

# **Business Valuation Issues in Marital Dissolution and Other Equitable Distribution Cases**

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## **I. (§1.1) INTRODUCTION**

Since 1975, Oregon appellate courts have issued relatively few decisions pertaining to the valuation and division of business interests in the context of a divorce. Taken together, these cases represent a hodgepodge of *ad hoc* rulings that are not always clear or consistent. The cases demonstrate that the litigants' imperative is to fully-advise the court of the intricacies of the business, including its size, the quantum and origins of revenues, its uniqueness and commonality in the industry in which it functions, the importance of the spouse in the business, and other similar relevant factors. It also is apparent that there is significant need for expert testimony to guide the court.

These materials are designed to assist the practitioner with developing a systematic approach toward the identification and analysis of relevant legal issues in cases involving business valuation issues. While it is evident there remain significant gaps of guidance in the governing case law, these materials are designed to present a general approach to preparing for equitable distribution cases having business valuation overlays.

## **II. (§1.2) GENERAL PRINCIPLES REGARDING DIVISION OF BUSINESS INTERESTS**

### **A. (§1.3) Disentanglement of the Parties**

The Court's desire to financially disentangle the parties cannot be

overstated. Even where disentanglement presents “short term financial problems” for the spouse able “to recover more quickly financially,” the court will insist upon it. *Short and Short*, 155 Or App 5, 15, 964 P2d 1033 (1998). “Simple ownership is a preferable way of severing the parties’ financial interdependence.” *Jenks and Jenks*, 294 Or 236, 244, 656 P2d 286 (1982). The disentanglement should occur “as expeditiously as possible.” *Williams and Williams*, 98 Or App 360, 361, 779 P2d 199 (1989) (citing *Slauson and Slauson*, 29 Or App 177, 183-84, 562 P2d 604 (1977)).

In *Slauson and Slauson*, 29 Or App 177, 562 P2d 604 (1977), the parties owned a convenience store. Based upon the testimony of an expert experienced with the purchases and sales of grocery stores, the court found the business value was negligible and limited to its assets. *Id.* at 182-83. It affirmed an award of the entire business to husband, concluding: “. . . [I]n dividing the property the dissolution decree should seek to disentangle the parties’ financial affairs and make them free from each other’s interference. The friction resulting from the unsuccessful marriage partnership almost inevitably makes continued business association untenable.” *Id.* at 183-84; *see also Price and Price*, 43 Or App 1029, 607 P2d 756 (1979) (reversing the trial court’s award of husband’s interest in his deceased father’s wheat farm to the parties jointly based disentanglement considerations).

Another example of the need to disentangle is *Madden and Madden*, 114

Or App 319, 836 P2d 1349 (1992). *Madden* involved a husband's 2/9 interest in a company selling wholesale food preservatives. The trial court found it hard to value the interest, so it awarded it to husband but required him to provide wife with annual accountings and half of all future monies received on account of the interest. The Court of Appeals reversed this decision and awarded wife a simple money judgment, concluding: "It is apparent that the parties have had difficulty in resolving their differences and that it would be in both parties' best interests to end their financial relationship to the greatest extent possible." *Id.* at 323.

Similarly, in *Smith and Smith*, 168 Or App 349, 7 P3d 559 (2000), the Court of Appeals affirmed the trial court's denial of wife's request to be awarded 20% of marital business' earnings as spousal support, explaining that wife's proposed approach ". . . would invite potential disputes about the calculation of corporate profits and the manner in which husband is managing the business, should wife conclude that earnings are not being maximized." 168 Or App at 355. While this case does not strictly pertain to division of the parties' interest in the business because wife framed her claim in terms of spousal support, it does illustrate the importance the court places on disentanglement.

Where one spouse and the business owners are closely aligned, the court has strictly required disentanglement. In *Tripineras and Tripineras*, 185 Or App 283, 59 P3d 586 (2002), for example, the court affirmed the trial court's

decision to award wife the marital interest in a car dealership and another business, both of which were owned by her family. *Id.* at 285-86, 288 & 295-96.

Where disentanglement likely would reduce the value of the business, however, the court will be willing to entertain the continuation of mutual interests in the business. *See, e.g., Kollman and Kollman*, 195 Or App 108, 118-19, 96 P3d 884 (2004) (allowing wife to retain stock in business in which husband retained an interest).

**B. (§1.4) Maximizing Value: Awarding Business to Operating Party.**

Courts endeavor to maximize the value of a business interest. Often, this requires that the business be placed in the hands of the spouse who best knows how to run it while awarding the other spouse an offsetting judgment or other property. The Supreme Court in *Haguewood and Haguewood*, 292 Or App 197, 638 P2d 1135 (1981), which involved the division of a wheat farm, stated the rule as follows:

. . . [T]he corporation reflects the industry and operational control of the husband and its profitability is dependent upon his continued participation. It would be legally possible to order the sale of the corporation and divide the proceeds, thus providing to each party a base upon which to build financially. This solution is not desirable in this case, however, because evidence establishes

that the assets of the parties would be substantially reduced by taxes on the proceeds of sale. The value of the corporation to both parties is greatest as an operating entity in the continued operational control of the husband, potentially generating cash, profits and appreciated value, free from the influence of minority ownership in a former spouse.

*Haguewood*, 292 Or at 207-08.

*Bidwell and Bidwell*, 170 Or App 239, 12 P3d 76 (2000), *aff'd on recons.*, 172 Or App 292, 18 P3d 465, *rev den*, 332 Or 305, 18 P3d 465 (2001), involved division of the parties' interest in a stock brokerage awarded to husband subject to wife's offsetting equalizing judgment of \$17.8 million. *Id.* at 242. The court rejected husband's argument that, if he did not agree with the value of the business as determined by the trial court, he should be allowed to sell the business, which would then force him to pay all potential taxes due upon sale. *Id.*

In limited instances, the court has awarded the business to the spouse less familiar with the business. *See Malloy and Malloy*, 31 Or App 1359, 572 P2d 672 (1977) (wife awarded grocery store though husband had more skills because he had other job skills and she did not); *Ford and Ford*, 26 Or App 353, 552 P2d 563 (1976) (wife awarded advertising business but husband allowed to compete so he could earn a living).

### III. (§1.5) STANDARDS OF VALUE FOR BUSINESS APPRAISALS

The term “value” has a number of different meanings in the business appraisal field. Accepted standards of value include “fair market value,” “fair value,” “investment value,” “intrinsic value,” and “liquidation value.” Shannon Pratt & Alina V. Niculita, *Valuing a Business: The Analysis and Appraisal of Closely-Held Companies* 41-46 (5th ed. 2008). The expert’s opinion may vary widely depending upon which definition of value is selected. Typically, the expert looks to the lawyer to define the standard for the assignment.

Lawyers, however, tend to ignore the issue, and, in the absence of instruction from the lawyer, appraisers tend to rely upon “fair market value” as the default standard. As such, the court has endorsed reliance upon Internal Revenue Ruling 59-60 to value business interests in divorce. *See, e.g., Webber and Webber*, 99 Or App 703, 706, 784 P2d 111 (1989), *adh’d to on recons.*, 102 Or App 93, 792 P2d 484, *rev den*, 310 Or 282, 796 P2d 1207 (1990). As more specifically defined by the Internal Revenue Service, fair market value is “the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the facts.” Treas Reg §1.17A-1(c)(1); *accord Tofte and Tofte*, 134 Or App 449, 457, 895 P2d 1387 (1995).

COMMENT: Business appraisers likely rely upon this definition of value because it is commonly used in the gift and estate tax field,

which comprises much of the business appraiser's work.

