

Theories and Methods for Valuing Marital Assets

by
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I. Introduction

When the court divides marital property, it must complete four basic tasks. First, it must identify the parties' assets.¹ Second, it must classify the parties' assets to determine the extent of any marital interest in them.² Third, it must value at least the marital estate, and usually the parties' nonmarital estates as well.³ Finally, the court must actually divide the marital assets.⁴

This article focuses on the third task, the valuation of the marital estate. Valuation is the most technical of the four tasks, and for assets with significant value, much of the real work is usually done by expert witnesses.⁵ But the law must still set forth a valuation standard to guide the experts in defining value, and it must still resolve the inevitable conflicts between the testimony of competing experts. This article will discuss reported case law addressing these issues.

¹ See generally BRETT R. TURNER, *EQUITABLE DISTRIBUTION OF PROPERTY* §§ 5:3-5:12 (3d ed. 2005).

² See generally *id.* §§ 5:13-5:71. Classification is required even in all-property states which do not recognize the concept of separate property, see generally *id.* § 2:8, because the court still cannot divide interests which do not meet the definition of property, *id.* §§ 5:8-5:11, property that is beneficially owned by third parties, *id.* §§ 5:13-19, and property that will not be acquired until after the divorce. *Id.* § 5:28.

³ See generally *id.* chapter 7.

⁴ See generally *id.* chapters 8-9.

⁵ See generally *id.* § 7:15.

II. Defining Value: Theories of Valuation

A. Net Present Fair Market Value

1. Fair Market Value

The most common definition of value is *net present fair market value*.⁶

Fair market value is generally defined as the price for which an asset would be sold, in a transaction between a willing buyer and a willing seller, with neither party being under any particular compulsion to complete the deal within any particular period of time.⁷ In other words, fair market value is the price an asset would command in an orderly sale in the due course of business.

The sale assumed by the law is hypothetical, not actual. Thus, it does not matter if the owner is unwilling to sell the asset at all, or is willing to sell the asset only for a certain price. The court must look to the price at which a *hypothetical* seller would sell the asset, in an ordinary sale on the open market.⁸

The sale assumed by the law is one made in an orderly manner, with neither party under any particular time pressure. The court therefore cannot look to *liquidation value*—value in an immediate cash sale, with the seller under pressure to complete the transaction in a short period of time.⁹

More generally, there are many assets that cannot be sold at all in a short period of time. The most common example is small businesses. Locating a willing buyer for these businesses can require months or even years of effort. Because value is based upon a sale without time pressure, the court may assume that

⁶ See *Nelson v. Jones*, 781 P.2d 964 (Alaska 1989); *Crismon v. Crismon*, 34 S.W.3d 763 (Ark. Ct. App. 2000); *Rattee v. Rattee*, 767 A.2d 415 (N.H. 2001); *Reid v. Reid*, 312 S.E.2d 724 (S.C. Ct. App. 1984); *Liddle v. Liddle*, 410 N.W.2d 196 (Wis. Ct. App. 1987).

⁷ See *Martin v. Martin*, 52 P.3d 724, 731 n.30 (Alaska 2002); *In re Marriage of Cream*, 13 Cal. App. 4th 81, 16 Cal. Rptr. 2d 575 (1993); *Turgeon v. Turgeon*, 460 A.2d 1260 (Conn.1983); *Christians v. Christians*, 732 So. 2d 47 (Fla. Dist. Ct. App. 1999); *Antolik v. Harvey*, 761 P.2d 305 (Haw. 1988); *In re Marriage of Reib*, 449 N.E.2d 919 (Ill. App. Ct. 1983); *Singley v. Singley*, 846 So. 2d 1004, 1011 (Miss. 2002); *Carlson v. Carlson*, 487 S.E.2d 784 (N.C. Ct. App. 1997); *Morgan v. Morgan*, 657 S.W.2d 484 (Tex. App. 1983); *Tankersley v. Tankersley*, 390 S.E.2d 826 (W. Va.1990).

⁸ *Champion v. Champion*, 764 N.E.2d 898 (Mass. App. Ct. 2002).

⁹ See *infra* Part III(L).

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reasonable time and effort are spent to find an appropriate buyer. The amount of time and effort necessary, however, may justify a discount to the resulting value.¹⁰

2. *Highest and Best Use*

The price that would be paid for an asset sometimes depends upon the purpose for which the buyer intends to use the property. The general rule is that the property should be given the value that would be paid by a reasonable buyer, planning to give the property its highest and best use.¹¹ Thus, when property is suitable for commercial use, it should be valued as commercial, not residential, property.¹² When property is zoned for residential use, commercial buildings located on the property may have reduced value.¹³ Farmland suitable for growing crops should be given its value when used as a farm, not a lower value when used only for grazing livestock.¹⁴ When valuing property that is leased to a tenant, the court may assume that the tenant will remain in possession.¹⁵

Valuation should be based, however, only upon the highest and best *present* use. If the property could, with expenditure of substantial time and effort, be made suitable for a different use, that use is not the current use, and it should not be the basis for valuation. For example, real estate should not be given its value

¹⁰ See *infra* Part IV(B).

¹¹ See *In re* Marriage of Ahearn and Whittaker, 113 P.3d 439, 443 (Or. Ct. App. 2005) (accepting the opinion of an expert who “concluded that the highest and best use of the property is rural residential/recreational use combined with grazing and timber use,” and valuing the property consistently with that use).

¹² *Scoles v. Scoles*, No. 5-02-15, 2002 WL 1822753 (Ohio Ct. App. Aug. 2, 2002) (in valuing property used by husband to run his business, the trial court properly chose commercial value over agricultural value; “[a]lthough the land may not be officially zoned commercial, it is used commercially”).

¹³ See *In re* Marriage of Romey, No. 02-1539, 2004 WL 57566 (Iowa Ct. App. Jan. 14, 2004) (where property was zoned residential, it was proper for the court to give only minimal value to commercial building located on the same property as the marital home; the expert testified that the presence of the building actually reduced marketability of the residence, and residential use was presumably the best use for the overall property).

¹⁴ See *In re* Marriage of Garst, 669 P.2d 1063 (Mont.1983).

¹⁵ See *Drumheller v. Drumheller*, 972 A.2d 176, 188 (Vt. 2009) (in valuing rental property, a trial court may assume the presence of the current tenant, which had a long term lease).

when subdivided, if subdivision would require substantial capital investment and/or significant efforts to obtain rezoning.¹⁶

For similar reasons, when property can be sold in more than one manner, the court may assume a sale in the manner that generates the highest price. For example, a vehicle should be given its retail sale value, not a lower trade-in value.¹⁷

3. *Current Condition*

Property should be valued in its current condition on the date of valuation. If the property reasonably needs repairs, the cost of the repairs should be subtracted from the value.¹⁸ If the repairs are necessary because the spouse in possession has failed to maintain the property, the property should still be valued in its current condition, but the court may compensate the innocent spouse for any resulting harm.¹⁹

¹⁶ See *Edelman v. Edelman*, 3 P.3d 348 (Alaska 2000) (finding it an error to use the subdivided value); *Berg v. Berg*, 983 P.2d 1244 (Alaska 1999) (holding it was proper to reject valuation based on subdivision of the property); *Kitchar v. Kitchar*, 553 N.W.2d 97 (Minn. Ct. App. 1996) (deciding that the trial court did err by rejecting appraisal of the property based on subdivision into separate lots).

