Oklahoma Law Review

Volume 61 | Number 3

2008

Peace on Earth, Goodwill in Divorce: Revisiting *Travis* in Light of Oklahoma's Revised Ethical Rule Allowing the Sale of Law Practice Goodwill

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COMMENT

Peace on Earth, Goodwill in Divorce: Revisiting *Travis* in Light of Oklahoma's Revised Ethical Rule Allowing the Sale of Law Practice Goodwill

She cried, and the judge wiped her tears with my checkbook.[1]

I. Introduction

Consider for a moment this hypothetical. The year is 2008. Abe Lawyer has been a sole practitioner in Oklahoma for years, and much to his surprise, his practice is quite profitable. His reputation as counsel for medical malpractice plaintiffs is outstanding. With potential clients and referrals coming in from all over the state, Abe knows that his future will have few financial bounds if everything stays on course. Unfortunately, while he climbs the ladder of success within his legal profession, his marriage plummets. Abe's marriage to his wife, Oasis, turned out to be a mirage, and in the words of famous country singer Tammy Wynette, it is time for a "D-I-V-O-R-C-E."[2]

Abe calls Beth Counsel and prepares to divide all he has acquired during his marriage to Oasis. Beth Counsel, a law school friend who handles divorces, advises him to prepare a list of all assets and liabilities acquired during his marriage, including his solo law practice. Despite his successful law practice, Abe begins to worry because he does not have liquid cash to satisfy a property division of his practice. Almost everything Abe has in his practice is tied up in contingency fee cases, which he knows are not guaranteed recoveries. In fact, he could actually incur a substantial loss on litigation expenses if a jury comes back with a verdict for the defense. Beth tells Abe not to worry because his law practice and livelihood are safe. She explains that while Oasis has the right to an equitable division of marital property, including Abe's office furnishings and equipment and the right to use his projected earning capacity to seek support alimony, Oklahoma law protects the goodwill Abe has accumulated in his law practice from division as a marital asset.[3] Has Beth given Abe good advice?

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1. Cathy Meyer, Funny Divorce Quotes, http://divorcesupport.about.com/b/2007/08/29/funny-divorce-quotes.htm (Aug. 29, 2007) (quoting Tommy Manville). Manville was married thirteen times to eleven different women. *Id.*

2. TAMMY WYNETTE, D-I-V-O-R-C-E (Epic Records 1968).

3. Travis v. Travis, 1990 OK 57, ¶¶ 11-13, 795 P.2d 96, 100 (holding that the reputation of a lawyer could not be purchased by another; therefore, the law practice at issue had no

Effective January 1, 2008, Oklahoma adopted the American Bar Association's (ABA) newest version of Model Rule of Professional Conduct 1.17.[4] Under both the ABA Model Rules and the Oklahoma Rules of Professional Conduct, Rule 1.17 allows and provides guidelines for the ethical sale of a law practice.[5] While Oklahoma's 2008 version of Rule 1.17 affords substantially more protection to clients than its ABA counterpart, the main features of both the ABA model rule and the Oklahoma rule are the same.[6] Subject to only a few restrictions, both rules explicitly allow the sale of a law practice along with such practice's goodwill.[7] Goodwill, under Oklahoma

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goodwill for the purpose of dividing the marital estate).

4. Application of the Okla. Bar Ass'n to Amend the Rules of Prof'l Conduct, 2007 OK 22, ¶ 1, 171 P.3d 780, 780.

5. MODEL RULES OF PROF'L CONDUCT R. 1.17 (2007); OKLA. RULES OF PROF'L CONDUCT R. 1.17 (Supp. 2008).

6. MODEL RULES OF PROF'L CONDUCT R. 1.17 (2007); OKLA. RULES OF PROF'L CONDUCT R. 1.17 (Supp. 2008).

7. MODEL RULES OF PROF'L CONDUCT R. 1.17 (2007); OKLA. RULES OF PROF'L CONDUCT R. 1.17 (Supp. 2008). Oklahoma Rule 1.17 currently states:

> A lawyer or a law firm (or the authorized representative of a lawyer or a law firm) may sell or purchase a law practice, or an area of practice, including good will, if the following conditions are satisfied:
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> (a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, in the geographic area in Oklahoma in which the practice has been conducted; and
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> (b) The entire practice, or the entire area of practice, is sold to one or more lawyers or law firms, except that (1) the representation of any client who does not consent as provided in paragraph (c) shall not be transferred; (2) matters shall not be transferred to a purchaser unless the seller has reasonable basis to believe that the purchaser has the requisite knowledge and skill to handle such matters, or reasonable assurances are obtained that such purchaser will either acquire such knowledge and skill or associate with another lawyer having such competence; (3) matters shall not be transferred to a purchaser who would not be permitted to assume such representation by reason of restrictions contained in Rules 1.7 through 1.10 or other Rules; and (4) where matters in litigation are involved, any necessary judicial approvals of the transfer of representation must be obtained.
>
> (c) The seller or the seller's representative shall give written notice to each client whose representation is proposed to be transferred, stating: (1) a sale of the entire practice, or the entire area of practice, is proposed; (2) a transfer of the representation of such client to a specified lawyer, lawyers, or law firm is contemplated; (3) the client has the right to take possession of the file and retain other counsel; (4) the existence and status of any funds or property held for the client, including but not limited to retainers or other prepayments; and (5) the fact that the client's consent to the transfer of the client's files will be presumed if he client does not take any action or does not otherwise object within ninety (90) days of the date of the notice.
>
> The signed written consent of each client whose representation is proposed

law, is the "value that results from the probability that old customers will continue to trade with an established concern."[8]

The concept of ethically providing for the sale of law practices is not a new concept to Oklahoma. In 1995, Oklahoma adopted its original version of Rule 1.17, which allowed lawyers to sell their practices if they completely ceased the private practice of law in Oklahoma.[9] Prior to the enactment of this rule, lawyers in Oklahoma could not sell their law practices because in doing so, they would violate their professional duty to refrain from obtaining a proprietary interest in client matters and their duty to avoid an unethical division of fees.[10] Once Oklahoma adopted Rule 1.17, it served its purpose by allowing attorneys to wind down their practices in the event of retirement, relocation, or in hopes of judicial or legislative office.[11] Under both the new and old Rule 1.17, attorneys selling their practices can receive the compensation they have already earned while they also ensure their clients receive new representation.[12] Yet, Oklahoma's original rule allowed only for the sale of the law practice itself, not its goodwill.[13]

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to be transferred to a purchaser must be obtained; provided that the client's consent to the transfer of the client's files shall be presumed if the client does not take any action or does not otherwise object within ninety (90) days of the date of the notice. If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.

(d) The purchaser may, however, refuse to undertake the representation unless the client consents to pay the purchaser fees at a rate not exceeding the fees charged by the purchaser for rendering substantially similar services prior to the initiation of the purchase negotiations.

Id.

8. Freeling v. Wood, 1961 OK 113, ¶ 12, 361 P.2d 1061, 1063.
9. OKLA. RULES OF PROF'L CONDUCT R. 1.17 (2001) (amended 2008).
10. Travis v. Travis, 1990 OK 57, ¶ 11, 795 P.2d 96, 100.
11. OKLA. RULES OF PROF'L CONDUCT R. 1.17 (2001) (amended 2008).
12. *Id.*
13. *Id.* Oklahoma's old rule stated:

A lawyer (or the authorized representative of a lawyer) who ceases to engage in the private practice of law in Oklahoma may sell the law practice of such a lawyer to a lawyer or law firm, and a lawyer or law firm may purchase that law practice, if the following conditions are satisfied:

(a) The practice is sold in its entirety, except that (1) the representation of any client who does not affirmatively consent as provided in paragraph (c) shall not be transferred; (2) matters shall not be transferred to a purchaser unless the seller has a reasonable basis to believe that the purchaser has the requisite knowledge

The chart below indicates the major distinctions between Oklahoma's old and new Rule of Professional Conduct 1.17.[14]

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and skill to handle such matters, or reasonable assurances are obtained that such purchaser will either acquire such knowledge and skill or associate with another lawyer having such competence; (3) matters shall not be transferred to a purchaser who would not be permitted to assume such representation by reason of restrictions contained in Rules 1.7 through 1.12 or other Rules; and (4) where matters in litigation are involved, any necessary judicial approvals of the transfer of representation must be obtained.

(b) The seller or the seller's representative shall give written notice to each client whose representation is proposed to be transferred, stating: (1) The lawyer is ceasing to engage in the private practice of law in Oklahoma; (2) the practice of the lawyer is to be sold; (3) a transfer of the representation of such client to a specified lawyer or law firm is proposed; (4) the client has the right to take possession of the file and retain other counsel; (5) the existence and status of any funds or property held for the client, including but not limited to retainers or other prepayments; and (6) the terms of any proposed change in the fee arrangement within the limits authorized by paragraph (e).

(c) The signed consent of each client whose representation is proposed to be transferred to a purchaser must be obtained on a copy of the written notice provided for in paragraph (b), and such form of written notice shall also provide a space for the client to direct another disposition of the file.

(d) No attorney-client communications or other confidential information protected by Rule 1.6 shall be revealed to a purchaser or prospective purchaser unless the client's consent to the transfer of representation has first been obtained as provided in paragraphs (b) and (c).

(e) The fees charged clients shall not be increased by reason of the sale. The purchaser may, however, refuse to undertake the representation unless the client consents to pay the purchaser fees at a rate not exceeding the fees charged by the purchaser for rendering substantially similar services prior to the initiation of the purchase negotiations.

(f) A reasonable effort shall be made to locate each client whose representation is proposed to be transferred, but if such client cannot be located, then the seller of the practice must make appropriate arrangements with another lawyer or law firm who would be qualified to assume such representation, who need not be the purchaser of the practice. Any such files shall be segregated by the receiving lawyer or law firm for safekeeping and held for disposition as the client may direct when located.

(g) The custody of inactive files representing matters which have been concluded, or with respect to which no current activities are occurring or contemplated, shall only be transferred in accordance with the applicable provisions of paragraphs (b) and (c) or (f), as the case may be.

Id.

14. OKLA. RULES OF PROF'L CONDUCT R. 1.17 (Supp. 2008); OKLA. RULES OF PROF'L CONDUCT R. 1.17 (2001) (amended 2008).

	Pre-2008 Rule 1.17	2008 Rule 1.17
Allows sale of entire law practice	Yes	Yes
Allows sale of law "practice areas"	No	Yes
Specifically allows for the sale of law practice goodwill	No	Yes
Requires cessation of private practice of law in entire state of Oklahoma	Yes	No
Requires cessation of private practice in geographical area of Oklahoma where sold practice was located	Yes	Yes
Allows judicial consent to transfer clients who cannot be contacted	No	Yes
Prohibits transfer of confidential client information to potential purchaser	Yes	No
Requires purchasing attorney NOT to increase fees	Yes	No

Since an attorney could sell neither a law practice nor its goodwill under the ethical rules prior to the adoption of Rule 1.17, when the case of *Travis v. Travis* reached the Oklahoma Supreme Court in 1990, the court ruled that a lawyer's goodwill in his or her practice could not be a marital asset subject to division in a divorce proceeding.[15] To the court, a lawyer's professional goodwill was personal because "the reputation of [a] lawyer cannot be purchased by another."[16] When Oklahoma originally adopted Rule of Professional Conduct 1.17 in 1995, no language spoke to the nature or even existence of an attorney's goodwill.[17] Since *Travis* held that lawyers had only non-saleable, personal goodwill, the passage of the original version of Rule 1.17 without reference to the ability to sell goodwill implicitly adopted *Travis*; there was no need to address the sale of something the Oklahoma Supreme Court had already declared nonexistent. Despite years of reliance on the *Travis* construction of attorney goodwill as personal, the 2008 Oklahoma Rule

15. *Travis*, ¶ 13, 795 P.2d at 100.

16. *Id.* ¶ 11, 795 P.2d at 100.

17. OKLA. RULES OF PROF'L CONDUCT R. 1.17 (2001) (amended 2008); *see supra* note 13 (full text of R. 1.17 prior to the 2008 amendment).

of Professional Conduct 1.17 departed from precedent and statutorily codified attorney goodwill as a saleable commodity, in exact opposition to *Travis*.[18] Therefore, under Oklahoma's 2008 Rule of Professional Conduct 1.17, an attorney's goodwill and business reputation may now be bought and sold.[19]

By stating that a lawyer's goodwill may be bought and sold, the 2008 version of Rule 1.17 has radically re-characterized the professional goodwill of a practicing attorney from that of personal goodwill, which is generally non-transferable, to enterprise goodwill, which is readily transferable with the business to which it attaches.[20] Because a lawyer's goodwill is now alienable, it can theoretically be divisible in a divorce proceeding as Oklahoma has done with other professional practices.[21] This drastic change in Rule 1.17 places the fate of *Travis* and its classification of attorney goodwill as non-marital property in the balance, as it threatens to overturn precedent relied upon by Oklahoma practitioners for almost *19 years*. Nonetheless, this comment argues that because the sale of a law practice and its goodwill is still as untenable, impractical, and unlikely as it was when *Travis* was decided, the 2008 revision to Rule 1.17 should not result in overturning *Travis*. Further, a strict construction of Rule 1.17 may save *Travis* from certain death.