Most lawyers are not aware that Oregon has not adopted a single standard of value for divorce cases. Shortly after he wrote the opinion in *Tofte*, 134 Or App 449, Justice William Riggs, who then sat on the Oregon Court of Appeals, was interviewed by nationally-prominent appraiser and author, Shannon P. Pratt, DBA, CFA, ASA. Dr. Pratt asked Justice Riggs about business value standards in Oregon:

“Question: Is there an accepted standard of value in family law cases in Oregon?”

“Answer: No. Like other states, there is no statutory standard of value, and (also like most states) there is no clear-cut standard established by case precedent. To the extent that we have a standard, we tend to focus on what a hypothetical person would pay; however, the standard of value can be whatever the experts say, and the Court will consider it on a case-by-case basis.”

Pratt, Shannon, *Deluxe BVUpdate* (Business Valuation Library December 1995). In other words, Oregon lawyers may not be bound to the fair market value standard and should include other standards where appropriate to advocate for their client's interests.

PRACTICE TIP: The “fair market value” standard may not always be the most equitable standard to use in divorce because there is

typically no “willing buyer” or “willing seller” and the party who is retaining the interest is typically under a compulsion to sell. The standard fails to consider unique factors which may affect the value as it applies to the divorcing couple. Consider using the fair value standard, which has been used in Oregon and other states in the context of dissenting shareholder lawsuits where the shareholder is being forced out and needs to be compensated fairly for the interest. *See Columbia Management Co. V. Wyss*, 94 Or App 195, 765 P2d 207, *rev den*, 307 Or 571, 771 P2d 1021 (1988) (dissenting shareholder’s 14% interest in a financial service company was valued at fair value).

#### **IV. (§1.6) VALUATION METHODOLOGIES**

Business valuation issues require a “fact-based analysis necessarily taken on a case-by-case basis.” *Tofte and Tofte*, 134 Or App 449, 457 n5, 895 P2d 1387 (1995). Where fair market value is the indicator of value, the court must determine what a willing buyer would pay a willing seller for the interest in question. *Id.* at 457 (*citing Kingery v. Dept. of Revenue*, 276 Or 241, 249, 554 P2d 471 (1976)); *see also Gibbons and Gibbons*, 194 Or App 257, 263, 94 P3d 879 (2004). As a general principal, the court has at its disposal 3 different methodologies to determine the value of a business: the asset approach, the market approach, and the income approach.

**A. (§1.7) Asset Approach.**

The court has held that the asset approach is inappropriate unless the owners intend to liquidate a business. *Hinrichs and Hinrichs*, 37 Or App 833, 836, 588 P3d 130 (1978). Additionally, the court has applied it in cases in which the parties fail to introduce evidence supporting a reliable value for the business.

*Belt and Belt*, 65 Or App 606, 608, 672 P2d 1205 (1983), *clarified*, 68 Or App 42, 680 P2d 390 (1984), involved the valuation of husband's 9% interest in a family farm corporation that was governed by a restrictive stock redemption agreement. Husband posited that the court should rely upon the stock's book value – suggesting a \$59,253 value – because of restrictive covenants governing the marketability of the shares that defaulted to book value if no purchaser could be found. *Id.* Wife advocated for a \$132,200 value based upon the company's net assets. *Id.* The court determined the company's stock should be valued on a net asset approach because both parties presented “unacceptable positions” as to the entity's value, and the corporation had completed a loan application suggesting a value closer to wife's position. *Id.* at 610-11.

Similarly, in *Kelley and Kelley*, 40 Or App 605, 608, 595 P2d 1294, *reversed*, 287 Or 215, 595 P2d 1294 (1979), the court relied upon the net asset value of husband's accountancy practice to determine its value. In *Goebel and Goebel*, 56 Or App 52, 641 P2d 59 (1982), the court relied upon a balance sheet

wife introduced at trial showing a net asset value for husband's accountancy business suggesting a \$75,000 value when increasing wife's equalizing judgment by \$25,000. *Id.* at 55.

Special issues arise when valuing a company's accounts receivables. The court normally will want data as close in time to the date of trial as possible, and it normally applies a discount rate reflecting the rate of collections based upon the industry in which the business operates and the experience of the business at bar. *See, e.g., Peterson and Peterson*, 141 Or App 446, 450, 918 P2d 858 (1996). The court has approved inclusion of funds maintained in the capital account, including retained earnings, in the business' assets, as well. *See, e.g., Tripineras and Tripineras*, 185 Or App 283, 292, 59 P3d 586 (2002); *see also Carlson and Carlson*, 236 Or App 291, 306, 236 P3d 810 (2010), *rev den*, 349 Or 602, 249 P3d 123 (2011) (retained earnings accrued during marriage are marital asset).

In the absence of clear evidence that a prospective buyer would discount assets when purchasing the business, the court will not allow such deductions. *Weakley and Weakley*, 177 Or App 363, 368, 33 P3d 1045 (2001) (commissions on sale of equipment and shareholder loan discount).

**B. (§1.8) Market Approach.**

The market approach compares the business to other similar businesses in the marketplace. The court has approved experts' reliance upon this

methodology when the similarities are significant. *See, e.g., Hanson and Hanson*, 192 Or App 422, 428, 86 P3d 94, *adh'd to on recons*, 193 Or App 246, 89 P3d 1226, *rev den*, 337 Or 182, 94 P3d 877 (2004). Where the court relies upon comparable businesses that are publicly-traded when valuing privately-held interests, however, the need for marketability discounts is more pronounced. *Id.* at 427-28; *see discussion, infra*, §1.16 *et seq.*

**E. (§1.9) Income approach.**

When the business is a going concern, courts have approved the income approach. *Olinger and Olinger*, 75 Or App 351, 357, 707 P2d 64, *rev den*, 300 Or 367, 712 P2d 109 (1985), was one of the first cases to address the issue of valuation methodologies. The court was tasked with valuing the appreciation of husband's interests in two vehicle dealerships that accrued during the marriage. Wife's expert employed an income methodology valuing the stream of income that the businesses produced, while husband's employed a book value methodology. *Id.* at 356. The court noted that both experts reached nearly identical conclusions regarding the marital appreciation once husband's inappropriate tax discount was reversed. *Id.* at 356-57. The court concluded: "The fair market value is most likely somewhere between the two [experts' opinions], but *the income approach is more realistic if the businesses are to be viewed, as we think they should be, as going concerns.*" *Id.* at 356 (emphasis added).

Other cases supporting the use of some form of the income approach include: *Bors and Bors*, 115 Or App 572, 575, 839 P2d 272 (1992) (scrap metal corporation); *Cookson and Cookson*, 134 Or App 357, 895 P2d 345 (1995) (retail cookware store and coffee shop); *Hanson and Hanson*, 192 Or App 422, 86 P3d 94, *adh'd to on recons*, 193 Or App 246, 89 P3d 1226, *rev den*, 337 Or 182, 94 P3d 877 (2004) (electronic component manufacturer); and *Gibbons and Gibbons*, 194 Or App 257, 94 P3d 879 (2004) (logging business); *Melander and Melander*, 92 Or App 342, 758 P2d 415 (1988) (bullet mold manufacturer); and *Tofte and Tofte*, 134 Or App 449, 895 P2d 1387 (1995) (amusement park).

One type of income approach is the capitalization of earnings methodology, which “estimates a business’s value by dividing the income stream of a business by its capitalization rate.” *Cookson and Cookson*, 134 Or App 357, 362, 895 P2d 345 (1995) (footnote omitted). This approach “is likely to give a more accurate estimate of value of [a] . . . going and successful business than is book value . . .” *Melander and Melander*, 92 Or App 342, 345, 758 P2d 415 (1988). When employing this methodology, there are often disputes regarding the extent of the deduction for the owner’s “reasonable salary” when arriving at the company’s net income, and the appropriate capitalization rate. See , e.g., *Cookson*, 134 Or App at 362; *Arends and Arends*, 141 Or App 340, 345, 917 P2d 1060, *rev den*, 323 Or 690, 920 P2d 549 (1996).