¹⁷ See *Porter v. Porter*, 769 A.2d 725 (Conn. App. Ct. 2001).

¹⁸ See *Bass v. Bass*, 779 N.E.2d 582 (Ind. Ct. App. 2002) (the trial court properly subtracted certain necessary repairs from value of home, but erred by subtracting other repairs that were not reasonably necessary); *Becker v. Becker*, 489 S.E.2d 909 (N.C. Ct. App. 1997) (the court should consider the probable expense of any repairs needed to place the asset into reasonable condition).

¹⁹ See *Hansen v. Hansen*, 616 N.Y.S.2d 637 (N.Y. App. Div.1994) (a husband sold the marital apartment building at a loss after negligently allowing it to fall into disrepair); *Held v. Held*, 896 S.W.2d 709 (Mo. Ct. App. 1995) (awarding unequal division to the wife, relying in part upon the husband's negligent failure to perform routine maintenance on marital property); *Gibson v. Gibson*, 622 N.E.2d 425 (Ohio Ct. App. 1993) (while a trial court could not properly render judgment for damages caused by one spouse to the other's car, damage was properly considered as a division factor); *Grossnickle v. Grossnickle*, 935 S.W.2d 830 (Tex. Ct. App. 1996), *writ denied* (holding the wife responsible for the loss of value of the home in her care; she had neglected the home, and her neglect had led to damage by vandalism); *Mir v. Mir*, 571 S.E.2d 299 (Va. Ct. App. 2002) (the husband failed to take proper care of the home, and made improvements that ultimately reduced its value; it was proper to award the wife 95% of the marital equity).

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B. *Intrinsic Value*

In an ideal world, fair market value would be the universal standard for valuation. But there are some assets that simply cannot be sold on the open market. The clearest example is retirement benefits. Not only is there no actual market for sale of retirement benefits, but alienation of most retirement benefits is actually forbidden by federal law.²⁰ Necessarily, a valuation standard other than fair market value must be used to value retirement benefits.

The valuation standard applied to assets which cannot be sold is known as *intrinsic value*. Intrinsic value is the value of the asset in the hands of its present owner, without sale.²¹ It is normally determined by measuring the future benefits of ownership, and reducing those benefits to present value. For example, to value retirement benefits, the court determines the benefits that the owner is most likely to receive, discounts them to reflect the chance that the owner will die before they are received, and then reduces them to present value.²²

Another type of asset commonly given its intrinsic value is a business. Businesses can be sold, and when actual sale data is available, fair market value is preferred. But sales of businesses are not common, and sometimes there will not be sufficient actual sale data to permit a court to determine fair market value. Also, business conditions are constantly changing, so actual sale data that is more than few years old may be too stale to offer much insight into the *present* value of the business. Necessarily, therefore, business valuers tend to consider an intrinsic value

²⁰ See 26 U.S.C. § 401(a)(13) (Westlaw 2011); 29 U.S.C. § 1056(d)(3)(A).

²¹ See *Martin v. Martin*, 52 P.3d 724, 731 (Alaska 2002) (“an asset need not be marketable if the court can objectively determine that it has value to its owner”); frequent flyer miles are a marital asset even if they are not marketable); *Howell v. Howell*, 523 S.E.2d 514 (Va. Ct. App. 2000) (adopting intrinsic value as the general standard of valuation for all cases); *R.V.K. v. L.L.K.*, 103 S.W.3d 612, 618 (Tex. Ct. App. 2003) (“if the property does not have a market value, the parties may show the actual value of the property to the owner”).

²² See, e.g., *Bender v. Bender*, 785 A.2d 197 (Conn. 2001); *Bishop v. Bishop*, 440 S.E.2d 591 (N.C. Ct. App. 1994); see generally TURNER, *supra* note 1, § 6:40.

approach. Normally, the business is given the present value of the income it is expected to produce in the future.²³

In theory, there should not be any difference between fair market value and intrinsic value. When an asset is sold on the open market, its value should normally be fairly close to the benefit that the buyer expects to receive from owning the asset. In fact, when businesses are being sold in the open market, income-based methods for computing intrinsic value are often used by buyers and sellers as a guide in determining the actual sale price.²⁴ Properly applied, both fair market value and intrinsic value should reach similar results.

Intrinsic value is sometimes questioned in divorce cases, however, because it tends to define future value by looking at the future benefits of ownership. Since the future benefits of ownership, by definition, will be post-divorce benefits, there is a risk that intrinsic value will divide property that was not acquired during the marriage.

But a careful valuator can account for this risk. To begin with, the income-generating ability of an asset is clearly a major factor in determining its present market value. For example, if two businesses have exactly the same hard assets, but one produces twice as much income as the other, the business with greater income would surely command a higher present sale price. Actual sale data is always proof of fair market value, even if the sale price depends in part upon the earning capacity of the business.²⁵

For exactly the same reason, a determination of intrinsic value can properly be based upon the present income *capacity* (as opposed to the actual future earnings) of a business. Many

²³ Income-based methods for determining the intrinsic value of a business are discussed *infra* in Part III(M).

²⁴ See, e.g., Alan S. Zipp, *Divorce Valuation of Business Interests: A Capitalization of Earnings Approach*, 23 FAM. L.Q. 89, 91 (1989) (noting that the American Institute of Certified Public Accountants listed capitalization of excess earnings as one of “the most popular approaches to business valuation in its 1987 management advisory services practices aid for CPAs”) (quoting AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, SMALL BUSINESS CONSULTING PRACTICE AID NO. 8 (1987).) See also Rev. Rul. 68-609, 1968-2 C.B. 327 (approving capitalization of excess earnings as a valuation method for tax purposes).

²⁵ See *infra* Part III(D).

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income-based valuation methods, for example, define the current value of business as some function of its present income. Those methods are widely used to value businesses both inside and outside of the divorce context.²⁶

In addition, the valuator can make adjustments to ensure that benefits acquired after the divorce are not included in the valuation. For example, when valuing a pension, the court applies a *coverture fraction* to determine the marital share of total value.²⁷ The most common coverture fraction is years employed during the marriage, divided by total years employed.²⁸ By applying the coverture fraction, the court ensures that benefits acquired after the divorce are not divided.