Part II of this comment examines goodwill, specifically addressing its definition, origins, and common valuation methods, including the difficulties experienced when trying to value such an intangible and erratic asset. Part III examines the current scheme for dividing marital property in Oklahoma, including the equitable division of goodwill in the professional context. It particularly focuses on the sale of goodwill in the legal profession. Part IV considers the effect of the 2008 revision to Rule 1.17 on the viability of *Travis v. Travis* and suggests that because the revised rule statutorily modifies the *Travis* definition of goodwill from personal to enterprise goodwill, a lawyer's goodwill will very likely become a divisible marital asset. Part IV also suggests plausible alternatives to overturning *Travis* based upon the realities faced by many solo or small firm practitioners and the many restrictions inherent in Rule 1.17. This comment concludes in Part V.

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18. OKLA. RULES OF PROF'L CONDUCT R. 1.17 (Supp. 2008).

19. *Id.*

20. *Id.*; *see* David H. Levy, *The Nature of the Beast: Hunting (Professional) Goodwill*, 25 FAM. ADVOC. 31, 31 (2003) (explaining the difference between personal goodwill and enterprise goodwill).

21. *See* Traczyk v. Traczyk, 1995 OK 22, 891 P.2d 1277, *superceded by statute on other grounds as stated by* 1999 OK 57, ¶ 17, 983 P.2d 1025, 1028-29. *Traczyk* was superceded by statute only as to the section of the decision discussing the computation of interest according to 12 OKLA. STAT. § 727 (2001), which in no way affects its validity for the purpose of discussion in this Comment. Cox v. Kan. City Life Ins. Co., 1999 OK 57, ¶ 17, 983 P.2d 1025, 1028-29.

II. Goodwill: A Quick Look at an Expansive Concept

A. Defining Goodwill—Many Definitions, One General Trend

The oldest known decision on goodwill appears in the 1690 case *Broad v. Jollyfe*[22] where the court concluded that goodwill "is but the selling of his custom and leaving another to gain it."[23] Given *Broad*'s lack of clarity regarding the concept of goodwill, a better known description of goodwill is found within an 1810 discussion in *Crutwell v. Lye*, which involved the sale of a country waggoner's goodwill.[24] In *Crutwell*, Lord Chancellor Eldon defined the term as "nothing more than the probability that the old customers will return to the old place."[25] Similarly, in the 1842 case of *England v. Downs*, Lord Langdale defines goodwill as "the chance or probability that custom will be had at a certain place of business, in consequence of the way in which that business has been carried on."[26] Shortly thereafter, courts described goodwill as: "[w]hen a trade is established in a particular place, the goodwill of that trade means nothing more than the sum of money any person would be willing to give for the chance of being able to keep the trade connected with the place where it has been carried on."[27]

Early American decisions describe goodwill in similar terms. *Rowell v. Rowell*, a 1904 case from Wisconsin, colorfully described goodwill as "a sort of beaten pathway from the seller to the buyer,"[28] and in the same year, a California court in *Dodge Stationery Co. v. Dodge* defined goodwill in more explicit prose as "a well-founded expectation of continued public patronage."[29] *Vonderbank v. Schmidt*, an early Louisiana case, described goodwill as "an advantage or benefit which is acquired by a business establishment beyond the mere intrinsic value of the capital stock; . . . it is the general public patronage and encouragement which a business receives from its customers on account of its local position."[30]

Because definitions of goodwill have evolved over many years, finding a single, uniform definition is a difficult task. Today, two distinct definitions

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22. (1620) 79 Eng. Rep. 509 (K.B.).

23. Gabriel A. D. Preinreich, *The Law of Goodwill*, 11 ACCT. REV. 317, 317 (1936) (quoting *Broad*, 79 Eng. Rep. at 510).

24. *Id.* (citing Crutwell v. Lye, (1810) 34 Eng. Rep. 129 (Ch.)).

25. *Id.* (quoting *Crutwell*, 34 Eng. Rep. at 134).

26. *Id.* (quoting England v. Downs, (1842) 49 Eng. Rep. 829, 832-33).

27. *Id.* (quoting Austen v. Boys, (1858) 44 Eng. Rep. 1132, 1136 (Ch.)).

28. 99 N.W. 473, 478 (Wis. 1904).

29. 78 P. 879, 882 (Cal. 1904).

30. 10 So. 616, 619 (La. 1892).

have emerged for goodwill depending upon the field in which the concept arises—a factor which further complicates the task of defining goodwill.[31] First, the economic or accounting definition of goodwill focuses on goodwill as an asset of a business, generally characterizing it as the "excess of the 'normal rate of return for the identifiable tangible and intangible assets used in [a] given business.'"[32] The computation of goodwill under the economic definition requires the consideration of the following sources of goodwill: (1) strategic location; (2) effective advertising; (3) the value of a skilled, trained workforce; (4) assemblage of property and equipment in a productive arrangement; and (5) the systems, controls, and management procedures developed as a part of any operation.[33]

By contrast, the legal definition of goodwill describes it as the continued patronage of customers with a certain business.[34] The legal definition of goodwill generally ignores all other sources of goodwill other than return business and reputation.[35] Black's Law Dictionary takes both the economic and legal definitions into consideration and defines goodwill as "[a] business's reputation, patronage, and other intangible assets that are considered when appraising the business, [especially] for purchase; the ability to earn income in excess of the income that would be expected from the business viewed as a mere collection of assets."[36]

Although two prevailing definitions exist, Oklahoma has adopted the continued public patronage, or legal, definition of goodwill by codifying the definition of goodwill as "the expectation of continued public patronage, but it does not include a right to use the name of any person from whom it was acquired."[37] As such, case law applying the Oklahoma rule has interpreted goodwill as the "value that results from the probability that old customers will

31. Helga White, Comment, *Professional Goodwill: Is It a Settled Question or Is There Value in Discussing It?*, 15 J. AM. ACAD. MATRIMONIAL LAW. 495, 497 (1998) ("Defining goodwill is a complicated task. In part this is due to distinctions between the legal definition of goodwill and an accounting or economics definition.").

32. *Id.* (quoting Allen Parkman, *The Treatment of Professional Goodwill in Divorce Proceedings*, 18 FAM. L.Q. 213, 214 (1984)).

33. Grace Ganz Blumberg, *Identifying & Valuing Goodwill at Divorce*, 56 LAW & CONTEMP. PROBS. 217, 221-22 (1993).

34. White, *supra* note 31, at 498.

35. Gary S. Rosin, *The Hard Heart of the Enterprise: Goodwill & the Role of the Law Firm*, 39 S. TEX. L. REV. 315, 320 (1998).

36. BLACK'S LAW DICTIONARY 715 (8th ed. 2004).

37. 60 OKLA. STAT. § 315 (2001).

continue to trade with an established concern."[38] Additionally, a business's goodwill constitutes transferable property in Oklahoma.[39]

Defining the term does not negate additional complications. Goodwill can be further divided into specific categories. Depending upon its source, goodwill must be either enterprise or personal and either commercial or professional.[40] Sometimes these categories overlap, and determining in which category an asset belongs is not always clear. Despite this complication, general analytical principles exist.[41] If the goodwill is intrinsic to the practice itself, it is labeled as enterprise goodwill.[42] Enterprise goodwill is not contingent upon any single person. It depends upon the location of the office, the reputation of the business as a whole for quality service, and the "local flavor of the practice."[43] On the other hand, personal goodwill is dependant upon the person, and comes from the person's "reputation, accolades, and unique professional accomplishments."[44] Commercial goodwill resembles enterprise goodwill and encompasses that which comes from a commercial establishment, like a store or manufacturing plant, whereas professional goodwill resembles personal goodwill and inheres in individuals and their particular skill sets.[45] While these classifications seems arbitrary, they are legally important because professional and personal goodwill are generally nontransferable and unmarketable.[46]

Although courts, businesses, and other entities have struggled with the concept of goodwill for years, goodwill in the legal profession is a relatively new phenomenon. While the physical assets of a law office could always be sold, sale of the entire practice, including clients and open cases, was generally prohibited before 1990.[47] Without the adoption of Rule 1.17, a lawyer selling his practice would violate Oklahoma Rule of Professional Conduct 1.8, which bars an attorney from obtaining a proprietary interest in

38. Freeling v. Wood, 1961 OK 113, ¶ 12, 361 P.2d 1061, 1063.

39. 60 OKLA. STAT. § 316.

40. Levy, *supra* note 20, at 31.

41. White, *supra* note 31, at 501-14 (identifying and discussing the methods courts use in distinguishing between enterprise and personal goodwill as well as distinguishing between commercial and professional goodwill).

42. Levy, *supra* note 20, at 31.

43. *Id.*

44. *Id.*

45. White, *supra* note 31, at 499-500.

46. *Id.* at 499.

47. Barton T. Crawford, Comment, *The Sale of a Legal Practice in North Carolina: Goodwill and Discrimination Against the Sole Practitioner*, 32 WAKE FOREST L. REV. 993, 994-95 (1997).

a client's case.[48] The selling attorney would also violate Oklahoma Rule of Professional Conduct 1.5 by splitting a fee with the purchasing attorney unless the selling attorney assumed joint responsibility for any case with the purchasing attorney.[49] Retaining such responsibility might defeat the purpose of the sale especially if the selling attorney is trying to end his or her practice. Yet, the concerns regarding these Rule violations were alleviated by the adoption of Rule 1.17, which implicitly approved such violations by allowing law practice sales.

The ABA best summarizes the general rationale for preventing attorneys from selling their practices in the comments to Rule 1.17, which state: "The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will."[50] Nonetheless, Oklahoma, following the suit of many other states, adopted the ABA Model Rule of Professional Conduct 1.17 with revisions, and the sale of a law practice, including goodwill, is now permissible in Oklahoma.[51] Because attorney goodwill can now be sold, the viability of *Travis* is in question. In the event that *Travis* is overturned, goodwill of a legal practice would constitute marital property, and Oklahoma courts would be faced with how to determine the value of such goodwill. While the procedure appears simple, valuing goodwill has perplexed courts for years.

B. Valuing Goodwill—A Question of What, Not How

Valuing goodwill is a speculative, inexact guessing game, leading one professional to label it as one of "the most challenging aspects of a matrimonial case."[52] Goodwill is fickle, and "[i]ts value may rise and fall over the course of its life in response to extrinsic as well as intrinsic factors."[53] For instance, the entrance, exit, or failure of a competitor can cause goodwill to

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48. OKLA. RULES OF PROF'L CONDUCT R. 1.8(a) (Supp. 2008); *see* Travis v. Travis, 1990 OK 57, ¶ 11, 975 P.2d 96, 100.

49. OKLA. RULES OF PROF'L CONDUCT R. 1.5(e) (Supp. 2008); *see Travis*, ¶ 11, 975 P.2d at 100. Rule 1.5(e) states:

> A division of a fee between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation; (2) the client agrees to the arrangement and the agreement is confirmed in writing; and (3) the total fee is reasonable.

OKLA. RULES OF PROF'L CONDUCT R. 1.5(e).

50. MODEL RULES OF PROF'L CONDUCT R. 1.17 cmt. 1 (2007). Oklahoma has also adopted this comment. OKLA. RULES OF PROF'L CONDUCT R. 1.17 cmt. 1 (Supp. 2008).

51. OKLA. RULES OF PROF'L CONDUCT R. 1.17 (Supp. 2008).

52. Levy, *supra* note 20, at 34.

53. Blumberg, *supra* note 33, at 222.

rise or fall, as can effective advertising.[54] Despite these factors and the fluctuation potential they create, a professional spouse's goodwill must be valued if it is to be divided as marital property in a divorce.[55]

A vast array of goodwill valuation methods exists, and which method the expert uses could strikingly alter outcomes.[56] Courts generally consider some form of the following factors as relevant to valuating professional goodwill, regardless of the valuation method used:

- The practitioner's age, health, past demonstrated earning power
- The practitioner's professional reputation in the community as to his or her judgment, skill, and knowledge
- The practitioner's comparative professional success
- The nature and duration of the practitioner's business as a sole practitioner or as a member of a partnership or professional corporation to which his or her professional efforts have made a proprietary contribution.[57]

Nonetheless, most courts have declined to adopt one specific method of valuation for all goodwill divisions, inviting attorneys to argue for the valuation method most helpful to their client's cause.[58] Part II.A.2 below discusses the five most common methods of goodwill valuation at length, including any valuation method specifically approved or rejected in Oklahoma. Nevertheless, before even attempting to approach valuation methods, the court must determine the appropriate standard of value.