**E. (§1.10) Other Indicia of Value.**

**1. (§1.11) Book Value.**

Book value is not a strong indicator of value for business interests divided in marital dissolution actions, and, as such, the court traditionally has been reluctant to rely upon this approach. *See, Messerle and Messerle*, 57 Or App 15, 20, 643 P2d 1286, *rev den*, 293 Or 340, 648 P2d 853 (1982). *Obiter dicta* in *Bors, supra*, suggests that book value is an appropriate valuation methodology only for a company “that has just been formed or is contemplated for sale.” 115 Or App at 575 (*citing Olinger*, 75 Or App at 356). Where the parties fail to offer any evidence of going concern value, the court may default to a book value methodology. *Messerle and Messerle*, 57 Or App at 18. The court may also rely upon it when there is a contractual requirement that the stock be sold or purchased at book value. *Belt and Belt*, 65 Or App 606, 610, 672 P2d 1205 (1983), *clarif’d*, 68 Or App 42, 680 P2d 390 (1984).

**2. (§1.12) Liquidation Value.**

Where there is no evidence of a spouse’s intent to liquidate a business interest, the court generally will reject the use of a liquidation value. *Hinrichs and Hinrichs*, 37 Or App 833, 588 P2d 130 (1978) (recreational vehicle sales business). Where the business has operated a deficit for a significant period, however, the court has approved use of this methodology. *Webber and Webber*, 99 Or App 703, 784 P2d 111 (1989), *adh’d to on recons.*, 102 Or App 93, 792

P2d 484, *rev den*, 310 Or 282, 796 P2d 1207 (1990) (minority interest in grass seed farm); *Wolhaupter-Heinzel and Heinzel*, 108 Or App 514, 520, 816 P2d 672, *rev den*, 312 Or 526, 816 P2d 672 (1991) (gun shop). If such a value is used, the court has approved lump sales of inventory rather than assume individual sales of each item of inventory. *Wolhaupter-Heinzel*, 108 Or App at 519-20.

Alternatively, if the business has an established history of unprofitability, the court may assign no value to the asset. In *Cunningham and Cunningham*, 74 Or App 311, 315, 702 P2d 1157 (1985), the court found wife's 7.38% interest in a closely-held family farm corporation that was functioning at a loss had no value. She testified that she received no dividends, and was not entitled to sell her shares. *Id.* Husband presented no evidence to the contrary. *Id.*

### **3. (§1.13) Offers to Purchase.**

*Madden and Madden*, 114 Or App 319, 324, 836 P2d 1349 (1992), explored the propriety of relying upon the price that a third party offered for the company where there was no other clear evidence of value. Similarly, in *Arends and Arends*, 141 Or App 340, 345-46, 917 P2d 1060, *rev den*, 323 Or 690, 920 P2d 549 (1996), the court relied upon the price at which the owner sold and later re-purchased a minority interest in a financial services company to establish the business' value.

#### 4. (§1.14) Buy-Sell Agreements.

Shareholder buy-sell agreements may impact a shareholder's ability to market and control his or her shares. Such restrictions may or may not affect value depending upon the circumstances. An excellent discussion of the evolution of the rules in this area is found in *Gibbons and Gibbons*, 194 Or App 257, 94 P3d 879 (2004). *Gibbons* addressed the value of husband's 20.45% minority interest in a logging business that was subject to a mandatory buy-sell agreement that permanently assigned his voting rights to the company, and allowed the company to purchase his stock at favorable terms if and when he elected to sell it. *Id.* at 260-61. The court allowed a substantial discount of more than 75% in the shares' value and made the following comments about the effect of buy-sell agreements and stock restrictions:

Wife argues that the trial court should have ignored the stock transfer agreement when it assigned a value to the stock, citing *Reiling and Reiling*, 66 Or App 284, 673 P2d 1360 (1983), *rev den*, 296 Or 536 (1984), and *Phillipakis and Phillipakis*, 14 Or App 377, 513 P2d 529 (1973). In both of those cases, we concluded that the relevant stockholder agreements did not affect the value of the stock. In *Reiling*, we concluded that the . . . purpose of a corporate resolution that placed a value on the corporation was not, as the trial court concluded, to value the corporate stock but to effect a

corporate dissolution and, therefore, that the resolution had no determinative effect on the stock's value. 66 Or. App. At 290-91. *Phillipakis* involved a buy-sell agreement that "did not contain any obligation on either party to purchase at" the price stated in the agreement. 14 Or. App. at 379-80. Here, in contrast, the . . . agreement . . . deprives husband's shares of all voting power and any possibility that husband could orchestrate a liquidation of the company with other minority shareholders to reach the assets of the company. . . .

*Id.* at 260-61.

## **5. (§1.15) Loan Applications**

In *Arends and Arends*, 141 Or App 340, 917 P2d 1060, *rev den*, 323 Or 690, 920 P2d 549 (1996), the court affirmed the trial court's conclusion that 2 financial services companies had a fair market value of \$425,000, and not \$49,359, as husband posited, in part because husband had completed a loan application under oath shortly before trial valuing them at \$689,000. *Id.* at 346 n4.

## **V. (§1.16) DISCOUNTS**

### **A. (§1.17) Oregon's Lead Case on Discounts – *Tofte and Tofte***

Oregon's lead case on the subject of control and marketability discounts is *Tofte and Tofte*, 134 Or App 449, 895 P2d 1387 (1995). *Tofte* involved the

valuation of husband's 10.1% interest in Enchanted Forest, Inc., an amusement park south of Salem, Oregon. *Id.* at 452. The court approved a 35% marketability discount on husband's interest. *Id.* at 455-56. Judge William Riggs authored the opinion, explaining the difference between marketability and minority discounts as follows: "[A] marketability discount addresses the degree of liquidity of the interest. Such discounts compensate for the lack of a recognized market for a particular stock, lack of ready marketability, or restrictive provisions affecting ownership rights or limiting sales." *Id.* at 456 n 3 (emphasis omitted). By contrast, a minority discount "takes into account the relationship between the interest being valued and the total enterprise. A primary factor in determining the value of a minority interest is the degree of control that the owner either does or does not have within the corporation." *Id.* (emphasis omitted). No sale need be contemplated to justify application of a minority discount. *Tripineras and Tripineras*, 185 Or App 283, 295, 59 P3d 586 (2002).

Either discount, or both, can be applied, depending upon the circumstances. A court should take great care in determining the appropriate discount, because "to not discount the value of the interest is to ignore economic reality and to apply too large a discount is to grant a financial windfall to the recipient spouse." *Id.* at 293 (quoting trial court).

**B. (§1.18) Discounts Applied in Oregon Cases**

In spite of the Tofte court's admonition that marketability and minority discounts be segregated, the discounts are often aggregated.