Likewise, when valuing a business using an income-based method, the court must generally subtract a reasonable salary for the owner.²⁹ This subtraction ensures that the future earnings of the owner are not included in the valuation.

Intrinsic value is most controversial when courts cannot agree as to what benefits were acquired during the marriage. For example, a majority of courts hold that future earnings attributable to the individual goodwill of a business owner must be excluded from the valuation.³⁰ These courts reason that individual goodwill is inherently personal to the owner, and therefore not marital property, so that future earnings caused by such goodwill are acquired after the divorce. A minority of courts treat individual goodwill as a marital asset,³¹ and therefore reason that future earnings caused by such goodwill are merely the post-divorce receipt of a marital asset—conceptually similar to a pension that is earned before the marriage, but not received until after the divorce. Courts following the first approach place more restric-

²⁶ See *infra* Part III(M).

²⁷ See generally TURNER, *supra* note 1, § 6:25.

²⁸ *Id.*

²⁹ See *infra* notes 152 and 171.

³⁰ See, e.g., Eslami v. Eslami, 591 A.2d 411 (Conn. 1991); Thompson v. Thompson, 576 So. 2d 267 (Fla. 1991); *In re Marriage of Zells*, 572 N.E.2d 944 (Ill. 1991); see generally TURNER, *supra* note 1, § 6:74.

³¹ See, e.g., *In re Marriage of Huff*, 834 P.2d 244 (Colo. 1992); Dugan v. Dugan, 457 A.2d 1 (N.J. 1983); Poore v. Poore, 331 S.E.2d 266 (N.C. Ct. App. 1985).

tions upon intrinsic value, requiring a larger subtraction before the intrinsic value can be used for divorce purposes.³²

C. *Present Value*

When most assets are sold, the purchase price is paid in a single lump sum. But some assets—especially businesses and real estate—are so large that the purchase price must be paid gradually in installments. As most economics students know, because money earns interest, a dollar paid in the future is worth less than a dollar paid in the present. Thus, the real value of a series of payments is less than the total face value of the payments. When the hypothetical willing buyer would purchase an asset in installments, the fair market value is the *present* value of the installments, not their total face value.

For example, in *Liddle v. Liddle*,³³ an expert used a hypothetical sale to determine the value of a real estate partnership:

The [hypothetical] purchase would occur July 17, 1985, but the purchaser would not receive the total \$143,002 until 1990. Because the value of a dollar to be received in the future is less than \$1, Gunkel had to determine the present value of the \$143,002. He calculated that value to be \$64,578.³⁴

A trial court decision accepting the above valuation was affirmed on appeal.³⁵

Present value must also be used when computing the intrinsic value of payments due in the future. For example, when valuing a defined benefit pension, it is error to look to the total

³² See *infra* notes 160 and 191 and accompanying text.

³³ 410 N.W.2d 196 (Wis. Ct. App. 1987).

³⁴ *Id.* at 199.

³⁵ See also *Shumaker v. Shumaker*, 559 N.E.2d 315 (Ind. Ct. App. 1990) (the right to receive future payments under a contract from the sale of land should be given its present value, not the total value of all future payments); *Hendricks v. Hendricks*, 759 S.W.2d 903 (Mo. Ct. App. 1988) (a structured settlement for the sale of a business should be valued at the original principal amount, and not the sum of all future payments); *O'Neil v. O'Neil*, 917 P.2d 916 (Mont. 1996) (finding an error to value a note received for the sale of a saloon by multiplying the amount of each payment by the total number of future payments required; the proceeds must be reduced to present value); *In re Marriage of Summerfelt*, 688 P.2d 8 (Mont. 1984); *Polis v. Polis*, 367 S.E.2d 465, 467 (S.C. Ct. App. 1988) (reversing the trial court because “the appealed order failed to reduce the balloon payments and the sales proceeds from the Queen Street property to their present values”).

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amount of the expected benefits, without reducing that amount to its present value.³⁶

A benefit should be not be reduced to present value if it is receivable at present, but the owner voluntarily chooses to defer it. For instance, in *In re Marriage of Nevarez*,³⁷ the husband owned an interest in a partnership. He had a contractual right to receive a substantial payment upon withdrawal from the partnership, and he was eligible to withdraw immediately. But he testified that did not intend to withdraw for ten more years. The trial court valued the partnership at the present value of the withdrawal payment, received in ten years. The appellate court reversed. “[H]usband’s stated intention not to retire for ten years, and thus to delay receiving his partnership interest, cannot be used to deny wife her immediate enjoyment of her share of the partnership interest.”³⁸

It may be permissible to ignore present value, and use total face value, if neither party submits evidence as to present value.³⁹ In other words, the burden of proving present value is upon the party who asks the court to use it.

D. *Net Value*

Most marital assets are owned outright by the parties. But some marital assets are subject to liens. The most common example is a marital home, on which a bank or other financial institution holds a mortgage.

³⁶ See *Hartland v. Hartland*, 777 P.2d 636 (Alaska 1989) (finding it reversible error to value a pension at the total expected future benefits, without reducing that amount to present value); *Ascherman v. Ascherman*, 977 So. 2d 763 (Fla. Dist. Ct. App. 2008) (finding it an error not to reduce future pension benefits to present value); *Lowrey v. Lowrey*, 25 So.3d 274, 287 (Miss. 2009) (reversing the trial court’s valuation of a pension, where “the analysis failed to reduce the purported future income stream to present net value”).

³⁷ 170 P.3d 808 (Colo. Ct. App. 2007).

³⁸ *Id.* at 814.

³⁹ See *In re Marriage of Porter*, 807 P.2d 192 (Mont. 1991) (determining it was not an error to value a land sale contract at the total face value of all future payments, where neither party introduced evidence of present value); *Litmans v. Litmans*, 673 A.2d 382 (Pa. Super. Ct. 1996) (where a wife submitted only a maturity value for pensions, the court refused to permit her to complain that the trial court should have used present value).

When property is sold on the open market, the purchaser takes title subject to any existing liens on the property. If payments on the underlying debt are not kept current, the lien holder has the right to foreclose on the property—to force sale, and to take from the proceeds of sale the amount of the lien. Thus, when property is subject to a lien, the value of the property is its *net* value—the amount which a willing buyer would pay to purchase the property from a willing seller, *minus the amount of the lien*.⁴⁰

A good example is *Chavis v. Chavis*.⁴¹ There, the marital home was appraised at \$80,000, but was subject to a \$49,000 mortgage. The trial court valued the home at \$80,000, and awarded it to the wife. The court reasoned that it could ignore the mortgage because it had ordered the husband to pay it, so that it would never be a real burden on the wife’s interest. The appellate court reversed.