1. Standards of Value

When valuing a closely held business, such as a solo practice or closely held partnership, an appraiser must use the appropriate standard of value, and the judge and any readers of the appraisal must understand exactly what standard of value is being used.[59] Defining the standard of value is particularly important because value is a relative term.[60] The most common standards of value used for appraisal of a closely held business in a divorce situation are fair market value and fair value. Additionally, other standards used for divorce valuation include book value, adjusted book value, going

54. *Id.* at 221-22.

55. For the distinction in outcomes between dividing goodwill as marital property and using future earnings to determine support awards, see *infra* notes 178-99 and accompanying text.

56. White, *supra* note 31, at 515.

57. 24 AM. JUR. 2D *Divorce and Separation* § 582 (2007).

58. White, *supra* note 31, at 515-16.

59. ROBERT E. KLEEMAN, JR. ET AL., THE HANDBOOK FOR DIVORCE VALUATIONS 7 (1999).

60. *Id.*

concern value, investment value, and liquidation value.[61] Each of these standards must be explored to determine the legal consequences of dividing attorney goodwill.

Fair market value is the most commonly used standard of value in the appraisal of a closely held business and is defined in the Business Valuation Standards of the American Society of Appraisers as "[t]he amount at which property would change hands between a willing seller and a willing buyer when neither is under compulsion and when both have reasonable knowledge of the relevant facts."[62] Fair market value assumes neither party is under duress to buy or sell, and the parties are conducting an arms-length transaction where each party has reasonable knowledge of the facts necessary to make an informed decision to buy or sell.[63] Fair market value is also based on a transaction with a hypothetical buyer, as opposed to a specific buyer who might pay more or less.[64] *Fair value*, on the other hand, is a statutorily or judicially defined standard of value that varies from jurisdiction to jurisdiction.[65] Divorce situations constitute the majority of cases applying the fair value standard, and when valuing a business using this method, an appraiser will normally consider all elements of a business, such as assets, income, cash flow, *with the exception of the business's investment value in the actual marketplace*.[66]

For assets, *book value* is "the capitalized cost of an asset less accumulated depreciation, depletion, or amortization as it appears on the books of account of [an] enterprise[,]" and for an entire business, book value is the "difference between total assets (net of depreciation, depletion, and amortization) and total liabilities of an enterprise as they appear on the [company's] balance sheet."[67] Book value has also been called net book value, net worth, or shareholder equity.[68] Book value almost never equals fair market value and is an accounting fiction which only reflects the historic value of assets as of the date they appeared on a company's balance sheet less depreciation, which may not have any relationship to the actual value of the assets.[69] *Adjusted book value* is the same as book value except that the business's tangible assets

61. *Id.*
62. *Id.* at 8.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*

are adjusted to their fair market value, and the total valuation may include intangible assets such as patents, trademarks, or goodwill.[70]

Investment value is the value of a business to a specific buyer and is rarely used in divorce matters as it may discount or inflate value based upon dealings with one specific buyer.[71] *Going concern value* is a subset of standard of value and simply refers to the value of a business using any of the above methods and assuming that the business will continue to operate into the foreseeable future.[72] Finally, *liquidation value* is the value of a business assuming that the business's operations have ceased, and the assets of the business will be sold off on a piece by piece basis.[73] The liquidation valuation standard generally assumes that all of the business's assets will be sold in an orderly manner to achieve the highest price possible, yet forced liquidation is always a possibility.[74] If forced liquidation is used as a standard of value, the necessity to sell assets as quickly as possible should be considered to generally reduce the value of the business.[75]

2. Valuation Approaches

Before discussing any valuation methods, it should be noted that Oklahoma affords the trial judge considerable discretion in determining the applicable valuation method to be used in any particular circumstance.[76] In fact, the Oklahoma Court of Civil Appeals stated: "All methods of valuation need not always be considered. There is no definitive formula which when used in computer-like manner results in a magical equation for fair value determination—nor should there be."[77] The trial judge has a duty to review all of the factors bearing on which method should be used because "[t]he surrounding circumstances in each case differ," and a "case-by-case approach is indispensable" in the search for a fair value for an asset.[78] Nonetheless, if the court arrives at a value for the property in issue that is less than the amounts stated by both of the parties' experts, the valuation will be reversed.[79]

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70. *Id.* at 9.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 9-10.
75. *Id.* at 10.
76. King v. Sw. Cotton Oil Co., 1978 OK CIV APP 19, ¶ 27, 585 P.2d 385, 392 ("The question of what weight the trial court should assign the various methods of valuation is purely one of judgment left to the prudent discretion of the trial judge.").
77. *Id.*
78. *Id.*
79. Landers v. Landers, 2000 OK CIV APP 42, ¶¶ 9-10, 4 P.3d 51, 53-54.

With Oklahoma's extremely deferential standards in mind, the following sections discuss the most common methods of valuation.

a) Capitalized Excess Earnings Method

The capitalized excess earnings method is probably the most common method of goodwill valuation.[80] Traditionally, excess earnings are defined as "earnings above and beyond all identifiable inputs from labor, tangible assets, and separable intangible assets. Labor is defined as the market labor value of the services of a person with the business or professional spouse's education, training, experience, and ability."[81] The capitalized excess earnings method for valuation of goodwill of a law practice involves three steps. First, a party must determine the practice's average net income for the past four or five years before the practitioner's compensation is deducted, eliminating any non-recurring or unusual expenditures or revenues.[82] Second, a reasonable rate of return based upon the practice's net tangible assets (usually eight to ten percent) must be subtracted from the net income.[83] Third, a reasonable amount of compensation must be deducted for the sole practitioner.[84] This amount should be determined by taking into account what the practitioner could make as an employee of a comparable firm in the geographic region and the nature of the practice of law.[85] The remaining balance amounts to the practitioner's goodwill.[86]

The New Jersey Supreme Court specifically approved the capitalized excess earnings method in *Dugan v. Dugan*, in which the court explained its reasoning for approving the method as follows: "One appropriate method to determine the value of goodwill of a law practice can be accomplished by fixing the amount by which the attorney's earnings exceed that which would have been earned as an employee by a person with similar qualifications of

80. Rosin, *supra* note 35, at 350. The excess earnings method has many variations, e.g., average earnings, capitalization of normalized earnings, etc.; however, as used in this Comment, capitalized excess earnings refers to what has been called the "traditional" approach. Blumberg, *supra* note 33, at 264-65; Nina Fields, Note, *The Sale of a Law Practice in South Carolina: The Impact of Model Rule 1.17 on Sole Practitioners and their Clients*, 50 S.C. L. REV. 1029, 1035-36 (1999).

81. Blumberg, *supra* note 33, at 265.

82. Gayle L. Coy, Note, *Permitting the Sale of a Law Practice: Furthering the Interests of Both Attorneys and Their Clients*, 22 HOFSTRA L. REV. 969, 984 (1994) (describing the steps necessary to value a law firm's goodwill through the capitalized excess earnings method).

83. *Id.*

84. *Id.*

85. *Id.* at 984-85.

86. *Id.* at 985.

education, experience and capability."[87] The *Dugan* court reasoned that this method is fair because an attorney who works solely as an employee in a firm does not earn goodwill. Therefore, the same attorney should not accumulate any goodwill up to the amount he could earn in employment just because he or she is a sole practitioner.[88]

The New Jersey Supreme Court then gave instructions for conducting a capitalization analysis. The court stated: "[F]irst ascertain what an attorney of comparable experience, expertise, education and age would be earning as an employee in the same general locale. The effort that the practitioner expends on his law practice should not be overlooked when comparing his income to that of the hypothetical employee."[89] The court placed critical emphasis on the workload of sole practitioners, noting that the number of hours and time put into the practice by the sole practitioner, not the practice's inherent goodwill, could increase the practitioner's income.[90] Thus, the attorney's regular work habits should be taken into account.[91] The attorney's net income before federal and state income taxes for preferably five years should be averaged and then compared with the employee norm.[92] Any excess over the employee norm and the return on any tangible office assets (if any) forms the number capitalized to determine goodwill.[93]

The court then explained that "[t]he capitalization factor is generally perceived as the number of years of excess earnings a purchaser would be willing to pay for in advance in order to acquire the goodwill."[94] Determining such a factor would depend upon the evidence presented by the parties, including a comparison of factors used in capitalization analyses for other types of professional businesses. These factors would then need to be adjusted for "ingredients peculiar to law, such as the inability to sell the practice and nonavailability of a restrictive covenant."[95] The court also noted that the age of a lawyer "may be particularly important because a sole practitioner's goodwill would probably terminate upon death."[96] However, the court in *Dugan* did not foreclose the use of other methods for valuing

87. 457 A.2d 1, 9 (N.J. 1983).
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at 9-10.
94. *Id.* at 10.
95. *Id.*
96. *Id.*

goodwill, especially in the presence of other evidence befitting of alternative valuation methods.[97]

The capitalized excess earnings method has both benefits and faults. It has been praised for avoiding the commingling of pre- and post-marital goodwill because its formula requires the use of historical earnings.[98] It also has been praised for recognizing the "something special" about a professional practice, known as goodwill.[99] This realization allows a non-professional spouse[100] to share in the value of the professional career that he or she usually helped the other achieve.[101] Conversely, capitalization has been criticized as only a method of predicting future earnings, not valuing goodwill.[102] Further, the capitalized excess earnings method may produce unrealistic figures, which can be of particular concern when professional spouses must liquidate tangible assets to pay for intangible goodwill.[103] In addition, tampering by a professional spouse who keeps his or her earnings artificially low can skew this formula.[104] For these reasons, Oklahoma has specifically rejected the capitalized excess earnings method as a valuation technique for goodwill in divorce cases.[105]

b) Fair Market Value Method

The fair market value method is by far the simplest method for goodwill valuation.[106] Fair market value is the amount a willing buyer would pay and the amount a willing seller would accept for the sale of a business.[107] In this method, a business's goodwill is the difference between the going-concern value, which is the amount for which the business itself or other comparable businesses have been sold, and the liquidating value of the business's assets.[108] The distinction between the going-concern value of a professional practice and

97. *Id.*

98. White, *supra* note 31, at 526.

99. *Id.* (quoting Andrew C. Mallor et al., *A Professional's Guide for Surviving Divorce in Indiana*, 37 RES GESTAE 112, 114-15 (1993)).

100. "Non-professional spouse" as used throughout this Comment means the spouse of the professional whose goodwill is being valued. The use of non-professional in no way indicates that the spouse is not also a professional. Whether the spouse is professional or non-professional, the analysis discussed will not change.

101. White, *supra* note 31, at 526.

102. *Id.*

103. *Id.* at 526-27.

104. *Id.* at 527.

105. Mocnik v. Mocnik, 1992 OK 99, ¶¶ 20-21, 838 P.2d 500, 505.

106. Rosin, *supra* note 35, at 350.

107. White, *supra* note 31, at 521.

108. Rosin, *supra* note 35, at 350.

such practice's goodwill is sometimes hyper-technical, and the following has been offered by *American Jurisprudence* to distinguish the two:

> Goodwill and going-concern value are distinct; that is, going-concern value refers generally to the ability of a business to generate income without interruption, even where there has been a change of ownership, whereas goodwill represents a preexisting relationship arising from a continuous course of business which is expected to continue indefinitely.[109]

Although the Oregon Court of Appeals expressed reluctance in valuing goodwill in a law practice, it has applied the fair market valuation method to determine the goodwill of a law practice.[110] The court reasoned that "such value should be determined with *considerable care and caution*, since it is a unique situation in which the continuing practitioner is *judicially forced to buy an intangible asset at a judicially determined value and compelled to pay a former spouse her share in tangible assets*."[111] Nevertheless, Oklahoma has approved the fair market valuation method as a proper method for valuing other professionals' businesses, like those of physicians, lending credence to the acceptance of this method for valuing attorneys' practices in Oklahoma.[112] At least two courts, Florida and Missouri, have held that fair market value is the only acceptable method for assessing goodwill.[113]

The fair market value approach has three main benefits. First, it eliminates the consideration of post divorce earnings.[114] Second, it inherently separates the individual reputation of the professional from the other goodwill in the law practice.[115] Third, it eliminates double awards in divorce settlements.[116] For instance, double dipping into the value of goodwill may occur when the professional spouse's income is used to compute goodwill, which would then

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109. 24 AM. JUR. 2D, *supra* note 57, § 582.

110. *In re* Marriage of Reiling, 673 P.2d 1360, 1363 (Or. Ct. App. 1983).

111. *Id.* (quoting Lopez v. Lopez, 38 Cal. App. 3d 93, 108 (Cal. Ct. App. 1974)).

