Professional Goodwill in Louisiana: An Analysis of Its Classification, Valuation, and Partition

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Within the last few years, several community property states have classified professional goodwill as community property while several noncommunity property states have classified professional goodwill as an asset of marital property. These classifications recognize the economic realities involved when a marriage between a professional spouse and a nonprofessional spouse terminates. Although each spouse contributes substantial time and effort to building a secure future, the nonprofessional spouse often sacrifices his or her career to allow the other spouse to devote efforts exclusively to a professional practice. That practice and its assets are the spouses' economic investment for the future. Yet, when the marriage ends, the professional spouse retains the practice, including its frequently substantial asset of professional goodwill. Goodwill, an incorporeal asset, represents the value of the professional practice beyond the value of the practice's corporeal and other incorporeal assets. Goodwill is often the most valuable asset of professional practices, because most professional practices offer services and have limited capital investments and relatively few corporeal and other incorporeal assets. Classifying professional

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1. The discussions in this comment are based on the assumption that a professional person is married to a nonprofessional person. The author realizes that in some instances both spouses may be professionals; if so, the same principles apply.


goodwill as community property recognizes the nonprofessional spouse's share in this major asset.4

Louisiana courts have not yet decided whether professional goodwill is community property. The courts must first recognize that professional goodwill is property, for only after they have determined that professional goodwill is property can they classify it as community property. Should Louisiana courts find that professional goodwill is community property, they must adopt methods of valuing it which afford each spouse the full value of his or her interest in the professional goodwill at dissolution of the community. Additionally, Louisiana courts must partition professional goodwill so as to ensure realization by the nonprofessional spouse of the present value of his or her interest in the "community" goodwill.

**Professional Goodwill as Property**

A crucial determination prior to the classification of professional goodwill as community property is whether professional goodwill is "property." Louisiana courts cannot subject an asset to the matrimonial regimes law and classify it as separate or community property until that asset has been recognized as property. Furthermore, if professional goodwill is recognized as property, it will exist as an asset separate and distinct from the person of the professional and his individual abilities.5

Traditionally, courts did not consider the goodwill of a professional practice to be a property right; they considered it to be an inseparable part of the person of the professional.6 This attitude prevailed because

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4. This comment's focus is the community property treatment of professional goodwill. The approaches of noncommunity property states, although presented, are not presented in detail because the specifics of their systems are beyond this comment's coverage. For a discussion of the systems in noncommunity property states, see W. REPPY & W. DEFUNIAK, COMMUNITY PROPERTY IN THE UNITED STATES 8, 13-24 (1975).

This comment assumes that the professional spouse's practice will continue after dissolution of marriage. The dissolution of a marriage does not affect the continuation of a practice nor the continued existence of professional goodwill. Generally, the goodwill of a professional practice will terminate when the practice is dissolved, by either the death or retirement of the sole practitioner or the termination of the partnership or corporation. See, e.g., In re Marriage of Slater, 100 Cal. App. 3d 241, 247, 160 Cal. Rptr. 686, 689 (1979), citing In re Marriage of Foster, 42 Cal. App. 3d 577, 584, 117 Cal. Rptr. 49, 54 (1974).

5. See text at notes 27-31, infra.

goodwill was envisioned as dependent solely upon the personal skills and abilities of the professional person, rather than as a distinct asset of the practice. Relatively recent developments in several community property states, most notably California and Washington, indicate that this view is not the modern conception of professional goodwill. All but one of the states that have dealt with professional goodwill in the context of community property law have found it to be property.

The concept of "property" in Louisiana is broader than traditional legal and social notions of what constitutes property. As expressed

201, 207 (1951); Magee v. Pope, 234 Mo. App. 191, 206-07, 112 S.W.2d 891, 899 (1938).


7. See cases cited in note 6, supra. See, e.g., Trask v. Susskind, 376 F.2d 17, 20 (5th Cir. 1967); Liquidators of Nicholson Pub. Co. v. E.S. Upton Printing Co., 152 La. 270, 278, 93 So. 91, 93 (1922); In re Giants' Estate, 57 Wash. 2d 309, 312, 356 P.2d 707, 709 (1960).

8. See cases cited in notes 33-34, infra. Goodwill is an intangible and often valuable asset created by the professional's reputation, learning, skill, and experience in his profession. Goodwill is an asset susceptible of valuation apart from the other assets of the professional practice. See Mueller v. Mueller, 144 Cal. App. 2d 245, 250-51, 301 P.2d 90, 94-95 (1956); Evans v. Gunnip, 36 Del. Ch. 589, 593-95, 135 A.2d 128, 131 (1957); Durio v. Johnson, 68 N.M. 82, 84-85, 358 P.2d 703, 705 (1961). See also Annot., 79 A.L.R. 3d 1243, 1244-45 (1977). Furthermore, professional goodwill may be sold and transferred. Red Wing Malting Co. v. Willcuts, 15 F.2d 626, 629-30 (8th Cir. 1926), cert. denied, 273 U.S. 763 (1927); Ballero v. Heslin, 128 So. 2d 453, 455 (La. App. 4th Cir. 1961). "[M]en have been willing to buy and to pay a price for a professional 'practice' with its goodwill . . . [despite the fact that] . . . [t]he goodwill of a physician, lawyer, or other professional man is usually pretty strictly personal in character." 6 A. CORBIN, A COMPREHENSIVE TREATISE ON THE WORKING RULES OF CONTRACT LAW § 1938, at 83 (1962).

9. See cases cited in notes 33-36, infra.

10. See Due v. Due, 342 So. 2d 161, 165 (La. 1977); 1 A. YIANNOPOULOS, PROPERTY § 1 in 2 LOUISIANA CIVIL LAW TREATISE 1 (1980). See also LA. CIV. CODE art. 2325, comment (b). Louisiana courts have found that the goodwill of a business is a property right; however, these courts were dealing with commercial goodwill and not the goodwill of a professional practice. See Succession of Jurisich, 224 La. 325, 330-33, 69 So. 2d 361, 363 (1953); Succession of Conway, 215 La. 819, 828, 41 So. 2d 729, 732 (1949); Desselle v. Petrossi, 207 So. 2d 190, 193 (La. App. 4th Cir. 1968); Ballero v. Heslin, 128 So. 2d 453, 455 (La. App. 4th Cir. 1961). Traditional narrow notions of property are reflected in the analysis of professional goodwill in Nail v. Nail, 486 S.W.2d 761 (Tex. 1972). In Nail, the Texas Supreme Court refused to classify the professional goodwill of the husband's sole professional practice as property because of traditional property notions. These concepts are similarly reflected in the Colorado Supreme Court's determination that a professional degree is not property. See In re Marriage of Graham, 574 P.2d 75, 78 (Colo. 1978).
by Professor Yiannopoulos, "[a]ll rights that are susceptible of pecuniary evaluation are property in the sense that they are guaranteed by the legal order and form part of a person's patrimony.""Louisiana jurisprudence has specifically adopted this broad concept of property in *Due v. Due.*

In *Due*, the Louisiana Supreme Court classified an attorney's interest in a contingent fee contract as a patrimonial right and as community property subject to division at dissolution of the marriage. The court, referring to Professor Yiannopoulos, stated that "[p]roperty in its broad sense denotes all patrimonial rights." It further explained that "[t]he civil law concept of patrimony includes the total mass of existing or potential rights and liabilities attached to a person for the satisfaction of his economic needs."

The civilian theory is that property is a term used to designate those things, both corporeal and incorporeal, in which people have rights. The legal system defines the things which may be the objects of property rights and affords its protection to those things, thus making them one's property.

In theory, the test of whether an asset is a patrimonial asset, or "property," is its susceptibility to pecuniary evaluation. Additionally, it must be an existing or potential asset or right. Professional goodwill is an existing asset which adheres to the practice of the professional. The fact that professional goodwill is an asset susceptible of evaluation has been demonstrated by cases in California and

12. 342 So. 2d 161 (La. 1977).
13. *Id.* at 165.
14. *Id.* at 165-66.
15. *Id.* at 165, citing A. Yiannopoulos, *supra* note 10, § 1, at 1. See *La. Civ. Code* art. 2325, comment (b). "Patrimonial rights are those susceptible of pecuniary evaluation, and which, for this reason, may form a part of a person's patrimony." A. Yiannopoulos, *Louisiana Civil Law System* § 70, at 243 (1971).
Washington. Furthermore, things similar to professional goodwill which have presented difficulties in pecuniary evaluation have been found to be property by Louisiana courts. These things include the potential assets or rights of pension plans, retirement annuities, and profit sharing plans. Thus, unless they are prepared to retreat from the expansive view of property expressed in Due, Louisiana courts should classify professional goodwill as property.

One must be careful to distinguish professional goodwill as a distinct asset of the professional practice from professional goodwill as a factor contributing to the value of the professional practice. Courts in jurisdictions which have found professional goodwill to be community property have not specifically articulated this distinction. The distinction is vital; if professional goodwill is considered as a distinct property right, goodwill individually would be classified and, after valuation, accounted for at dissolution of the marriage. Yet, if goodwill is envisioned as a factor contributing to the value of the practice, the spouse's interest in the practice as a whole would be classified, valued, and accounted for at dissolution; the nonprofessional spouse's compensation for the enhancement of the practice, if separate property, would be limited to the right of reimbursement. Additionally, it is conceptually clearer to disassociate professional goodwill from the practice itself and to consider it as a separate patrimonial asset, although professional goodwill's existence depends upon the continued existence of the practice.

The following example illustrates the importance of the above distinction. H, the sole surviving heir, inherits a professional practice from his father during the existence of his marriage. Having recently completed his medical internship, H decides to put his efforts into his deceased father's practice. As an inheritance, the practice and its

22. See cases cited in notes 33-34, infra.
23. For a thorough discussion of things similar to professional goodwill which have been found by Louisiana courts to be community property, see Comment, supra note 19, at 1117-18.
27. See LA. CIV. CODE art. 2368.
goodwill are $H$'s separate property, but the professional goodwill thereafter created will be community property. Additionally, the earnings and increased value of the practice as an entity will thereafter be community property. Thus if the professional goodwill is treated as a distinct patrimonial asset, it could be classified, depending upon the circumstances, differently from the practice itself. Yet, if the goodwill is considered solely as a factor contributing to the value of the practice, its classification would depend upon the practice's classification. As the practice in this example is deemed to be $H$'s separate property, the professional goodwill would be also $H$'s separate property. In such a situation, the nonprofessional spouse's only compensation would be the right of reimbursement for the enhancement of the separate property of the professional spouse. However, reimbursement, which entitles the nonprofessional spouse to one-half of the increased value attributed to the common labor, may not necessarily represent the value of the professional goodwill. Hence, reimbursement may not adequately compensate the nonprofessional spouse if professional goodwill is characterized as a factor contributing to the value of the practice, since the nonprofessional spouse only receives monetary compensation for one-half the enhanced value and not a separate property interest. Furthermore, reimbursement defies the economic reality of the situation since professional goodwill is often the most vital asset of the professional practice.

