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FAIR VALUE™

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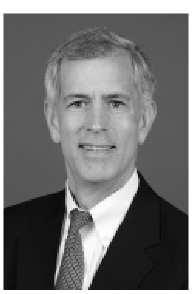
The Income Valuation Approach In Action: Doofusgram and the Craft Beer Company

By: George Hawkins, ASA, CFA, Managing Director

Introduction. Two new clients have found their way to your family law practice, each with a very different type of company. The respective business appraisers for the opposing attorneys valued the companies using the income valuation approach, with one appraiser using the discounted future income method and the other using the capitalization method. The only problem- you missed your law school seminar on business valuation and don't have a clue regarding what the income approach even is, much less how to interpret it. Plus, the depositions of these experts are coming up shortly and you need to prepare. The capitalization method? Greek. The discounted future income method? It might as well be Sanskrit. Fear not...

Valuing the Selfie Sensation and the Craft Beer Manufacturer. Here is a snapshot of the two clients, each with a very different type of company:



Family Law Client A- Doofusgram- The Hopeful Millennial's Selfie Sensation. Client A founded (in Starbucks, of course) Doofusgram, the new social networking, selfie posting

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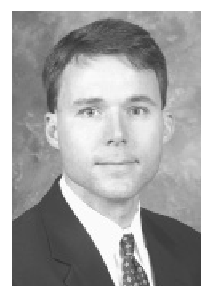
Moore is Better!

By: Michael Paschall, ASA, CFA, JD, Managing Director

As business appraisers with a significant portion of our practice concentrated in litigation, we are always searching for judicial guidance on various valuation topics and issues. In too many instances, however, the case law on a particular topic is too vague, confusing or even non-existent to reliably incorporate into a valuation report or expert testimony. In *Moore v. Moore, 779 S.E.2d 533 (SC 2015)*, however, the South Carolina Supreme Court tackles the difficult issue of identifying, valuing, and dividing the personal and enterprise goodwill of a business in the divorce context in a well-analyzed, well-written, and well-reasoned manner. The Court's process, analysis and findings serve as a blueprint for all courts discussing and deciding this or any other complex business valuation issue.



Michael Paschall

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The Income Valuation Approach In Action

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• Companies that have matured, even if they were rapidly growing in the past.

Scenarios where the discounted future income method may be more appropriate:

• Rapidly growing results are expected for the near-term, followed by a more modest and mature growth rate.

• Deteriorating results expected over the next few years (e.g., due to the expect ending of a major customer contract), followed by mature and stabilized growth.

• Where the future results of a company are expected to change materially from their recent actual history (e.g., a company is coming out with an exciting new product line or service, or the company has been mired in the Great Recession, but there is strong reason to expect that results are going to materially recover).

• A company (e.g., a joint venture between two companies) is project-related and has a finite expected life, at which time the venture will end.

While the previous list is not exhaustive, it nonetheless provides helpful examples of the analytical process necessary to determine which income approach might be appropriate in a particular situation.

Summary. At its core, the income approach really is that simple. Deciding whether the discounted future income or capitalization method is the appropriate method boils down to understanding the history and the expected future dynamics of the company being valued. This is where elbow grease is necessary as the valuator must attempt to fully understand the company at issue and the many internal and external factors that impact it, its expected future results, and its risk. This is where the real work occurs in business valuation and future articles will deal with some of these factors, as well as how the all important discount rate is actually determined. It is hoped that the examples in this article have provided a basis for a more intuitive understanding of the income approach and how this knowledge can be used to (a) better understand business valuations, and (b) ascertain if the method being used by the business appraiser makes sense. ◆

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Facts of the Case. The business at issue in *Moore* was Candelabra, a retailer of "trendy, high-end boutique lighting, home furnishings, and home accessories." Originally operating as a retail showroom, over the next ten years the company developed a strong Internet presence with online sales eventually representing as much as 80% of total revenues. Utilizing her strong training and background in retail marketing, the business was started by the wife in 2001, immediately prior to the marriage. Although the husband helped periodically in the business, the wife remained the main driving force behind the company's success.

The Valuation Issues. The parties filed for divorce on June 30, 2011. The key issues as concerned the division of the value of the business were: (1) the overall value of the company, and (2) the allocation of the intangible value of the company (also called goodwill) between the wife's personal goodwill and the enterprise goodwill that remained with the company. Determination of these values was done by the following process.