112. Traczyk v. Traczyk, 1995 OK 22, ¶¶ 12-13, 891 P.2d 1277, 1280, *superceded by statute on other grounds as stated by* 1999 OK 57, ¶ 17, 983 P.2d 1025, 1028-29 (determining the goodwill of a podiatry clinic using the fair market value method by multiplying the previous year's gross income by the percentage of patients who would probably remain patrons of the clinic).

113. Thompson v. Thompson, 576 So. 2d 267, 269-70 (Fla. 1991); Hanson v. Hanson, 738 S.W.2d 429, 434 (Mo. 1987).

114. White, *supra* note 31, at 522.

115. *Id.*

116. *Id.*

be divided as a marital asset, and also used again to compute future income to set a support award.[117]

Despite its benefits, the fair market valuation method also presents its share of concerns. It has been sharply criticized because the value it produces may fall below the true value of the asset.[118] This is especially true when valuing professional goodwill, because the fair market value will often be based solely on the tangible assets of a business.[119] When compared to other assets of a law practice, tangible assets like books and desks may not reflect the true value of the business.[120] Further, because no actual or willing buyer exists and no sale will occur, all valuations are inherently unrealistic.[121] Another critique of this method is that very few or no sales of law practices occur to provide a comparison for the going-concern value.[122]

c) Buy-Sell or Shareholder Agreement Valuation

Some courts have approved the use of buy-sell or shareholder agreements to determine a value for the professional spouse's goodwill. A typical buy-sell or partnership agreement provides a clause requiring the professional to sell his or her holdings in the partnership back to the partnership upon withdrawal, retirement, disability, or termination and provides an exact formula to value the professional's interest.[123] Many courts favor these agreements because they contain specific formulas limiting the goodwill available to the non-professional spouse to the amount that could actually be realized by the professional spouse, and valuation of goodwill based upon this method has been praised for preventing "the 'disturbing inequity in compelling a professional practitioner to pay a spouse a share of intangible assets at a judicially determined value that could not be realized by a sale.'"[124] Nevertheless, buy-sell agreements suffer from one substantial limitation: they can only be used to value practices comprised of one or more professional; a sole practitioner cannot have a buy-sell agreement with himself.

Even so, the use of buy-sell agreements varies between jurisdictions. A small number of courts, including the Oklahoma Supreme Court, have gone

117. *Id.*
118. *Id.* at 523.
119. *Id.*
120. *Id.* at 523-24.
121. *Id.* at 524.
122. Rosin, *supra* note 35, at 350.
123. White, *supra* note 31, at 527. For an example of a buy-sell agreement, see *infra* text accompanying notes 201-08.
124. White, *supra* note 31, at 528 (quoting Holbrook v. Holbrook, 309 N.W.2d 343, 355 (Wis. Ct. App. 1981)).

so far as to find that the presence of a buy-sell agreement is controlling on the value of a professional's goodwill even if the resulting value is zero.[125] Other courts view buy-sell agreements as establishing a presumptive value of goodwill but allow the agreement to be challenged if the non-professional spouse can prove the buy-sell agreement is not the true value of the professional spouse's interest.[126] Other courts use buy-sell agreements as only one factor in determining the presence of goodwill in a professional's practice.[127] Yet, many courts have concluded that buy-sell or partnership agreements are only useful to value goodwill when "they: (a) accurately represent consistent transactions over time; (b) are entered into at arm's length without intent to deprive the nonprofessional spouse of marital property; (c) are comprehensive and clear in their valuation formula; and (d) represent a present day interest value."[128]

Although buy-sell agreements provide a clear cut, non-speculative method for valuing goodwill of professional partnerships, many arguments have emerged against their use for valuation of goodwill in marital property divisions. The primary argument is that partnership agreements were not designed to be used in this manner.[129] Rather, they were designed to *discourage* sale and govern the relationship between the professional and his or her partners.[130] Such an agreement was not intended to divide property between spouses, change the property from community to individual, or provide a share of the goodwill value to the non-professional spouse.[131] Therefore, while these agreements are pertinent for transactions within the partnership, they are minimally relevant to divorce valuations.[132]

Another argument advanced against the use of buy-sell agreements reasons that the professional spouse may be influenced by factors other than the fair market value of the arrangement when entering into a partnership

125. Mocnik v. Mocnik, 1992 OK 99, ¶¶ 19-22, 838 P.2d 500, 505; *see also* White, *supra* note 31, at 528 n.200.

126. White, *supra* note 31, at 528; *see also* Weaver v. Weaver, 324 S.E.2d 915, 917 (N.C. Ct. App. 1985), *rev'd on other grounds*, 368 S.E.2d 595, 599 (N.C. 1988); Stern v. Stern, 331 A.2d 257, 260-61 (N.J. 1975).

127. White, *supra* note 31, at 528-29; *see also In re* Marriage of Kells, 897 P.2d 1366, 1370 (Ariz. Ct. App. 1995); *In re* Marriage of Keyser, 820 P.2d 1194, 1197 (Colo. App. 1991); Poore v. Poore, 331 S.E.2d 266, 270 (N.C. Ct. App. 1985); Butler v. Butler, 663 A.2d 148, 154-55 (Pa. 1995).

128. White, *supra* note 31, at 529 (footnote omitted).

129. *Id.* at 530.

130. *Id.*

131. *Id.* at 530-31.

132. *Id.* at 531.

agreement.[133] As a result, the partnership agreement may not reflect the true value of the professional spouse's interest and will not be a true measure of goodwill value.[134] Many opponents to this method of valuation also argue that partnership agreements result in the ability to rob and perpetrate a fraud on the non-professional spouse by creating an easy path to remove goodwill from marital property division.[135]

d) The Net Asset Value Approach

Under the asset approach, a business is valued "using one or more methods based directly upon the value of a business's tangible assets less liabilities," which is "analogous to the cost approach in real estate."[136] Specifically, the net asset value method values a business by adjusting a business's assets and liabilities to their estimated fair market value or other standard of value.[137] The assets are adjusted to either their value in use for a going concern business or to their liquidation value if the appraiser believes the business is worth more defunct than operating.[138] The asset approach is usually utilized to value total businesses and is usually not used to value an operating business considered a going concern.[139]

Accounts receivable, which are often the professional's most valuable asset, are properly adjusted to the projected realizable value of the accounts.[140] Other assets such as inventory, machinery, equipment, and real property are increased or decreased in value to represent their fair market value as opposed to the depreciated or cost value assigned to such assets on the books of the company.[141] Notes receivable are adjusted to current value, and notes payable are adjusted to match current interest rates.[142] Finally, any deferred taxes due are generally not included as a liability unless the liability for such taxes is "immediate and specific."[143]

In *Hertz v. Hertz*, the Supreme Court of New Mexico specifically endorsed the net asset value method, and noted that "'[p]rofessional goodwill' is basically defined as the difference between the total value of the professional association or corporation and the aggregate value of its separable resources

133. *Id.*
134. *Id.*
135. *Id.*
136. KLEEMAN, *supra* note 59, at 10.
137. *Id.* at 12.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.* at 12-13.
142. *Id.* at 10.
143. *Id.* at 13.

and property rights, less liabilities."[144] The *Hertz* court gave a list of factors to be considered when determining professional goodwill, including "'[t]he length of time the professional has been practicing, his comparative success, his age and health, and any past profits of the practice. Attention should also be given to the physical and fixed resources of the practice.'"[145] The court then noted that courts should not interpret its list of factors for determining goodwill as a closed set because the valuation of goodwill in each case is a fact specific determination.[146] Oklahoma has approved this method for valuation by implication for items such as stock,[147] and the possibility exists that this method could be a valid measure of goodwill in a law practice.[148]

e) The Income Valuation Method

The income valuation approach assesses a business "by determining the present value of an expected benefit stream."[149] Depending upon the type of business, expected benefits are usually represented by cash flow, earnings, or dividends.[150] Conversion of those benefits into present value is most generally accomplished by capitalization or discounting techniques.[151] Capitalization generally applies if the appraiser believes the financial situation of the business currently indicates future operations, and annual growth is expected to occur at a constant rate over the next few years.[152] Discounting is used when the opposite occurs—that is, when the business's current status does not implicate future operations or growth; therefore, the most common use of discounting occurs in start-up companies which are expected to incur losses for their first few years.[153]

Most jurisdictions do not allow the use of this method when valuing assets for marital property division because this approach takes into consideration

144. 657 P.2d 1169, 1173 (N.M. 1983). While the court in *Hertz* specifically approved the net asset value method, such method was not actually applied to reach a decision in the case, as the court ruled that a buy-sell/shareholder agreement was controlling as to the value of a professional spouse's goodwill. *Id.* at 1174.

145. *Id.* (quoting Hurley v. Hurley, 615 P.2d 256, 259 (1980)).

146. *Id.*

147. Johnson v. Johnson, 1983 OK 117, ¶¶ 11-12, 674 P.2d 539, 543-44; King v. Sw. Cotton Oil Co., 1978 OK CIV APP 19, ¶¶ 27-28, 585 P.2d 385, 389-90.

148. *But see* Mocnik v. Mocnik, 1992 OK 99, ¶ 21, 838 P.2d 500, 505 ("If goodwill is to be divided as an asset, its value should be determined either by an agreement or by its fair market value.").

149. KLEEMAN, *supra* note 59, at 10.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

"postmarital efforts and investment by the spouse" retaining the business.[154] Since the purpose of division of marital property is to allocate the property and debts accrued *during* the marriage, the income approach does not seem viable for valuation of businesses for marital property divisions. Oklahoma has not specifically accepted or rejected this method of valuation.

III. Division of Marital Assets in Oklahoma

A. What Is Marital Property in Oklahoma, and Why Should It Include Goodwill?

Every state provides for some form of property division upon divorce.[155] The most common method of property division is equitable division of marital property.[156] In an equitable division of marital property, each spouse retains his or her separate property.[157] "Separate property" includes not only the property owned by a spouse before marriage which has not been commingled with marital property[158] but also the separate property acquired by each spouse during the marriage.[159] Oklahoma defines "marital property" as that property which is "accumulated by the joint industry" of the spouses during the marriage.[160] Property acquired during the marriage is presumed to be jointly acquired, and the party seeking to establish property as separate property has the burden of proof.[161] Even though the Oklahoma Supreme Court determined that a professional degree or license is the individual, indivisible property of the holder,[162] the court subsequently found that a law practice can be

154. *Id.* at 11.

155. Mary Jane Connell, Note, *Property Division and Alimony Awards: A Survey of Statutory Limitations on Judicial Discretion*, 50 FORDHAM L. REV. 415, 433 (1981).

156. *Id.* at 436-37.

157. 43 OKLA. STAT. § 121(B) (2001). Oklahoma requires its courts to enter an order "confirming in each spouse the property owned by him or her before marriage and the undisposed-of property acquired after marriage by him or her in his or her own right." *Id.*

158. *See* Standefer v. Standefer, 2001 OK 37, ¶¶ 16-18, 26 P.3d 104, 108-09 (comingled personal injury settlement determined to be marital property because spouses' separate tort actions combined into one settlement); Umber v. Umber, 1979 OK 24, ¶¶ 10-12, 591 P.2d 299, 302 (pharmacy deemed marital property because parties combined separate property to purchase it); *see also* 43 OKLA. STAT. § 121(B).

159. *E.g.*, *In re* Estate of Hardaway, 1994 OK 30, ¶ 14, 872 P.2d 395, 399 (citing Perdue v. Hartman, 1965 OK 177, ¶ 6, 408 P.2d 293, 296) (inheritances and gifts to individual marriage partner); Manhart v. Manhart, 1986 OK 12, ¶¶ 18-40, 725 P.2d 1234, 1238-40 (conveyance from one spouse to another can transform property from marital to separate).

160. Longmire v. Longmire, 1962 OK 219, ¶ 11, 376 P.2d 273, 275; *see also* Williams v. Williams, 1967 OK 97, ¶¶ 18-20, 428 P.2d 218, 222.

161. Gray v. Gray, 1996 OK 84, ¶¶ 11-15, 922 P.2d 615, 619.

162. Hubbard v. Hubbard, 1979 OK 154, ¶ 13, 603 P.2d 747, 750 (determining professional

considered jointly acquired property subject to property division in a divorce.[163]

Once property is determined to be separate or marital property, Oklahoma provides that all marital property must be divided in a just and reasonable manner.[164] In Oklahoma, "just and reasonable" means "equitable."[165] Yet, achieving an equitable division in Oklahoma is not as easy as it would seem because Oklahoma has not determined the meaning of the term "equitable" with much clarity. Therefore, most equitable divisions require the consideration of many different factors and involve a number of value judgments, most of which are left to the discretion of the trial judge. A few of the problems encountered when making equitable divisions of marital property in Oklahoma are discussed below.