[A]lthough the former husband was ordered to assume the mortgage on the marital home, as long as the house stands as collateral to a mortgage she has not actually received the full value credited to her in the final judgment. For example, should the former husband die or otherwise be unable to make the required payments, she could lose the house through foreclosure. We agree that unless the mortgage is satisfied, the wife has not received and has no security that she will ever realize the full \$80,000 credited to her in the equitable distribution. The award as made by the court is thus illusory.⁴²

Another example is *Arneault v. Arneault*.⁴³ The husband in that case owned an oil and gas business, but its debts were equal

⁴⁰ See, e.g., *Meints v. Meints*, 608 N.W.2d 564 (Neb. 2000); *Carlson v. Carlson*, 487 S.E.2d 784 (N.C. Ct. App. 1997); *Brown v. Brown*, 324 S.E.2d 287 (N.C. Ct. App. 1985); *Brown v. Brown*, 324 S.E.2d 287 (N.C. Ct. App. 1985); *Trivett v. Trivett*, 371 S.E.2d 560 (Va. Ct. App. 1988); *Tankersley v. Tankersley*, 390 S.E.2d 826 (W. Va. 1990).

⁴¹ 727 So. 2d 1148 (Fla. Dist. Ct. App. 1999).

⁴² *Id.* at 1148. Another risk, not mentioned by the court, is the possibility that the husband’s liability on the mortgage would be discharged in bankruptcy. Property division debts cannot be discharged in Chapter 11 bankruptcy cases after 2005, see 11 U.S.C. § 523(a)(15) (Westlaw 2011), but they remain subject to discharge in Chapter 13 bankruptcy cases. See TURNER, *supra* note 1, § 9:22 following note 86 (Supp. 2010); Brett R. Turner, *The Vampire Rises: Discharge of Property Division Obligations Under Chapter 13 of the Bankruptcy Code in Post-2005 Litigation*, 19 DIVORCE LITIG. 1 (2007).

⁴³ *Arneault v. Arneault*, 639 S.E.2d 720 (W. Va. 2006).

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in value to its assets. The court held that the business had no value. “Mrs. Arneault’s entitlement to twenty-five percent of CEMCO’s assets coupled with her responsibility for twenty-five percent of its liabilities cancel each other, resulting in a net value of zero.”⁴⁴

E. *Expenses of Sale and Capital Gains Taxes*

Fair market value is based upon a hypothetical sale, not an actual one. Any broker’s fee or other sales commission which would be required to sell the asset is therefore hypothetical and speculative, and should not be subtracted from the value.⁴⁵

For the same reasons, capital gains taxes which would be due upon a hypothetical sale should not be subtracted from the value.⁴⁶

⁴⁴ *Id.* at 735.

⁴⁵ See, e.g., *Virgin v. Virgin*, 990 P.2d 1040 (Alaska 1999); *Kohler v. Kohler*, 118 P.3d 621 (Ariz. Ct. App. 2005); *In re Marriage of Finer*, 920 P.2d 325 (Colo. App. 1996); *Goodwin v. Goodwin*, 640 So. 2d 173 (Fla. Dist. Ct. App. 1994); *In re Marriage of Benkendorf*, 624 N.E.2d 1241 (Ill. 1993); *Dowden v. Allman*, 696 N.E.2d 456 (Ind. Ct. App. 1998); *Coviello v. Coviello*, 605 A.2d 661 (Md. Ct. Spec. App. 1992); *M.A.Z. v. F.J.Z.*, 943 S.W.2d 781 (Mo. Ct. App. 1997); *Walker v. Walker*, 618 N.W.2d 465 (Neb. Ct. App. 2000); *Crowder v. Crowder*, 556 S.E.2d 639 (N.C. Ct. App. 2001); *Kapp v. Kapp*, No. 2003-CA-9, 2005 WL 3502000 (Ohio Ct. App. Dec. 23, 2005) (“the trial court abused its discretion in applying a 7.5% discount for transaction costs where there is no indication that Mr. Kapp is planning on selling KCI in the foreseeable future”); *Matter of Marriage of Webber*, 784 P.2d 111 (Or. Ct. App. 1989); *Pruitt v. Pruitt*, 697 S.E.2d 702, 712 (S.C. Ct. App. 2010) (“Because the family court’s order does not contemplate the sale of either the marital home or the real property associated with Husband’s business, it would be inappropriate to deduct any estimated costs of converting the real estate to cash”); *Hayden v. Hayden*, 838 A.2d 59, 65 (Vt. 2003) (“Potential costs such as taxes or commissions cannot affect the valuation of a marital asset”); *In re Marriage of Stenshoel*, 866 P.2d 635 (Wash. Ct. App. 1993). *But see* *Balicki v. Balicki*, 4 A.3d 654 (Pa. Super. Ct. 2010) (under specific unique Pennsylvania statute, costs of sale must be considered even if sale is not immediate).

⁴⁶ See, e.g., *Harlan v. Harlan*, 544 N.E.2d 553, 556 (Ind. Ct. App. 1989), *aff’d*, 560 N.E.2d 1246 (Ind. 1990) (“there is no ominous specter of an IRS agent lurking in the shadows waiting to pounce on this plan of distribution”); *Hamroff v. Hamroff*, 826 N.Y.S.2d 389, 391 (N.Y. App. Div. 2006) (“the trial court was not required to consider the tax consequence of the sale of assets where there was no evidence that sale of any assets was expected”); *Koutroumanos v. Tzeremes*, 865 A.2d 1091 (R.I. 2005); *Wooten v. Wooten*, 615 S.E.2d 98, 103 (S.C. 2005) (“if the apportionment order does not contemplate

The rule is otherwise, with regard to both expenses of sale⁴⁷ and capital gains taxes,⁴⁸ when the business will actually be sold as part of the divorce proceedings. Sale is imminent not only when the court actually orders sale, but also when it makes a monetary award that can be satisfied only by selling assets. But courts are reluctant to hold that sale is required merely because a monetary award exceeds the payor's liquid assets. If the payor can raise the funds needed to pay the award by borrowing,⁴⁹ or can pay the award from future income,⁵⁰ sale is not required, and

the liquidation or sale of an asset, then it is an abuse of discretion for the court to consider the tax consequences from a speculative sale or liquidation"); *Drumheller v. Drumheller*, 972 A.2d 176, 191-92 (Vt. 2009) ("It would be inappropriate to consider the tax liability on a sale of assets if no asset is to be sold and husband is to accrue no tax liability"); *Hall v. Hall*, 125 P.3d 284, 289 (Wyo. 2005) ("It would be the basest form of speculation to attempt to determine tax consequences of a voluntary liquidation of assets at an unknown future time"). *But see Balicki*, 4 A.3d at 663 contrary result under specific unique Pennsylvania statute).

