus, it does not represent an asset of the law practice. *Id.* Therefore, it follows that the fees cannot be marital property. *Id.* Second, the amount is uncertain until there is a final settlement, so their value cannot be ascertained. *Id.* at 292-93. Finally, until cash is received, the value of the fees to the attorney is uncertain. *Id.* at 293.

However, the court noted that the exclusion of contingent fees from the value of a law practice requires other adjustments to avoid an inequitable result in property distribution. *Id.* The court noted that Mr. Zells' law practice incurred expenses attributable to the contingent fees. *Id.* The court reasoned that these expenses were identical to any other investment made with an expectancy of future gains. *Id.* Moreover, the expenses incurred in the expectation of realizing the contingent fees effectively reduced the value of the law practice. *Id.* Therefore, the court required that Mrs. Zells receive credit for the amount of the expenses in order to achieve an equitable result. *Id.* In this way, the value of the law practice would not include future contingent earnings, as well as expenses related to those future earnings. *Id.* This treatment of contingent fees by the *Zells* court demonstrates its understanding that the value of the law practice does not include future earnings.

267. See *Zells*, 554 N.E.2d at 292-93 (explaining why the court did not consider contingent fees to be marital property).

268. *Id.* at 293.

269. See *id.* at 292-93 (discussing why contingent fees are not properly included in the value of professional goodwill).

professional goodwill to be marital property.²⁷⁰ Thus, whether professional goodwill was subject to distribution was not an issue in the case. Nevertheless, the Supreme Court of Illinois disagreed.

The Supreme Court of Illinois addressed the issue of whether professional goodwill is subject to valuation and distribution in divorce at all.²⁷¹ Then, in a two-page opinion, the court dismissed the issue in a conclusory manner.²⁷² The court merely adopted the reasoning of the *Courtright* court and concluded that valuing and distributing professional goodwill results in the double counting of future earnings.²⁷³ The *Zells* court stated that goodwill, in the form of future earnings, is properly considered merely as a factor in property distribution generally and in awarding maintenance.²⁷⁴ The court held that professional goodwill is not itself subject to distribution in divorce.²⁷⁵ Unfortunately, such a cursory treatment of this controversial issue will unfairly impact numerous nonprofessional ex-spouses in the future.

B. *An Analysis of Zells*

The holding in *Zells* that professional goodwill cannot be marital property is not justified for three reasons. First, Section 503 of the Illinois Dissolution Act²⁷⁶ requires the distribution of *all* assets acquired during the marriage, which includes business interests.²⁷⁷ Second, nonrecognition of professional goodwill is in direct conflict with the legislative intent behind the enactment of the Illinois Dis-

270. See *id.* at 293 (remanding the case for a redetermination of the value of the law practice solely to eliminate the contingent fees and related expenses from the valuation).

271. *In re Marriage of Zells*, 572 N.E.2d 944, 944-45 (Ill. 1991). In addition to deciding whether to recognize professional goodwill as marital property, the *Zells* court addressed the issue of whether contingent fee contracts are subject to valuation and distribution as marital property. *Id.* The court agreed with the Appellate Court's judgment and held that the contracts are not marital property. *Id.*

272. See *id.* at 945 (summarily concluding that professional goodwill is not marital property). The Illinois Supreme Court agreed with the Appellate Court's reasoning for not recognizing contingent fee contracts as marital property. *Id.* In addition, the court stated that contingent fees cannot be divided in divorce because Rule 5.4 of the Illinois Rules of Professional Conduct prohibits a lawyer from sharing fees with a nonlawyer. *Id.* The court cited a 1989 case in which the Supreme Court of Illinois outlined the harms of a lawyer sharing fees with a non-lawyer. *Id.* The *Zells* court then merely stated that the same concerns arise when contingent fee contracts are divided pursuant to divorce. *Id.*

273. *Id.* at 946.

274. *Id.*

275. *Id.*

276. Illinois Dissolution Act, ILL. REV. STAT. ch. 40, para. 101-08 (1991). See *supra* note 80 for the complete text of the Illinois Dissolution Act, para. 503(a).