**Development of Professional Goodwill as Community Property**

Courts in four of the eight community property states have dealt with the problem of whether professional goodwill is community property. California's courts were the first to decide that professional goodwill, if found to exist in a particular practice, was community property. This approach was followed by Washington and New

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28. See LA. CIV. CODE art. 2341.
29. See LA. CIV. CODE art. 2338.
30. See LA. CIV. CODE art. 2338.
31. See LA. CIV. CODE art. 2368. Reimbursement entitles the nonprofessional spouse to one half of the increased value attributable to the uncompensated labor or industry of the spouses.
32. The eight community property states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. The four states that have dealt with professional goodwill as community property are California, New Mexico, Texas, and Washington.
34. See In re Marriage of Fleege, 91 Wash. 2d 324, 588 P.2d 1136 (1979); In re
Mexico. In contrast, the Texas Supreme Court refused to recognize professional goodwill as community property in the context of a sole practitioner. Yet, Texas appellate courts subsequently found that professional goodwill in a professional corporation was community property. Several noncommunity property states have treated professional goodwill as a marital asset, although only one of these jurisdictions has specifically held that professional goodwill is marital property.

California

Mueller v. Mueller was the first case in California dealing with professional goodwill as community property. In its decision, the court of appeals concluded that professional goodwill was property of an intangible nature. The Mueller court then upheld the lower court's finding of the existence of goodwill in the husband's dental laboratory business and the lower court's treatment of the goodwill as community property whose value had to be accounted for at dissolution. Yet, the court failed to articulate explicitly any reasoning for classifying professional goodwill as community property.

In Brawman v. Brawman, the court noted that the husband's law practice was community property and that it had substantial value. Yet, the Texas Supreme Court has expressly left unresolved the issue of whether the professional goodwill of a corporation or partnership is community property. See text at note 96, infra.

37. Trick v. Trick, 587 S.W.2d 771 (Tex. Civ. App. El Paso 1979); Geesbreght v. Geesbreght, 570 S.W.2d 427 (Tex. Civ. App. Fort Worth 1978) Texas courts have treated the sole practitioner differently from the professional corporation because the Texas Supreme Court persists in handling the professional goodwill of the sole practitioner as a part of the professional person, rather than a separate asset of the practice. Yet, the Texas Supreme Court has expressly left unresolved the issue of whether the professional goodwill of a corporation or partnership is community property. See text at note 96, infra.

41. 144 Cal. App. 2d at 251-52, 301 P.2d at 94-95.
42. 144 Cal. App. 2d at 251-52, 301 P.2d at 95.
43. 144 Cal. App. 2d at 252, 301 P.2d at 95-96.
value. In its opinion, the court did not consider specifically the goodwill of the professional practice; yet, the court stated that because a professional practice automatically goes to the spouse licensed to practice it and continues after marital dissolution, the other spouse should be compensated for his or her fair share as a "silent partner" who withdraws. In Fritschi v. Teed, the California appellate court, in dictum, stated that "[o]n divorce and dissolution of the community a professional practice perforce remains in the hands of the spouse licensed to practice it. Nevertheless, in terms of its existing economic potential, it may have a substantial worth which must be taken into account in evaluating the community estate for divorce purposes."

Although the Brawman and Fritschi courts did not decide the issue of professional goodwill as community property, they did recognize the contribution made by the community to the future earning potential of the professional spouse. The nonprofessional spouse frees the professional spouse of other marital responsibilities and enables the professional spouse to devote time and efforts to the building of a successful professional practice.

Following these opinions, a California appellate court, in Golden v. Golden, classified professional goodwill as community property, thus establishing a "rule" which has been followed consistently in later cases. Golden involved an appeal by a husband, who was a sole medical practitioner, from a lower court's division of community assets. Included in these assets was an allocation of $32,500 for the goodwill of the husband's professional practice. The husband argued that there

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45. 199 Cal. App. 2d at 882, 19 Cal. Rptr. at 109.
46. 199 Cal. App. 2d at 882, 19 Cal. Rptr. at 110.
48. 213 Cal. App. 2d at 726, 29 Cal. Rptr. 119.
49. In Todd v. Todd, 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (1969), the appellate court applied the rules of Brawman and Fritschi in upholding the trial court's valuation of the husband's sole law practice. "While the right to practice law is a property right which cannot be classed as community property, the value of the practice at the time of dissolution of the community is community property." 272 Cal. App. 2d at 791, 78 Cal. Rptr. at 135.
51. 270 Cal. App. 2d at 404, 75 Cal. Rptr. at 736.
52. 270 Cal. App. 2d at 404, 75 Cal. Rptr. at 737. This case reflects California's approach to the "aggregate theory." Louisiana has never followed the "aggregate theory" of partition; Louisiana instead has used the "item theory" of partition in kind or partition by licitation. New Civil Code article 2369.1, however, provides for the "aggregate theory" of partition of the community property in Louisiana. See Note, Termination of the Community, 42 La. L. Rev. 789, 811-12 (1982). See also notes 170-77, infra, and accompanying text.
was no goodwill in his professional practice upon dissolution of the marriage. The husband relied upon Lyon v. Lyon, which had held that upon dissolution of a law partnership there could be no allowance for goodwill, since the reputation of the firm depended upon the skill of each member. The Golden court made a fundamental distinction between the treatment of goodwill at partnership dissolution and the consideration of professional goodwill at dissolution of the marital community. The court stated that when a professional partnership is being dissolved, a court cannot determine the amount of goodwill attributable to each partner. But, in a marriage dissolution, the practice of the sole practitioner spouse will continue after dissolution of the community with the same value it had during the existence of the marriage. Under community property law principles, the nonprofessional spouse makes the same contribution to the value of the professional business as he or she makes to the professional spouse’s earnings and other accumulations. By making this distinction, the court recognized the economic reality of the situation when a professional practice is involved at the dissolution of the community: (1) the professional business does continue, because it is that spouse’s profession, and (2) the professional goodwill of the business had a substantial and real value during the existence of the marriage.

California appellate courts did not again consider the issue of the goodwill of a spouse’s professional practice until In re Marriage of Fortier, in 1973. Although the issue in this case was the method of valuation used by the lower court, the Fortier court stated that “the goodwill of [the husband’s] medical practice was, in fact, community property.” This case indicates that the California appellate courts have accepted the proposition that, if created during the marriage, professional goodwill is community property.

54. 270 Cal. App. 2d at 405, 75 Cal. Rptr. at 737-38. The court stated:
Where, as in Lyon the firm is being dissolved, it is understandable that a court cannot determine what, if any, of the goodwill of the firm will go to either partner. But, in a matrimonial matter, the practice of the sole practitioner husband will continue, with the same intangible value it had during marriage. Under the principles of community property law, the wife, by virtue of her position as wife, made to that value the same contribution as does a wife to any of the husband’s earnings and accumulations during marriage. She is as much entitled to be recompensed for that contribution as if it were represented by the increased value of stock in a family business.

Id.

55. 270 Cal. App. 2d at 405, 75 Cal. Rptr. at 737-38.
57. 34 Cal. App. 3d at 388, 109 Cal. Rptr. at 918.
Although all California cases prior to *In re Marriage of Lopez* had dealt with professional goodwill in the context of a sole practitioner, the *Lopez* court experienced no difficulty in handling the professional goodwill of a law partnership. The court stated that a trial court should consider the issue of professional goodwill as community property "whether related to that of a sole practitioner, a professional partnership or a professional corporation."9

The *Lopez* court analogized the value of the husband's interest in the law partnership to the efforts, time, and skills of a spouse which, in California, are community property.6 The court concluded that "if 'goodwill' in a professional practice as a going business is found to exist as an asset at the time of a marital dissolution, such asset is subject to the innumerable consequences" of community property law. It further reasoned that, depending upon the particular circumstances of the case, such professional goodwill could be "separate property, community property, or varying degrees of both."61

The *Lopez* court also indicated that courts should not ignore the existence of professional goodwill merely because it is "elusive, intangible, difficult to evaluate and will ordinarily require special disposition."62 Because the determination of the existence of goodwill in a professional practice is a vital inquiry, the *Lopez* court established several factors which may be used in determining the existence or nonexistence of goodwill.63 These factors include: (1) the practitioner's age, health, and past demonstrated earning power; (2) his professional reputation in the community as to his judgment, skill, and knowledge; (3) his comparative professional success; and (4) the nature and duration of his business as a sole practitioner or as a member of a partnership or professional corporation to which his professional efforts have made a proprietary contribution.64 Additionally, the court stated that the expectancy of future earnings should not be the basis

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61. 38 Cal. App. 3d at 107, 113 Cal. Rptr. at 67.  
63. Id.  
64. 38 Cal. App. 3d at 109-10, 113 Cal. Rptr. at 68.  
65. Id.
for determining the value of professional goodwill, but rather, should be a factor in determining the existence of such an asset.66

Professional goodwill is community property in California if it is found to have accrued to the professional spouse's practice during the marriage. Professional goodwill as community property represents a portion of the community's interest in the professional spouse's practice as a going concern. This portion has been referred to by the California appellate court, in In re Marriage of Foster, as "community goodwill."67

Washington

The courts of the state of Washington first classified professional goodwill as community property in In Re Marriage of Lukens.68 In Lukens, the appellate court, which based its reasoning upon the California decisions discussed previously,69 found that professional goodwill was an asset of a professional practice that should be included in the

66. Id. In a subsequent case, In re Marriage of Foster, 42 Cal. App. 3d 577, 117 Cal. Rptr. 49 (1974), the court significantly noted that goodwill may exist in a professional practice or in a business which is founded upon personal skill or reputation. 42 Cal. App. 3d at 582 n.2, 117 Cal. Rptr. at 52 n.2.