For example, in *Gibbons and Gibbons*, 194 Or App 257, 94 P3d 879 (2004), the court was confronted with valuing husband's 20.45% interest in a family logging corporation. *Id.* at 261. The court found that a controlling interest in the company was worth \$3,100 per share, but husband's interest was worth only \$684.73, representing a discount of over 75%. *Id.* at 263. The court based its decision on the fact that husband's shares were subject to a stock transfer agreement that permanently assigned his voting rights and also gave the company the right to purchase the stock at favorable terms if husband decided to sell. *Id.* The court accepted testimony from husband's experts suggesting that the proper valuation of husband's interest required consideration of the stock transfer agreement. *Id.*

The reported cases disclose approval of the following discounts based upon variable percentages of ownership:

|  | % Ownership | Discount |
|--|-------------|----------|
| <i>Barlow</i> , 111 Or App at 181          | 15%         | 25%      |
| <i>Belt</i> , 65 Or App at 608, 610–11     | 9%          | 50%      |
| <i>Gibbons</i> , 194 Or App at 263         | 20.45%      | 75%      |
| <i>Reiling</i> , 66 Or App at 290–91       | 12.5%       | 25%      |
| <i>Tofte</i> , 134 Or App at 452, 455      | 10.1%       | 30%      |
| <i>Tripineras</i> , 185 Or App at 286, 295 | 10.5%       | 25%      |
| <i>Webber</i> , 99 Or App at 706           | 33%         | 0%       |

### **C. (§1.19) Discounts for Family Farms – An Exception?**

Some Oregon cases disclose that discounts may not be appropriate when valuing minority interests in family farms. In *Webber and Webber*, 99 Or App 703, 784 P2d 111 (1989), *adh'd to on recons.*, 102 Or App 93, 792 P2d 484, *rev den*, 310 Or 282 (1990), the Court of Appeals approved a liquidation methodology when valuing husband's minority interest in a farm, but rejected the application of any discounts. If husband were to sell his stock, he probably would sell it to his parents without significant costs of sale or minority or marketability discounts." 99 Or App at 706.

The court approved a similar outcome in *Batt and Batt*, 149 Or App 517, 945 P2d 517, *rev den*, 326 Or 233, 952 P2d 60 (1997), where the court did not apply discounts to the parties' interests in multiple farm corporations because the farms are usually sold as a whole if and when sales occur. The rationale for this approach appears to be that any sale of the family farm would require all interest holders to liquidate their interests simultaneously. *See Barlow and Barlow*, 111 Or App 179, 182, 826 P2d 18, *rev den*, 313 Or 299, 826 P2d 18

(1992).

*Belt and Belt*, 65 Or App 606, 672 P2d 1205 (1983), *clarified*, 68 Or App 42, 680 P2d 390 (1984), represents an exception to the no discount rule. There, husband's 9% interest in a family dairy corporation was subject to certain restrictions on transfer. It appears the trial court relied upon the value as stated in a corporate loan application, and did not apply any discounts. The Court of Appeals reversed, applying a 50% discount, because the only evidence in the record concerning discounts supported that approach. *Id.* at 609-10.

*Barlow and Barlow*, 111 Or App 179, 826 P2d 18, *rev den*, 313 Or 299, 826 P2d 18 (1992), is instructive regarding whether discounts should be applied when valuing family farms. The trial court applied a 25% discount to the value of husband's 15% interest, and husband appealed, seeking a 75% discount. *Id.* at 181-82. Wife did not cross appeal. *Id.* The Court of Appeals affirmed the trial court's decision, concluding:

Factual evaluations under principles of equity often bring about what appear to be inconsistent results, when the results are misunderstood as turning on fixed legal principles rather than the different facts in different case. The assumption that husband's stock will be sold apart from a sale of the entire corporation is not supported by the evidence.

*Id.* at 182.

**E. (§1.20) Applicability of Marketability Discounts to Majority Interests.**

*Hanson and Hanson*, 192 Or App 422, 86 P3d 94, *adh'd to on recons*, 193 Or App 246, 89 P3d 1226, *rev den*, 337 Or 182, 94 P3d 877 (2004), addressed the question of whether a marketability discount should be applied when determining the value of husband's majority interest in a closely-held electronics manufacturing company. The court held that it may be appropriate to apply such discounts in certain circumstances, as when the evaluator has relied upon purported comparable publicly-traded companies as he developed an opinion of value, and the publicly-traded stock value already reflects the constraints on the shares' marketability. *Id.* at 428-29.

**VI. (§1.21) GOODWILL.**

**A. (§1.22) Personal Versus Entity Goodwill.**

Ordinarily, businesses that do not depend upon the services of one individual have goodwill value. *Weakley and Weakley*, 177 Or App 363, 368, 33 P3d 1045 (2001); *Tripineras and Tripineras*, 185 Or App 283, 293, 59 P3d 586 (2002). In certain circumstances, a company's goodwill can be its principal asset. *Goger and Goger*, 27 Or App 729, 732, 557 P2d 46 (1976).

Late 2010 brought a decision of great significance in marital dissolution case law with *Slater and Slater*, 240 Or App 30, 245 P3d 676 (2010), *rev den*, 350 Or 408. At issue in *Slater* was the division of husband's 100% interest in

Slater Chiropractic, a “very successful chiropractic business” in Prineville, Oregon. *Id.* at 32. When he purchased the business during the marriage for \$157,500, he paid \$37,000 in goodwill and \$75,000 for the selling owner’s non-competition agreement. *Id.* Wife’s expert opined the business had a fair market value of \$610,000, including \$449,098 in goodwill all of which was attributable to the business and not to husband personally. *Id.* at 34.

Husband’s expert attested the business had a fair market value of \$230,795, including \$30,373 in goodwill related only to the business. *Id.* at 35. He explained that \$273,357 in goodwill was attributable to the “ongoing personal services of husband.” *Id.*

The *Slater* court distinguished between business goodwill and personal goodwill. *Id.* at 38-39. The former it defined as “the intangible assets of a business, such as its relationships with suppliers, customers, and employees, as well as its location, name recognition, and reputation that engender customer loyalty regardless of who works there.” *Id.* at 38 (*citing* Christopher A. Tiso, *Present Positions on Professional Goodwill: More Focus or Simply More Hocus Pocus?*, 20 J Am Acad Matrimonial L 51, 52 (2006)). The latter it defined as “the increased earnings capacity of a business attributable to an *individual’s* (often the principal’s) skills, efforts, personality, or reputation.” *Id.* at 38-39 (emphasis in original; footnote omitted). The court concluded that personal goodwill should not be included as a marital asset divisible upon divorce:

That understanding comports with the view of the majority of state courts, many of which have reasoned that it is improper to treat an individual principal's or professional's reputation as "goodwill" or as a divisible marital asset because it is indistinguishable from that individual's probable future earning capacity. In other words, to the extent that the enhanced earnings of a closely held business or professional practice are due to an individual's skills, qualities, reputation or continued presence, those earnings are attributable to the individual, not to the business entity.

*Id.* at 41-42 (citations omitted).

The court then concluded there was minimal entity goodwill in Slater Chiropractic because husband was the sole shareholder, the business was named after him, over half of the revenues were traceable to husband's role as a preferred provider, and the goodwill paid when he purchased the business was insignificant. 240 Or App at 44.

PRACTICE TIP: When assessing the goodwill divisible in marital dissolution cases, the litigant is assigned the task of distinguishing between the personal and entity goodwill. This exercise requires an analysis of the features of the business that make it profitable, including the number of interest holders, the number of employees, how the business is marketed, the features of the

business that make it more profitable than others within the same industry sector, like the source of business generation, the business' intact succession plan, and similar factors.

One example of a case in which the court found enterprise goodwill in the marital business was *Weakley and Weakley*, 177 Or App 363, 33 P3d 1045 (2001). There, the court affirmed the trial court's decision that there was \$117,018 in goodwill in Cascade, the specialized logging company in which husband held a 36% interest with two other shareholders. *Id.* at 366-67. Significant to the court's decision was that the business had 11 employees, and 50% of the business came from fixed bid contracts when 90% of similar businesses derived their revenues from bid contracts. *Id.* at 366, 369. Perhaps most importantly, husband failed to introduce any evidence that Cascade was dependent on husband's "personality or reputation." *Id.* at 369; *see also Slater*, 240 Or App at 41 (discussing *Weakley*).