277. *Id.*

solution Act.²⁷⁸ Third, properly valued, professional goodwill does not result in a double counting of future earnings.²⁷⁹ Thus, the court in *Zells* erroneously concluded that professional goodwill cannot be valued and distributed pursuant to divorce.

First, section 503(a) of the Illinois Dissolution Act requires a court to distribute all marital property.²⁸⁰ Property acquired during the marriage carries a presumption of being marital property.²⁸¹ Courts routinely consider a business interest, including goodwill, to be marital property.²⁸² Further, a professional practice is a business interest.²⁸³ Thus, it can properly be valued and classified as marital property. Moreover, since goodwill is recognized as a part of the value of a business interest, section 503 requires that the court distribute it upon divorce. Thus, by ignoring professional goodwill in property distribution, the *Zells* court failed to comply with section 503 of the Illinois Dissolution Act.

Second, the most crucial reason for recognizing professional goodwill as marital property arises from the legislative intent behind enacting the Illinois Dissolution Act.²⁸⁴ First, the General Assembly intended to treat marriage like a partnership, and thus correct the glaring inequities of prior law.²⁸⁵ Second, the General Assembly intended to seek finality in divorce and thus avoid the

278. See *Kujawinski v. Kujawinski*, 376 N.E.2d 1382, 1388 (Ill. 1978). The Illinois legislature enacted the Illinois Dissolution Act, § 503, to provide for an equitable distribution of property upon divorce. *Id.*

279. See *infra* notes 318-321 and accompanying text for an explanation of why the recognition of professional goodwill does not result in the double counting of future earnings.

280. Illinois Dissolution Act, *supra* note 7, para. 503(c). See *supra* note 80 for the text of the Illinois Dissolution Act, § 503(a) requiring a court to treat all property acquired during the marriage as marital property.

281. Illinois Dissolution Act, *supra* note 7, at para. 503. See also *supra* note 79 for the text of Illinois Dissolution Act, ¶ 503(b), stating that property acquired during the marriage carries a presumption of being marital property. Additionally, ¶ 503(a)(7) includes, as property subject to distribution, the increase in value of property acquired during the marriage. Illinois Dissolution Act, *supra* note 7, at para. 503(a)(7). Such increase in value is divisible "irrespective of whether the increase results from a contribution of marital property, non-marital property, the personal effort of a spouse, or otherwise." *Id.* (Emphasis added.)

282. See *supra* note 6 for cases that stand for the proposition that business interests are distributable as property pursuant to divorce.

283. See PRATT, *supra* note 122, at 280 (stating that valuing a professional practice is no different than valuing any other small business).

284. See *supra* notes 8-10 and accompanying text for a discussion of the legislative intent behind enacting the Illinois Dissolution Act.

285. *Kujawinski v. Kujawinski*, 376 N.E. 2d 1382, 1388 (Ill. 1978). See also *supra* note 71 and accompanying text supporting the proposition that equitable distribution treats marriage like a partnership.

payment of maintenance.²⁸⁶ By refusing to recognize professional goodwill in property distribution, the *Zells* court contradicted these goals.

The General Assembly intended primarily to treat marriage like a partnership.²⁸⁷ In so doing, the legislature intended the courts to distribute all property of the marital partnership in a manner similar to partnership dissolution.²⁸⁸ Thus, each spouse has an equal claim to assets acquired during the marriage.²⁸⁹ The underlying legislative intent is to recognize each spouse's claim to marital assets regardless of who made direct contributions to specific assets and who holds title.²⁹⁰

Irrespective of which spouse owns the professional goodwill, both spouses invested in its creation.²⁹¹ The investment required the expenditure of both tangible and intangible assets of the marriage.²⁹² The tangible assets expended may include funds to set up an office, to buy into a partnership, or to provide continuing education.²⁹³ The marital unit also invested in the business by foregoing the benefits of alternative employment opportunities. Moreover, by investing marital assets in the professional practice, the spouses forego alternative investments that might otherwise be divisible in divorce.