67. 42 Cal. App. 3d at 583-84, 117 Cal. Rptr. at 53. California courts accept the fact that professional goodwill is community property; issues focus upon the existence and valuation of the professional goodwill. See In re Marriage of Slater, 100 Cal. App. 3d 241, 160 Cal. Rptr. 686 (1979), which involved a dispute as to the valuation of a husband's interest in a medical partnership, which included the valuation of the partnership's goodwill. The appellate court reversed the trial court's valuation of the husband's interest in the group medical practice. In re Marriage of Webb, 94 Cal. App. 3d 335, 156 Cal. Rptr. 334 (1979), involved a dispute about the value of the goodwill of a husband's private investigation business. In finding that goodwill could exist in a private investigation business, the court quoted Foster. "Goodwill may exist in a professional practice or in a business which is founded upon personal skill or reputation." 94 Cal. App. 3d at 344, 156 Cal. Rptr. at 339, quoting 42 Cal. App. 3d at 582 n.2, 117 Cal. Rptr. at 52 n.2. In In re Marriage of Aufmuth, 89 Cal. App. 3d 446, 152 Cal. Rptr. 668 (1979), the appellate court upheld the trial court's determination that a husband had no goodwill interest of any value in a law firm, a professional corporation. In In re Marriage of Barnert, 85 Cal. App. 3d 413, 149 Cal. Rptr. 616 (1978), the major issue as to goodwill was the method and time of valuation of a husband's medical practice (sole practitioner). In re Marriage of Foster, 42 Cal. App. 3d 577, 117 Cal. Rptr. 49 (1974), also involved the professional goodwill in a husband's medical practice. See also In re Marriage of Denny, 115 Cal. App. 3d 543, 171 Cal. Rptr. 440 (1981); In re Marriage of Winn, 98 Cal. App. 3d 363, 159 Cal. Rptr. 554 (1979).


property division. The husband in this case was an osteopathic physician who enjoyed a large clientele and a very successful practice. Dr. Lukens had argued that as a sole practitioner, any goodwill associated with his practice was personal and unmarketable, and, therefore, valueless. The court, however, rejected this reasoning and recognized that although the goodwill of Dr. Luken's practice was not readily saleable, it did have a value. The court noted that "so long as he maintains his osteopathic practice . . . he will continue to receive a return on the goodwill associated with his name."  

In 1979, the issue of professional goodwill at marital dissolution reached the Washington Supreme Court. In re Marriage of Fleege involved the question of whether the goodwill of a husband's dental practice was an asset subject to division as an item of community property. The court in Fleege adopted the reasoning of the appellate court in Lukens and noted that "the modern tendency is to acknowledge the economic facts and take such [professional] goodwill into account." The Washington Supreme Court reversed the appellate court's decision not to include professional goodwill as an asset of community property and specifically found that professional goodwill existed in Dr. Fleege's practice. The court in Fleege held: "The value of goodwill to the professional spouse, enabling him to continue to enjoy the patronage engendered by that goodwill, constitutes a community asset and should be considered by the court in distributing the community property."  

Following the Fleege decision, two Washington appellate court decisions, In re Marriage of Freedman and In re Marriage of Kaplan, dealt with the professional goodwill of a husband's law practice. The
court in Freedman said that the issue of whether professional goodwill could be community property was foreclosed by the Fleege decision. The Freedman court further stated that there was no difference between the professional practice of a dentist and that of an attorney. The Kaplan court felt foreclosed by both Fleege and Freedman.

The courts in Freedman and Kaplan used imprecise language and associated goodwill with the person of the professional, rather than with the practice itself. The Fleege court, on the other hand, spoke of the professional goodwill of the practice and the professional spouse's interest therein and contribution thereto. The Fleege approach is clearer than the Freedman-Kaplan approach because speaking of the goodwill of the professional person, rather than of the goodwill of the practice, is extremely close to evaluating the professional spouse's future earning potential. Louisiana courts should follow the rationale of the Fleege court; they should view the community's interest in professional goodwill as that portion of the goodwill attributable to the professional spouse's interest in the practice. This approach, which is also employed by California courts, should be controlling whether the practice is a sole proprietorship, a professional partnership, or a corporation.

New Mexico

The New Mexico Supreme Court, in Hurley v. Hurley, classified professional goodwill as community property. The court distinguished the individual's right to practice a profession from the value of the professional's practice as a business, and stated, "once [profes-

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81. 23 Wash. App. at 29, 592 P.2d at 1126.
82. 23 Wash. App. at 504-05, 597 P.2d at 440. See also Suther v. Suther, 28 Wash. App. 838, 627 P.2d 110 (1981), in which the court held that in valuing the husband's interest in a mechanical contracting business, a close corporation, the goodwill of the corporation must be included.
84. 91 Wash. 2d 327-30, 588 P.2d at 1138-40.
86. 94 N.M. 641, 615 P.2d 256 (1980).
87. 615 P.2d at 259. The Hurley court noted that the right to practice a profession is a property right which cannot be classified as community property. See note 49, supra, where it is noted that the Todd court made a similar statement.
sional goodwill's] existence and value are established, it should be in-
cluded in and divided along with other community property."\textsuperscript{88}

\textit{Arizona}

An Arizona appellate court, in \textit{Wisner v. Wisner},\textsuperscript{89} dealt with the existence of goodwill in a husband's professional medical corporation. The wife in \textit{Wisner} had argued that a professional corporation could possess goodwill.\textsuperscript{90} The \textit{Wisner} court responded by stating, "We do not reach this question, however, since in our opinion, the trial court made no such finding [that a professional corporation cannot possess goodwill]."\textsuperscript{91} The court chose to limit its decision to a reversal of the trial court's finding that "there was no goodwill value to be attached to \textit{this} professional corporation."\textsuperscript{92} Although the \textit{Wisner} court limited its decision to the particular corporation at issue and refused to consider the general question of the classification of professional goodwill as community property,\textsuperscript{93} the decision does indicate that Arizona courts, when again presented with the issue of professional goodwill, may follow the approach of the community property states discussed above.

\textit{Texas}

The Texas Supreme Court, in \textit{Nail v. Nail},\textsuperscript{94} refused to classify the professional goodwill of a sole practitioner's medical practice as community property. The \textit{Nail} decision was based upon the court's reasoning that "the accrued goodwill in the medical practice of Dr. Nail . . . did not possess value or constitute an asset separate and apart from his person, or from his individual ability to practice his profession."\textsuperscript{95} Significantly, however, the court expressly left open the issue as to the goodwill of a professional partnership or corporation.\textsuperscript{96}

\textsuperscript{88} 615 P.2d at 259. \textit{See} Lucas v. Lucas, 95 N.M. 283, 621 P.2d 500 (1980), wherein the Supreme Court of New Mexico distinguished \textit{Hurley} and held that a husband's contract not to compete was not community property when the stockholders received adequate value for their interests in a corporation. Of course, the stock and the subsequent proceeds of the stock sale were community property. 621 P.2d at 501-02.

\textsuperscript{89} 129 Ariz. 333, 631 P.2d 115 (1981).

\textsuperscript{90} 129 Ariz. at 336, 631 P.2d at 118.

\textsuperscript{91} Id.

\textsuperscript{92} 129 Ariz. at 336-37, 631 P.2d at 118-19.

\textsuperscript{93} 129 Ariz. at 336, 631 P.2d at 118.

\textsuperscript{94} 486 S.W.2d 761 (Tex. 1972).

\textsuperscript{95} 486 S.W.2d at 764. The appellate court in \textit{Nail v. Nail}, 477 S.W.2d 395, 398 (Tex. Civ. App. Fort Worth 1972), treated the professional goodwill of a husband's medical practice as community property. In so doing, the court adopted the approach of \textit{Mueller}.

\textsuperscript{96} 486 S.W.2d at 764.
The question of the goodwill of a professional corporation was addressed by the Fort Worth Court of Civil Appeals in *Geesbreght v. Geesbreght.* The corporation in this case was Dr. Geesbreght's emergency room service, which sold its services to local hospitals. Recognizing that this was one of the questions left open by *Nail,* the *Geesbreght* court held that the professional corporation did possess goodwill separate from the doctor's person and that this goodwill was an asset divisible upon divorce. The court felt that the hospitals to whom the corporation was providing its services would continue to use the corporation's services even after Dr. Geesbreght's departure.

The El Paso Court of Civil Appeals, in *Trick v. Trick,* likewise dealt with the goodwill of a professional corporation at marital dissolution. The *Trick* court followed the *Geesbreght* decision and affirmed an award to Dr. Trick's wife which represented her interest in his professional corporation's goodwill.

**Colorado**

A court in one noncommunity property jurisdiction, Colorado, has explicitly followed the rationale of the California and Washington decisions. A Colorado appellate court, in *In re Marriage of Nichols,* reversed a trial court's refusal to consider goodwill as an intangible asset of the husband's dental practice. After finding that goodwill did exist in the husband's dental practice and that it had a substantial value, the *Nichols* court held that "in a division of marital property, the value of goodwill incident to [the] husband's practice which is an asset acquired during his marriage, must be considered as marital property."

98. 570 S.W.2d at 435-36.
100. *Id.* at 773-74. The issue in *Trick* was whether or not the trial court had included the value of the goodwill of the professional corporation in the valuation of the stock. The appellate court found that the trial court had properly included the value of the professional goodwill in the stock valuation and that the trial court had attributed an appropriate value. *Id.* at 774.
102. 43 Colo. App. at 385, 606 P.2d at 1316. The court noted:

A professional, like an entrepreneur who has established reputation for skill and expertise, can expect his patrons to return to him, to speak well of him, and upon selling his practice, can expect that many will accept the buyer and will utilize his professional expertise. These expectations are a part of goodwill and they have a pecuniary value.

*Id.*

The other noncommunity property states that have considered professional goodwill as an asset available for equitable distribution are New Jersey, Oregon, and Il-
The preceding analysis demonstrates that courts in community property jurisdictions will likely classify professional goodwill as community property. This trend reflects an enlightened and modern view of the nonprofessional spouse's predicament. At divorce, the professional spouse will retain his or her proportional interest in the professional practice and its goodwill. During the marriage, the professional goodwill and the professional practice were enhanced because of the time and energy the professional spouse was able to devote to the practice. Yet, the contributions and sacrifices made by the non-

linois. In the New Jersey Supreme Court case of Stern v. Stern, the question on appeal was the valuation of the husband's law partnership interest. While reviewing the trial court's evaluation, the Stern court noted that goodwill was one of the factors which contributed to the value of the partnership. 66 N.J. 340, 344-47, 331 A.2d 257, 260-61 (1975). A New Jersey appellate court, in Grayer v. Grayer, reversed the trial court's valuation of the husband's interest in his professional law partnership because the trial court failed to include in its consideration a valuation of goodwill. 147 N.J. Super. 513, 520-21, 371 A.2d 753, 758 (1977).