**B. (§1.24) Covenants Not to Compete.**

In *Ford and Ford*, 26 Or App 353, 552 P2d 563 (1976), the court affirmed the trial court's refusal to impose a covenant not to compete on husband where wife was awarded an advertising businesses, observing:

Restrictions on free competition are generally disfavored and are allowed only in limited situations, even where the parties themselves agree to such a restriction. *See Annotation*, 45

A.L.R.2d 77 (1956); Annotation, 41 A.L.R.2d 15 (1955).

Additionally, we note that the husband has pursued this type of business for most of his working life and is prepared to do little else. To impose such a restriction upon him would therefore greatly impair his ability to earn a livelihood.

26 Or App at 355.

The *Slater* decision also directly addressed the question of whether the court should assume that the owner-spouse will enter into a covenant not to compete when valuing the marital interest in a business. The court concluded:

Although no Oregon appellate decision has addressed that question, courts in other jurisdictions have. Among those courts, there is a split of authority, with most having concluded that, to the extent that a noncompetition covenant corresponds to the business's future earning capacity attributable to an individual's skills, qualities, reputation or continued presence, the value of that covenant is not cognizable in a marital property division. . . . We agree with the majority approach.

240 Or App at 42.

PRACTICE TIP: The *Slater* court made it clear that the court could rely upon any valuation of such a noncompetition covenant, implying that a business valuation properly could assume such a

covenant, but deduct its value from the fair market value of the business. 240 Or App at 43-44.

**C. (§1.24) Particular Business Interests.**

It is most difficult to determine the enterprise goodwill in professional practices and small businesses. Professional practices are typically service-type businesses such as those operated by doctors, lawyers and certified public accountants. However, the court has drawn a distinction between the different components of the business' intangible value, and its goodwill value in particular, requiring special care when valuing professional practices in a marital dissolution setting.

COMMENT: Cases issued prior to *Slater*, 240 Or App 30, should be read with great care, as many do not closely distinguish between personal and entity goodwill.

**1. (§1.25) Law Practice.**

*Reiling and Reiling*, 66 Or App 284, 673 P2d 1360 (1983), *rev den*, 296 Or 536, 678 P2d 738 (1984), is Oregon's landmark case dealing with a lawyer's professional practice. There, wife appealed the trial court's decision, contending that it failed to assign a goodwill value to husband's law practice. *Id.* at 287. The Court of Appeals affirmed, finding that wife's methodology for determining the goodwill value was inappropriate:

Here, the trial court may have believed that good will should not be

considered in the property division, that husband's law practice had no good will or that evidence of value was speculative. Wife's expert witness determined his value for good will by taking the median income of lawyers in Linn County with more than 20 years' experience, subtracting 25 percent from that to account for the salary husband receives as a judge, taking an average of the excess of husband's earnings above the median income for the past three years and multiplying it by 4.5.

. . .

We find the evidence that wife presented does not adequately consider the factors of health, professional reputation, skill, knowledge, work habits and the nature and duration of husband's law practice. Assuming that the value of good will could be considered in a dissolution proceeding in valuing a sole practitioner's law practice, we do not find that the testimony of wife's expert proves a basis on which to assign a value to good will. We do not, accordingly include a value for good will.

66 Or App at 288-89.

**2. (§1.26) Certified Public Accountant Practice.**

*Gobel and Gobel*, 56 Or App 52, 641 P2d 59 (1982), held that the trial court erred in failing to determine the value of husband's accountancy practice

even though the practice would fund husband's spousal support obligation to wife. The court did not expressly discuss goodwill, but it acknowledged that wife introduced evidence suggesting the business had a net asset value of \$89,134, and ultimately increased wife's property award by \$25,000. *See id.* at 55.

In *Kelley and Kelley*, 40 Or App 605, 595 P2d 1294, *rev den*, 287 Or 215, 595 P2d 1294 (1979), the court affirmed the trial court's decision to include the tangible assets of husband's sole proprietorship accountancy practice, but declined to assign a goodwill value because it was unduly speculative. *Id.* at 608.

### **3. (§1.27) Medical Practice.**

In *Steinbrenner and Steinbrenner*, 60 Or App 106, 652 P2d 845 (1982), the court found \$6,000 to \$8,000 of goodwill value in husband's Grants Pass medical practice despite testimony by husband's expert that goodwill was negligible, and the expert was familiar with 15 sales of medical practices in the area with only one including a goodwill component. *Id.* at 109-10.

In *Marriage of Pokorny*, 109 Or App 503, 820 P2d 827 (1991), the court affirmed the trial court's award of \$25,000 of goodwill in dermatology practice. *Id.* at 507. Wife there argued that the business had \$203,400 in goodwill. *Id.* The court held there was some divisible goodwill because half of husband's practice involved him seeing 30 patients a day 2 days per week, including 10

returning patients, which his expert admitted represent business suggesting divisible goodwill. *Id.*

More often than not, the court has failed to find a divisible goodwill component in the value of medical practices. *Stuart and Stuart*, 107 Or App 549, 813 P2d 49 (1991), involved a doctor who worked on contract in an emergency room. The court found husband effectively had no practice, and therefore no goodwill. “He does not maintain an office, has no accounts receivable and owns no equipment or supplies.” *Id.* at 552-53. In *Peterson and Peterson*, 141 Or App 446, 918 P2d 858 (1996), the court approved the use of a formula that included a goodwill component in valuing husband’s sports medicine practice, which had offices in Eugene and Roseburg. However, it noted that husband’s argument concerning the absence of goodwill was not properly preserved, so the issue was not squarely addressed by the court. 141 Or App at 449.

#### **4. (§1.28) Contract Logging.**

In *Lankford and Lankford*, 79 Or App 742, 720 P2d 407 (1986), the court held that there was no good will value in a logging business when the evidence demonstrated that the success or failure of the business was dependent on husband’s personal services and his ability to generate new work. *Id.* at 745. “There is generally no goodwill in such an operation . . . unless the owner personally promised his services to accompany the sale of the business.” *Id.*

**5. (§1.29) Electrical Contracting.**

In *Rolie and Kunkel*, the court found no goodwill value in a business operated by husband as a “one man shop.” 127 Or App 428, 433 n3, 873 P2d 397 (1994). One customer accounted for 85% of the income, and husband’s work for that customer was ending. The court concluded: “[W]e question if the business is the kind that can have any goodwill value.” *Id.* at 433.

**6. (§1.30) Advertising Copywriter.**

*Maxwell and Maxwell*, 128 Or App 565, 876 P2d 811 (1994), involved the question of goodwill in a self-employed advertising copywriter’s business. The court found that the business had no goodwill because husband was a sole proprietor, and the success of the business’ success was “completely dependent on [the husband’s] creative, personal services.” *Id.* at 569.

**8. (§1.31) Financial Services Company.**

In *Arends and Arends*, the court was confronted with competing expert valuations of 2 financial services companies, with one concluding the value was \$49,359 and the other suggesting a \$537,000 value. 141 Or App 340, 343, 917 P2d 1060 (1996). The trial court determined the value was \$425,000. *Id.* This value was consistent with the company CPA’s annual letters of valuation, and was supported by higher values reflected in a previous purchase of company stock by a minority shareholder, and with a loan application husband completed under oath. *Id.* at 345-46. The companies employed other

professional employees who were paid significant salaries. *Id.* at 342.