In addition to the tangible investments, the spouses invest significant intangible assets in the professional practice. For example, spouses allocate family responsibilities to accommodate the professional spouse's required time commitments. Further, they may forego leisure time together. The spouse not involved in the professional practice may sacrifice by spending more time alone. Finally, certain related professional activities might require that the uninvolved spouse participate as escort or host(ess). These intangible investments contribute to the creation of a professional practice.

Accordingly, the risks and rewards of the investment of tangible and intangible assets of the marital unit require the agreement and cooperation of the parties as a partnership. Such investments represent a joint decision to pursue goals of the marital partnership.

286. *In re Marriage of Lee*, 398 N.E.2d 126, 133 (Ill. App. Ct. 1979). See also *supra* notes 9-10 and accompanying text stating that the legislature intended to seek finality in divorce.

287. See *supra* notes 69-73 and accompanying text for a discussion of how equitable distribution treats marriage like a partnership.

288. See Prefatory Note, *supra* note 1, at 147-49; *Kujawinski v. Kujawinski*, 376 N.E. 2d 1382, 1388 (Ill. 1978).

289. *In re Marriage of Lee*, 398 N.E. 2d 132-33 (Ill. App. Ct. 1979).

290. *Id.*

291. See *In re Marriage of Davis*, 476 N.E.2d 1137, 1141 (Ill. App. Ct. 1985).

292. See generally Cheryl E. Hader, *Marriage in New York: An Economic Partnership?*, 9 PACE L. REV. 91, 108 (1989).

293. See generally *id.*

While these elements of investment are difficult to track and weigh, they are contributions nonetheless.²⁹⁴

Furthermore, a spouse involved in a professional practice receives the benefit of professional goodwill after divorce no differently than during the marriage.²⁹⁵ As a result, if a court ignores goodwill in property distribution, it allows the professional spouse to walk away with the entire investment. This result is in direct contradiction to the legislative intent of equitably distributing all things of value acquired during the marriage under a partnership theory.²⁹⁶

The holding in *Zells* also directly contradicts the legislative intent of seeking finality in divorce.²⁹⁷ The *Zells* court stated that professional goodwill, in the form of future earnings, is properly considered in setting maintenance.²⁹⁸ However, properly valued, professional goodwill does not include future earnings. Moreover, the objective of equitable property distribution is to avoid the necessity of awarding maintenance.²⁹⁹ The goal is to terminate the relationship so that the parties may begin anew.³⁰⁰ An award of modifiable maintenance prevents the parties from severing their ties and thus contradicts the legislative intent of seeking finality. Therefore, the holding in *Zells* contradicts both the legislative intent of treating marriage like a partnership and of achieving finality in divorce.

Finally, the *Zells* court erroneously concluded that distributing professional goodwill results in the double counting of future earnings. Numerous courts recognize that professional goodwill is not synonymous with future earnings.³⁰¹ The expectation of future earnings may support a finding that goodwill exists.³⁰² However,

294. See generally *In re Marriage of Caldwell*, 465 N.E.2d 523 (Ill. App. Ct. 1984) (stating that the court must consider even the noneconomic contributions of a homemaker as contributions to marital property).

295. *In re Marriage of Lopez*, 113 Cal. Rptr. 58, 67 (Cal. Ct. App. 1974).

296. See generally *Kujawinski v. Kujawinski*, 376 N.E.2d 1382, 1388 (Ill. 1978) (stating that the legislature enacted the Illinois Dissolution Act to provide for equitable treatment in property pursuant to divorce).

297. See *supra* notes 96-98 and accompanying text for a discussion supporting the proposition that the legislature enacted the Illinois Dissolution Act to achieve finality in divorce.

298. *In re Marriage of Zells*, 572 N.E.2d 944, 946 (Ill. 1991).

299. See *supra* notes 98-99 and accompanying text explaining that one objective of a system of equitable distribution is to award maintenance only when there is a real need.

300. *In re Marriage of Lee*, 398 N.E.2d 126, 133 (Ill. App. Ct. 1979).