In Levy v. Levy, the New Jersey Superior Court, Chancery Division, expressly dealt with professional goodwill as a marital asset subject to equitable distribution. The Levy court approved the approach of treating professional goodwill as a marital asset, but found that the husband's sole law practice had no goodwill to be included as an asset in determining the practice's value. 164 N.J. Super. 542, 555, 397 A.2d 374, 381 (1978). These New Jersey cases indicate that, when presented with the proper case, New Jersey courts may consider professional goodwill as a marital asset subject to equitable distribution upon divorce.

In the Oregon case of In re Marriage of Goger, the appellate court said: that "the goodwill of the professional corporation, is not only an asset, . . . but may, for a professional corporation such as husband's, [a professional dental corporation] often be the principal asset possessed by the corporation. As such, goodwill may be properly considered when an interest in a corporation is among the marital assets to be divided." 27 Or. App. 729, 557 P.2d 46, 47 (1976).

Recently, an Illinois appellate court, in the case of In re Marriage of Leon, noted that "the interest of a spouse in a law or medical partnership including the 'goodwill' of such business has been held to be marital property" in other jurisdictions. The court felt that the reasoning of these other jurisdictions was applicable to a husband's insurance brokerage business since this business was similar to the sole practitioner in a professional business. 80 Ill. App. 3d 383, 386, 399 N.E.2d 1006, 1009 (1980). Another recent Illinois appellate court decision, In re Marriage of White, held that a husband's professional dental corporation can be marital property and that goodwill was a factor to consider when valuing the professional dental corporation. The White court remanded for a new trial and instructed the trial court to receive evidence of the value of the dental corporation and to distribute the value. 98 Ill. App. 3d 380, 382-84, 424 N.E.2d 421, 432-24 (1981).

See also Rostel v. Rostel, 622 P.2d 429 (Alaska 1981); In re Marriage of Morris, 588 S.W.2d 39 (Mo. Ct. App. 1979). In Rostel, the Supreme Court of Alaska analogized the spouses' close corporation to a professional corporation since it was dependent upon the husband's skills. The court held that goodwill must be included in the valuation of the spouses' respective interests in their electrical supply corporation. 622 P.2d at 430-31.
COMMENTS

professional spouse enabled the professional spouse to immerse himself or herself in the professional practice. Since the whole theory of community property is that the nonprofessional spouse has contributed equally to the practice by freeing the professional spouse of marital responsibilities, professional goodwill created or enhanced under such circumstances should be recognized as community property.

Professional Goodwill as Community Property in Louisiana

If Louisiana courts determine that professional goodwill is property, they will have to classify it as community property or separate property or both.103 The classification of professional goodwill, like the

103. The Louisiana Civil Code classifies all property involved at termination of a marriage as separate property, community property, or degrees of both. LA. CIV. CODE arts. 2338, 2339, 2341, 2343, 2343.1, & 2344. See notes 115-123, infra, and accompanying text. For a through discussion of classification, see Note, Classification of Incorporeal Movable, 42 LA. L. REV. 744 (1982). The separate property of a spouse is his or hers exclusively. LA. CIV. CODE art. 2341. Separate property is composed of property acquired by a spouse prior to the establishment of the community, property acquired by a spouse with separate things or with separate and community things when the value of the separate things is inconsequential as compared to the value of the separate things, and property acquired by a spouse by inheritance or donation to him or her individually. Damages awarded to a spouse in an action for breach of contract against the other spouse or for loss sustained as a result of fraud or bad faith in the management of community property by the other spouse, and damages or other indemnity awarded to a spouse in connection with the management of his or her separate property are the separate property of a spouse. LA. CIV. CODE art. 2341. Additionally, things acquired by a spouse as a result of a voluntary partition of the community during the existence of a community property regime are a spouse's separate property. LA. CIV. CODE art. 2336 & 2341. When a spouse donates his or her undivided interest in a thing forming part of the community to the other spouse, that interest is transformed into the separate property of the donee spouse. The donor spouse's interest is likewise transformed into separate property, unless otherwise provided in the act of donation. Also, all natural and civil fruits, minerals, and mineral lease revenues produced from or attributable to the separate thing form part of the donee spouse's separate property, unless otherwise provided in the act of donation. LA. CIV. CODE art. 2343. Damages for personal injuries sustained by a spouse during the existence of the community are his or her separate property. Furthermore, the portion of damages for loss of earnings that would have accrued after termination of the community property regime, if the community is terminated in any manner other than by the death of the injured spouse, is the spouse's separate property. LA. CIV. CODE art. 2344.

"Ejch spouse owns a present undivided one-half interest in the community." LA. CIV. CODE art. 2336. The community is comprised of property acquired during the existence of the legal regime through the effort, skill, or industry of either spouse, property donated to the spouses jointly, and property acquired with community things or with community and separate things when the community things are not inconsequential as compared to the separate things. LA. CIV. CODE arts. 2338 & 2341. The natural and civil fruits of community property are community property. LA. CIV. CODE art. 2338. Also, the natural and civil fruits of the separate property of a spouse, minerals
classification of all property at dissolution of a marriage, will involve a determination of the manner and time of its acquisition. The Louisiana Civil Code article by which professional goodwill would be classified as community property is article 2338. In order to classify professional goodwill as community property, its manner of acquisition must be through the efforts, skill, or industry of the professional spouse and its time of acquisition must be during the existence of the community property regime. With professional goodwill, the manner of acquisition element is satisfied, for it is by virtue of the professional spouse's working contributions to the practice that the professional goodwill of the practice is either enhanced or harmed. The working contributions of the professional spouse to the practice are a direct result of his or her efforts, skill, and industry. The form of the practice should not matter; in a sole proprietorship, partnership, and corporation, the professional goodwill of the practice is involved as a distinct asset. To recognize the community's interest in the professional practice, Louisiana courts will have to determine the proportion of professional goodwill attributable to the professional spouse's efforts. In the majority of cases, this can be achieved by delineating the professional spouse's proportionate interest in the professional practice.

The second element of article 2338 is the time of acquisition. Louisiana courts have adopted three theories to determine the time of acquisition: produced from or attributable to a separate asset, and bonuses, delay rentals, royalties and shut-in payments arising from mineral leases on separate property are community property, unless reserved as separate property in the manner provided by law. LA. CIV. CODE art. 2339. The transfer by one spouse to the other of a thing forming part of his or her separate property, with a stipulation that it shall become part of the community, transforms that thing into community property. LA. CIV. CODE art. 2343.1. Additionally, that portion of the damages received for a personal injury sustained by a spouse which can be attributed to the expenses incurred by the community or those damages in compensation for the loss of community earnings is community property. LA. CIV. CODE art. 2344.

104. See Note, supra note 103, at 744.
105. See In re Marriage of Lopez, 38 Cal. App. 3d 93, 113 Cal. Rptr. 58 (1974). In Lopez the court stated:

The fact that "professional goodwill" may be elusive, intangible, difficult to evaluate and will ordinarily require special disposition, is not reason to ignore its existence in a proper case. . . . Whatever the result in a given case, we hold that where the issue is raised in a marital dissolution action, the trial court must make a specific finding as to the existence and value of the "goodwill" of a professional business as a going concern whether related to that of a sole practitioner, a professional partnership or a professional corporation.
acquisition of property to be classified. These three theories are: (1) inception of title, (2) vesting, and (3) pro rata. The inception of title theory classifies property according to marital status at the time of the initiation of the transaction granting the title. The vesting approach classifies property according to marital status at the time the right to title vests, usually at the completion of the transaction. The pro rata theory classifies property as partially community and partially separate; the relative portions depend upon the amount acquired during the existence of the community property regime and the amount acquired prior to the existence or after the termination of the marriage. Any one of these three approaches may be used when dealing with the classification of property under article 2338.

Because of the nature of professional goodwill, its time of acquisition will often be difficult to ascertain. Since professional goodwill is acquired over an extended period of time, there is no definitive time of acquisition. Goodwill is often acquired before, during, and after the existence of the marriage. The inception of title approach and the vesting approach cannot be used readily in determining the time of acquisition of an asset acquired over time. No definite moment in time exists from which the acquisition can be measured. Furthermore, these approaches are unsuitable because professional goodwill involves no title or transaction with which to establish the point of initiation or completion. Thus, the pro rata theory is the theory most suitable for determining time of acquisition of professional goodwill.

106. Note, supra note 103, at 745.
107. The inception of title theory is concerned with the initiation of the transaction involved. W. REPPY & W. DEFUNIAK, supra note 4, at 220.
109. The pro rata theory focuses upon "the overall percent of consideration paid over time by the community and by a spouse separately," and it provides for "concurrent ownership by community and separate estates." W. REPPY & W. DEFUNIAK, supra note 4, at 221. See, e.g., T. L. James & Co. v. Montgomery, 332 So. 2d 834, 852-53 (La. 1976).
111. Id.
112. Id.
113. See Note, supra note 103, at 766.
114. Use of the pro rata theory, although not explicitly rejected, has been questioned recently by the Louisiana Supreme Court in Curtis v. Curtis, 403 So. 2d 56 (La. 1981). In Curtis, the court implied that pro rata classification is not recognized in Louisiana. The issue in the case was whether a certain piece of immovable property was the separate property of the wife or community property. Mrs. Curtis bought
The following examples illustrate the utility and adaptability of the pro rata theory for determination of the time of acquisition. When property is acquired during the existence of the marital community by means of a down payment of separate funds; later payments on the credit portion of the price were made with rentals from the property. The act of sale declared that Mrs. Curtis bought the property with her separate funds and that it was her separate property. The Fourth Circuit Court of Appeal prorated the property and found that the community's interest was 52.5 percent and that Mrs. Curtis' separate interest was 47.5 percent. 388 So. 2d 816, 819 (La. App. 4th Cir. 1980). The supreme court reversed, stating that the court of appeal erred in holding that the property was partially community and partially separate property. 403 So. 2d at 57. The court held that unlike other community property states which characterize property paid for in part with separate and community funds as mixed, Louisiana law does not characterize property purchased in such a manner as mixed; the court stated Louisiana law classifies property as either community or separate. Id. at 57-58. The court then proceeded to classify the property as the separate property of the wife under the inception of title theory. The court indicated that the only right the community would have, if community funds were used to pay the credit debt, was the right of reimbursement. Yet, the court found that in the instant case the community did not have the right of reimbursement. Id. at 60. Thus, the Curtis court rejected the application of the pro rata theory to the classification of immovable property.