The first step in realizing an equitable property division requires the understanding that equitable does not always mean equal.[166] In fact, the Oklahoma Supreme Court gave the following insight concerning equitable divisions: "What constitutes an 'equitable division' of the parties' jointly acquired property . . . is to be determined from the circumstances surrounding the acquisition of the property and the conduct of the parties with relation thereto, and in making such determination a wide discretion is vested in the trial court."[167] Courts do not consider need an acceptable criterion on which to base a property division, and the extent of each party's rights in property depends upon "their respective conduct and efforts as the contributing factors" in the creation and acquisition of the entire marital estate.[168] In fact, the court can and should consider the efforts of both parties during the marriage, including such factors as frugality, economy, and industry.[169] If one party

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degree indivisible property of holder but spouse not prohibited from seeking award in lieu of division of such property).

163. Ford v. Ford, 1988 OK 103, ¶ 3, 766 P.2d 950, 952.

164. 43 OKLA. STAT. § 121(B) (2001). The statute states in part:

> As to such property, whether real or personal, which has been acquired by the parties jointly during their marriage, whether the title thereto be in either or both of said parties, the court shall, subject to a valid antenuptial contract in writing, make such division between the parties as may appear just and reasonable, by a division of the property in kind, or by setting the same apart to one of the parties, and requiring the other thereof to be paid such sum as may be just and proper to effect a fair and just division thereof.

Id.

165. *Williams*, ¶ 17, 428 P.2d at 222; McCoy v. McCoy, 1967 OK 86, ¶ 8, 429 P.2d 999, 1004.

166. *McCoy*, ¶ 8, 429 P.2d at 1004.

167. *Id.*

168. Bouma v. Bouma, 1968 OK 35, ¶ 8, 439 P.2d 198, 200.

169. Tobin v. Tobin, 1923 OK 164, ¶ 32, 213 P. 884, 889.

spends much of the parties' money in activities not conducive to the marriage relationship or accumulation of marital property, the Oklahoma Supreme Court has said it would not be equitable to award such a spending, extravagant party half the marital property.[170] Additionally, the court cannot award any marital property to the children of the parties.[171]

An added problem in the equitable division maze is the failure of the Oklahoma statutory scheme to provide an exact—or even any—"formula for distribution of the 'net estate.'"[172] In fact, Oklahoma law does not even state explicitly whether courts should take into account debts in addition to assets during marital property division.[173] Nonetheless, Oklahoma has long allowed trial judges to consider the net worth of property in an equitable property division, to order one party to pay any debt, and to hold the other party harmless for such debt.[174] For that reason, debt can drastically alter equitable division decisions, especially when combined with the equity factor when one party has primarily incurred most of the debt. Whatever the divorcing parties' debt may be, the next logical step is valuing their assets to determine exactly what their net estate holds, yet Oklahoma law is, once again, less than clear.

Oklahoma creates yet another fork in the road of equitable marital property division by failing to provide guidance for determining exactly when courts should value assets in the marital estate. As discussed above, for property divisions to be equitable, courts must value the marital property before it is divided.[175] Oklahoma law does not set a definitive date upon which to value the marital assets, and trial judges are left with the discretion to fix the date of valuation after due consideration of all of the circumstances.[176] Additionally, valuation dates may be different for each item of property at issue.[177] Attorneys may argue for whichever date produces the most profitable results for their clients, ranging from the date of separation to the date of the divorce decree or any date in between. Once the trial judge sets the valuation date, such date cannot be disturbed unless one party shows an abuse of discretion.[178] Consequently, determining the property valuation date in

170. *Id.*

171. Williams v. Williams, 1967 OK 97, ¶ 11, 428 P.2d 218, 221.

172. Teel v. Teel, 1988 OK 151, ¶ 6, 766 P.2d 994, 997.

173. *Id.*

174. *Id.*

175. *See supra* text accompanying notes 56-154 for a discussion of valuation methods. The selection of the proper valuation method for the marital property is another factor that must be addressed when attempting to achieve an equitable division of marital property.

176. Thielenhaus v. Thielenhaus, 1995 OK 5, ¶ 16, 890 P.2d 925, 933.

177. *Id.*

178. Lemons v. Lemons, 2006 OK CIV APP 5, ¶¶ 10-13, 128 P.3d 1113, 1115.

Oklahoma is a key aspect to any marital property valuation and division because it can translate into a larger or smaller award.

Finally, the most important task is to decide exactly how to equitably divide the assets. In Oklahoma, two primary approaches exist for achieving equitable division of assets: (1) cash or kind property division, or (2) support awards, usually called alimony.[179] While property division generally has no specific prerequisites other than holding of property or owing of debt, as an initial requirement, an alimony award must be based on a demonstrated need[180] which has some rational relationship to the marriage itself.[181] In determining the amount of alimony to award, the trial judge must consider the parties' station in life, their conduct, "the earning capacity and estate of the [payor spouse], and the financial means and physical condition of the [payee spouse]."[182] The would-be payor spouse's ability to pay is also a necessary consideration in determining alimony awards.[183] The listed factors do not exhaust the list of acceptable factors for consideration when awarding alimony, and at one time, the Oklahoma Court of Appeals identified twenty-one factors that could influence support alimony determinations.[184]

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179. *See supra* note 164; *see also* 43 OKLA. STAT. § 121(B) (2001). This statute states in relevant part:

> Either spouse may be allowed such alimony out of real and personal property of the other as the court shall think reasonable, having due regard to the value of such property at the time of the divorce. Alimony may be allowed from real or personal property, or both, or in the form of money judgment, payable either in gross or in installments, as the court may deem just and equitable.

Id.

180. Johnson v. Johnson, 1983 OK 117, ¶ 23, 674 P.2d 539, 546.

181. Wood v. Wood, 1990 OK CIV APP 49, ¶ 14, 793 P.2d 1372, 1376 (citing Dowdell v. Dowdell, 1969 OK 155, 463 P.2d 948); Bowman v. Bowman, 1981 OK CIV APP 71, ¶ 29, 639 P.2d 1257, 1262, *rev'd on other grounds*, 657 P.2d 646, 651 (Okla. 1983).

182. Durland v. Durland, 1976 OK 102, ¶ 5, 552 P.2d 1148, 1149.

183. Jupe v. Jupe, 1947 OK 2, ¶ 13, 175 P.2d 976, 978; *Wood*, ¶ 14, 793 P.2d at 1376.

184. *Bowman*, ¶ 29 n.8, 639 P.2d at 1263 n.8. The twenty-one factors include: (1) payee spouse's loss of inheritance rights; (2) expectation of future inheritance from the payor spouse; (3) payor's future earning capacity; (4) payor's present ability to pay; (5) payee spouse's contribution to the payor spouse's accumulation; (6) whether the marriage was one of affection or convenience; (7) the payor's earning capacity; (8) payee's condition and means; (9) duration of married life and ages of the parties; (10) payee's health ; (11) any future increase in the value of land; (12) the payee's opportunity for employment; (13) the payee's ability to obtain gainful employment; (14) the mode of living to which the payee had become accustomed during the marriage; (15) the probability of the payor's ability to progress financially; (16) the earning capacity of the payee; (17) the payee's ability to make a living before the marriage; (18) the conduct of the parties; (19) the payee's education; (20) the age of the children and the need to maintain a home for them; and (21) the parties' station in life before the divorce. *Id.*

Courts use many combinations of property division and support awards to reach an equitable division of assets, such as when one party is awarded both property division and support or when one party is awarded property and the other party support. Additionally, the trial judge has the discretion to award a hybrid type of property division and support called property-division alimony or property division in lieu of alimony.[185] With property-division alimony, the trial judge awards one spouse most of the property and awards off-setting property division alimony to the other.[186] Property-division alimony cannot be modified for any reason and does not terminate upon death.[187] Further, since it is not pure support alimony, property-division alimony is not tax deductible.[188] With all its restrictions, property-division alimony seems to be merely the division of property on a cash based installment plan. Since a divorce is an equitable proceeding, the trial judge's division of the marital estate is given great deference, and "[t]he reviewing court will not disturb the division absent some abuse of discretion or a finding that the nisi prius decision is clearly contrary to the weight of the evidence."[189]

Of all of the numerous and tedious decisions that are involved in the process of equitable division, the choice of the proper vehicle to effect such division, i.e., alimony, property division, or a hybrid of the two, outweighs all other decisions because such choice can create a drastic cost or benefit to one party in terms of dollars and cents expended. This is so because Oklahoma courts treat alimony and property division differently when faced with modification based on changed circumstances. Oklahoma law provides that "[p]ayments pertaining to a division of property are irrevocable and not subject to subsequent modification by the court making the award."[190] Yet, payments of support alimony may be modified if the parties experience a change in circumstances sufficient to change the equity of the original award.[191] Circumstances that support modification or termination of alimony

185. Record v. Record, 1991 OK 85, ¶¶ 2, 14-18, 816 P.2d 1139, 1141-43.

186. Isenhower v. Isenhower, 1983 OK CIV APP 12, ¶¶ 8, 666 P.2d 238, 240.

187. *Id.* ¶¶ 8-16, 666 P.2d at 238-42.

188. 26 U.S.C. § 215 (2006).

189. Teel v. Teel, 1988 OK 151, ¶ 7, 766 P.2d 994, 998 (footnote omitted).

190. 43 OKLA. STAT. § 134(A) (2001).

191. *Id.* § 134(D). The subsection provides in part:

> [T]he provisions of any divorce decree pertaining to the payment of alimony as support may be modified upon proof of changed circumstances relating to the need for support or ability to support which are substantial and continuing so as to make the terms of the decree unreasonable to either party. Modification by the court of any divorce decree pertaining to the payment of alimony as support, pursuant to the provisions of this subsection, may extend to the terms of the payments and to the total amount awarded; provided however, such modification

awards include remarriage of the payee spouse,[192] cohabitation of the payee spouse,[193] and financial change of circumstances,[194] yet modification is only allowed for future payments.[195] Last, the tax implications arising from the division of the marital estate can have extraordinary financial effects on the parties especially as alimony, unlike property division is income to the payee and a deduction from the gross income of the payor.[196]

Modification of support awards is especially important to the business professional who knows that financial certainty may not exist. As unpleasant as it may be to consider, businesses fail, and people lose their jobs. Many law practices hinge on income and needs that rest on probabilities, and, as such, many sole legal practitioners do not have the financial guarantee they sought when they opened their practice. If goodwill is divided as marital property in Oklahoma, the amount of the award is permanent regardless of the fluctuations of the professional's business or even business failure.[197] Yet, support alimony can be prospectively modified if the professional experiences either an upturn or downturn in their business upon "proof of changed circumstances relating to the need for support or ability to support which are substantial and continuing so as to make the terms of the decree unreasonable to either party."[198] Therefore, support alimony in lieu of the division of a professional's goodwill as part of a property settlement provides a more flexible basis to deal with the changing financial positions of the parties and helps to ensure that the overall divorce settlements are equitable.

Despite the fairness rationale for the greater use of support awards, Oklahoma has found that goodwill sometimes constitutes divisible marital property in professions other than law based upon the manner in which the professional spouse holds his or her interest in the profession.[199] This professional goodwill can also be used as a basis for determining support alimony.[200] In *Mocnik v. Mocnik*, the Oklahoma Supreme Court held that a

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shall only have prospective application.

Id.

192. *Id.* § 134(B); Mathis v. Mathis, 2004 OK CIV APP 32, ¶ 9, 91 P.3d 662, 664.

193. 43 OKLA. STAT. § 134(C); Smith v. Smith, 1992 OK CIV APP 132, ¶¶ 7-8, 849 P.2d 1097, 1098.

194. 43 OKLA. STAT. § 134(D).

195. Thielenhaus v. Thielenhaus, 1999 OK CIV APP 7, ¶¶ 5, 7, 978 P.2d 369, 370-71.

196. 26 U.S.C. §§ 71, 215 (2006).

197. 43 OKLA. STAT. § 134(A).

198. *Id.* § 134(D).

199. Traczyk v. Traczyk, 1995 OK 22, ¶¶ 12-13, 891 P.2d 1277, 1280, *superceded by statute on other grounds as stated by* 1999 OK 57, ¶ 17, 983 P.2d 1025, 1028-29; Mocnik v. Mocnik, 1992 OK 99, ¶¶ 21-22, 838 P.2d 500, 505.

200. *Mocnik*, ¶ 13, 838 P.2d at 504.

radiologist's goodwill in the professional radiology corporation he held under a partnership agreement with other radiologists should not be divisible marital property.[201] There, the couple was already married when the husband attended medical school and completed his residency in radiology.[202] The husband then entered the practice of radiology with the Tulsa Radiology Associates and practiced with such group until his divorce.[203]

The trial court separately valued the husband's interest in the professional corporation based upon the value of his stock, his part of the accounts receivable due under the non-competition agreement with the other doctors, and his goodwill.[204] The trial court determined the value of the husband's goodwill based upon the capitalized excess earnings method.[205] The Supreme Court reversed the trial court because the husband was required by the partnership agreement to sell his stock back to the corporation should he terminate his employment.[206] As a result, he could not realize his share of the corporation's goodwill except by continued practice with the corporation, especially since the partnership agreement set a specific sale price for each share of stock should it be sold back to the corporation.[207] Thus, the Oklahoma Supreme Court's decision indicates that if a professional cannot realize his goodwill in a partnership except through continued practice with the partnership, the professional does not actually have any goodwill to divide as a marital asset.