301. *Molloy v. Molloy*, 761 P.2d 138, 141 (Ariz. Ct. App. 1988); *In re Marriage of Lopez*, 113 Cal. Rptr. 58, 68 (Cal. Ct. App. 1974); *In re Marriage of Stone*, 507 N.E.2d 900, 907 (Ill. App. Ct. 1987); *Prahinski v. Prahinski*, 540 A.2d 833, 841 (Md. Ct. Spec. App. 1988), *aff'd*, 582 A.2d 784 (Md. 1990); *Dugan v. Dugan*, 457 A.2d 1, 6 (N.J. 1983).

302. *Lopez*, 113 Cal. Rptr. at 68.

future earnings do not play a part in its valuation.³⁰³ The valuation of goodwill derives from evidence of past earnings in excess of the earnings of an equivalent salaried practitioner, plus a normal return on the investment in tangible assets of the practice.³⁰⁴ Therefore, the holding in *Zells* that professional goodwill cannot be marital property subject to distribution cannot be justified.

V. A PROPOSAL FOR THE VALUATION OF PROFESSIONAL GOODWILL IN PROPERTY DISTRIBUTION

The Illinois General Assembly should amend the Illinois Dissolution Act to require courts to recognize professional goodwill as marital property.³⁰⁵ The General Assembly should also adopt a valuation methodology applicable to the valuation of professional goodwill.³⁰⁶ The treatment of professional goodwill as marital property, once properly valued, provides equitable results in property distribution.³⁰⁷

A. Illinois Should Recognize Professional Goodwill as Marital Property

In property division pursuant to marital dissolution, the court's concern is primarily to effect an equitable economic distribution.³⁰⁸ Thus, as long as goodwill exists, it should be treated as marital property subject to division.³⁰⁹ Once the court establishes that goodwill exists in a particular professional practice, the only remaining issue is one of how much value to assign to it. If there is a ready market for the sale of goodwill for the particular profession, the court should refer to market comparables to value professional goodwill.

Nevertheless, when no ready market exists for goodwill, the court must determine goodwill value from sources other than comparable sales.³¹⁰ The Supreme Court of New Mexico, in *Hurley v.*

303. *Id.*

304. *Stone*, 507 N.E.2d at 908. See *infra* notes 322-339 and accompanying text for a complete explanation of how to value professional goodwill.

305. See *supra* notes 276-304 and accompanying text for a discussion of the reasons that support the proposition that courts should recognize professional goodwill as marital property.

306. See *supra* notes 237-238 and accompanying text for one court's assertion that there is a need to define a methodology for valuing professional goodwill.

307. See *supra* notes 284-296 and accompanying text for a discussion supporting the proposition that courts must recognize professional goodwill as marital property in order to achieve equitable results in property distribution.

308. *In re Marriage of Lopez*, 113 Cal. Rptr. 58, 67 (Cal. Ct. App. 1974).

309. *Id.*

310. See, e.g., *id.* In *Lopez*, the court acknowledged "that 'professional goodwill' may be elusive, intangible, [and] difficult to [value]. . . ." *Id.* at 67. However, the difficulty in valuation is no reason to ignore it. *Id.* See also, *Stern v. Stern*, 331 A.2d 257, 260 (N.J. 1975). New Jersey courts agree that even though

Hurley,³¹¹ recognized that no definitive method for valuation exists.³¹² Therefore, valuation depends on the particular facts and circumstances of each case.³¹³ By its very nature, a sole proprietorship may possess little or no divisible goodwill value.³¹⁴ In contrast, a larger professional firm may possess substantial divisible goodwill value.³¹⁵ Nevertheless, a court should not ignore professional goodwill in property distribution merely because goodwill in a particular professional practice has relatively little value.³¹⁶ Further, the fact that it is difficult to value does not preclude a court from taking professional goodwill into account.³¹⁷