**9. (§1.32) Dental Practice.**

In *Goger and Goger*, 27 Or App 729, 557 P2d 46 (1976), the court affirmed the trial court's determination that husband's dental practice had goodwill of \$33,000, noting that husband failed to introduce any evidence concerning the value, and that the particularities of his business suggested it had a goodwill component: "husband testified that his practice is expanding, that he has recently opened a branch office in a neighboring town, that his income and that of the professional corporation has been increasing, and that his professional corporation has recently purchased the practice of another dentist and the physical assets relating to it." *Id.* at 732-33.

**10. (§1.33) Veterinary Practice.**

In *Maurer and Maurer*, 49 Or App 355, 359, 619 P2d 964 (1980), the court affirmed the trial court's division of assets, and did not reach the question of whether it was appropriate to determine whether its determination that husband's veterinary practice had \$39,500 in goodwill was appropriate. The court's discussion of the parties' respective positions is instructive, but the more important lesson is the court's determination that the issue of business valuation can be avoided if the entire property disposition is just and equitable.

**11. (§1.34) Trucking Business.**

In *McDuffy and McDuffy*, 184 Or App 359, 56 P3d 449 (2002), the court

was called upon to place a goodwill value on husband's interest in Brittain International Trucks. The evidence adduced at trial revealed it had no value beyond the trucks it owned. *Id.* at 362. While husband did not properly preserve error regarding the goodwill issue, the court exercised its discretion to rule on the issue. *Id.* at 365. Nonetheless, it reversed the trial court's decision that there was \$10,000 in goodwill value, finding the record was "completely devoid of any evidence of the goodwill value of the trucking business. . . ." *Id.* at 363, 365. This decision illustrates the importance of introducing the evidence of goodwill at trial.

#### **VII. (§1.35) INCOME STREAM AS PROPERTY.**

*Fisher and Fisher*, 148 Or App 208, 939 P2d 149 (1997), involved the question of whether an insurance agent's income from future policy renewals, valued at \$435,720, should be divided as an asset when it also has formed the basis for a spousal support award. *Id.* at 211. Husband's \$10,000 monthly income consisted of new policy sales and trail commissions from previously-sold policies. *Id.* at 211, 214. Wife presented testimony that the present value of husband's future renewals was \$435,720. *Id.* at 211. Husband argued that the present valuation was inequitable because it duplicated his obligations by creating an income-related obligation (spousal support) and a property-related obligation (an equalizing judgment). *Id.* at 151. The court disagreed, explaining:

“ . . . [T]he fact that an asset produces monthly income does not

necessarily lead to the conclusion that it may not be valued as a marital asset. See *Colling and Colling*, 139 Or. App. 16, 22, 910 P2d 1165, *rev den*, 322 Or. 655 (1996) (husband's monthly retirement income treated as property); *Pugh and Pugh*, 138 Or. App. 63, 906 P2d 829 (1995), *rev den*, 322 Or. 644 (1996) (personal injury award paid out monthly under annuity treated as property). The characterization of an asset such as this as "income" or "property" for purposes of dissolution proceedings depends on the specific nature of the particular asset. In considering renewal commissions in particular, the contract between the agent and the employed is especially important. Under husband's contract here, he has a vested right to the renewal commissions. If he leaves his employment with AFLAC, he will continue to receive the monthly income that he is entitled to for the renewals unless he violates the noncompete clause. If he dies, his surviving spouse will receive 50 percent of the amount that husband is entitled to for the commissions. Husband's employer may not unilaterally terminate husband's right to these commissions unless he violates the contract . . . the fact that there is some uncertainty in the percentages of policies that actually will be renewed was considered in the valuation of this asset and, as demonstrated by that evidence, the value is adequately predictable and quantifiable. . . . Based on the above considerations, we conclude that the trial

court properly treated the renewal commissions as a marital asset.

*Id.* at 213.

#### **VIII. (§1.36) EFFECT OF TAXES ON VALUATION.**

According to *Olinger and Olinger*, 75 Or App 351, 357, 707 P2d 64, *rev den*, 300 Or 367, 712 P2d 109 (1985), deduction of capital gains tax in the valuation of a business upon divorce is not appropriate when no sale of the business is planned. *Webber*, held that, even where liquidation value is used to value a company, no taxes should be deducted unless the business is really going to be liquidated. 99 Or App 703, 706-07 (1989), *adh'd to on recons.*, 102 Or App 93, 792 P2d 484 (1990). In *Bidwell*, 170 Or App 239, 242, 12 P3d 76 (2000), *aff'd on recons.*, 172 Or App 292, 18 P3d 465, *rev den*, 332 Or 305, 18 P3d 465 (2001), the court declined to reduce the \$57 million value of husband's business for taxes that would be incident to sale. The court rejected husband's argument that the effect of the ruling would be to force him to pay the capital gains tax on the entire appreciated value of the company, including wife's share, stating:

When dividing property on dissolution, the court may consider the tax consequences that the divisions will have on the parties. ORS 107.105(2). In this case, however, it is not certain that husband will chose to sell the company. He testified that he planned to continue to operate the company but if the court did not accept his

valuation of the company he was willing to sell. *Additionally, and more importantly, there is no evidence in this record of what the tax consequence would be if husband sold the company.*

*Id.* at 243 (emphasis supplied).

COMMENT: As of the time of this writing, this issue is before the Court of Appeals in *Rodenbeck and Rodenbeck*, CA A138922, which has been fully briefed and argued, but no written decision has been issued. There, husband argued that he would not have any resources other than after-tax dollars to service the equalizing judgment, and he could not afford the equalizing judgment unless a tax discount were applied.

#### **IX. (§1.37) SECURITY AND PAYMENT PROVISIONS.**

The trial court is free to fashion provisions to secure the debt the continuing business owner may owe the other spouse as a result of the divorce. For example, in *Messerle and Messerle*, 57 Or App 15, 18, 643 P2d 1286, *reversed*, 293 Or 340, 648 P2d 853 (1982), the Court of Appeals authorized the insertion of the following security provision into the dissolution judgment:

4. Respondent is awarded all of the preferred and common stock of Fred Messerle & Sons, Inc., standing in his name on the 27<sup>th</sup> day of May, 1981, as his sole and separate property; subject, however, to a lien in favor of appellant on each and every share and all of the

shares in the aggregate amount of \$251,002, which lien shall bear interest from May 27, 1981, at the rate of 9 percent per annum, simple interest, and shall be paid at the rate of not less than \$2,095.85 per month for 120 months, beginning on the first day of the third full month following the effective date of the decision on appeal; the first payment shall have added to it accrued interest from May 27, 1981, and each 12<sup>th</sup> payment thereafter shall have added to it the accrued interest since the last payment of interest.

5. Respondent shall not permit, cause or allow any sale, transfer or encumbrance of any stock awarded to him without the express written consent of the petitioner or the court unless and until 75 percent of the lien amount plus accrued interest has been paid and then only upon the furnishing of such security for the payment of the balance then owing, plus interest to accrue, as shall satisfy the court.

*Id.* at 22.

In *Haguewood*, the court affirmed a provision that required the husband's corporation to redeem wife's stock valued at \$40,500 over a four-year period. 292 Or at 209. No mention was made of the fact that the corporation was not a party to the divorce, perhaps because the husband would be the sole remaining shareholder and could control the company's

decision to redeem. *See id.*

*In Waker and Waker, 114 Or App 255, 834 P2d 522, rev den, 314 Or 574, 834 P2d 522 (1992) (engineering firm),* the court modified a dissolution judgment to eliminate a provision that required corporate shareholders who were not parties to the divorce case to guarantee payments to wife totaling \$373,445.

PRACTICE TIP: Where appropriate, consider joining the corporation as a party to the dissolution case so the court has control over the corporation as well as the spouse. This is especially appropriate where the corporation appears to be the “alter ego” of a spouse. *See* ORCP 29A.