Conversely, in *Traczyk v. Traczyk*, the Oklahoma Supreme Court held that a doctor's goodwill in a sole proprietorship does constitute marital property.[208] In *Traczyk*, the husband was a doctor of podiatric medicine in his wholly owned and operated professional corporation.[209] His wife was a part-time registered nurse, but it is unclear from the record if she worked with the husband at his corporation.[210] The trial court ruled—and the Oklahoma Supreme Court agreed—that the goodwill value of the husband's medical practice should be properly included in the marital property division because, as a sole proprietorship, the husband's practice was readily transferable.[211]

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201. *Id.* ¶¶ 17-18, 22, 838 P.2d at 504-05.
202. *Id.* ¶ 2, 838 P.2d at 501.
203. *Id.*
204. *Id.* ¶ 4, 838 P.2d at 502.
205. *Id.* ¶ 11, 838 P.2d at 504.
206. *Id.* ¶¶ 17-18, 838 P.2d at 504-05.
207. *Id.*
208. 1995 OK 22, ¶ 2, 891 P.2d 1277, 1278, *superceded by statute on other grounds as stated by* 1999 OK 57, ¶ 17, 983 P.2d 1025, 1028-29.
209. *Id.* ¶ 3, 891 P.2d at 1278.
210. *Id.*
211. *Id.* ¶¶ 2, 4, 891 P.2d at 1280.

Because the sale of the husband's practice was not restricted like the partnership in *Mocnik*,[212] a real value could actually be placed upon its goodwill by determining what percentage of the husband's patients might stay with the clinic if the husband left his practice.[213] The court also found it proper to include the practice's goodwill in the marital property division because the reputation of the husband's podiatry clinic was distinct from that of the husband.[214] In explaining its rationale for this finding, the court gave some guidance for future courts to use to determine whether goodwill is personal to the professional:

> The goodwill of the [clinic] is distinct from the personal reputation of Dr. Traczyk. Although many of Dr. Traczyk's patients would not continue to patronize the [clinic] were Dr. Traczyk to sell to another podiatrist, competent evidence indicates that many would stay. Indeed, Dr. Traczyk may use the goodwill as a selling point to potential purchasers.[215]

The court then goes on to reject the theory urged by Dr. Traczyk based upon two cases discussed in the *Travis* decision that a double award would occur by allowing his spouse to receive both support alimony and a division of the goodwill of his podiatry practice.[216] The court indicated that no double award would occur in this instance because Dr. Traczyk's professional practice had transferable goodwill, which was a separate and distinct asset subject to division.[217]

Two main arguments exist for including professional goodwill in the marital property division of divorcing couples. One of the most prominent is drawn from the partnership theory of marriage, reasoning that because goodwill is the result of a marital partnership, it should be divided between both the professional and the non-professional spouse.[218] Under this theory, "a nonprofessional spouse is similar to a silent partner in the professional spouse's practice, indirectly contributing to the business" by providing personal services that enable the professional spouse to pursue career opportunities.[219] Since the non-professional spouse has contributed to the

212. *Mocnik*, ¶¶ 17-18, 838 P.2d at 504.
213. *Traczyk*, ¶¶ 11-19, 891 P.2d at 1280.
214. *Id.* ¶ 14, 891 P.2d at 1280.
215. *Id.*
216. *Id.* ¶¶ 20-21, 891 P.2d at 1281; *see infra* text accompanying notes 230-32, 243-46.
217. *Traczyk*, ¶ 21, 829 P.2d at 1281.
218. Carmen Valle Patel, Note, *Treating Professional Goodwill as Marital Property in Equitable Distribution States*, 58 N.Y.U. L. REV. 554, 572-73 (1983).
219. *Id.*

professional spouse's attainment of an enhanced professional, financial, and social status, the non-professional spouse should have a right to the assets of the professional spouse he or she helped to create.[220] Another argument for including professional goodwill as marital property is to compensate the non-professional spouse for opportunities lost.[221] While this theory closely resembles the partnership theory, it assumes that the non-professional spouse has foregone opportunities in order to allow the professional spouse to pursue or advance in a career.[222]

Nonetheless, multiple contrary arguments exist. First, goodwill should not exist to the extent that it is inalienable and illiquid.[223] This concern is particularly relevant for the legal profession because a developer of goodwill cannot cash out his or her goodwill in the market—usually because no market exists.[224] Further, to sell his or her goodwill, a lawyer under the revised Rule 1.17 must cease to engage in the practice of law in his or her old geographic area.[225] For many lawyers, this is not a viable option because they need to continue to earn a living post-divorce and may not desire to abandon their established office and move to a different geographic area and start anew. A second concern with valuing and dividing goodwill is that all valuation methods inherently include future earnings.[226] While the future earnings of a professional may be used to set a support award, generally they are not divisible marital property.[227] This argument is very powerful because in valuing and dividing a professional practice's goodwill, the professional spouse is not expected to sell the practice to provide the non-professional spouse with a share of it.[228] Instead, recovery is based upon anticipation that the professional spouse will continue to practice and recoup the value allocated to the goodwill from future earnings.[229]

Other sources have articulated additional arguments against including goodwill in marital property divisions. If the professional spouse's goodwill is valued and divided as marital property, and the non-professional spouse is

220. *Id.*

221. Michael G. Heyman, *Goodwill & the Ideal Equality: Marital Property at the Crossroads*, 31 U. LOUISVILLE J. FAM. L. 1, 16 (1992-1993).

222. *Id.*

223. Blumberg, *supra* note 33, at 234.

224. *Id.* (discussing the increased relevance of inalienability and illiquidity for those whose goodwill is inseparable from a particular person).

225. OKLA. RULES OF PROF'L CONDUCT R. 1.17 (Supp. 2008); *see supra* note 7 (full text of amended Rule 1.17).

226. Blumberg, *supra* note 33, at 233.

227. *Id.*

228. *Id.*

229. *Id.*

also awarded support payments based upon the professional spouse's projected earnings, the non-professional spouse receives, in essence, a double award.[230] This double award occurs because the non-professional spouse receives a payout of his or her portion of the professional spouse's goodwill, the value of which has been determined by the professional spouse's projected earnings. The same projected earnings, of which the professional spouse has just paid a portion in a property settlement, will again be used to set support payments.[231] In essence, the non-professional spouse gets a portion of the projected earnings through goodwill and another portion through the support award, resulting in an inequitable double award. Critics have also argued that goodwill should not be recognized if it is not marketable because unmarketable goodwill produces the potential for overvaluation and abuse.[232] Any value in a professional business in excess of the market price is personal to the professional spouse and will disappear when the specific professional departs the business; thus, goodwill truly does not exist in professional settings because it follows the professional, not the business.[233] Whether the proponents or opponents of including professional goodwill as marital property win in the theoretical realm, Oklahoma has already decided the issue for attorneys in Oklahoma.

B. An Attorney's Goodwill Is Not Marital Property in Oklahoma—Travis *Revisited*

In 1990, in *Travis v. Travis*, the Oklahoma Supreme Court first entertained whether the goodwill accumulated by an attorney in his sole practice should be valued and divided as a marital asset in a divorce.[234] Rex Travis testified that he was a sole practitioner who worked primarily on a contingent fee basis on plaintiffs' personal injury cases referred to him by other attorneys.[235] His office furnishings were worth about $40,000.00, but his business was in debt by $415,000.00.[236] Rex and his expert testified that the value of his practice was only the value of his office furnishings, while his wife and her expert testified that the practice was worth $750,000.00 based upon Rex's projected future earnings.[237] The trial court agreed with Rex that the value of his

230. *Id.* at 236; *see infra* text accompanying notes 243-46; *see also supra* text accompanying note 216.
231. Blumberg, *supra* note 33, at 236.
232. *Id.*
233. *Id.* at 237.
234. 1990 OK 57, 795 P.2d 96.
235. *Id.* ¶ 3, 795 P.2d at 96.
236. *Id.*
237. *Id.*

practice existed only in himself and the furnishings.[238] His wife appealed the ruling.[239] The Oklahoma Supreme Court agreed with the trial court and held that Rex Travis had no goodwill in his law practice for the purposes of dividing the marital estate.[240]

In determining whether to include goodwill in the value of a lawyer's practice, the Oklahoma Supreme Court surveyed the treatment of attorney goodwill as a marital asset in other states and found a virtually even split.[241] At the time of the *Travis* decision, seven states refused to recognize an attorney's goodwill for marital property division, while nine states did recognize such goodwill.[242] The court then considered factors of equity discussed by the Wisconsin and Pennsylvania courts when they were confronted with the same issue.[243] The Wisconsin Court of Appeals in *Holbrook v. Holbrook* stated, "There is a disturbing inequity in compelling a professional practitioner to pay a spouse a share of intangible assets at a judicially determined value that could not be realized by a sale or another method of liquidating value."[244] The Wisconsin court concluded that awarding alimony plus half of a practitioner's goodwill would constitute double recovery because the goodwill was included in the practitioner's

238. *Id.*

239. *Id.* ¶ 1, 795 P.2d at 96.

240. *Id.* ¶ 13, 795 P.2d at 100.

241. *Id.* ¶ 4, 795 P.2d at 97.

242. The following states recognized goodwill for the purpose of property division at the time of the *Travis* decision: Arizona, Molloy v. Molloy, 761 P.2d 138 (Ariz. Ct. App. 1988) (professional corporation); California, *In re* Marriage of Green, 261 Cal. Rptr. 294 (Cal. Ct. App. 1989) (sole practitioner); Delaware, E.E.C. v. E.J.C., 457 A.2d 688 (Del. 1983) (sole practitioner); Illinois, *In re* Marriage of Stone, 507 N.E.2d 900 (Ill. App. Ct. 1987) (partnership); New Jersey, Dugan v. Dugan, 457 A.2d 1 (N.J. 1983) (exclusively-owned professional corporation); New Mexico, Hertz v. Hertz, 657 P.2d 1169 (N.M. 1983) (professional corporation); New York, Stolowitz v. Stolowitz, 435 N.Y.S.2d 882 (N.Y. Sup. Ct. 1980) (law firm); North Carolina, McLean v. McLean, 374 S.E.2d 376 (N.C. 1988) (professional association); and Washington, *In re* Marriage of Brooks, 756 P.2d 161 (Wash. Ct. App. 1988) (partnership). The following states refused to recognize good will for the purpose of division at the time of the *Travis* decision: Alaska, Richmond v. Richmond, 779 P.2d 1211 (Alaska 1989) (sole shareholder of a professional corporation); Florida, Thompson v. Thompson, 546 So. 2d 99 (Fla. Dist. Ct. App. 1989) (professional association); Maryland, Prahinski v. Prahinski, 540 A.2d 833 (Md. 1988) (sole practitioner); Pennsylvania, Beasley v. Beasley, 518 A.2d 545 (Pa. Super. 1986) (sole proprietorship employing fourteen to fifteen additional attorneys); Tennessee, Smith v. Smith, 709 S.W.2d 588 (Tenn. Ct. App. 1985) (partnership); Texas, Hirsch v. Hirsch, 770 S.W.2d 924 (Tex. App. 1989) (professional corporation); and Wisconsin, Holbrook v. Holbrook, 309 N.W.2d 343 (Wis. Ct. App. 1981) (partnership).

243. *Travis*, ¶¶ 6-7, 795 P.2d at 99.