Moreover, proper application of valuation methodology avoids the concern about the double counting of future earnings.³¹⁸ The *Lopez* court stated that future earnings are merely considered as one factor in determining whether goodwill *exists*.³¹⁹ However, the court is not to consider future earnings in its determination of the *value* of goodwill.³²⁰ Thus, even if the court considers future earnings in setting maintenance, there is no risk of double counting.³²¹

Accordingly, the Illinois Dissolution Act should require that courts treat professional goodwill as marital property subject to division upon divorce. In addition, the statute should prescribe the methodology for valuing professional goodwill in order to achieve

a law firm's goodwill is not salable, it has economic worth. *Id.* Further, valuation may be difficult when the practitioner does not intend to transfer the interest. *Id.* However, that fact does not preclude its valuation by acceptable methods. *Id.*

311. *Hurley v. Hurley*, 615 P.2d 256, 259 (N.M. 1980), *overruled on other grounds by* *Ellsworth v. Ellsworth*, 637 P.2d 564, 566 (N.M. 1981).

312. *Id.*

313. *Id.*

314. *See Prahinski v. Prahinski*, 540 A.2d 833, 841-43 (Md. Ct. Spec. App. 1988) (holding that while professional goodwill may exist in some law practices, there was no goodwill value in the sole practitioner husband's law practice) *aff'd*, 582 A.2d 784 (Md. 1990).

315. *See id.* at 841 (pointing out that law firms bearing the names of deceased partners may have goodwill value).

316. *See Hurley v. Hurley*, 615 P.2d 256, 259 (N.M. 1980) (stating that even though not always salable, goodwill is not without some value), *overruled on other grounds by* *Ellsworth v. Ellsworth*, 637 P.2d 564, 566 (N.M. 1981).

317. *Id.*

318. *See In re Marriage of Lopez*, 113 Cal. Rptr. 58, 68 (Ca. Ct. App. 1974); *Dugan v. Dugan*, 457 A.2d 1, 6 (N.J. 1983); *Stern v. Stern*, 331 A.2d 257, 260 (N.J. 1975); *Hurley*, 615 P.2d at 259. *See also Prahinski*, 540 A.2d at 841 ("goodwill reflects not simply a *possibility* of future earnings, but . . . [reflects] existing circumstances").

319. *Lopez*, 113 Cal. Rptr. at 68.

320. *Id.*

321. *See Stern*, 331 A.2d at 260 (noting that future earnings should not be recognized as a separate item of property, but would be considered in ensuring that a distribution is 'equitable' and to determine the amount of alimony payments).

equitable results. The following section discusses an appropriate methodology.

B. The Methodology for Valuing Professional Goodwill

The Illinois General Assembly should adopt a methodology for valuing goodwill for purposes of property distribution pursuant to divorce. Since the court should distribute professional goodwill upon divorce, a prescribed valuation methodology provides objective criteria for the courts to apply in valuing it. Moreover, by prescribing a methodology uniquely designed for this purpose, the General Assembly can insure that the courts will produce equitable results in property distribution.

The General Assembly should adopt the valuation methodology suggested by the *Stone* court.³²² As an element of this methodology, the legislature should also require that the court consider the factors enumerated by the California Court of Appeals in *Lopez*.³²³ These factors include:

the practitioner's age, health, past demonstrated earning power, professional reputation in the community as to his judgement, skill, knowledge, his comparative professional success, and the nature and duration of his business as a sole practitioner or as a member of a partnership or professional corporation to which his professional efforts have made a proprietary contribution.³²⁴

The General Assembly should mandate that courts consider these factors, which will aid in accurately reflecting the value of

322. *E.E.C. v. E.J.C.*, 457 A.2d 688, 693 (Del. 1983); *Hanson v. Hanson*, 738 S.W.2d 429, 435-36 (Mo. 1987); *Dugan*, 457 A.2d at 9-10; *Hurley*, 615 P.2d at 259. See *In re Marriage of Stone*, 507 N.E.2d 900, 908 (Ill. App. Ct. 1987) (describing the capitalization of excess earnings approach as one appropriate method of valuing professional goodwill).