## Index of Cases.

1. *Adams and Adams*, 121 Or App 187, 854 P2d 501 (1993). [**Lumber trading business**]. Affirmed a trial court finding of substantial goodwill value (5 times projected earnings) in husband's international lumber trading business.
2. *Arends and Arends* 141 Or App 340, 917 P2d 1060 (1996). [**Financial service companies**]. Found substantial goodwill value in what was essentially a personal service business. The case discusses the methodology used in the capitalization of earnings method and also discusses evidence of value found in the sale and repurchase of a minority interest in the business.
3. *Barlow and Barlow*, 111 Or App 179, 826 P2d 18 (1992). [**Family Farm**] Involved the valuation of husband's 15% interest in a family farm corporation. The trial court allowed a 25% discount for reduced marketability but rejected husband's argument that his interest should have been discounted by 75% due to a restrictive by-law and his minority interest status.
4. *Batt and Batt*, 149 Or App 517, 945 P.2nd 517 rev den 326 Or 323, 952 P2d 60 (1997) [**Family farm**]. Husband held a minority position in various family farm operations. The court disallowed any minority or marketability discounts. The court reaffirmed its statement in *Tofte* that "valuation is a fact-based analysis necessarily taken on a case-by-case basis" The court held that this family farm situation was more like the situations in the *Webber* and *Barlow* cases in that the farm's value was derived from its underlying assets, and there was expert testimony to the effect that small family farm corporations are normally sold as a whole.
5. *Belt and Belt*, 65 Or App 606, 672 P2d 1205 (1983), *modified on other grounds*, 68 Or App 42 (1984) [**Family Farm**]. *Belt* involved husband's 9% interest in a family farm corporation that had a restrictive stock redemption agreement. The court determined the stock's value to be the "net asset value" of the stock (not book value) minus a discount because it represented a minority interest in a closely held family corporation.
6. *Bidwell and Bidwell* 170 Or App 239, 12 P3d 76 (2000). [ Bidwell #1- **Stock Brokerage**]. Husband offered no appraisal evidence to rebut wife's evidence. Instead he testified that in his opinion the company was worth much less and that if the court did not agree with his lower value, he was prepared to sell the company. Court affirmed trial court award of \$17 million adjustment judgment to wife.

7. *Bidwell and Bidwell* 172 Or App 292, 18 P3d 465 (2001). [Bidwell #2 - **Stock Brokerage**] Husband petitioned for review arguing the court should have ordered a sale. Case discusses when to sell versus award to operator.

8. *Bors and Bors*, 115 Or.App. 572, 839 P2d 272 (1992). [**Scrap metal business**]. Case held that the capitalized earnings method was properly used to determine the value of this closely held corporation and adjustments made because of the corporation's recent switch from partnership status were proper.

9. *Browning and Browning*, 28 Or App 563, 559 P2d 1314 (1977). [**Farm operation**]. Court found trial court had undervalued husband's farm operation by not considering its value as a going concern and thereafter adjusted the property division.

10. *Carlson and Carlson*, 236 Or App 291, 236 P3d 810 (2010) [**Retail marketing services company**]. The Court found that the appreciation in value of husband's business, which was significant due to a substantial amount of retained earnings, that occurred during the marriage was a marital asset. The Court awarded wife, a homemaker, 15% of the appreciation in value of the business.

11. *Cookson and Cookson*, 134 Or App 357, 362B363, 895 P2d 345 (1995). [**Retail cookware store and coffee shop**]. The Court approved of a capitalization of earnings approach to the value of a wife's store; however, the Court adjusted the calculation by subtracting a reasonable salary expense for wife and her partner thereby lowering the total value of the business.

12. *Cunningham and Cunningham*, 74 Or App 311, 702 P2d 1157 (1985) [**Family farm corporation**]. The Court found assigned no value to wife's 7.38% interest in a closely-held family farm corporation, which was leased to wife's brother, that was functioning at a loss. Wife testified that the shares were of no value to her because her parents planned to retain control until their deaths, she did not have a right to sell the shares, and she did not receive any dividends.

13. *Ford and Ford*, 26 Or App 353, 552 P2d 563 (1976). *Ford and Ford*, 26 Or.App. 353, 552 P2d 563 (1976) [**Specialty advertising business**]. The Court awarded the business to the wife but refused to impose a noncompetition on the husband saying restrictions on free competition are generally disfavored.

14. *Fisher and Fisher*, 148 Or App 208 (1997) [**Insurance agent's future policy renewals**]. This case counted as marital property the present, after-tax

value of husband's future policy renewals despite the fact that the future renewals were a part of his income stream from which he was expected to pay spousal support.

15. *Gibbons and Gibbons*, 194 Or App 257,94 P3d 879 (2004) [20.45% of **logging operation**]. The Court discounted the value of a controlling interest in the company by more than 75% because husband's shares were subject to a highly restrictive stock transfer agreement. The Court accepted testimony from husband's experts to the effect that the proper assessment of husband's interest would be to consider the value of the cash flow resulting from an application of the terms of the stock transfer agreement together with the value of a possible future liquidation of the corporation.

16. *Goebel and Goebel*, 56 Or.App.52, 641 P2d 59 (1982). [**CPA practice**]. Held trial court erred in failing to consider the value of husband's professional practice even though it was the source of husband's income from which he must make support payments.

17. *Haguewood and Haguewood*, 292 Or. 197, 207-08, 638 P2d 1135 (1981) [**Wheat farm**]. The case did not discuss valuation methods. It is best known for establishing the principle that an entity's value is greatest as an operating entity in the control of the person who best knows how to operate it.

18. *Hanson and Hanson*, 192 Or App 422, 86 P3d 94 (2004) [**Electronic components**]. The case dealt with the question of whether a marketability discount should be applied to the value of a husband's majority interest in a closely held electronics manufacturing company. The court held that it may be appropriate in certain circumstances such as where the evaluator has arrived at a value for the closely held company based upon the analysis of publically traded companies.

19. *Hinrichs and Hinrichs* 37 Or App 833, 588 P2d 130 (1978) [**Recreational vehicle sales**] Court affirmed a modest good will value assigned to husband's 1/3 interest in the business saying the valuation of the business must be as a going concern, which, generally, is greater than its asset value.

20. *Kelley and Kelley*, 40 Or.App. 605, 595 P2d 1294 (1979) [**CPA practice**]. Affirmed a trial court decision to include the tangible assets of husband's sole proprietorship CPA practice but declined to assign a goodwill value because it was too speculative.

21. *Kollman and Kollman* 195 Or App 108, 96 P3d 884 (2004) [**Harvesting &**

**marketing blue green algae products - Voting Rights**]. The case involved a long term marriage in which the wife, some years earlier, had signed an agreement granting husband voting control over her shares in the business. Once the divorce was filed, husband sought to control wife's shares and later argued that her shares should have been awarded to him and/or that presumption of equal contribution was rebutted with respect to the shares. The Court of Appeals rejected these arguments and divided the stock equally between the parties.

22. *Lankford and Lankford*, 79 Or App 742, 720 P2d 407 (1986). [**Logging Operation**]. Here husband was the sole owner of a logging operation. The court found that his operation was dependent on his special expertise and ability to negotiate contracts. Thus, the business had no ongoing value, apart from its assets, in his absence.

23. *Madden and Madden*, 114 Or App 319, 836 P2d 1349 (1992) [**Food ingredients sales**]. Trial court found it hard to value 2/9 interest so it awarded the interest to husband but required him to provide wife with annual accounting and half of all future monies received on account of the interest. The Court of Appeals modified to give wife a simple money judgment because the trial court ruling left the parties too entangled when their relationship should be severed.