Calculation of the goodwill or intangible value of the company was done via a simple formula: the total value of the company, less the value of the tangible assets of the company equals the intangible value of the company. Both parties stipulated to the value of the tangible assets of the company, therefore, the first key issue was determining the total value of the company. Once this was done, subtracting the value of the tangible assets of the company from the total value of the company resulted in the intangible (or goodwill) value of the company.

The second key issue was allocating the intangible (or goodwill) value of the company between the percentage that was due to the personal efforts of the owner/wife (i.e., personal goodwill) and the percentage that adhered to the business itself (i.e., enterprise goodwill). This distinction is important because personal goodwill is not a marital asset subject to division – it remains a separate asset of the wife. Enterprise goodwill, however, is part of the value of the company that is a marital asset and is subject to division.

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Battle of the Experts. The experts hired by the respective parties provided the following opinions of value:

Item	Wife's Expert	Husband's Expert
Valuation Date	6/30/11	6/30/12
Total Company Value (pre-discount)	$1,200,000	$2,960,000
Less: Discount for Lack of Marketability	20%	0%
Equals: Total Company Value (post-discount)	$960,000	$2,960,000
Less: Value of Company Tangible Assets	($354,000)	($354,000)
Equals: Value of Company Intangible Assets (Goodwill)	$606,000	$2,606,000
Times: % of Total Company Goodwill Personal to Wife	25%	5%
Equals: Separate Property of Wife (Personal Goodwill)	$151,500	$130,300
Total Goodwill (Intangible) Value of Company (from above)	$606,000	$2,606,000
Less: Separate Property of Wife (Personal Goodwill)	($151,500)	($130,300)
Equals: Marital Portion of Goodwill (Enterprise Goodwill)	$454,500	$2,475,700
Times: Husband's Share of Marital Estate	50%	50%
Equals: Husband's Share of Enterprise Goodwill	**$227,250**	**$1,237,850**

Business Valuation Positions in *Moore.* As seen above, there were major differences between the experts that led to a $1+ million disagreement as to the ultimate amount to which the husband believed he was entitled. These differences were as follows:

1. **Valuation Date.** The wife's expert used a valuation date of June 30, 2011 (the date of the divorce filing), while the husband's expert used a valuation date exactly one year later on June 30, 2012. Due to differences in the financial performance and financial condition of the company, the use of different valuation dates can result in significantly different company values.

2. **Total Company Value.** Prior to the application of any discounts, the experts had a wide disagreement on the total value of the company with the wife's expert at $1.2 million and the husband's expert at almost $3 million.

3. **Discount for Lack of Marketability.** Further exacerbating the difference in the company value, the wife's expert applied a 20% discount for lack of marketability whereas the husband's expert did not apply any discount for lack of marketability.

4. **Personal Goodwill of the Wife.** The wife's expert opined that 20-25% of the total goodwill value of the company was personal to the wife as without the wife, the company's sales and profits would suffer. The husband's expert did not calculate a personal goodwill estimate in his report but testified on cross-examination that this percentage was likely between 5-10%. For illustration purposes, the upper and lower end of these respective ranges are used in the above table.

As evidenced above, the wife's expert presented a low company value and high personal goodwill percentage (resulting in a lower amount payable to the husband) whereas the husband's expert presented a high company value and low personal goodwill percentage for the wife (resulting in a higher amount payable to the husband).

The Family Court initially accepted the valuation date and total company value of the husband's expert, valuing the company at $2,960,000. The family court also held that the wife's percentage of the company's goodwill (i.e., her personal goodwill) was 10% and therefore was her separate property. The remaining 90% of the company's goodwill was held to be enterprise goodwill and was included in the marital estate as it "inhered to the business itself and was unrelated to the individual efforts of any single person." This decision resulted in a major financial victory for the husband. Both parties appealed this decision.