Valuation specialists recognize the capitalization of excess earnings approach for professional goodwill valuations in divorce proceedings. See PRATT, *supra* note 122, at 305-08 (stating that the excess earnings approach is a method accepted by numerous courts for valuing a professional practice). See also Rev. Rul. 68-609, 1968-2, C.B. 327 (suggesting the capitalization of excess earnings approach for valuing intangible assets of a business when no other method exists); Rev. Rul. 59-60, 1959-1, C.B. 237 (designating the method for valuing the stock of a closely held corporation for estate and gift tax purposes). But see SHANNON PRATT, VALUING A BUSINESS, 104-05 (2d ed. 1989) (discussing denunciation of the method by the Internal Revenue Service because of the misapplication of the method, primarily due to the arbitrary rates of return used by people applying the method).

323. *Lopez*, 113 Cal. Rptr. at 68. See also PRATT, *supra* note 122, at 300-03 (stating that business valuation specialists should consider the *Lopez* factors in valuing professional goodwill). The consideration of factors similar to those enumerated in *Lopez* is akin to the Illinois Dissolution Act, § 503, which requires that the court consider certain factors in property distribution. See *supra* note 85 for a listing of the factors in § 503(d) of the Illinois Dissolution Act.

324. *Lopez*, 113 Cal. Rptr. at 68.

goodwill.³²⁵

There are three basic steps entailed in the valuation methodology that this Note proposes. First, the court should analyze past earnings of the professional practice to determine whether the practice has "excess earnings."³²⁶ If excess earnings exist, step two requires that the court determine an appropriate capitalization rate.³²⁷ Finally, step three requires that the court capitalize excess earnings by multiplying the excess earnings derived in step one by the capitalization rate determined in step two.³²⁸ The result is the value for professional goodwill.

In order for the court to determine if "excess earnings" exist, the court must first ascertain what would be the normal earnings of a professional with comparable experience, expertise, education, age and hours worked in the same community.³²⁹ Then, the court should obtain the past five years' pre-tax earnings of the professional practice.³³⁰ The court then should compute a weighted average³³¹ of these earnings and compare the result with the norm for the comparable employee.³³² If the weighted averaged earnings of the practice exceed (1) the norm for the comparable employee plus

325. *Id.*

326. See PRATT, *supra* note 122, at 156-57 for a complete discussion of the excess earnings method of valuation. See also *In re Marriage of Stone*, 507 N.E.2d 900, 908 (Ill. App. Ct. 1987) (describing the excess earnings method of valuation for professional practices).

327. See PRATT, *supra* note 122, at 122 (defining the term, "capitalization rate," as "a percentage rate by which a constant income stream is divided in order to indicate a value").

328. *Id.* at 157; *Stone*, 507 N.E.2d at 908.

329. PRATT, *supra* note 122, at 303. There are numerous earnings surveys available that provide comparable earnings of professionals in different geographical areas. *Id.*

330. *Id.* at 307. Five years of earnings history usually reveals trends, and exposes extraordinary occurrences that are relevant to valuing goodwill.

331. *Id.* at 335. To "weigh" earnings, the court assigns each year's earnings a weight factor, assigning the most recent year's earnings the most weight. *Id.* If the court uses the five preceding years, the following results:

1987 earnings:	\$20,000	X	1 = \$ 20,000
1988 earnings:	\$25,000	X	2 = \$ 50,000
1989 earnings:	\$30,000	X	3 = \$ 90,000
1990 earnings:	\$30,000	X	4 = \$120,000
1991 earnings:	\$35,000	X	5 = \$175,000
Total			15 <u>\$455,000</u>

$$\text{Weighted Average} = 455,000/15 = \underline{\underline{\$30,333}}$$

See *id.*

332. *Id.* at 303. The court compares the professional practitioner's earnings to those of a comparable practitioner to determine "success." *Id.* The "success" of a professional is usually measured by earnings. *Id.* It is critical, however, that the court compare practitioners that work comparable hours, serve a comparable number of clients or patients, and so forth. *Id.* The court must compare earnings in light of these factors in order to determine whether the practi-

(2) a return on investment from the tangible assets of the practice,³³³ then the court determines that goodwill exists.