24. *Malloy and Malloy*, 31 Or App 1359, 572 P2d 672 (1977). [**Grocery Store**]. The issue was who got to own and run the store. There was no mention of value. The trial court found, the husband had marketable skills and could become employed within a brief period of time. Since it would be more difficult for the wife to find employment she was awarded the store.

25. *Maxwell and Maxwell*, 128 Or App 565, 876 P2d 811 (1994) [**Advertising copywriter**]. Case involved the question of goodwill in relation to a self-employed advertising copywriter. The Court found that the business had no goodwill because husband was the sole proprietor and the success of the business depended on his skills and talents.

26. *McDuffy and McDuffy* 184 Or App 359, 56 P3d 449 (2002) [**Trucking business**]. Court held the trial court erred in assigning a good will value to the business where the trial court found the business had goodwill but the record was devoid of evidence as to precise value of it.

27. *Melander and Melander*, 92 Or App 342, 758 P2d 415 (1988) [**Bullet mold manufacturer**]. Court rejected a book value approach in favor of a cash flow

capitalization method.

28. *Messerle and Messerle*, 57 Or App 15, 643 P2d 1286 (1982) [**Family corporation raising beef and selling timber**]. The company had \$1.5 in net earnings but distributed only modest income to the shareholders. The Court approved of a book value approach because neither party offered evidence of a going concern value.

29. *Olinger and Olinger*, 75 Or.App. 351, 707 P2d 64, *rev den*, 300 Or. 367, 712 P2d 109 (1985). [**Travel home & auto dealerships**]. This was one of the first cases to deal with the issue of valuation methodology. The case dealt with the value of husband's interests in travel home and auto dealerships. Husband's expert used a "book value" approach and proposed a deduction for future capital gains taxes. The court rejected husband's approaches in favor of a capitalization of earnings approach with no deduction for future taxes.

30. *Peterson and Peterson*, 141 Or App 446, 918 P2d 858 (1996)[**Sports medicine practice**]. Husband's medical practice was valued based on a formula provided by an appraiser. It added the value of the accounts receivable, cash on hand, goodwill, equipment and furnishings and subtracted liabilities.

31. *Phillipakis and Phillipakis*, 14 Or App 377, 513 P2d 529 (1973) [**Restaurant business**]. An older case in which neither party offered expert testimony on value. Husband would operate the business. He felt it was worth \$20,000. His wife believed it was worth at least \$70,000. She offered evidence of a financial statement showing a value of \$80,000 and a buy/sell agreement which valued the business at \$140,000. The court noted that the \$140,000 value may have been for insurance purposes and did not contain any obligation on either party to purchase at the price recited in the agreement. The Court affirmed the trial judge who found the business was struggling and accepted husband's \$20,000 value.

32. *Rolie and Kunkel*, 127 Or App 428, 873 P2d 397 (1994) [**Electrical Contractor**]. The Court found no goodwill value in a business operated by husband as a "one man shop" One customer accounted for 85% of his income and his work for that customer was ending. The court said: "we question if the business is the kind that can have any goodwill value". *Rolie, supra*, 127 Or App at 400.

33. *Slater and Slater*, 240 Or App 30, 245 P3d 676 (2010) [**Chiropractic business**]. The Court held that the valuation of husband's chiropractic

business could not be predicated on an assumption that husband would execute a noncompetition covenant. The Court also found that the goodwill inhering to husband's chiropractic business as an entity was minimal.

34. *Slauson and Slauson*, 29 Or App 177, 562 P2d 604 (1977) [**Convenience store**] The Court found business value was negligible where the balance sheet showed a net operating loss and a stockholders' equity of \$595. The Court affirmed an award of the entire business to husband saying:

“Similarly in dividing the property the dissolution decree should seek to disentangle the parties' financial affairs and make them free from each other's interference. The friction resulting from the unsuccessful marriage partnership almost inevitably makes continued business association untenable.” *Slauson*, supra, 20 Or App at 183-184.

35. *Steinbrenner and Steinbrenner*, 60 Or App 106, 652 P2d 845 (1982) [**Medical Practice**]. Court found some goodwill value in husband's Grants Pass medical practice despite testimony by husband's expert that goodwill value was negligible and that he was familiar with 15 sales of medical practices in the area and that in only one of those was any value assigned to good will.

36. *Stuart and Stuart*, 107 Or App 549, 813 P2d 49 (1991): [**Physician working on employment contract**]. Case involved a doctor who worked on contract in an emergency room. The Court found there was no goodwill to consider, because husband had no private professional practice. “He does not maintain an office, has no accounts receivable and owns no equipment or supplies. As a result, wife's argument fails.” *Stuart*, supra, 107 Or App 552.

37. *Triperinas and Triperinas*, 185 Or App 283, 59 P3d 586 (2002). [**Auto dealership**]. Wife had a 10.5% interest in an auto dealership. The Court averaged the differing expert values for goodwill, added the compromise goodwill value to the tangible assets and then applied a 25% minority discount to the result

38. *Tofte and Tofte*, 134 Or App 449, 895 P2d 1387 (1995). [**Amusement park**]. A family owned amusement park near sale called Enchanted Forest. Oregon's lead case on minority interest and marketability discounts. Court concludes appraisers must evaluate whether or not to use a discount on a case by case basis.

39. *Reiling and Reiling*, 66 Or App 284, 291, 673 P2d 1360 (1983), *rev. den.*

296 Or. 536, 678 P2d 738 (1984). [**Law practice**]. Oregon's landmark case on valuing a lawyer's professional practice. The court affirmed trial court's refusal to assign a good will value to husband's practice. The court also approved a minority discount of 25% in valuing husband's fractional interest in a closely held corporation.

40. Waker and Waker, 114 Or App 255, 834 P2d 522 (1992) [**Engineering firm**]. The Court modified a dissolution judgment to eliminate a provision which required corporate shareholders who were not parties to the divorce case to **guarantee payments** to wife totaling \$373,445.

41. *Webber and Webber*, 99 Or App 703, 784 P2d 111 (1989), *adh'd to on recons.*, 102 Or App 93, 792 P2d 484, *rev den*, 310 Or 282, 796 P2d 1207 (1990) [**Farming operation**]. This ruling came out of a petition for reconsideration from the court's earlier ruling appearing at 102 Or App 93 (1990). Husband held a minority interest in a farming operation. In its original decision the court rejected husband's arguments for a 25% minority discount and a 30% marketability discount and noted that if his interest were sold it would probably be to his parents. On reconsideration, the Court again disallowed the discounts saying:

If a sale should occur, and there is no evidence of any prospective sale, it could as well be by a sale of the corporate assets at their fair market value as by a transfer of the stock. We decline to apply either a minority or a marketability discount". *Webber*, supra at page 95.

42. *Weakley and Weakley*, 177 Or App 363, 33 P3d 1045 (2001) [**Log thinning business**]. Case involved valuation issues relating to husband's 50% interest in a small log thinning business. The court did the following:

- (1) accepted the value developed by wife's expert;
- (2) included a goodwill value because:
  - (a) husband was not the sole shareholder;
  - (b) 50% of the company's business came from fixed contracts; and
  - ©) there was no evidence in the record that the business is dependent on husband's personality or reputation.

(3) refused to deduct for assumed sales commissions that would be incurred if logging equipment were sold;

(4) refused to discount the shareholder loan owed by husband's company to him because "the amount of any discount would necessarily have to be speculative, based on the record before us".

43. *Wolhaupter-Heinzel and Heinzel*, 108 Or App 514, 816 P2d 672, *rev den*, 312 Or 526, 816 P2d 672 (1991). [**Gun Shop**]. Approved of wholesale value of gun shop inventory where business had been losing money for several years.