The Issue. The Court presents its analysis and decision

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in a highly-organized and logical fashion that makes it very easy for the reader to follow. The Court first notes that the issue upon appeal was "whether and to what extent the enterprise goodwill of Candelabra is a marital asset." The Court initially recognizes the complexity of this issue:

> Courts throughout the country, including this Court, have struggled in how to resolve the issue of goodwill value in the domestic relations arena. The family court seeks to achieve equity, yet in the quest for fairness, real world valuation principles are often and purposely ignored. The familiar tension between a family court's goal of equity and recognized valuation principles may be explained, at least in part, due to the absence of a true willing buyer and willing seller in marital litigation. The reality in a family court action is that there is rarely a true sale, for one spouse typically retains the business interest which is the subject of the goodwill valuation and apportionment dispute. Another factor at play is the clear intent not to include future earnings as part of an equitable division award and also order an award of alimony based on those same earnings - in essence, to prevent the inequity of a double recovery. In this regard, one of the common methods of valuing goodwill is by a capitalization of earnings. The various factors and concerns explain South Carolina's categorical rule against the inclusion of personal goodwill in the marital estate. For the first time, we are asked whether enterprise goodwill can be a marital asset subject to division. While we ultimately answer the question in the affirmative, we do so cautiously, knowing that today's decision does not and could not possibly answer the myriad questions that will arise.

As seen above, the Court does a good job in framing the issue and also communicating to the reader where its analysis is going to go: the Court is going to hold that enterprise goodwill (i.e., that portion of the intangible value of a company that adheres to the business regardless of the efforts of any individuals) *IS* a marital asset subject to division. The Court has already noted in this paragraph that personal goodwill is *NOT* a marital asset subject to division. While we would rather not know the ending when starting a novel, we believe this practice of informing the reader of the decision at the beginning of the opinion is very helpful when reading court decisions as it allows the reader to follow the various arguments knowing which ones the court will accept and which ones the court will discard.

Defining Goodwill. The Court then proceeds to recognize and define goodwill - namely, that portion of a company's value that is in excess of the company's tangible (i.e., hard asset) value:

> When marketable businesses are bought and sold upon the open market, the actual negotiated price for the conveyance is often greater than the total value of the tangible assets of the business involved. This difference is due to the fact that the income of a business depends upon many factors other than its assets. Many of these factors are transferred along with the business: for example, a convenient location, the reputation of a trade name, or even simply the probability that the old customers will resort to the old place. Because these factors are transferable, persons who purchase a business upon the open market are often willing to pay more than the total value of the business' individual hard assets. This additional element of value is called goodwill.

Should Goodwill be a Marital Asset? The Court then moves to the next question of "whether and to what extent goodwill should be considered a marital asset." To conduct this analysis, the Court analyzes the important difference between personal and enterprise goodwill.

> Enterprise goodwill is that which exists independently of one's personal efforts and will outlast one's involvement with the business." *In re Marriage of Alexander*, 857 N.E.2d 766, 769 (Ill. App. Ct. 2006). "Enterprise goodwill 'is based on the intangible, but generally marketable, existence in a business of established relations with employees, customers and suppliers.'" *Yoon v. Yoon*, 711 N.E.2d 1265, 1268 (Ind. 1999) (quoting Allen Parkman, *The Treatment of Professional Goodwill in Divorce Proceedings,* 18 Fam. L.Q. 213, 215 (1984)).

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"[Enterprise] goodwill attaches to a business entity and is associated separately from the reputation of the owners. . . . The asset has a determinable value because the enterprise goodwill of an ongoing business will transfer upon sale of the business to a willing buyer." *Wilson v. Wilson*, 706 S.E.2d 354, 361 (W. Va. 2010). Many courts have found "[e]nterprise goodwill is an asset of the business and accordingly is property that is divisible in a dissolution to the extent that it inheres in the business, independent of any single individual's personal efforts and will outlast any person's involvement in the business." *Yoon*, 711 N.E.2d at 1268– 69 (citations omitted)."

In contrast, [p]ersonal goodwill is associated with individuals." *Wilson*, 706 S.E.2d at 361. "It is that part of increased earning capacity that results from the reputation, knowledge and skills of individual people." Id. "The implied assumption is that if the individual were not there, the clients would go elsewhere." *Business Valuation Resources, LLC, BVR's Guide to Personal v. Enterprise Goodwill* 19 (Adam Manson & David Wood eds., 2011) [hereinafter *BVR's Guide*]. "Accordingly, the goodwill of a service business, such as a professional practice, consists largely of personal goodwill." *Wilson*, 706 S.E.2d at 361. "[A]ny value that attaches to a business as a result of this 'personal goodwill' represents nothing more than the future earning capacity of the individual and is not divisible [in a divorce proceeding]." *Yoon*, 711 N.E.2d at 1269. In the family court setting, future earning capacity based on a spouse's reputation, knowledge and skills—personal goodwill—is considered nonmarketable and thus not property subject to division. See *Butler v. Butler*, 663 A.2d 148, 156 (Pa. 1995) ("[W]here there has been an award of alimony, . . . to also attribute a value to goodwill that is wholly personal to the professional spouse, would in essence result in a double charge on future income.").