⁴⁷ See, e.g., *Tollefsen v. Tollefsen*, 981 P.2d 568 (Alaska 1999); *Keown v. Keown*, 883 N.E.2d 865, 870 (Ind. Ct. App. 2008) (trial court properly subtracted repair costs and costs of sale from value of home, where sale of home was ordered in the final decree, and repairs were necessary to sell home); *Cohen v. Cohen*, 73 S.W.3d 39 (Mo. Ct. App. 2002); *Reiter v. Reiter*, 886 N.Y.S.2d 434 (N.Y. App. Div. 2009) (trial court erred in failing to give wife credit for legal fees incurred in actual sale of her ownership interest in certain companies, where proceeds of sale were marital property); *Abrams v. Abrams*, 516 N.W.2d 348 (S.D. 1994) (subtracting closing costs where actual sale was pending); *Payne v. Payne*, 363 S.E.2d 428 (Va. Ct. App. 1987).

⁴⁸ See, e.g., *Hall v. Hall*, 833 So. 2d 305 (Fla. Dist. Ct. App. 2002); *In re Marriage of Malters*, 478 N.E.2d 1068 (Ill. App. Ct. 1985); *Bayley v. Bayley*, 602 A.2d 1152 (Me. 1992); *Merriken v. Merriken*, 590 A.2d 566 (Md. Ct. Spec. App. 1991); *Lekutanaj v. Lekutanaj*, 651 N.Y.S.2d 154 (N.Y. App. Div. 1996).

⁴⁹ See, e.g., *Barnes v. Barnes*, 820 P.2d 294 (Alaska 1991) (holding that the husband could pay a monetary award by liquidating other assets not subject to tax liability); *Hornyak v. Hornyak*, 48 So.3d 858, 863 (Fla. Dist. Ct. App. 2010) ("husband could obtain loans against his retirement accounts"); *In re Marriage of Perino*, 587 N.E.2d 54 (Ill. App. Ct. 1992) (determining that the husband could borrow or otherwise withdraw funds from his business to pay the award; the husband had loaned \$15,000 from the business to his brother in the recent past); *Granger v. Granger*, 579 N.E.2d 1319 (Ind. Ct. App. 1991) (deciding that the husband could borrow funds to pay the award, despite the husband's testimony that he actually intended to sell the business).

⁵⁰ E.g., *Solomon v. Solomon*, 857 A.2d 1109, 1119 (Md. 2004) (the husband "had access to several proven lending sources from which he had bor-

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expenses and capital gains tax should not be subtracted from value.

As an exception to the exception, costs of sale⁵¹ and capital gains taxes⁵² should not be subtracted, even when sale is imminent, if the record does not contain sufficient evidence to determine their amount with reasonable accuracy. The burden of proving the amount of these expenses is on the party who asks the court to consider them.

A minority of cases permit future capital gains taxes to be considered as a division factor even when sale is not imminent.⁵³ This result seems to be more common when the asset has an un-

rowed significant sums of money in the past”, and had “seven-figure income” from which the debt could be repaid).

⁵¹ See *Virgin v. Virgin*, 990 P.2d 1040 (Alaska 1999).

⁵² See *Calhoun v. Calhoun*, 156 S.W.3d 410, 417-18 (Mo. Ct. App. 2005) (“There was no testimony relating to the applicable tax rate, whether the amount would change from year to year, how the court should evaluate the tax consequences, whether the court should award a credit for the tax consequences in the future and reduce that to present value, or a host of other considerations”); *Bayer v. Bayer*, 914 N.Y.S.2d 169 (N.Y. App. Div. 2011); *Smith v. Smith*, 433 S.E.2d 196 (N.C. Ct. App. 1993), *rev’d on other grounds*, 444 S.E.2d 420 (N.C. 1994) (the court required a sale of assets, but no evidence was on record regarding the likely amount of capital gains taxes; the court did not error by failing to consider the tax consequences); *Koutroumanos v. Tzeremes*, 865 A.2d 1091 (R.I. 2005); *Hall v. Hall*, 125 P.3d 284, 289 (Wyo. 2005) (“Husband merely identified various assets he might liquidate in whole or in part. . . . He left it to the trial court to divine both the taxable income generated by whichever option, or combination of options, he might choose in the future, as well as the future tax rate applicable”).

⁵³ See *Miller v. Miller*, 625 So. 2d 1320 (Fla. Dist. Ct. App. 1993) (encouraging the trial court to consider upon remand the low tax basis of certain corporate stock); *Baldwin v. Baldwin*, 905 S.W.2d 521 (Mo. Ct. App. 1995) (where taxes would clearly be incurred in the future, the mere fact that their amount was uncertain did not prevent court from considering them in dividing marital property); *Goldman v. Goldman*, 646 A.2d 504 (N.J. Super. Ct. App. Div. 1994) (speculative future taxes can be considered as a division factor; affirming a trial court decision reducing the wife’s share of the husband’s business from 50% to 40% because of tax consequences); *Barnes v. Barnes*, 428 S.E.2d 294 (Va. Ct. App. 1993) (holding that it was proper to award the wife only 35% of home, because the husband was receiving legal title and the home had a low tax basis); *Michael v. Michael*, 469 S.E.2d 14 (W. Va. 1996) (considering the low basis of certain stock owned by a corporation as one factor supporting the application of a 25% lack of marketability discount in valuing the company).

commonly low tax basis.⁵⁴ The low basis looks more like a presently existing fact, even though the effect of that basis is only to increase future taxes. These cases consider the taxes only in determining the percentage division of the marital estate; they do not treat future capital gains taxes as a subtraction from current value.

III. Computing Value: Methods of Valuation

A. Role of the Court

After the court determines the proper standard for valuation, it must then apply that standard and value the marital assets. The court is not a valuation expert, and it cannot value assets without evidence. Rather, the role of the court is to review the evidence on value, which is often conflicting, and determine which value is correct.⁵⁵

The court makes this determination on an asset-by-asset basis, and it is free to value different assets using the testimony of different witnesses.⁵⁶

Because the court cannot value property without evidence, it is normally restricted to the range of the valuation evidence. A

⁵⁴ *E.g.*, Miller, 625 So. 2d 1320; *Barnes*, 428 S.E.2d 294.

⁵⁵ *See* *Mobley v. Mobley*, 18 So.3d 724, 726 (Fla. Dist. Ct. App. 2009) (“the trial court merely stated the differing valuations presented at trial,” without resolving the conflict; remanding with instructions to value the property).

⁵⁶ *See, e.g.*, *Dronen v. Dronen*, 764 N.W.2d 675, 687 (N.D. 2009) (“Although the district court accepted Timothy Dronen’s expert’s opinion on the value of the real estate, it found Nancy Dronen’s expert’s opinion on the machinery and equipment more persuasive”; affirming the trial court’s valuations). The court must, however, give the same value per share or item to both parties’ interests in the same asset. In other words, the court cannot give one value to property owned by the husband, and a different value to the same property owned by the wife. *See* *Hutchings v. Hutchings*, 547 N.Y.S.2d 970 (N.Y. App. Div. 1989) (error to give different values per share to each party’s interest in the same business); *Kaiser v. Kaiser*, 474 N.W.2d 63 (N.D. 1991) (error to accept testimony of the husband, who valued the corporation’s mineral interests at \$500 per acre, but his own similar interests at \$150 per acre).