244. *Holbrook*, 309 N.W.2d at 351.

salary, which was used to determine the alimony award.[245] Thus, the court did not allow the goodwill of an attorney to be divided as marital property.[246]

Similarly, the Superior Court of Pennsylvania in *Beasley v. Beasley* concluded that goodwill was not an asset for marital property division purposes under Pennsylvania law, finding that double recovery would occur as follows:

> To assess a value on future productivity and to award a proportionate amount to the spouse is akin to making a lump sum alimony payment since it is based on future earnings of the paying spouse. If, in addition to this payment, alimony is awarded, there is, in effect, a double charge on the future income of the paying spouse.[247]

The Oklahoma Supreme Court also relied heavily upon a Maryland case styled *Prahinski v. Prahinski*[248] in making its decision.[249] In *Prahinski*, the lawyer husband was a sole practitioner, and his practice was almost exclusively devoted to real estate settlements.[250] The trial court observed that if Mr. Prahinski were to terminate his employment, "the lights would go out," and his practice would cease to exist.[251] Thus, the court concluded that Prahinski's goodwill was not true goodwill because it depended entirely upon his reputation as a lawyer and, thus, could not be an independent asset of the Prahinski law practice.[252] Therefore, any valuation of Prahinski's goodwill would actually be a calculation of his future earnings, which was allowable only as a proper consideration for alimony, not marital property division.[253] Thus, the Oklahoma Supreme Court concluded that

> for professional goodwill to be marital property it must be a business asset having a value independent of the continued presence or reputation of any particular individual. "That is, it must be shown to be an asset distinct from, and thus not dependant

245. *Id.* at 352.
246. *Id.*
247. *Beasley*, 518 A.2d at 553.
248. 540 A.2d 833 (Md. 1988).
249. Travis v. Travis, 1990 OK 57, ¶¶ 9-10, 795 P.2d 96, 99-100.
250. 540 A.2d 833.
251. *Id.* at 843.
252. *Id.* at 843-44.
253. *Id.*

> on, the reputation or continued presence of the individual professional."[254]

The Oklahoma Supreme Court, while not specifically adopting the reasoning of either the Wisconsin or Pennsylvania courts, ruled consistently with their holdings.[255] Further, the court seemed to specifically adopt the rationale of the *Prahinski* court[256] and later endorsed this adoption.[257] While it appears at first glance that *Prahinski* had the same equity and double award rationales as the Wisconsin and Pennsylvania cases discussed by the court, the main rationale for the *Prahinski* decision was that for goodwill to be a divisible marital asset, it must have a value independent of the continued presence or reputation of the individual professional—i.e., the goodwill must not be personal.[258] The court further found that support awards, unlike one-time goodwill divisions, presented a more equitable vehicle for marital property division because they could be adjusted over time to fit the sole practitioner's circumstances.[259]

The *Prahinski* court reasoned that this was a better scheme because it was much less speculative to determine future earning capacity for support awards than to establish the goodwill value of law practice.[260] Like the court in *Prahinski*, the Oklahoma Supreme Court also held that goodwill of a sole practicing lawyer was *personal* goodwill by stating "the reputation of the lawyer cannot be purchased by another seeking to acquire an established law practice."[261] The court further reasoned that an attorney's goodwill should not be divisible because Rex Travis could not ethically sell his law practice even he if so desired.[262] For these reasons, the court held that the goodwill of a sole practicing attorney should not be valued and divided as a marital asset in a divorce proceeding.[263] Further, the Oklahoma Supreme Court went so far as to hold that Rex Travis had *no goodwill in his law practice*.[264]

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254. *Travis*, ¶ 9, 795 P.2d at 99 (quoting *Prahinski*, 540 A.2d at 843).
255. *Id.* ¶ 12, 795 P.2d at 100.
256. *Id.* ¶¶ 11-12, 795 P.2d at 100.
257. Traczyk v. Traczyk, 1995 OK 22, ¶¶ 9-10, 891 P.2d 1277, 1279-80, *superceded by statute on other grounds as stated by* 1999 OK 57, ¶ 17, 983 P.2d 1025, 1028-29.
258. *Travis*, ¶¶ 6-10, 795 P.2d at 98-100.
259. *Id.* ¶¶ 11-12, 795 P.2d at 100.
260. *Id.*
261. *Id.* ¶ 11, 795 P.2d at 100.
262. *Id.*
263. *Id.* ¶ 13, 795 P.2d at 100.
264. *Id.*

IV. Rule 1.17's Impact on the Division of Law Practice Goodwill in Divorces

A. What Is New, and Why Does It Matter?

Under Oklahoma's revised Rule of Professional Conduct 1.17, an attorney may now sell the goodwill of his or her law practice along with the other assets of the practice.[265] Rule 1.17's specific acknowledgment that goodwill exists in the practice of law, coupled with the authorization to sell such goodwill, has opened the door for a careful revisiting of the *Travis* decision. Deferring to the Oklahoma Supreme Court's *Travis* definition of an attorney's goodwill as personal, the pre-2008 Rule 1.17 did not allow or even mention the sale of goodwill because at that time, in accordance with *Travis*, a lawyer had no goodwill.[266] While the old Rule 1.17 did not explicitly say that goodwill could not be sold,[267] no necessity existed to do so because *Travis* had already established that Rex Travis had "no" goodwill to sell because as a lawyer, the personal goodwill he had in his reputation could not be purchased.[268]

A long-standing tenet of statutory construction is that any common law rule is not changed by the passage of a statute unless the statute specifically speaks to the common law rule.[269] In fact, Oklahoma specifically provides,

> By statutory mandate *the common law remains in full force in this state, unless a statute explicitly provides to the contrary*. Oklahoma law does not permit legislative abrogation of the common law by *implication*; rather, its alteration must be clearly and plainly expressed. An intent to change the common law will

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265. *See supra* notes 7-19 and accompanying text.

266. *Travis*, ¶¶ 11-13, 795 P.2d at 100.

267. OKLA. RULES OF PROF'L CONDUCT R. 1.17 (2001) (amended 2008); *see supra* note 13 (full text of Rule 1.17 prior to the 2008 amendment).

268. *Travis*, ¶¶ 11-13, 795 P.2d at 100.

269. Tate v. Browning-Ferris, Inc., 1992 OK 72, ¶ 11, 833 P.2d 1218, 1225-26. *But see* 12 OKLA. STAT. § 2 (2001). Section 2 states as follows:

> The common law, as modified by constitutional and statutory law, judicial decisions and the condition and wants of the people, shall remain in force in aid of the general statutes of Oklahoma; but the rule of the common law, that statutes in derogation thereof, shall be strictly construed, shall not be applicable to any general statute of Oklahoma; but all such statutes shall be liberally construed to promote their object.

Id.

> not be presumed from an ambiguous, doubtful or inconclusive text. A presumption favors the preservation of common-law rights.[270]

Thus, since the pre-2008 Rule 1.17 did not speak specifically to the definition or existence of an attorney's goodwill in opposition to *Travis*, the ruling in *Travis* was not disturbed. Yet, the mere mention of goodwill as saleable by the revised 2008 Rule 1.17 creates a strong argument that attorney goodwill is no longer personal. If the legislature did not intend to change *Travis*'s holding, it presumably would not have made goodwill saleable.

As a result, the potential exists for the revised Rule 1.17 to tremendously upset the definition of an attorney's professional goodwill, which legal practitioners in Oklahoma have relied upon for the last nineteen years. In an instant, the inclusion of the words "including goodwill" in the revised statute allowing the sale of a law practice transformed an attorney's personal goodwill in his or her law practice into enterprise goodwill in the practice itself.[271] The statutory language seems to virtually amend the operative language in the *Travis* decision as if to say a lawyer's goodwill is saleable and transferable with the practice. By implication, the personal nature of an attorney's practice and skill set is instantly dissolved, and an attorney is now worth no more than an office fixture or good location to his or her law practice. Such a change shakes the divorcing attorney's world. If an asset is saleable, transferable, and implicit in the business to which it inheres, it can be valued and divided in a divorce proceeding as a marital asset just like the podiatry practice in *Traczyk*.[272] The attorney's once distinct and personal goodwill becomes just another asset of the marital estate, just like the attorney's office furniture; and once it has become an asset of the marriage, no reason exists not to divide it with the non-professional spouse.[273]

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270. *Tate*, ¶ 11, 833 P.2d at 1225-26 (footnotes omitted).

271. OKLA. RULES OF PROF'L CONDUCT R. 1.17 (Supp. 2008); *see supra* note 7 (full text of amended Rule 1.17).

272. *See* Traczyk v. Traczyk, 1990 OK 22,¶ 21, 891 P.2d 1277, 1281, *superceded by statute on other grounds as stated by* 1999 OK 57, ¶ 17, 983 P.2d 1025, 1028-29; *see also supra* notes 208-17. For further support of this author's conclusion, see ROBERT G. SPECTOR, OKLAHOMA FAMILY LAW: THE HANDBOOK 2007-2008, at 128-31 (2008), which was published after the author submitted this Comment for publication but became available before final publication of this Comment. Professor Robert Spector concludes *Travis* is likely no longer good law "to the extent the practitioner can include the goodwill value as part of the sale price of the practice." *Id.* at 131.

273. *Traczyk*, ¶¶ 20-22, 891 P.2d at 1281 ("Husband further argues that by both allowing goodwill to be divided as marital property and awarding support alimony the trial court has charged him twice for his future income. . . . He asserts two cases cited in *Travis* resolve the issue of 'double dipping' into his future income. However, we find these cases, *Holbrook v. Holbrook*, and *Beasley v. Beasley*, unpersuasive because, as *Travis* indicates, they both

The forced covenant not to compete is another vital change to the old rule. In the pre-2008 version, a lawyer wishing to sell his or her practice had to cease the private practice of law in Oklahoma completely.[274] The revised rule, by allowing a lawyer to sell his or her practice or practice area as long as the attorney "ceases to engage in the private practice of law . . . in the *geographic area* in Oklahoma in which the practice has been conducted,"[275] creates more of an express ethical covenant not compete with the purchasing attorney rather than an outright bar on practicing in Oklahoma. Selling attorneys need only cease the private practice of law in their old geographic area, not the entire state of Oklahoma.[276] Herein lies another argument that *Travis* is no longer good law because an attorney could plausibly sell his or her practice to liquidate the goodwill for division without destroying his or her livelihood, especially since the attorney could just move and set up a new practice in a nearby town still in Oklahoma. As such, the express ethical covenant not to compete, which allows an attorney to sell his or her practice and then set up shop in another geographical area in Oklahoma, drives one more nail into the rationale and decision in *Travis* based upon the non-saleability of a law practice and its goodwill.

Another key change to Rule 1.17 is the allowance of "practice area" sales.[277] Under the pre-2008 Rule 1.17, attorneys were only permitted to sell their entire practice.[278] The new rule allows attorneys to sell only a part of their practice, and the part of the practice sold can be very specific. The Comment section to Rule 1.17 explains this distinction:

> [A] lawyer with a substantial number of estate planning matters and a substantial number of probate administration cases may sell the estate planning portion of the practice but remain in the practice of law by concentrating on probate administration;

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concerned the goodwill of law practices where such goodwill was related to the reputation of the lawyer. In other words, *Holbrook* and *Beasley* are distinguishable because they did not involve a professional practice with transferable goodwill as the case at bar did. . . . This goodwill was part of the property which should be divided between the parties; Wife has a right to receive her share of the property." (citations omitted) (citing 43 OKLA. STAT. § 121 (1991)).

274. OKLA. RULES OF PROF'L CONDUCT R. 1.17 (2001) (amended 2008); *see supra* note 13 (full text of Rule 1.17 prior to the 2008 amendment).

275. OKLA. RULES OF PROF'L CONDUCT R. 1.17(a) (Supp. 2008) (emphasis added).

276. OKLA. RULES OF PROF'L CONDUCT R. 1.17 (Supp. 2008); *see supra* note 7 (full text of amended Rule 1.17).

277. OKLA. RULES OF PROF'L CONDUCT R. 1.17 (Supp. 2008); *see supra* note 7 (full text of amended Rule 1.17).

278. OKLA. RULES OF PROF'L CONDUCT R. 1.17 (2001) (amended 2008); *see supra* note 13 (full text of Rule 1.17 prior to the 2008 amendment).

> however, that practitioner may not thereafter accept any estate planning matters.[279]

While another comment to this section explains that practice area sales were instituted as a mechanism to protect clients with less lucrative matters,[280] an application of the above comment distinguishing practice areas seems to negate, or at least greatly lessen, this protection. Considering the example given in the comment distinguishing estate planning and administration as different areas of practice, circumvention of this rule would seem rather easy as the definition of practice areas could be as simple as creating practice areas from different aspects of the same process. For instance, an attorney could sell his or her practice area of obtaining divorces but retain his or her divorce modification practice.

With the liberal interpretation of "practice area" given under the above example, practice area sales could be a relatively easy undertaking. While it may be argued that the comment requires the practitioner to have "a substantial number" of cases in a practice area,[281] what is substantial to a general practitioner who has five or six cases each in ten or fifteen areas of law? No guidance is given by the rule, and a good argument could be made that five or six cases is "a substantial number" to a general practitioner. Consequently, practice area sales could create an easy way to liquidate goodwill and further seal the fate of *Travis* as defunct.

Some changes have been made to Rule 1.17 that may save *Travis*, as they may affect the validity of the new rule and even require its repeal or revision. The prior rule's protection of attorney-client confidentiality has been removed from the new Rule 1.17. The old rule required that no attorney-client communications protected under other rules be revealed to the purchaser until the client consented to the transfer of his or her file and also required sequestration of the file until such consent was obtained.[282] This deletion may affect the validity of the new rule, especially considering the removal of the requirement to segregate the files of clients who cannot be contacted to obtain

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279. OKLA. RULES OF PROF'L CONDUCT R. 1.17 cmt. 5 (Supp. 2008).