This implied rejection of the pro rata theory should be limited to immovable property. Because of the factual circumstances, the classification of the immovable property in Curtis as separate property by means of the inception of title theory was justified. However, to view the Curtis case as a total rejection of the pro rata theory in Louisiana would be improper. In many instances, the Civil Code does not address which theory should be used for determining the time of acquisition for classification purposes, as is evident by the broad language as to time used in both article 2338 and article 2341. Additionally, the legislature specifically provides for the use of the pro rata method in article 2344, which relates to damages for personal injury to a spouse. C.C. art. 2344. This article mandates that damages for the lost earnings of an injured spouse be prorated between the community and his or her separate estate. See Note, supra note 103, at 754. These articles indicate at least limited legislative approval of the pro rata theory.

Also, the implication left by the court in Curtis is not consistent with the action of the Louisiana Supreme Court over the last few years; on several occasions the court has utilized the pro rata classification theory. See, e.g., Due v. Due, 342 So. 2d 161 (La. 1977); T. L. James & Co. v. Montgomery, 332 So. 2d 834 (La. 1976); West v. Ortego, 325 So. 2d 242 (La. 1975). For example, in the classification of pension plans, which are similar in many ways to professional goodwill (see notes 23-26, supra and accompanying text), the Louisiana Supreme Court used the pro rata theory and found that the contributions to the plan made during the existence of the community entitled the nonmember spouse to the "right to share pro rata in the proceeds ultimately payable from the funds." T. L. James & Co. v. Montgomery, 332 So. 2d 834, 849-850 (La. 1976). Similarly, the Louisiana Supreme Court has used the pro rata theory in the classification of damages for personal injury to a spouse. West v. Ortego, 325 So. 2d 242 (La. 1975). Money damages were classified as either community or separate depending on whether the losses were incurred before or after dissolution of the community. Id. Finally, the pro rata approach was also used by the Louisiana Supreme Court in Due v. Due, 342 So. 2d 161 (La. 1977). In its classification of the rights under the husband's
had a sole professional practice prior to her marriage which she continued during her marriage and after her divorce. The practice itself is W's separate property, and the professional goodwill acquired prior to and after dissolution of the marriage is likewise W's separate property. Yet, the professional goodwill acquired through W's efforts during the marriage is community property. The value of the professional goodwill attributable to these time periods must be prorated between W's separate estate and the community. The determination of the value attributable to each period requires the use of experts in the business, accounting, and economics fields.

If W joins a professional partnership prior to the existence of her marriage, her interest in the practice itself and its professional goodwill acquired before the marriage are her separate property. However, her proportional interest in the professional goodwill arising after her marriage, represented by her proportional interest in the partnership, is community property because it was acquired by W's efforts during the existence of her marriage. The same analysis applies to the situation where W buys into a professional corporation prior to marriage and obtains a percentage of stock representing her interest. In this case, the stock is W's separate property and the cash dividends are community property, unless W reserves them as

contingent fee contract, the court found that the value of contract interests based upon the attorney's "services performed during the marriage" was community property. See Note, supra note 110, at 1199. Furthermore, the Due court indicated, in dictum, that it would apply the pro rata approach to the partnership interest of a spouse acquired partially prior to or after the existence of the community regime and partially during the existence of the community by the efforts, skill, or industry of the partner spouse. 242 So. 2d at 166.

The fact that the legislature did not provide for the use of any particular theory in the classification of property, other than damages for personal injury, does not mean that the legislature meant to foreclose the use of the pro rata approach in the classification of other assets; rather, it indicates a desire on the part of the legislature to leave the choice to the courts. Until the legislature indicates otherwise, Louisiana courts should continue using the pro rata theory to avoid unjust dispositions, at least when classifying incorporeal movables. See Note, supra note 103, at 760 & 765-68. See also, Sims v. Sims, 358 So. 2d 919 (La. 1978); Due v. Due, 342 So. 2d 161 (La. 1977); T. L. James & Co. v. Montgomery, 332 So. 2d 834 (La. 1976); West v. Ortego, 325 So. 2d 242 (La. 1975).

115. LA. CIV. CODE art. 2341. Property acquired by a spouse prior to the establishment of the community property regime is his or her separate property.
116. LA. CIV. CODE art. 2338. Property acquired during the existence of the legal regime through the effort, skill, or industry of either spouse is community property.
117. See LA. CIV. CODE art. 2341.
118. See LA. CIV. CODE art. 2338.
119. See LA. CIV. CODE art. 2341.
The professional goodwill of the corporation acquired during the existence of marriage is community property.\(^1\) The result is the same when \(W\) inherits the practice from a professional parent and then marries or when \(W\) inherits the professional practice during marriage and then commences professional work. In either case, the practice and its prior goodwill are the separate property of \(W\) and the professional goodwill acquired during the existence of \(W\)'s marriage by her efforts, skill, or industry is community property.\(^2\) These examples demonstrate that by using the pro rata theory, Louisiana courts will be able to deal adequately and fairly with the classification of professional goodwill as community property.

Methods of Valuing Professional Goodwill

Upon dissolution of the community, Louisiana courts will have to ascertain the present value of the "community" goodwill in order to account for it at partition. Numerous methods of valuation of goodwill exist and are used in business transactions.

Book Value

The method least desirable for valuing professional goodwill is the "book value" method. Book value represents the historical cost of an asset less accumulated depreciation and amortization.\(^3\) Therefore, only purchased goodwill would have a book value. Goodwill which has been developed would not appear on the books under generally accepted accounting principles.\(^4\) Book value rarely reflects the price that goodwill would bring in the open market; it does not reflect the excess earnings of the professional practice. The use of the book value method assumes that the value of goodwill is shown on the books, yet goodwill is often excluded as an asset on the books.\(^5\) Normally, book value is substantially lower than the market value of the professional goodwill.

\(^{120}\) See La. CIV. CODE art. 2339.
\(^{121}\) La. CIV. CODE art. 2338.
\(^{122}\) La. CIV. CODE art. 2341. Property acquired by a spouse by inheritance or donation to him or her individually is his or her separate property.
\(^{123}\) La. CIV. CODE art. 2338.
\(^{124}\) See Welch, Discovery and Valuation in a Divorce Division Involving a Closely-Held Business or Professional Practice, 7 COMM. PROP. J. 103, 106 (1980).
\(^{125}\) "[Book value] is an arbitrary and conventional thing unrelated or in opposition to real value." Annot., 47 A.L.R.2d 1425, 1426 (1956).
\(^{126}\) See Note, Divorce—Division of Property—Professional Corporation May Have Valuable Goodwill, Apart from Person of Individual Member, That Must Be Considered in Property Settlement on Divorce, 11 St. Mary's L. J. 222, 230 (1979).
A method of valuation more acceptable than book value is the use of agreements. These agreements often include partnership agreements, stock purchase agreements, and buy-sell agreements. Such agreements usually set forth a formula agreed upon by the members of the practice which is to be used in the valuation of goodwill or a member's proportional interest in the practice. The formulas are used to determine the value of a member's interest at death or retirement, and they are used when one of the members chooses to withdraw from the practice or another person wishes to enter the practice. Like book value, these agreements seldom reflect the market value or present value of the professional goodwill. Additionally, these agreements normally fail to account for the fact that at dissolution of a marriage, the professional spouse will take with him or her the goodwill he or she has acquired, since the professional spouse usually continues in the same practice.

Despite the undesirability of this method, such agreements, when existing, present a court with an easy way to value professional goodwill. This is reflected by the New Jersey case of *Stern v. Stern*. The court in *Stern* used the value of the professional spouse's interest, as set forth in the law partnership agreement, as the presumptive value of the professional spouse's interest in the partnership. The formula set out in the agreement was established to determine a partner's interest in the law partnership at death. Additionally, the California appellate court in *In re Marriage of Lopez* recognized this method as a legitimate manner of determining the value of professional goodwill. Thus, even though these agreements seldom reflect...
the present value of professional goodwill, they are useful tools for a court. If no agreement exists, however, the courts must turn to alternative methods of valuation.

**Fair Market Value**

The "fair market value" approach is the method of valuation preferred by courts which have valued professional goodwill at dissolution of a marriage. Fair market value is the price agreed upon by a willing buyer and a willing seller when both have knowledge of all pertinent facts and circumstances and neither is compelled to act.\(^{133}\) As it relates to professional goodwill, fair market value is the price at which the professional practice would sell if the market value of all of the practice's tangible assets and other intangible assets was excluded.\(^{134}\) Since professional goodwill is not sold in most dissolution cases, the determination of its fair market value actually will be an estimation. By use of expert testimony (that of an accountant or an economist) and of testimony of members of the same profession, a value which approximates the present price the professional goodwill would bring on the open market can be ascertained. Additionally, the price paid for the professional goodwill of comparable practices can be used for establishing the fair market value of the professional goodwill at issue.

The fair market value method is preferred by courts in dissolution cases because it does not take explicitly into consideration the future earning capacity of the professional goodwill or the post-dissolution efforts of the professional spouse. As expressed by the *Fortier* court,

> the value of the goodwill must exist at the time of the dissolution. That value is separate and apart from the expectation of the spouse's future earnings. . . . [S]ince community goodwill may be evaluated by no method that is dependent upon the post-marital efforts of either spouse, then, as a consequence, the value of community goodwill is simply the market value at which the goodwill could be sold upon dissolution of the marriage, taking into consideration the expectancy of the continuity of the practice.\(^ {135}\)

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135. 34 Cal. App. 3d at 388, 109 Cal. Rptr. at 918. The "value must be established without dependence upon the potential or continuing net income of the selling doc-
Courts in later cases have acknowledged the philosophy of community property systems which dictates that post-marital efforts cannot be considered in the valuation of community goodwill; yet, courts have not accepted the fair market method as the exclusive method available for valuation. The fair market value of an asset necessarily reflects its potential for economic growth, because the price a willing buyer will pay depends upon whether he or she feels that the asset is capable of producing a return or profit in the future. The price paid, therefore, reflects the goodwill's "present dollar value of the opportunity for expected business earnings." Thus, determination of fair market value necessarily involves taking into account the future earning potential of the professional goodwill; otherwise, the goodwill would attract a deflated price or suffer a valuation of "zero." However, the fair market value approach, while taking earning potential into consideration, does not set a dollar value on the future earning capacity except to the extent that it reflects the present value of the professional goodwill.

The fair market value approach to valuation is advantageous, as it often reflects the present value of the property as viewed by the open market. Yet, there are several disadvantages to the use of this method. One problem arises when the practice in question is a law practice. It is unethical to sell the goodwill of a law practice. Thus, there is no readily available market from which the fair market value...
of the goodwill of a law practice can be determined. This problem may plague many other professional practices, because many professions, due to their degree of specialization, have relatively small markets, if any, available. In these situations, the determination of fair market value is more of a guess than a reflection of the professional goodwill's true value. Furthermore, where there is no actual market, such that no potential buyer can be found, theoretically, there is no goodwill at all, for its market value would be "zero."\(^{141}\)

Another problem occurs when the market is unstable. In a depressed market, the market value of the professional goodwill will be deflated. Conversely, if the market is temporarily inflated, the price designated will be increased superficially.