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value lower than the lowest value submitted,⁵⁷ or higher than the highest value submitted,⁵⁸ is generally error.

Within the range of the evidence presented, the trial court has considerable discretion in choosing a value.⁵⁹ In particular, the court is not required to accept even uncontradicted expert testimony.⁶⁰ The court may abuse its discretion, however, if it

⁵⁷ See *In re Marriage of Cardona and Castro*, ___ P.3d ___, No. 09CA1996, 2010 WL 5013737 (Colo. App. Dec. 9, 2010) (where the husband valued the car at \$20,000 minus \$8,000 lien, and the wife valued it at \$10,000 to \$12,000, it was error to value the car at \$5,500); *Fuentes v. Fuentes*, 59 So.3d 1204 (Fla. Dist. Ct. App. 2011) (where the husband valued the debt on the car at \$6,000, and the wife valued it at \$5,200, it was error to value the debt at only \$3,000); *Wyzard v. Wyzard*, 771 N.E.2d 754, 757 (Ind. Ct. App. 2002) (where expert valuations of the husband's pension "ranged between \$340,897.49 and \$518,174," it was error to value the pension at only \$32,409.53); *In re Marriage of Barton*, 158 S.W.3d 879 (Mo. Ct. App. 2005) (where the parties essentially agreed on the value of the component assets, liabilities and goodwill of a marital business, it was error to value the business at \$50,000, when the sum of the agreed-upon components was \$142,485); *Kauffman v. Kauffman*, 101 S.W.3d 35 (Mo. Ct. App. 2003) (where both parties testified that a note receivable was for \$9,000, it was error to value note at \$2,000); *Taylor v. Taylor*, 25 S.W.3d 634 (Mo. Ct. App. 2000) (where both parties gave the business a positive value, it was error to hold that it had no value; also it was error to value a bracelet at \$3,000, when the only evidence in the record gave it a value of \$2,000); *Gaglio v. Molnar-Gaglio*, 753 N.Y.S.2d 185 (N.Y. App. Div. 2002) (where both parties agreed that a home was worth \$143,000, less liens of \$55,000, the trial court erred by valuing the home at \$125,000, with a net worth of \$53,000); *Landers v. Landers*, 4 P.3d 51 (Okla. Ct. App. 2000) (where the husband valued an asset at \$238,025 and the wife valued it at \$332,508, it was error to value the asset at only \$150,000).

⁵⁸ See *Moser v. Moser*, 422 N.W.2d 594 (S.D. 1988) (finding that a court improperly valued property at an amount higher than either party's contended value); *Traylor v. Traylor*, 454 S.E.2d 744 (Va. Ct. App. 1995) (where the husband valued an asset at \$5,583 and the wife valued her half interest at \$14,128, it was error to value the asset at \$40,000).

⁵⁹ See, e.g., *Theberge v. Theberge*, 9 A.3d 809, 814 (Me. 2010); *Jones v. Jones*, 277 S.W.3d 330, 337 (Mo. Ct. App. 2009) (holding that a trial court may make its own valuation, within the range of the estimates submitted by the parties, so long as that valuation is supported by the evidence); *In re Marriage of Crilly*, 124 P.3d 1151, 1154 (Mont. 2005) ("the district court may select any value within the range of values supported by the evidence"); *In re Chamberlin*, 918 A.2d 1 (N.H. 2007); *Wasserman v. Wasserman*, 888 N.Y.S.2d 90 (N.Y. App. Div. 2009).

⁶⁰ See, e.g., *In re Marriage of Dennis*, 467 N.W.2d 806 (Iowa Ct. App. 1991); *Huelskamp v. Huelskamp*, No. 2-09-21, 2009 WL 5064298 (Ohio Ct.

rejects such testimony without stating a plausible basis on the record.⁶¹

The court is allowed to reach a value that is within the range of the evidence presented, but not exactly equal to any one witness's valuation.⁶² This sort of independent valuation is not uncommon when the courts finds flaws in all of the valuation testimony. Stated differently, the court is free to combine methods used by different witnesses to reach a value between them, so long as the value found is within the range of the evidence. The reasoning behind an independent valuation should be stated on the record.⁶³

In reaching this sort of independent valuation, most states will allow the court to average the valuations given by witnesses

App. Dec. 28, 2009) (deciding that the trial court did not err in finding both parties' expert appraisals to be flawed, and valuing real property at the amount of the tax assessment); *Gaydos v. Gaydos*, 693 A.2d 1368 (Pa. Super. Ct. 1997); *Stratton v. Stratton*, 433 S.E.2d 920 (Va. Ct. App. 1993).

⁶¹ See *Axsom v. Axsom*, 565 N.E.2d 1097, 1101 (Ind. Ct. App. 1991) (where uncontested expert testimony gave the business a value of \$30,000, it was error to value the business at only \$2,000; "the court could have discounted the value of the business as not being worth \$30,000, but the discrepancy between the court's valuation of the business and the testimony is so far apart that it appears to be an arbitrary determination"); *In re Marriage of Crilly*, 124 P.3d 1151, 1154 (Mont. 2005) ("the court must state its reasons for the value it adopts. . . when the values [submitted by the parties] diverge widely; otherwise, the district court may select any value within the range of values supported by the evidence"); *Gaydos v. Gaydos*, 693 A.2d 1368, 1377 (Pa. Super. Ct. 1997) ("the fact-finder should offer some explanation of the basis on which it sets value where that value varies from the only value given in evidence").

⁶² See *Nowels v. Nowels*, 836 N.E.2d 481, 486 (Ind. Ct. App. 2005) ("Although the trial court declined to adopt either appraisal in its entirety, the valuation is not arbitrary but rather is a well-reasoned resolution of conflicting evidence"); *Wandishin v. Wandishin*, 976 A.2d 949, 953 (Me. 2009) ("the court may . . . reach a conclusion which accepts the valuation offered by one or the other of the witnesses, or a differing valuation based on the court's independent review of the evidence").

⁶³ See, e.g., *Sieger v. Sieger*, 829 N.Y.S.2d 649, 653 (N.Y. App. Div. 2007) (reversing an independent valuation and remanding for additional findings; "We are unable to discern from the record how the court arrived at the figure of \$7,206,778 as Kingsbridge's operating income for 1998, or what mathematical calculation was utilized in arriving at the values of the various components of that calculation").