One court noted the distinction as follows: "[w]here goodwill is a marketable business asset distinct from the personal reputation of a particular individual, as is usually the case with many commercial enterprises, that goodwill has an immediately discernible value as an asset of the business and may be identified as an amount reflected in a sale or transfer of a business." *Prahinski v. Prahinski*, 540 A.2d 833, 843 (Md. Ct. Spec. App. 1988) (citing *Wilson v. Wilson,* 741 S.W.2d 640 (Ark. 1987); *Taylor v. Taylor,* 386 N.W.2d 851 (Neb. 1986)). However, "[i]f the goodwill depends on the continued presence of a particular individual, such goodwill, by definition, is not a marketable asset distinct from the individual." *Id*.

By citing from a wide range of cases from numerous jurisdictions, the Court does a good job in defining and explaining the difference between enterprise and personal goodwill. Stated simply, enterprise goodwill attaches to and conveys with the transfer of the company regardless of the continued performance or actions of any specific individual. Personal goodwill, on the other hand, is personal to a specific individual and likely does not convey with the transfer of a company unless that individual continues with the company.

Precedent in South Carolina. The Court's next step is to review the prior case law on the classification of goodwill (on an overall basis, i.e., combined enterprise and personal) as either marital or separate property. Three prior cases are cited:

In *Casey v. Casey (Casey II)*, 293 S.C. 503, 362 S.E.2d 6 (1987), the Supreme Court held: "[w]hen the goodwill in a business is dependent upon the owner's future earnings, it is too speculative for inclusion in the marital estate," and noted "[t]he continued success of the [fireworks] business can be attributed largely to Husband's lobbying efforts to keep the sale of fireworks legal in South Carolina."

The two other cases cited in this analysis each involved dental practices. In both *Dickert v. Dickert*, 387 S.C. 1, 691 S.E.2d 448 (2010), and *Donahue v. Donahue*, 299 S.C. 353, 384 S.E.2d 741 (1989), the Court noted that

"[a]lthough these cases seem to hold that goodwill in general is too speculative to be considered a marital asset, upon careful review, the goodwill at issue on the fact of each of these

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> decisions was *personal* goodwill."

In all three of these cases, then, the South Carolina Supreme Court, in addressing goodwill (used generically in each case), was in effect addressing the *personal* goodwill of an entity. In all three cases, the Court held that this *personal* goodwill was a non-marital asset, was separate property of its holder and was not subject to division.

The Holding. Following the establishment of this foundation, the Court then reaches its decision:

> Today, we recognize enterprise goodwill as marital property subject to equitable division. We continue to hold that personal goodwill, which follows the owner and is entirely dependent on the owner's personal or professional services and skills, is not marital property subject to division. However, we are persuaded that enterprise goodwill, which inheres in the business itself and is transferrable in the market, should be distinguished from personal or professional goodwill.
>
> Accordingly, we elect to follow the emerging majority approach and hold enterprise goodwill is marital property subject to equitable division. *See Yoon*, 711 N.E.2d at 1272 ("To the extent goodwill is enterprise goodwill, it is divisible."). We make our decision fully aware of the certainty and ease that would necessarily result from a categorical rule excluding all goodwill from the marital estate. We nevertheless believe that today's decision will better enable family courts to achieve equity in the apportionment of marital estates and will prove to be workable. *See Powell v. Powell*, 648 P.2d 218, 223 (Kan. 1982) (explaining the question of whether and to what extent goodwill should be recognized as a marital asset "is, in the final analysis, a public policy issue"). To be sure, identifying, valuing, and equitably dividing enterprise goodwill will present challenges, as a practical matter. The fact that enterprise goodwill is intangible will invariably create differences of opinion as to the existence of enterprise goodwill and its value. Yet, experts are routinely involved in family court valuation disputes. We are confident that South Carolina's excellent family court judges are able to navigate through the myriad issues associated with the identification, valuation, and division of enterprise goodwill to achieve an equitable result.

Thus the Court reaches its decision: As held previously, personal goodwill is a separate asset, not subject to division. Enterprise goodwill, however, is a marital asset, subject to division. The Court reaches this decision in an organized and logical way.