A final problem arises in dissolution cases because normally the professional practice is not sold to a third party. Because the professional practice continues as it did before dissolution and the professional spouse is generally more capable of serving the needs of his or her clientele than anyone else, the determined market value will probably be higher than it would be if actually sold to a third person.\(^{142}\) The market value actually will be the value of the goodwill to the professional spouse, rather than the value of the goodwill to third persons buying the practice.\(^ {143}\)

**Excess Earnings**

Economists view professional goodwill as a professional practice's excess earnings.\(^ {144}\) The goodwill of the professional practice "constitute[s] a unique resource which that [practice] possesses and others do not."\(^ {145}\) Every professional practice is not equally desired by the general public; rather, each practice possesses individual characteristics which cause its clientele to choose it over other similar practices.\(^ {146}\) The continued patronage of a practice's clientele creates that practice's excess earnings or professional goodwill.

The method for determining the value of professional goodwill based upon past excess earnings is generally referred to as the capitaliza-

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142. See Udinsky, supra note 139, at 94.
144. See Kennedy & Thomas, supra note 128, at 5; Udinsky, supra note 139, at 94; 16 AM. JUR. PROOF OF FACTS 2D *Forensic Economics* § 13, at 285-87 (1978).
146. See Udinsky, supra note 139, at 93.
tion of excess earnings. One such valuation method, commonly known as the "formula" method, views goodwill as the amount of earnings in excess of a fair return on net tangible assets and other invested capital. This value is determined by a three-step process. First, the average net earnings for a representative period preceding the valuation date is determined. This period is seldom less than a five year period. The valuation date in dissolution cases is the date of dissolution. Next, an amount representing a fair return on the average tangible assets for the same period must be deducted from the average net earnings. This amount is usually from 8 to 10 percent, depending upon the degree of risk involved in the practice. The greater the risk, the higher the return percentage used. The remainder, if any exists after deduction of the return on tangible assets from net earnings, is the average annual earnings of the intangible assets of the business. Goodwill is the major intangible asset of most businesses; in some cases, goodwill is a business's only intangible asset. The third step involves capitalization of the intangible asset earnings (the excess earnings) on the basis of an appropriate percentage, usually 15 to 20 percent. Higher percentages are used for higher risk practices, and lower rates are used for lower risk practices. "The [eight] percent rate of return and the [fifteen] percent rate of capitalization are applied to tangibles and intangibles, respectively, of [practices] with a small risk factor and stable and regular earnings; the [ten] percent rate of return and [twenty] percent rate of capitalization are applied to [practices] in which the hazards of business are relatively high." The procedure described is the basic formula method; however, individual cases may call for special adjustments, such as the elimination of earnings for atypical years.

Another method of capitalization of excess earnings, better suited to the case of a sole practitioner, computes excess earnings by comparing the average income of the independent professional to the average income of a salaried professional of equivalent stature. An amount for a fair return on the professional's invested capital is then deducted from the difference in these two incomes. The resulting difference represents the excess earnings, or the income derived from

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147. Id.
the professional goodwill. These excess earnings are then capitalized at an appropriate rate, usually 10 to 20 percent, depending on the risk factor of the practice, to determine the present value of the professional goodwill of the professional spouse's practice.\footnote{152}

These capitalization of excess earnings methods are viable alternatives for determining the present (actual) value of professional goodwill based on the past experience of the practice and its expectations of success in the future, as represented by the percentages of capitalization.\footnote{153} These methods are preferred by the nonprofessional spouse, because they generally yield higher valuations than the market value approach, even when a relatively low percentage rate is used.\footnote{154}

The capitalization of excess earnings approach was recognized as a legitimate method for valuing professional goodwill in the New Mexico case of Hurley v. Hurley.\footnote{155} In Hurley, the New Mexico Supreme Court acknowledged the Fortier limitation that the valuation of professional goodwill should not be dependent on a professional spouse's potential earning capacity. Yet, the court stated that "the value of community goodwill is not necessarily the amount of money that a willing buyer would pay for such goodwill. . . . We feel that [capitalization of excess earnings] is a legitimate, although not an exclusive, method of evaluation of community goodwill which should have been considered by the trial court."\footnote{156}

\textit{Multiples of Income}

An alternative accounting method of calculating the value of professional goodwill is to use a multiple of gross or net income. This method assumes that goodwill is directly reflected by the gross or net income of the practice.\footnote{157} The gross or net income of the practice over specified periods of time (either monthly or yearly) is multiplied by specified factors to determine the value of the professional goodwill.\footnote{158} The factors vary depending upon the field of practice.\footnote{159}

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\item \footnote{152} See 16 AM. JUR. PROOF OF FACTS 2D Forensic Economics §§ 57-63, at 375-82 (1978). See also Kennedy & Thomas, \textit{supra} note 128, at 5.
\item \footnote{153} See Comment, \textit{supra} note 137, at 294.
\item \footnote{155} 94 N.M. 641, 615 P.2d 256 (1980).
\item \footnote{156} 615 P.2d at 259, \textit{citing In re} Marriage of Fortier, 34 Cal. App. 3d 384, 109 Cal. Rptr. 915 (1973).
\item \footnote{157} See Norton, \textit{supra} note 127, at 12-13.
\item \footnote{158} Id. \textit{See Bergman, The Valuation of Goodwill}, 53 L.A.B.J. 87, 93 (1977) (now entitled \textit{L.A. LAW}).
\item \footnote{159} Bergman, \textit{supra} note 158, at 93-94.
\end{itemize}
This method, as well as the capitalization of excess earnings method, was used in a 1956 California case, *Mueller v. Mueller*, in determining the value of professional goodwill for dissolution purposes. The weakness of the multiples of income method is that it fails to subtract, from the calculation of the value of goodwill, the fair market value of the tangible assets and the fair market value of the initial capital investments of the professional. Thus, the valuation determined by this method may be higher than the actual value of the professional goodwill. This method has not been accepted by the courts as readily as the fair market value or capitalization of excess earnings methods, yet it has not been entirely foreclosed as an alternative.

The preceding discussion shows that the methods available to Louisiana courts for the valuation of professional goodwill are varied and limitless. As expressed by the *Hurley* court, "[t]here appears to be no definitive rule for the determination of the value of good will." Despite the restrictive language of *Fortier*, valuation methods which take the expectancy of economic potential into consideration can still be used as long as their calculations do not include a monetary value for future earnings or post-dissolution efforts of the professional spouse. The determination of the *present* value of any asset necessarily includes a consideration of its potential for economic growth.

**Partition of Professional Goodwill Between the Spouses**

Professional goodwill, after it has been recognized as property, classified as community property, and valued according to its present value, must be accounted for between the spouses at dissolution of the community. In Louisiana, the method of dividing community property at dissolution of the community is by partition. The two

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160. 144 Cal. App. 2d 245, 252, 301 P.2d 90, 95 (1956).
161. See text at notes 133-156, supra.
164. See text at notes 137-139, supra.
categories of partition provided for in the Civil Code are voluntary partition and judicial partition. If the spouses are in agreement, they can effectuate a voluntary partition of the community property and can stipulate this agreement in court. When the spouses cannot agree to a voluntary partition, either spouse has the right to file for a judicial partition. Regardless of the category of partition chosen, it will be difficult for Louisiana courts to partition professional goodwill because of its incorporeal nature and its physical indivisibility from the practice.

In 1981, the Louisiana legislature adopted Civil Code article 2369.1. This article deals specifically with partition at dissolution of the community and supplements the Civil Code articles dealing with partition. Article 2369.1 introduces the "aggregate theory" of partition in kind to Louisiana in order to ensure just partitions between spouses. Prior to the adoption of article 2369.1, Louisiana had followed the "item theory" of partition in kind; however, all other community property states had followed some form of the "aggregate theory."
Both theories are methods of partition in kind, for both involve the manner of physical distribution of assets or property. Under the "item theory," each item of community property that is susceptible of division in kind is divided equally between the spouses. Those items that are not susceptible of division in kind are partitioned by licitation. The "aggregate theory" involves the allocation of certain assets to one spouse and the allocation of the remaining assets to the other spouse, even though individual items are not divisible in kind.\(^{173}\) Louisiana's "aggregate theory" further requires that the net value of the aggregate of assets assigned to each spouse be equal. The "equitable" or "just" distribution method, followed by a majority of the community property states,\(^ {174}\) does not require a net equality in the allocation of assets; rather, it requires only that the assignment of certain assets to one or the other spouse be fair or equitable. Article 2369.1, by stipulating that the net values must be equal, rejects the notion of equitable distribution in Louisiana.

Adoption of the "aggregate theory" demonstrates the Louisiana legislature's willingness to provide a flexible partition mechanism for the spouses.\(^ {175}\) Article 2369.1 provides for "a partition of the community

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\(^{173}\) See Note, supra note 52, at 811-12.

\(^{174}\) See note 172, supra, and accompanying text.

\(^{175}\) The "item theory," traditionally followed by Louisiana, failed to provide flexible alternatives, particularly to spouses who had assets of substantial value which were insusceptible of partition in kind and which one or the other spouse did not really wish to sell. In such a situation, the spouses were usually left with the unsatisfactory alternative of judicial sale. For example, the "item theory" partition of the controlling stock of a closely held corporation would result in a loss of control of the company by the interested spouse. See LA. CIV. CODE art. 2334 (repealed by 1979 La. Acts, No. 709, § 1). Under the present law the stock would be classified as community property because of article 2338.