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who have roughly equal credibility.⁶⁴ But it is easy for a court to use averaging to avoid the hard work of reviewing the evidence. When the appellate court senses that the trial court used an average number too quickly, without applying its independent judgment to the facts, the averaging of values may be an error.⁶⁵

⁶⁴ See, e.g., *Forshee v. Forshee*, 145 P.3d 492, 499 (Alaska 2006) (affirming a well-explained independent valuation; “the trial court did not simply adopt a compromise value without weighing the evidence”); *Rolla v. Rolla*, 712 A.2d 440 (Conn. App. Ct. 1998) (deciding it was proper to adopt value halfway between parties’ competing estimates); *Brycki v. Brycki*, 881 A.2d 1056, 1062 (Conn. App. Ct. 2005) (affirming the trial court valuation which “attempted to split the difference between the value placed on the property by the plaintiff and the value placed on it by the defendant”); *Sheehan v. Sheehan*, 943 So. 2d 818, 821 (Fla. Dist. Ct. App. 2006) (“the valuation assigned to the business by the trial court is supported by competent, substantial evidence and was not the result of improper >averaging= of the experts’ values”); *Webb v. Schleitker*, 891 N.E.2d 1144 (Ind. Ct. App. 2008); *Ross v. Ross*, 734 N.E.2d 1192 (Mass. App. Ct. 2000); *McKnight v. McKnight*, 951 So. 2d 594, 596 (Miss. Ct. App. 2007) (“[t]he value of the home given by the chancellor appears to have been derived in a fair manner by taking the average of the two parties’ proposed appraisals”); *Walker v. Walker*, 618 N.W.2d 465 (Neb. Ct. App. 2000) (finding it was proper to average competing appraisals); *Frost v. Frost*, 618 N.E.2d 198 (Ohio Ct. App. 1992); *Cloutier v. Cloutier*, 567 A.2d 1131 (R.I. 1989).

⁶⁵ See *Augoshe v. Lehman*, 962 So. 2d 398, 403 (Fla. Dist. Ct. App. 2007), *review denied*, 973 So. 2d 1119 (Fla. 2007) (reversing a value equal to the average of the parties’ competing values; “[t]he trial court’s valuation must be based on competent evidence and cannot be determined by >split[ting] the difference”) (quoting *Solomon v. Solomon*, 861 So. 2d 1218, 1221 (Fla. Dist. Ct. App. 2003)); *Torres v. Torres*, 883 So. 2d 839, 841 (Fla. Dist. Ct. App. 2004) (“we caution the court that a valuation based on the average of the difference in the parties’ valuation is not a valuation based on the evidence”); *Spillert v. Spillert*, 564 So. 2d 1146 (Fla. Dist. Ct. App. 1990); *Gaskill v. Robbins*, 282 S.W.3d 306, 315 (Ky. 2009) (“Using an average to obtain a value, without some basis other than an inability to choose between conflicting and competing valuation methods, is nothing more than making up a number, for there is no evidentiary basis to support that specific number”); *Skrabak v. Skrabak*, 673 A.2d 732 (Md. Ct. Spec. App. 1996) (holding it was error to value realizable goodwill at an amount between figures of the competing experts, where a very real question existed as to whether goodwill was realizable at all); *Kevdzija v. Kevdzija*, 850 N.E.2d 734, 742 (Ohio Ct. App. 2006) (“The trial court erred, therefore, when it averaged the sale price and the tax appraisal value . . . It should have assigned the sales price established by the sale itself”); *Ferguson v. Ferguson*, 386 S.E.2d 267, 269 (S.C. Ct. App. 1989) (“while it is appropriate for a family court judge to select a value for property that falls within the range of values testified to[,] it is inap-

B. Valuation Witnesses

Valuation testimony is normally presented to the court through one or more witnesses. The easiest valuation witnesses to find are the parties themselves. The owning spouse is always qualified to express an opinion as to the value of property,⁶⁶ and the nonowning spouse is generally qualified as well if he or she

appropriate to simply average the values testified to by the parties to arrive at a value”).

⁶⁶ See, e.g., *Edwards v. Edwards*, 26 So.3d 1254, 1261 (Ala. Civ. App. 2009) (“Either party was permitted to testify regarding their opinion of the value of the marital property; an appraisal was not required to establish the value of the property”); *Ethelbah v. Walker*, 225 P.3d 1082, 1092 (Alaska 2009) (“the opinion of a lay owner as to the value of his or her property is admissible evidence”; the trial court properly accepted the wife’s testimony on the value of an excavator owned by marital business, where the wife “was the corporate officer of the Ethelbahs’ equipment leasing and sales companies, and was involved in the buying and leasing of its equipment”); *Watson v. Watson*, 568 A.2d 1044 (Conn. App. Ct. 1990); *Valentine v. Van Sickle*, 42 So.3d 267, 278 (Fla. Dist. Ct. App. 2010) (“The parties were competent to testify concerning the value of the marital home in which they each had an ownership interest”); *In re Marriage of Hansen*, 733 N.W.2d 683, 703 (Iowa 2007) (“[i]n ascertaining the value of property, its owner is a competent witness to testify to its market value”); *Brown v. Brown*, 5 A.3d 1144 (Md. Ct. Spec. App. 2010); *Wandishin v. Wandishin*, 976 A.2d 949, 953 (Me. 2009) (“parties who are owners of the marital home, or other marital property, may testify and give their opinion as to the value of that property”); *In re Marriage of Altergott*, 259 S.W.3d 608, 614 (Mo. Ct. App. 2008) (determining that the trial court properly accepted the wife’s testimony valuing her business at \$7,500, where the only other evidence was the husband’s completely unsupported claim that the business was worth more than \$40,000, the amount of wife’s initial investment, even though business lost almost \$30,000 in its first year); *Dalgewicz v. Dalgewicz*, 606 S.E.2d 164 (N.C. Ct. App. 2004); *Williamson v. Williamson*, 586 A.2d 967 (Pa. Super. Ct. 1991); *Smith v. Smith*, 486 S.E.2d 516 (S.C. Ct. App. 1997); *Garcia v. Garcia*, 170 S.W.3d 644 (Tex. Ct. App. 2005).

The rule may be otherwise, and expert testimony may be required, with regard to certain specialized types of assets. See *Craig v. Craig*, 982 So.2d 724, 729 (Fla. Dist. Ct. App. 2008) (finding it was an error to accept the husband’s unsupported testimony as to the development value of land, where the husband lacked any expertise in real estate development; the rule permitting owner to testify to value “is not so broad as to permit the former husband to hypothesize the property’s net value at a future date after the property is transformed through the application of developmental expertise he does not possess”).