Further Analysis, Explanations, and Illustrations. After reaching its general rule that enterprise goodwill is a marital asset subject to division, the Court then goes to great lengths to illustrate the difference between personal and enterprise goodwill before reaching a decision upon the specific facts of *Moore*. To the Court's credit, in addition to citing other case law, the Court also cites recognized and accepted business valuation textbooks, treatises, and articles, and then goes even further by offering a hypothetical illustration. This is above and beyond the narrative and analysis of a typical valuation-based decision and represents an invaluable service provided by the Court to attorneys and business appraisers.

The Court first offers a number of factors to consider in the personal vs. enterprise goodwill analysis:

> Before we address the specific facts of this case, we take the opportunity to provide further guidance to the bench and bar as to the distinction between personal and enterprise goodwill. Of course, a business may consist of both personal and enterprise goodwill, as does Candelabra. We emphasize that "before including the goodwill of a business or professional practice in a marital estate, a court must determine that the goodwill is attributable to the business as opposed to the owner as an individual." *Yoon*, 711 N.E.2d at 1269. "If attributable to the individual, it is not a divisible asset and is properly considered only as future earning capacity that may affect the relative property division." *Id*.
>
> Although the presence and extent of personal or enterprise goodwill depends on the facts and

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> circumstances of each case, there are numerous factors that can be examined to help identify the existence and extent of personal or enterprise goodwill. *BVR's Guide* at 91. First, the type of the business being valued can often indicate the existence of personal or enterprise goodwill. *Id*. at 239. For example, an important factor is whether the business involves the manufacture or sale of goods, which can indicate enterprise goodwill, or whether the business involves delivering highly skilled or personal services, which may indicate personal goodwill. *Id*. at 87. Moreover, the nature or attributes of the particular industry may also impact the goodwill analysis; for example, "[d]entists have close contact [with their patients], [but] radiologists do not." *Id*. at 86. It is also important to consider how customers are drawn to the business, including whether customers return/repeat their business or whether transactions are largely non-recurrent and whether new business comes primarily from customer referrals or from advertising. *Id*. at 239. As to the company itself, factors to consider include whether the company is a start-up or a well-established business; whether the business has its own name or is named after an owner; the number of owners; and whether the operating systems and procedures are in-place or still in the process of being established. *Id*. In ascertaining whether any personal goodwill exists, it is also important to consider the personal characteristics of the owner, including the owner's personal reputation, community visibility, age and health, work habits, as well as the owner's education, experience in the industry, judgment, ability, and special skills or talents. *Id*. We underscore that this list of factors is not exhaustive or exclusive, but rather is included merely as a starting point to guide the family courts' inquiry. *See Crossland v. Crossland*, 408 S.C. 443, 453, 759 S.E.2d 419, 424 (2014) ("Formulaic principles and bright-line rules will only hinder the ability of family court judges to reach an equitable result in this individualized, fact-intensive area of law.") (quoting *Rimer v. Rimer,* 361 S.C. 521, 527, 605 S.E.2d 572, 575 (Ct. App. 2004)).

Although the Court indicates that its list was "not exhaustive," we cannot immediately point to another case that offers so many examples or considerations to help guide the personal vs. enterprise goodwill analysis. But the Court is not done yet. In addition to offering these factors for consideration, the Court then goes even further:

> In separating personal and enterprise goodwill, the essential question is: can the business generate revenue from continued patronage without the current owner's participation? *BVR's Guide* at 239. We believe the following chart, which we have adapted from *BVR's Guide*, may be helpful in distinguishing personal and enterprise goodwill.

Personal Goodwill Indicators

- Small entrepreneurial business highly dependent on employee-owner's personal skills and relationships
- No employment agreement between company and employee-owner
- Personal service is an important selling feature in the company's product or services.
- No significant capital investment in either tangible or identifiable tangible assets.
- Only employee-owners own the company.
- Sales largely depend on the employee-owner's personal relationships with customers.
- Product and/or services know-how and supplier relationships rest primarily with the employee-owner.

Enterprise Goodwill Indicators

- Larger business, which has formalized its organizational structures and institutionalized its systems and controls.
- Owner-employee has employment agreement with company.
- The business is not heavily dependent on personal services.
- The business has significant capital investments in either tangible or identifiable intangible assets.
- The company has more than one owner, some of whom are not employees.
- Company sales result from name recognition, sales force, sales contracts and other company-owned intangibles.