Yet, under the old law, partition by licitation would result perhaps in total loss of the stock or in receipt of less than its actual value. See Note, supra note 52, at 812-13. See also, Comment, supra note 165, at 185-86. In Ballard v. Ballard, 367 So. 2d 1223 (La. App. 2d Cir. 1979), the partition of the stock of Ballard's, Inc., a closely held corporation owned by the community and managed by the husband, was at issue. The trial court ordered that the stock, although susceptible of partition in kind, be partitioned by licitation because if it was divided fifty-fifty the total value of the two parcels of stock would be less than the present value of all or 100% of the stock. The Louisiana Second Circuit Court of Appeal reversed the trial court's method of partitioning the stock and found that the stock of this closely held corporation should be partitioned in kind because of the circumstances of the spouses. The court believed the detriment that might be suffered by the unequal bidding power of the wife in a partition by licitation required a partition in kind. The wife would have been at
in kind by allocation of assets and liabilities of equal net value to each spouse." As applied to professional goodwill, this article can offer substantial assistance to the courts in partitioning community property between the spouses at dissolution of the marriage. The article allows the value of professional goodwill to be considered in a partition. Under the law prior to the adoption of 2369.1, professional goodwill, assuming there was no voluntary partition, was not susceptible of "item theory" partition in kind, for professional goodwill is an asset indivisible by nature. Professional goodwill cannot be partitioned by licitation individually because the professional goodwill of a practice cannot be sold separately from the practice itself. The court would have to order the sale of the professional practice with its professional goodwill in order to sell the professional goodwill. It is unlikely that a court will order the sale of a professional practice, even when the practice is community property. Furthermore, in many instances, a practice will be the separate property of the professional spouse. Thus, a court should not be able to force the sale of a practice with the professional goodwill.

A serious disadvantage if there had been a partition by licitation because she could not have afforded to bid for the stock at public auction. The court noted that because there was no real market for the stock of a close corporation, it was reasonable to assume that only the parties or their representatives would bid at a public auction. Thus, in this case, the husband was most likely to have been the sole bidder at the public sale and the wife's interest in the close corporation probably would not have been protected adequately. Because of these fears, the court decided that a partition in kind, although it would leave the parties in substantially the same situation as prior to the partition, would assure each spouse's receipt of his or her share of the reasonable market value of the corporate stock. 367 So. 2d at 1226.

In most cases under the old law, the interested spouse could retain the controlling stock of a closely held corporation only by reaching a voluntary agreement or by purchasing all of the stock at a judicial sale. The first alternative could force the interested spouse to accept terms that he or she felt were unacceptable in order to avoid loss of the controlling interest or total loss of the stock through judicial sale. The second alternative, buying all of the stock at judicial sale, involved a substantial investment of cash as well as the risk of being overbid, which again would result in total loss of the stock. Thus, this kind of situation often left the spouses in a dilemma unresolved by the Civil Code. Today, this dilemma can be alleviated in most instances by the application of article 2369.1. In the situation described above, a court can allocate the stock to the spouse interested in keeping it and give the other spouse other assets of equal net value, assuming sufficient assets are available to be so allocated. La. Civ. Code art. 2369.1.

178. In Deliberto v. Deliberto, the First Circuit Court of Appeal, in dictum, indicated that under the new matrimonial regimes law and the new property articles, the family home and the land upon which it is built would be classified differently. The court
Comments

The old scheme failed to provide the nonprofessional spouse with any acknowledgment of his or her interest in the professional goodwill except by the possible right of reimbursement. Reimbursement was the only remedy available to the nonprofessional spouse when the practice was the separate property of the other spouse; this situation still holds true today because Louisiana courts have not yet classified professional goodwill as community property. The nonprofessional spouse, under both the old and the new law, is entitled at

suggested that it would classify the real estate as the separate property of the husband, while it would classify the family home on this separate property as community property. However, the Deliberto case was decided under the old community property regime, since the community involved had existed under the old regime. The husband and wife had built a home during the existence of the marriage upon the husband’s separate property. The court held that, upon dissolution, the wife was entitled only to the right of reimbursement, that is, one-half of the value of the enhancement of the husband’s separate property due to improvements by community funds. In a footnote, the court indicated that under the theory of real subrogation expressed in new Civil Code article 491, the home would be community property because it was built with community funds. The land upon which the house sat would remain the husband’s separate property. Thus, rather than just providing the community with the right of reimbursement, the court would classify each piece of property separately, even though they were physically attached.

Furthermore, the court suggested that it would require partition by licitation of the house and the land to satisfy the community property interests of the wife in the home. This suggestion resulted from the fact that partition by licitation was the only alternative to “item theory” partition in kind at the time of the Deliberto opinion, and the house was not capable of being partitioned in kind.

The different classifications of the house and the land raise the same partition problems encountered when the professional practice is separate property and the professional goodwill is community property. The house is attached to the land just as the goodwill is attached to the practice. The sale of the home requires the sale of the husband’s separate property just as the sale of the community goodwill requires the sale of the professional spouse’s separate practice. Although the conclusion of the court indicates that it would require a sale of the husband’s separate property to realize a sale of the community home, it seems unlikely that a court will require a person to sell his or her separate professional practice to effectuate a partition of the goodwill. These problems should not plague the Louisiana courts today because article 2369.1 provides a potential solution. Under article 2369.1, the home and the goodwill can be given to the spouse who owns the land and the practice and equivalent assets or a promissory note can be given to the other spouse, thereby giving each equal net values.


179. LA. CIV. CODE art. 2408 (repealed by 1979 La. Acts, No. 709) & LA. CIV. CODE art. 2368. Under article 2408, a spouse was entitled to reimbursement when the separate property of the other spouse was increased or improved during the marriage by the common labor of either spouse. If the increase was due to the ordinary course of things, the spouse was not entitled to reimbursement. The reimbursement amount was one-half the value of the increase. See, e.g., Downs v. Downs, 410 So. 2d 793, 797 (La. App. 3d Cir. 1982).


181. LA. CIV. CODE art. 2368.
least to reimbursement for one-half of the value of the enhancement of the separate practice if he or she can prove that this increase is due to the common labor or industry of either spouse. But, if this increase is due to economic changes, the nonprofessional does not receive any reimbursement. This remedy may be inadequate because reimbursement of one-half of the enhancement to the separate practice may not reflect the nonprofessional's property interest in the present value of the professional goodwill. Furthermore, reimbursement does not give the nonprofessional spouse a distinct property interest.

Presently, if the practice is community property, no right of reimbursement is due the nonprofessional spouse; the sole recognition given professional goodwill is as a factor contributing to the value of the practice. The nonprofessional spouse is denied a distinct property interest in what is perhaps the most valuable asset of the professional practice.

Article 2369.1 provides an avenue for adequate recognition of the nonprofessional spouse's property interest in professional goodwill. The courts now can award the goodwill to the professional spouse and allocate property or assets of equal net value to the nonprofessional spouse. This system provides an alternative that allows the spouses to escape the inadequacy of the "item theory" of partition in kind.

The language of article 2369.1 suggests that partition by licitation should be a last resort. Initially, the article provides that there should be a partition in kind by allocation of assets if it is at all possible. The article then provides that only when the community or any part of it cannot be conveniently divided is there to be a partition by licitation. Thus, the order in which the legislature placed the

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183. **La. Civ. Code** art. 2408 (repealed by 1979 La. Acts, No. 709). Article 2368 does not state specifically, as did article 2408, that if the increase is due to the natural flow of commerce, no reimbursement is due. However, article 2368 does provide that reimbursement is due only for that labor which is uncompensated. Thus, the article implicitly indicates that only those increases due to the labor of the spouses shall be compensated by reimbursement. No reimbursement is due if the increase is caused by market changes or the compensated labor of the spouses.
184. See text at notes 30-32, supra.
185. "Item theory" partition in kind caused probable diminution in value of the community asset or loss or inconvenience to one of the spouses. The only alternative, partition by licitation, resulted in total loss of the property or the receipt of less than the actual value of the asset.
alternatives seems to establish “aggregate theory” partition in kind as a priority. The test of convenience under article 2369.1 should be the same test that existed under the prior law of partition at dissolution; when dividing property would diminish its value or create a loss or inconvenience to one of the spouses, partition by licitation should be required. However, the likelihood that partition by licitation will be used is greatly reduced by the adoption of the flexible “aggregate theory” of partition in kind.

Despite its attractiveness, new Civil Code article 2369.1 has numerous deficiencies. The article does not provide specific guidance in allocating assets; rather, it merely provides for the ultimate standard of equal net value. The article is result oriented and does not provide means for achieving the desired goal of net equality. Other deficiencies of article 2369.1 become apparent when professional goodwill is involved as the item of community property in dispute. A serious problem arises when the community does not own a sufficient amount of other valuable and substantial property which the court can allocate to the nonprofessional spouse to establish equal net value. In many cases, the value of the professional goodwill will be so high that the spouses often will not have other community assets of equal net value, thus preventing the “aggregate theory” partition. Nor is partition by licitation a viable alternative since professional goodwill cannot be sold separately from the practice, and it seems unlikely that a court will order a spouse to sell his or her professional practice, his or her means of livelihood. Therefore, the legislation offers no specific alternative by which the nonprofessional spouse can realize his or her one-half ownership interest in the goodwill of the professional practice.

A liberal reading of article 2369.1 would solve this problem by allowing the court to order the professional spouse to execute a promissory note payable to the nonprofessional spouse for one-half of the value of the goodwill. This note would represent the value owed to the nonprofessional spouse for one-half of the present value of professional goodwill at dissolution of the marriage. By giving a promissory note, the professional spouse actually purchases the other

188. See note 177, supra, and accompanying text.
189. See In re Marriage of Winn, 98 Cal. App. 3d at 364, 169 Cal. Rptr. at 555. In Winn, the appellate court affirmed the trial court’s valuation of $15,000 for the husband’s business, and its order that the husband purchase the wife’s one-half interest by executing a promissory note for $7,500. See also Comment, Identifying, Valuing, and Dividing Professional Goodwill as Community Property at Dissolution of the Marital Community, 56 TUL. L. REV. 313, 329-30 (1981).
spouse's interest in the goodwill; this has much the same effect as giving up other items of community property of equal net value. There should be no objection to the use of a promissory note to represent the value owed by the professional spouse to the nonprofessional spouse. A note is a thing of value, like cash or a check, and it can be easily sold and negotiated. Generally, the financial needs of both spouses would be best served if the note were paid in installments rather than on demand. Additionally, there is no reason why the note should not be interest-bearing. Interest will compensate the nonprofessional spouse for the loss of the use of the money or other assets he or she may have been allocated if the spouses had had other substantial assets at the time of dissolution, and interest will insure that the note's value over time will be equivalent to the present value of the professional goodwill. The court should order that the note be secured to further insure that the nonprofessional spouse will eventually receive the value of his or her interest in the goodwill.