Once the court determines that goodwill exists, the excess earnings serve as a basis for computing goodwill.³³⁴ The court shall determine the appropriate capitalization rate³³⁵ to apply to these excess earnings in order to arrive at a value for goodwill.³³⁶ The

tioner's "success" results from working longer hours, or from professional goodwill. *Id.*

333. *Id.* at 156-63. A professional practitioner invests capital in tangible assets that are necessary for the operation of the practice. *Id.* Such assets include furniture, office equipment, specialized professional equipment, telephones, leasehold improvements and the like. *Id.* The earnings of the practice provide a return on the investment in these assets. *Id.* In contrast, employees are not required to invest in these items because the employer provides them. *Id.* Thus, the employee invests his or her capital and earns a return from alternative investments. Therefore, a return on capital invested in the tangible assets of the practice must be first subtracted from earnings before a realistic comparison can be made between the earnings of the practice and those of a comparable employee. *See id.*

334. PRATT, *supra* note 122, at 307; *In re Marriage of Stone*, 507 N.E.2d 900, 908 (Ill. App. Ct. 1987).

335. *See* PRATT, *supra* note 122, at 121-42 (for a complete discussion of capitalization rates). Risk effects the capitalization rate. *Id.* at 128-29. Thus, characteristics increasing risk require an increase in the rate of return a buyer would command. *Id.* Conversely, characteristics reducing risk require a reduction in the required rate of return. *Id.* For example, suppose Buyer wants to purchase a business with a stream of income of \$50,000 per year. Further, Buyer has two available acquisition opportunities: A and B. Buyer's required rate of return for a business with equal risk and equal return as A is 25%. Thus, one would say Buyer's capitalization rate is 25%. Buyer capitalizes the income stream to arrive at the amount he is willing to pay. Thus, Buyer is willing to pay \$200,000 ($\$50,000/.25 = \$200,000$) today for the right to receive \$50,000 per year from A.

Now, assume that due to unique characteristics, the B business is a riskier venture. There is less certainty that Buyer will actually collect the \$50,000 each year from B after the acquisition. Consequently, Buyer may decide that he needs an increased return of 30% to compensate for the increased risk. Thus, Buyer is only willing to pay \$166,667 ($\$50,000/.30 = \$166,667$) for B.

Further, assume that the seller of B offers to guarantee the \$50,000 income stream for the first two years, but not thereafter. The guarantee reduces Buyer's risk. Therefore, Buyer may decide that his required rate of return on B with a two year guarantee is 28%. Thus, Buyer is willing to pay \$178,571 ($\$50,000/.28 = \$178,571$) for business opportunity B with a two year income guarantee. The valuation of professional goodwill follows a similar process to the foregoing. *See id.* at 305-16 (describing in detail an example of the valuation of a professional practice).

336. *Id.* at 307-08. The capitalization rate effectively converts the excess earnings into an amount of money that a willing and able buyer would pay up front for the right to receive the excess earnings in the future. *Id.* at 300-01. Because the purpose of the valuation is property distribution pursuant to divorce, the court does not contemplate an actual sale. *Id.* Thus, the court ignores difficulties in, or ethical restrictions on actual salability of a particular professional practice. *Id.* The value of the practice on the date of dissolution is relevant only insofar as it provides the value of an asset divisible upon divorce. *Id.*

Further, the appropriate capitalization rate depends on the evidence in the particular case. *Id.* In determining an appropriate capitalization rate, the court should consider capitalization rates applicable to the valuation of other professions, and adjust for peculiarities of the subject profession. *Id.* at 307-08. Fur-

capitalization rate is a percentage rate by which the court converts excess earnings into a single value.³³⁷ To determine the appropriate capitalization rate, the court considers the characteristics of the particular professional practice and the relative risks associated with those characteristics.³³⁸ The capitalization rate is then multiplied by the excess earnings to arrive at a value for professional goodwill.³³⁹