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- Company has supplier contracts and formalized production methods, patents, copyrights, business systems, etc.

  Another factor in distinguishing between personal and enterprise goodwill is the degree to which a purported purchaser would demand the seller enter into a covenant not to compete. While a covenant not to compete may be present in any transaction, the market-driven necessity for a covenant is manifest where personal goodwill is involved.

Now the Court has taken the additional valuable step of referencing an accepted and established business valuation treatise. This provides yet another layer of analysis to apply to the personal vs. enterprise goodwill determination. But wait...the Court *still* is not finished offering guidance. After offering numerous factors to consider, then referencing an accepted business valuation treatise, the Court then offers a hypothetical as a practical illustration in the personal vs. enterprise goodwill decision.

Haircuts. The Court's hypothetical involves two beauty salons. Salon A is located at a busy intersection, serves customers on a walk-in basis, and the owner/stylists split the profits evenly. At Salon A, the profits realized by the owners are due primarily to the **enterprise**. Salon B is located in a secluded neighborhood, is by appointment only with a particular stylist, and profits are divided among the owner/stylists based on the revenue generated by each individual stylist. At Salon B, the profits realized by the owners are due primarily to the personal skills, reputation and repeat clientele of the **individual stylists**. The Court summarizes its conclusion from this hypothetical as follows:

> In the above example, the value of each beauty salon may be comprised of both personal and enterprise goodwill. However, any reasonable valuator would unquestionably conclude that personal goodwill predominates in [Salon B] and enterprise goodwill predominates in [Salon A].

Up to this point, the Court *still* has not made its decision on the facts at hand. The Court has, however, presented a road map with intricate detail that should greatly assist the business appraiser and attorney in analyzing the personal vs. enterprise goodwill issue. There is something for everyone in this analysis – factors to consider, a reference to an accepted business valuation treatise, and a hypothetical example. Let's put this another way – if you don't understand the concept by now, you will never understand it. There will never be an objective formula to definitively calculate the division between personal goodwill and enterprise goodwill, however, we are hard-pressed to improve on the guidelines provided in *Moore*.

Decision on the Facts at Hand. As noted earlier, the Court had several decisions to make on the facts at hand, including (1) the proper valuation date, (2) the total value of the company, (3) the marketability discount (if any), and (4) the percentage of company goodwill that was personal to the wife. These issues were decided as follows:

Valuation Date. Under South Carolina law, the valuation date is the same date as the divorce filing, in this case, June 30, 2011 (the wife's selected valuation date). As noted earlier, the husband used June 30, 2012, as the valuation date, possibly in an attempt to share in any appreciated value of the company since the date of the divorce filing. The husband's potential theory here is that any increase in the value of the company since June 30, 2011, is entirely passive in nature (and thus divisible property) as it is due to the "market force of the Internet" on the company's sales. The Court questioned the husband's actions on this issue and found the statutory date of June 30, 2011, to be correct. The Court also disagreed with the husband's theory that the appreciation in value after June 30, 2011, was due to passive forces, noting that any increase in the company's value was due to the wife's active efforts in selecting and arranging product on the website and constantly revising and refining the company's marketing campaigns for existing and new brands. Finally, the Court noted that the husband had been terminated from the company prior to the June 30, 2011, divorce filing date, therefore, there were no active efforts by the husband after June 30, 2011, that increased the company's value.

Total Company Value. In addition to agreeing with the wife on the 2011 valuation date, the Court also held that the valuation report prepared by the wife's expert was superior to the valuation report prepared by the husband's expert. The wife's expert collected and analyzed data, visited the retail store, interviewed the

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wife, other company employees, and vendors and, in short, did the necessary due diligence that is required for a competent valuation report and opinion on the personal goodwill issue. The husband's expert, by contrast, did not interview the wife, did not visit the company, and did not offer an opinion on the personal goodwill issue except upon cross-examination at trial. This was obviously a subjective call by the Court. It is impossible to second-guess this decision without having read each report and witnessed each expert's testimony, however, given the thoroughness of the Court's analysis in this case and their obvious understanding of the issue, it is difficult not to trust the Court's judgment on this issue. Another factor that damaged the credibility of the opinion of fair market value by the husband's expert was the selection of the 2012 valuation date and the failure to provide a 2011 valuation date report until a couple of days before the trial.