190. See In re Marriage of Tammen, 63 Cal. App. 3d 927, 931, 134 Cal. Rptr. 161, 163 (1976). The interest on the note should be sufficient to insure that the note will be worth its stated face value in the market, since the stated face value represents the amount necessary to equalize the division. If the interest is not sufficient, the note may be substantially discounted if negotiated, and the spouse receiving the note will not receive equal value as required by article 2369.1. See, e.g., In re Marriage of Hermann, 84 Cal. App. 3d 361, 366, 148 Cal. Rptr. 550, 553 (1978). Also, if the interest is not a sufficient rate, it will not compensate the spouse for the effects of inflation or the loss caused by the inability to use the asset or assets he or she would have received. At the minimum, the interest rate should be the legal interest rate, presently twelve (12) percent, unless the court finds that the circumstances of the spouses warrant a lower rate. Whether a higher rate, such as that being presently charged in the market, is necessary should depend upon the circumstances, needs, and abilities of the spouses. The court should at all times keep in mind that the goal is an equal division of the assets and should tailor the interest rate to achieve this equality. Furthermore, the interest rate may depend upon the term of the note. A short term note would require a lesser rate of interest than a long term note because of the effects of inflation and the fact that the spouse awarded the note in lieu of his or her interest in the asset must wait a longer period of time to realize his or her interest.

191. The note awarded should be secured in a manner that will reasonably insure receipt of the value of the nonprofessional spouse's interest in the professional goodwill. The security, like the interest rate, should be tailored to the circumstances, needs, and abilities of the spouses. The professional spouse, for example, could pledge his or her interest in the practice to secure the note. See La. Civ. Code arts. 3133-3175 (specifically arts. 3153 & 3155). See, e.g., In re Marriage of Slater, 100 Cal. App. 3d 241, 248, 160 Cal. Rptr. 686, 688 (1979) (involved the pledge of a husband's one-half partnership interest in a professional medical partnership to secure a note the husband was ordered to execute in favor of the wife in order to equalize the community property division). The court could require the professional spouse to mortgage any immovable property he or she may own. See La. Civ. Code arts. 3278-3310. Additional-
The use of a promissory note is further supported by the fact that article 2369.1 closely resembles California Civil Code section 4800. Section 4800 provides for the equal division of community property.\(^{192}\)

In interpreting this section, California courts have allowed a spouse to equalize the division of assets at dissolution by execution of a promissory note.\(^{193}\) This use of a promissory note allows the professional spouse to compensate the nonprofessional spouse for his or her ownership interest in the goodwill in a manner advantageous to the economic interests of both spouses. The professional spouse is not forced to suffer a substantial loss at one time.

An additional weakness is article 2369.1's failure to establish a time for the determination of the value of the community's assets and liabilities. In Louisiana, the time of valuation of community property for purposes of a judicial partition is when the notary effectuates the partition.\(^{194}\) The value of each asset is established by the notary with the assistance of appraisers\(^{195}\) or by the stipulation of the parties.\(^{196}\) Since the spouses are co-owners in indivision of the community property until it is partitioned, the valuation of the asset as close to the homologation of the partition as possible will accord each spouse the present value of his or her interest in the community property.\(^{197}\) When the asset is one that is acquired over time, such as professional goodwill, the court could require the professional spouse to give the nonprofessional spouse a chattel mortgage on any equipment or machinery he or she may own. See La. R.S. 9:5351-5356 (Supp. 1981). See also La. R.S. 9:5357-5372 (Supp. 1981), relating to the mortgage of all corporeal movables used in any commercial, business, or industrial activity by mortgage of the immovable on which they are located. These three forms of security are merely illustrative; other forms of security may be determined by the court or suggested by the parties.

\(^{195}\) La. Code Civ. P. art. 3132.
\(^{196}\) 367 So. 2d at 1224.
\(^{197}\) Thus, when an appellate court reviews the method of partition chosen by the trial court, the court uses the present value of the disputed assets. See National American Bank of New Orleans v. Cleveland, 273 So. 2d 848, 850 (La. App. 4th Cir. 1973). When the partition is a voluntary partition, the value of the community assets is designated by the spouses. If the voluntary partition is later attacked by one of the spouses as lesionary, the court, in order to ascertain if there has been lesion, uses the fair market value of the community assets at the time of the partition agreement. La. Civ. Code arts. 1398 & 1570-71. See Pitre v. Pitre, 162 So. 2d 430, 431 (La. App. 3d Cir. 1964), aff'd, 247 La. 594, 172 So. 2d 693 (1965). See also Bedwell v. Bedwell, 399 So. 2d 685, 686 (La. App. 1st Cir. 1981); Watkins v. Watkins, 376 So. 2d 1316, 1317 (La. App. 1st Cir. 1979); Beatty v. Vining, 147 So. 2d 37, 45 (La. App. 2d Cir. 1962).
will, time of valuation difficulties occur. The value of professional goodwill acquired during the existence of the community should be the value of the goodwill from the date of marriage until the date of dissolution of the marriage. This time frame for valuation was alluded to in *Hamilton v. Hamilton*199 by the Louisiana Second Circuit Court of Appeal when it determined for partition purposes the wife's interest in the husband's retirement plan and thrift plan benefits which were acquired before, during, and after the marriage.199 The *Hamilton* court awarded the wife a one-half interest in the amount of benefits credited to the husband during their marriage200 and indicated that the wife's interest could be appraised at a certain monetary value.201 Additionally, in *Laffitte v. Laffitte*,202 the Second Circuit Court of Appeal awarded the wife a one-half interest in the portion of her husband's employee profit sharing plan which was credited to him during their marriage.203 Therefore, by analogy to the treatment of benefit plans, the courts in partition cases should value professional goodwill by using the present value of the value it had from the beginning of the marriage until the dissolution of the marriage. Since article 2369.1 does not provide a definitive time for valuation of community assets and liabilities,204 a specific time for valuation should be designated in an amendment to article 2369.1 in order to avoid the difficulties presented by assets, such as goodwill, which are acquired over time.205

198. 258 So. 2d 661 (La. App. 3d Cir. 1972).
199. Id. at 662-63.
200. Id. at 663.
201. Id. The court remanded the case for a valuation of the wife's interest.
203. Id. at 95-96. The total amount credited to the husband during this period was $7,905.51. The court held the husband accountable to the wife for one-half of this amount. Id. at 96.
204. The California Civil Code specifically provides that for purposes of making an equal division of property, "the court shall value the assets and liabilities as near as practicable to the time of trial." CAL. CIV. CODE § 4800 (West Supp. 1979). However, if a party, upon 30 days notice to the other party, moves for a different date, the court for good cause shown, may value the assets and liabilities at a date after the separation of the spouses and prior to the trial.
205. A bill was introduced in the 1982 legislative session to repeal article 2369.1 and reenact it with substantial additions as section 2801 of Title 9 of the Louisiana Revised Statutes. La. S.B. 261, 45th Reg. Sess. (1982). The substantial changes provided for by this legislation are detailed procedures and rules to be followed by the spouses and the courts in effectuating a partition of the community. The purpose of the legislation is "to give the court authority to do what the spouses usually do in an amicable, negotiated property settlement."

This bill protects spouses' community property interests and guides Louisiana's courts in partitioning the community. The legislation retains the "aggregate theory" of parti-
tion in kind and the requirement of equal net value in allocation of the assets and liabilities of the community.

The bill provides that either spouse, upon termination of the community, may institute a proceeding for partition of the community property or for settlement of the claims arising from the matrimonial regime. In the proceeding, each party files a detailed descriptive list of all community assets and liabilities, including the fair market value and location of each asset. An inventory is not required, because it was seen as a useless and expensive requirement in a community property partition. Additionally, each party must either traverse or concur in the inclusion or exclusion of each asset or liability and the valuations contained in the descriptive list. The court is permitted to appoint experts to assist in the settlement and partition of the community.

The legislation provides for specific instances when the court can appoint experts to assist it. Experts may be appointed for the classification of assets as community or separate, the appraisal of community assets, the settlement of the claims of the parties, and the allocation of assets and liabilities to the spouses.

Finally, the court partitions the community according to the five following rules:
(1) The court must value the assets as of the time of the trial on the merits. This remedies the time of valuation problem posed by article 2369.1 and professional goodwill. Until the trial on the merits, the spouses are co-owners in indivision of the community property; thus, the choice of this time adequately assures that each spouse receives the present value of his or her ownership interest in each community asset.
(2) After valuation, the court is required to divide community assets and liabilities in a fashion which ensures that each spouse receives property of equal net value.
(3) The court must allocate all assets and liabilities of the community. Yet, the court has discretion in allocating each particular asset or liability to allocate it equally or unequally between the spouses or to allocate it entirely to one of the spouses. In exercising its discretion, the court must consider the nature and the source of the asset or liability and the economic condition of each spouse. The court also may consider any other circumstances that it considers relevant. Significantly, the legislation provides that, as between the spouses, the allocation of a liability to a spouse obligates that spouse to extinguish the liability, but it in no way affects the rights of creditors. See LA. CIV. CODE art. 2357. This article provides for the rights of creditors vis-à-vis the community and the spouses. These rights remain intact and are not affected by the provisions of the legislation. If the allocation of assets and liabilities results in an unequal net distribution, the court must order the payment of an equalizing sum of money. The equalizing sum of money can be in cash or in deferred payments, and it can be secured or unsecured. Additionally, the sum shall be upon the terms and conditions decided by the court. The court may order the execution of notes, mortgages, or other documents it deems necessary, or the court may impose a mortgage or lien on the movable and immovable property of either the community property or the separate property of a spouse, depending upon the circumstances. La. S.B. 261, 45th Reg. Sess. (1982). See LA. CIV. CODE art. 1366, which provides for a money adjustment to compensate an heir for a lot which is unequal in value, in instances where the heirs choose to draw lots.
(4) When the court finds that the partial or total allocation of an asset would be inequitable to a spouse, it can order the spouses to draw lots for the asset or it can order the private sale of the asset according to terms and conditions it may set. Possible terms and conditions include the minimum price, the terms of sale, the execution of realtor listing agreements, and the period of time during which the asset shall be offered for private sale. La. S.B. 261, 45th Reg. Sess. (1982).
(5) If none of the above alternatives are feasible, the court shall order a parti-
Conclusion

A community property system's goal is to treat spouses equally as to certain property acquired during the existence of their marriage. Community property systems recognize the efforts of a nonworking spouse whose daily contributions to the marriage are considered legally as vital as those of a working spouse. Louisiana, as a community property state, should follow the lead of her sister states: Louisiana courts should classify professional goodwill as community property. Such a classification gives a nonprofessional spouse an equal interest in what may be the most valuable asset possessed by spouses. With the use of experts in the accounting and economics fields, Louisiana courts can arrive at an accurate value of the professional goodwill and thus eliminate perhaps the most difficult barrier to its recognition. Finally, Louisiana courts now have available the mechanism of article 2369.1 to effectuate a partition of professional goodwill.

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