The foregoing valuation methodology furthers the legislative intent behind the adoption of Section 503 of the Illinois Dissolution Act of achieving equitable results in property distribution pursuant to divorce.³⁴⁰ A professional practice acquired during a marriage is a valuable asset.³⁴¹ Under the partnership theory, that asset should be valued and distributed as marital property.³⁴² This proposed valuation methodology accomplishes the legislative goal by providing a means of valuing this important asset of the marriage in a reviewable, nonspeculative manner.³⁴³ The acceptance by numerous courts of this methodology³⁴⁴ further supports its reliability.³⁴⁵

ther, the court should consider the factors enumerated in *Lopez*. *Id.* at 301-03. For example, the court should consider the nature and duration of the practice. *Id.* In so doing, the court considers factors such as the type of client served, type of service offered, number and tenure of employees, how fees are billed, and how many other professionals offer the same service in the community. *Id.* These factors impact the risk related to an investment in the particular practice, which risk the court must consider in determining a capitalization rate. *Id.*

For example, a practice may have a large number of tenured employees, many of whom service a particular client. *See* *Beasley v. Beasley*, 518 A.2d 545, 552-53 (Pa. Super. 1986) (discussing the differences between a sole law practitioner and a law partnership). It is unlikely, in that situation, that a client will be sensitive to the departure of a particular practitioner. *Id.* Thus, there is little risk of an adverse impact on the practice's ability to generate earnings from that client. *Id.* In contrast, a client utilizing the services of a sole practitioner may be more sensitive to a transfer of the client's account to a new practitioner. *Id.* Thus, this adversely effects the ability of a transferee of the practice to retain the client and continue generating earnings therefrom. *Id.* Therefore, the court should adjust the capitalization rate to reflect the impact that the number of tenured employees has on the risk of retaining clients and retaining the earnings generated by them. PRATT, *supra* note 122, at 307-08.

337. *See* PRATT, *supra* note 122, at 122.

338. *See id.*, at 301-03.

339. *Dugan v. Dugan*, 457 A.2d 1, 10 (N.J. 1983).

340. *See supra* notes 8-10 and accompanying text for a discussion of the Illinois legislature's intent behind its adoption of the Illinois Dissolution Act.

341. *See supra* notes 180-204 and accompanying text for a complete discussion of the important value of a professional practice.

342. *See supra* notes 6-7 and accompanying text explaining that the partnership theory of marriage contemplates the distribution of a professional practice upon divorce.

343. *See supra* notes 322-339 and accompanying text for an explanation of the valuation methodology proposed in this Note.

344. *E.g., In re Marriage of Stone*, 507 N.E.2d 900, 908 (Ill. App. Ct. 1987); *Dugan v. Dugan*, 457 A.2d 1, 9-10 (N.J. 1983).

345. *See id.*

VI. CONCLUSION

Divorce reform in this country since 1974 reflects society's changing views of marriage.³⁴⁶ Historically, marriage reflected the unequal legal and economic roles of spouses.³⁴⁷ In contrast, society views modern marriage as a partnership between legal equals.³⁴⁸ Consistent with this view, forty-nine states now have laws recognizing the legal equality of spouses by requiring an equitable distribution of property, including business interests, pursuant to divorce.³⁴⁹ However, the Illinois Supreme Court in *Zells* established a rule creating gross inequities when one such business interest includes the goodwill of a professional practice.³⁵⁰ It is now time for the Illinois General Assembly to amend section 503 of the Illinois Dissolution Act and correct this gross inequity in property distribution by recognizing the divisibility of professional goodwill and establishing a proper valuation methodology.

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346. See *supra* notes 14-41 and accompanying text for a discussion of society's changing view of marriage on divorce reform.

347. *Id.*

348. See *supra* notes 32-41 and accompanying text for a discussion of society's view of modern marriage as a partnership between equals.

349. See *supra* notes 1-2 for a listing of states that adopted equitable distribution laws.

350. See *supra* notes 276-304 and accompanying text for a discussion of the inequities inherent in the holding in *Zells*.