Marketability Discount. Although the Court accepted the valuation report by the wife's expert, the Court did reject one aspect of this valuation report in holding that no marketability discount was applicable to the company since no sale of the company was contemplated. We note that this particular part of the holding is a departure from the usual fair market value standard of a hypothetical willing buyer and hypothetical willing seller in that the Court in this case is considering a specific individual (the wife) who is not going to sell the company. Whether or not a marketability discount applied in this case cannot be determined from a reading of the opinion, however, this particular decision by the Court is closer to the intrinsic value standard than it should be. The proper analysis should be whether a hypothetical willing buyer and hypothetical willing seller would agree that some discount for marketability is appropriate.

Personal versus Enterprise Goodwill. The Court also accepted the wife's expert on this issue, holding that 20% of the total goodwill value of the company was personal to the wife and therefore was her non-divisible personal asset. The Court's analysis and decision on this issue was logical and thorough with the Court focusing on the following issues in reaching its decision:

1. Valuation Report Quality. As noted above, the Court believed the valuation report and opinion of the wife's expert was superior to the valuation report and opinion of the husband's expert. In his valuation report, the wife's expert opined to a 20-25% personal goodwill percentage for the wife. By contrast, the husband's expert conducted no personal goodwill analysis in his report and only opined to a potential personal goodwill percentage upon cross-examination.

2. Evidence of Wife's Importance to Company. The research and analysis done by the wife's expert provided ample evidence of the wife's importance to the company. Factors listed included the day-to-day management of the business, total control of product selection, constant website monitoring and revision, and direct contact with manufacturers and vendors. Also, the wife's education and formal training in marketing as well as her prior retail experience further bolstered her indispensable nature at the company. In an interview, one company employee said that if wife left, "it wouldn't be Candelabra. [She] is Candelabra."

3. Possible Non-Compete Agreement. The Court noted the opinion of the wife's expert that a buyer of the company would not pay full fair market value without a non-compete agreement from the wife.

4. Personal Goodwill can Exist Outside of the Professional Practice Context. The Court disagreed with the husband's position that personal goodwill can only be developed in the environment of a professional practice. The Court cited a number of cases from different jurisdictions (including South Carolina) where a court found the existence of personal goodwill in an operating business.

5. Existence of Company Website Does Not Preclude the Existence of Personal Goodwill. The Court did not buy the husband's argument that personal goodwill value at the company was limited to some percentage of the 20% of company revenues generated by the retail store and the 80% of revenues generated by Internet sales had no personal goodwill component. The Court noted that the design, layout, and product content of the website, as well as the SEO (search engine optimization) strategies that drove customers to the website were all the sole responsibility of the wife and such artistic or creative talents are inherently personal and cannot be a divisible marital asset.

As with the rest of its decision, the Court's finding of a 20% personal goodwill percentage for the wife was

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thorough. Again, there is no formula or algorithm that can calculate this percentage. Arguments can be made for 30%, 10%, or some other percentage, however, the analysis and detail that went into the Court's decision is convincing.

Financial Result of the Court's Decision. The analysis and holding by the Supreme Court resulted in a significant victory for the wife as compared to the initial decision of the lower Family Court:

Item	Family Court	Supreme Court
Valuation Date	6/30/12	6/30/11
Total Company Value (pre-discount)	$2,960,000	$1,200,000
Less: Discount for Lack of Marketability	0%	0%
Equals: Total Company Value (post-discount)	$2,960,000	$1,200,000
Less: Value of Company Tangible Assets	($354,000)	($354,000)
Equals: Value of Company Intangible Assets (Goodwill)	$2,606,000	$846,000
Times: % of Total Company Goodwill Personal to Wife	10%	20%
Equals: Separate Property of Wife (Personal Goodwill)	$260,600	$169,200
Total Goodwill (Intangible) Value of Company	$2,606,000	$846,000
Less: Separate Property of Wife (Personal Goodwill)	($260,600)	($169,200)
Equals: Marital Portion of Goodwill (Enterprise Goodwill)	$2,345,400	$676,800
Times: Husband's Share of Marital Estate	50%	50%
Equals: Husband's Share of Enterprise Goodwill	**$1,172,700**	**$338,400**

Conclusion. From our perspective as business appraisers, courts have a very difficult job. We specialize in our fairly narrow field and are expected to know it backwards and forwards. Courts, however, must hear a range of cases on a wide variety of topics, many of which include highly technical or complex issues. It is unfair for business appraisers to expect courts to have the same level of business valuation knowledge or expertise. In its *Moore* decision, however, the South Carolina Supreme Court has exhibited a mastery of the personal vs. enterprise goodwill issue – in its understanding, its analysis, and its decision.