280. OKLA. RULES OF PROF'L CONDUCT R. 1.17 cmt. 6 (Supp. 2008). The comment states in part:

> The Rule requires that the seller's entire practice, or an entire area of practice, be sold. The prohibition against sale of less than an entire practice area protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters.

Id.

281. *See supra* text accompanying note 279.

282. OKLA. RULES OF PROF'L CONDUCT R. 1.17 (2001) (amended 2008).

their consent. While the new rule allows courts to enter orders approving the transfer of a file without a client's consent if the client cannot be contacted, the old rule protected the attorney-client privilege more by requiring actual consent before transfer.[283] Given this change, a situation could arise whereby a client who was not contacted regarding a sale and whose file was then judicially transferred to another attorney could file suit against the transferring attorney for breach of client confidentiality and indirectly challenge Rule 1.17's revised treatment of confidential client material.

The attorney-client privilege is the client's privilege to waive.[284] It is hard to envision a court deciding to involuntarily transfer representation of a client to another attorney in a for-profit sale of a law practice without obtaining the client's informed consent. Further, by specifically removing the prohibition against discussing case specifics with the purchaser without client consent, the new rule implies that the selling attorney may discuss such matters with the potential purchaser. Such a discussion would clearly violate other ethical rules and potentially subject an attorney to a malpractice action.[285]

Additional changes were made to Rule 1.17 that, while valid, are unwise in the protection of a client's best interests. While these changes are not particularly helpful in a re-analysis of the *Travis* decision, they are briefly described below in the interest of completeness. The provision that required fees not to be increased solely due to the sale has been removed from the new version of Rule 1.17. As with the old rule, the purchaser of the law practice can refuse to undertake the representation of a client who refuses to pay him or her at a rate the purchaser usually charges for the service.[286] This requirement seems to operate as an end run around the requisite sale of the entire practice or practice area, which according to the comment to Rule 1.17 was designed to protect those clients whose matters were less lucrative from being excluded from the sale.[287] A purchasing attorney could potentially raise his or her price for the services rendered on less lucrative cases, and if the client could not pay the higher price, the client could effectively be removed from the sale by the exception authorizing discretionary fee changes. Actions of this nature are clearly against the spirit of the rule.

In the end, the revised Rule 1.17 may be the death knell for *Travis*. While Rule 1.17's tenets may help lawyers in the relatively uncommon ordeal of

283. OKLA. RULES OF PROF'L CONDUCT R. 1.17 (Supp. 2008); OKLA. RULES OF PROF'L CONDUCT R. 1.17 (2001) (amended 2008).

284. OKLA. RULES OF PROF'L CONDUCT SCOPE, 5 OKLA. STAT. ch. 1, app. 3-A, Scope (Supp. 2008).

285. OKLA. RULES OF PROF'L CONDUCT R. 1.6 (2001).

286. OKLA. RULES OF PROF'L CONDUCT R. 1.17 (Supp. 2008).

287. *Id.* R. 1.17 cmt. 6.

disposing of their practice, it may drastically alter the fate of sole practitioners and small partnerships at the time of divorce—a situation all too common and much more likely to affect the lives of lawyers on a day-to-day basis. Nonetheless, all may not be as bleak as it seems for the personal classification of attorney goodwill under the *Travis* scheme. Strict construction of the new Rule 1.17 and the continuing rationale for the decision in *Travis* could potentially save lawyers across the state from the confusion and financial hardship that would be forced upon them by the division of their law practice goodwill.

B. Strict Construction—The Potential Saving Grace for Travis

A strict construction of the 2008 Oklahoma Rule of Professional Conduct 1.17 can save *Travis*. A reviewing court could realistically construe Rule 1.17 as not changing the substantive law in *Travis* but rather providing for the sale of goodwill if any ever accrues to a partnership or sole practitioner. In fact, since the 2008 version of Rule 1.17 does not specifically say an attorney's goodwill inheres to the business and is no longer personal, it may not even address the rule in *Travis*. While the implication may be that an attorney's goodwill is saleable and attached to the business, revised Rule 1.17 does not expressly say so, and to change a common law rule, a statute must speak *directly* to the common law.[288] In fact, Oklahoma's presumption favoring common law rights states that a common law rule cannot be changed by implication.[289] Nonetheless, should this argument fail, Rule 1.17's own restrictions should prevent *Travis* from being overturned.

While a lawyer under the new Rule 1.17 can ethically sell his or her law practice, the restrictions within the rule itself effectively prohibit the lawyer from selling the practice incident to a divorce. For a private attorney to cash out his or her interest in a law practice in order to pay a spouse a portion of the practice's goodwill, the attorney must cease the practice of law in Oklahoma or in the geographic area in which he or she currently practices.[290] This restriction is substantial in the context of awarding a property settlement to the non-professional spouse based upon goodwill. Moving or ending the law practice would effectively end the lawyer's ability to generate income from his goodwill in order to pay his or her spouse a share of goodwill; after all, the lawyer can no longer practice as before. Requiring a practitioner to cease the practice of law would defeat the entire rationale for allowing goodwill to be

288. 12 OKLA. STAT. § 2 (2001); Brown v. Founders Bank and Trust Co., Okla., 1994 OK 130, ¶ 15, 890 P.2d 855, 863; Tate v. Browning-Ferris, Inc., 1992 OK 72, ¶ 11, 833 P.2d 1218, 1225-26.

289. *Tate*, ¶ 11, 833 P.2d at 1225-26.

290. OKLA. RULES OF PROF'L CONDUCT R. 1.17 (Supp. 2008).

divided in a divorce, which is to continue to gain income from the accrued goodwill that would allow the non-professional spouse to recoup his or her share. Additionally, forcing the professional spouse to cash out and move his or her practice to another area could impair the relationship with the parties' children as well as place a significant barrier to the professional's fight for custody.

While critics could say the rule technically could allow goodwill to be liquidated because the practitioner could sell her or his practice and move to another location in the state, requiring attorneys to do this seems unreasonable and unrealistic, especially when the purpose of a divorce settlement is to produce an equitable division of assets.[291] Requiring the professional spouse to move either out of state or out of his or her practicing locale would effectively terminate the professional's ability to recoup goodwill because he or she would effectively have to start a new practice without the ability to gain from his or her old goodwill.

Proponents for overturning *Travis* could also find support for the ability of an attorney to liquidate the goodwill in the practice by embracing a loose or liberal construction of Rule 1.17's authorization of "practice area" sales.[292] Yet if the spirit of Rule 1.17 is followed, the sale of a practice area generally will not allow a practitioner a real opportunity for a cash out of goodwill. For those solo attorneys who specialize in one or two areas of law, a "practice area" sale could be the equivalent of a full sale of the practice and the loss of the ability to produce future income in the profession.

The same result ensues for the general practitioner, although it may stem from a different rationale; a general practitioner may not have enough cases in a single area to sell for a profit. It is common for attorneys to work as general practitioners who make their living taking in whatever clients come through the door. These general practitioners could practice in as many as twenty areas of law. Therefore, the sale of one area of a general practice might not generate much revenue. Of course, the goodwill general practitioners accumulate arises from their repeat business,[293] but such goodwill works differently for general practitioners because clients in one field may come back for legal assistance in another. For example, a client who comes in initially for a divorce returns for a will, then for her mother's probate, and then for her son's DUI. Forcing a "practice area" sale could destroy the ability of a general practitioner to accept that returning client. Even if a general practitioner could realize enough gain to justify selling a single

291. 43 OKLA. STAT. § 121(B) (2001).

292. OKLA. RULES OF PROF'L CONDUCT R. 1.17 (Supp. 2008); *see supra* notes 277-82 and accompanying text.

293. Freeling v. Wood, 1961 OK 113, ¶ 12, 361 P.2d 1061, 1063.

practice area, the general practitioner could severely injure his or her own practice by restricting the ability to take in clients. Once the practice was injured, the sole practitioner could not as easily recoup the lost goodwill.

Given all this, selling a law practice for the purpose of cashing out goodwill is practically unavailable because the attorney's ability to recoup the required payout through the continued practice of law would dissipate with the sale of the practice or practice area. As discussed in *Travis*, inequity still exists in saddling a practitioner with a single, unchangeable award produced by classifying a practitioner's goodwill as a marital asset subject to division. In *Travis*, the Oklahoma Supreme Court stated that "[e]stablishing earning capacity is much less speculative than trying to establish a good will value of a law practice. Projected earnings can be considered in establishing support alimony which, unlike property division of good will, may be adjusted upward or downward at a later date."[294]

V. Conclusion

While it appears that the 2008 amendment to Oklahoma Rule of Professional Conduct 1.17 has legislatively abrogated *Travis* by making an attorney's goodwill a saleable business asset that properly can be included in a marital property division, *Travis*, if ever challenged, should not be overturned. To change a common law rule in Oklahoma, a statute must speak directly to the rule it seeks to change.[295] A court could logically construe the new version of Rule 1.17 as merely providing for the sale of an attorney's goodwill should it come into existence, not stating that an attorney has goodwill in his or her practice. Such a finding would satisfy the court's precedent on changing common law by statute because the inclusion of goodwill in the ethical rule allowing a lawyer to sell his or her law practice is not specific enough to change the classification of an attorney's goodwill from personal to enterprise.

Nonetheless, the equity rationales used in the *Travis* decision still apply despite changes in the 2008 version of Rule 1.17, even if a reviewing court finds that a lawyer's goodwill is now a saleable business asset. While the ability to sell law practices, including goodwill, is now ethically permissible by the new version of Rule 1.17,[296] legal practices still are virtually not saleable, especially for the purpose of divorce property divisions. Unlike other professions, the ethical constraints provided in the rule itself, specifically the requirement of cessation in the practice or practice area sold,

294. Travis v. Travis, 1990 OK 57, ¶ 12, 795 P.2d 96, 100.

295. *See supra* note 269-70, 288-89 and accompanying text.

296. OKLA. RULES OF PROF'L CONDUCT R. 1.17 (Supp. 2008).

prohibit lawyers from cashing out their goodwill in sale if they wish to remain as privately practicing attorneys. Equity dictates that divorcing attorneys not be forced to quit practicing law in order to satisfy a divorce settlement obligation.

Further, valuation of goodwill in any profession is highly speculative, but this problem is much greater for the legal profession. Generally, no comparable sales exist to evaluate an attorney's practice or goodwill.[297] The valuation method employed by either spouse's expert could completely alter the outcome of the decision. Even if a jurisdiction has rejected or adopted certain valuation methods, as Oklahoma has done,[298] the goodwill value can vary even within a particular valuation method depending upon the expert who performs the computation. Since there will probably not be a sale, the valuation will be inherently unrealistic.[299]

Finally, the award of support alimony is much more equitable than property settlements that cannot be modified. This is especially true in the practice of law where the income stream can fluctuate from year to year depending on the needs of clients. Nonetheless, if *Travis* is overruled and the goodwill of a law practice is divided as marital property, the award of at least a substantial portion of that goodwill as support alimony and not property division could address the inequity of dividing goodwill. An award of this nature would allow the support award to be modified if circumstances warrant an adjustment of the original award.[300]

For these reasons, *Travis* should be upheld if it is ever challenged. Notwithstanding the 2008 change to Rule 1.17, the underlying rationale for the *Travis* rule still applies.[301] Considering the realities faced by the sole practitioner today, the *Travis* rule continues to present an equitable solution to a troubling question. Since lawyers cannot readily sell their practices like other professionals, modifiable support alimony awards present the most just and efficient basis for dividing marital property while protecting both parties from substantial, unforeseen circumstances. In addition, support awards provide the flexibility needed to help practitioners face the inevitable fluctuations in income inherent in the solo practice of law. *Travis* has provided balanced and fair precedent for practicing attorneys in Oklahoma for

297. Rosin, *supra* note 35, at 350.

298. Traczyk v. Traczyk, 1995 OK 22, ¶¶ 12-15, 891 P.2d 1277, 1280, *superceded by statute on other grounds as stated by* 1999 OK 57, ¶ 17, 983 P.2d 1025, 1028-29; Mocnik v. Mocnik, 1992 OK 99, ¶¶ 20-21, 838 P.2d 500, 505.

299. White, *supra* note 31, at 524.

300. 43 OKLA. STAT. § 134(D) (2001).

301. Travis v. Travis, 1990 OK 57, ¶¶ 12-13, 795 P.2d 96, 100.

almost 19 years, and Oklahoma courts should follow the rule of *stare decisis* by upholding it.

Returning to my initial hypothetical: Beth Counsel's legal advice to Abe Lawyer accords with the law as it exists today in Oklahoma. After his wife's attorney did not challenge *Travis* based on the revision to Oklahoma Rule of Professional Conduct 1.17, Abe Lawyer is granted a "D-I-V-O-R-C-E"[302] from Oasis. Abe's professional goodwill has been left untouched, and his practice of law and life continues.

Jennifer D. Ary-Hogue

302. WYNETTE, *supra* note 2.