In addition to its thoroughness and usefulness for business appraisers and attorneys, the *Moore* decision also passes another key test – it makes sense. Many (if not most) small, privately-held companies with goodwill value contain elements of both personal and enterprise goodwill. In general terms, as companies become larger, the personal goodwill value associated with a particular individual diminishes. This can present a difficult valuation conundrum. For example, how much of Microsoft's intangible value was due to the personal goodwill of Bill Gates? Probably a pretty fair percentage at the beginning, however, as Microsoft grew larger over the years, the personal goodwill component of Mr. Gates declined. At some point it reached zero, certainly by the time he retired from the company and perhaps sooner.

Conversely, as one moves down the spectrum to companies that are smaller and more specialized, the personal goodwill value associated with a particular individual increases. In some cases, the personal goodwill percentage can be 100% if the service provided by an individual is so unique that it cannot be replicated by or transferred to other individuals.

Also – it is entirely reasonable for personal goodwill to be classified as a separate asset of the individual while enterprise goodwill is an asset of the entity. This holding comports with the standard of fair market value in that the hypothetical willing buyer is paying for a business that may be comprised of both tangible and intangible value. That part of the intangible value that is enterprise goodwill is inseparable from and goes with the company in a sale. If a buyer of a company wants to retain that part of the total goodwill value that is personal in nature to a particular individual, the buyer must provide for this via an ongoing employment or consulting contract, a non-compete provision, or some other mechanism.

Moore is one of the better business valuation cases we have seen. We hope this case will serve as a useful and practical guideline for business appraisers and attorneys wrestling with the personal vs. enterprise goodwill issue and also serve as an inspiration for courts in other jurisdictions to use the same detail and thoroughness in reaching decisions on complex business valuation issues. ◆

ABOUT BANISTER FINANCIAL AND ITS VALUATION SERVICES

Banister Financial, based in Charlotte, North Carolina, specializes solely in the valuation of businesses, professional practices, and partnership interests. We are one of the leading independent valuation firms in the Southeast and nationally. Our clients range from small companies and professional practices to large regional and national companies. Our valuation work includes close and continuing relationships with successful privately held companies and their advisors throughout the country.

Scope of Business Valuation Services Offered

We prepare business valuations for purposes that include the following, among others:

Taxation Related Business Valuations:
- Estate and gift taxation and related planning
- Employee stock ownership plans (ESOP's)
- Tax related "reasonable compensation" issues
- Family limited partnership and LLC interests
- Buy/sell agreements
- Tax related litigation
- Charitable contributions
- C to S corporation conversions

Divorce, Litigation and Dispute Related Business Valuations:
- Equitable distribution (divorce)
- Dissenting minority shareholder litigation/corporate dissolution
- Minority shareholder disputes
- Business damages, lost profits

Transactional Related Business Valuations:
- Purchase or sale, merger
- Management/employee buyouts, acquisitions

Other Related Business Valuation Engagements:
- Reviews of valuations performed by others
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Our Position on Partner-Staff Leverage:
Unlike many valuation firms, Banister Financial **does not** use partner/staff leverage in performing assignments. One highly experienced valuation professional will perform your entire valuation assignment from start to finish. We do not use "face partners" to sell a project and then hand off the work to a junior staff person with little or no experience to do the work behind the scenes. We believe such practice is a disservice to clients who think they are receiving experienced, expert help when in fact they are receiving just the opposite. When it comes time to defend the work in court or before the IRS, you can be sure with Banister Financial that a highly-skilled, qualified and experienced professional has handled your project from start to finish and will be able to confidently and capably defend the value. We believe that "farming out" the majority of a business valuation project to a junior staffer does not allow the senior person (who will defend the report) the necessary familiarity and knowledge of numerous aspects of any one project. Furthermore, we believe the risk of unreasonable, illogical, or uneducated assumptions made in the report are greatly increased with the involvement of inexperienced, junior staffers. The professionals at Banister have years of total professional experience, including business valuation, along with strong prior backgrounds in such diverse areas as banking, public accounting, credit administration, and real estate investment banking.

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