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has had reasonable exposure to the property during the marriage.⁶⁷

While the parties are easily found, their testimony has limited persuasive value. Most parties are not experts in determining the value of their property. In addition, the parties have obvious reasons to give a low value to property they wish to keep, and a high value to property they expect to see awarded to the other spouse. The court certainly has discretion to accept the testimony of the owning spouse.⁶⁸ But when the testimony of the owning spouse conflicts with the testimony of an expert witness,

⁶⁷ See *Edwards v. Edwards*, 26 So.3d 1254, 1261 (Ala. Civ. App. 2009) (“Either party was permitted to testify regarding their opinion of the value of the marital property; an appraisal was not required to establish the value of the property”); *Barnes v. Sherman*, 758 A.2d 936 (D.C. 2000); *Valladares v. Junco-Valladares*, 30 So.3d 519, 524 (Fla. Dist. Ct. App. 2010) (allowing testimony on the value of a home by the non-owner wife, who had lived in the home for most of the fourteen year marriage); *In re Marriage of Vancura*, 825 N.E.2d 345 (Ill. App. Ct. 2005); *Wandishin v. Wandishin*, 976 A.2d 949, 953 (Me. 2009) (“parties who are owners of the marital home, or other marital property, may testify and give their opinion as to the value of that property”); *McGowan v. McGowan*, 43 S.W.3d 857 (Mo. Ct. App. 2001) (accepting a wife’s testimony that her husband’s car was worth \$24,000, because the wife said she had seen similar car offered for that amount in a newspaper); *Bannen v. Bannen*, 331 S.E.2d 379 (S.C. Ct. App. 1985) (allowing a wife to testify as to the value of her husband’s professional association, because she worked in the office for sixteen years as a secretary and bookkeeper). *But see* *Porter v. Thrane*, 908 A.2d 1137 (Conn. App. Ct. 2006).

⁶⁸ See, e.g., *Dunn v. Dunn*, 911 So. 2d 591 (Miss. Ct. App. 2005) (finding that the trial court did not err in rejecting an appraisal of real property, where the husband gave contradictory testimony); *Young v. Young*, 578 N.W.2d 111 (N.D. 1998) (holding that the trial court did not err by giving equal weight to the husband’s own valuation testimony and testimony of the wife’s expert witness); *Okos v. Okos*, 739 N.E.2d 368 (Ohio Ct. App. 2000) (deciding that the trial court properly accepted a valuation submitted by the husband, and rejected a valuation submitted by the wife’s appraiser); *In re Marriage of Gano-Ridge and Ridge*, 211155 P.3d 84, 90 (Or. Ct. App. 2007) (where the husband’s valuations were based upon “his experience in buying and selling real estate,” the trial court did not err in finding them more credible than the valuations of the wife’s expert appraisers).

As *Gano-Ridge* suggests, the owner’s testimony is more persuasive when the owner has expert knowledge of the asset. But even then, because of the potential for bias, testimony from an expert witness is generally more persuasive.

or with documentary evidence, the odds are good that the court will give little weight to the owner's testimony.⁶⁹

The cases allow a broad range of witnesses to qualify as valuation experts. The standard for giving expert testimony, in valuation as well as in other areas, is that the witness must have more knowledge than the finder of fact.⁷⁰ A wide variety of persons who have knowledge of property have been held to meet this standard.⁷¹

⁶⁹ See, e.g., *Beal v. Beal*, 88 P.3d 104, 117 (Alaska 2004) (“we cannot say that it was clear error for the trial court to adopt a trained appraiser’s valuation of a table over the evaluation of an owner of the table”); *In re Marriage of Wilson*, 449 N.W.2d 890 (Iowa Ct. App. 1989) (finding it was proper to reject the husband’s testimony on the value of the marital home, where the wife had introduced testimony of a qualified appraiser); *Nichols v. Nichols*, 737 N.Y.S.2d 449 (N.Y. App. Div. 2002) (finding that the trial court properly accepted expert appraisal of a tool collection over the husband’s own valuation); *Matter of Marriage of Melander*, 758 P.2d 415 (Or. Ct. App. 1988) (finding the testimony of a jointly selected appraiser more probative than the “unsupported and probably wishful” testimony of wife); *Thompson v. Thompson*, 782 N.W.2d 607 (Neb. Ct. App. 2010) (determining that the trial court could have accepted the testimony of the wife on the value of real property, but did not err by instead accepting an expert appraisal); *Blake v. Blake*, 2005 WL 1939434 (Ohio Ct. App. 2005) (“the third party appraiser’s testimony was a more accurate reflection of the equipment’s value than Michael’s own testimony”); *In re Marriage of Ahearn and Whittaker*, 113 P.3d 439, 443 (Or. Ct. App. 2005) (“We find the appraiser’s methodology and reasoning more persuasive than husband’s opinion as to the property’s fair market value”).

⁷⁰ See, e.g., *Rhodes v. Rhodes*, 52 So.3d 430, 445-46 (Miss. Ct. App. 2011) (“The test is whether a witness possesses peculiar knowledge or information regarding the relevant subject matter which is not likely to be possessed by a layman”; finding it was error to hold that a witness was not qualified merely because he had not given in-court testimony before, where the witness had more knowledge of valuation than a layman) (quoting *Grass v. State*, 739 So.2d 428, 431 (Miss. Ct. App.1999)). If the trial court in *Rhoades* was correct, there would eventually be no valuation experts at all, because no expert could ever give in-court testimony for the first time, so the pool of qualified experts would inevitably dwindle down to zero.

⁷¹ See, e.g., *Rothbart v. Rothbart*, 141 N.H. 71, 677 A.2d 151 (N.H. 1996) (retirement benefits can be valued by accountants as well as by actuaries); *Carter v. Carter*, 934 So. 2d 406 (Ala. Civ. App. 2005) (finding that the trial court did not err in holding that a stockbroker and financial planner was qualified to value retirement benefits under a state employees’ retirement plan); *Matter of Marriage of Arends*, 917 P.2d 1060 (Or. Ct. App. 1996) (valuation testimony can be given by accountants as well as by appraisers); *McDavid v. McDavid*, 451 S.E.2d 713 (Va. Ct. App. 1994) (deciding that an accountant with

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While any witness with more knowledge of valuation than the finder of fact can qualify as an expert, experts with more experience are of course normally more persuasive.⁷²

C. *Bare Opinion*

Regardless of which witness values the property, the witness must apply some valuation method. A pure opinion of value, with no proper stated basis, may be admissible, especially if the witness is the owner or the owner's spouse.⁷³ But a bare opinion is unlikely to carry much persuasive value.

D. *Comparable Sales*

To be persuasive, an opinion of value must be based upon one or more valuation methods. A witness is not limited to applying one method,⁷⁴ and indeed some courts have suggested

thirty years of experience was a qualified expert, even if he was not a specialist in valuing businesses); *Errington v. Errington*, 2002 WL 479161 (Ohio Ct. App. 2002) (when a broker had been in practice since 1971, had completed enough courses to sit for the appraisal examination if he so desired, and actually performed 300-325 appraisals per year, it was proper to accept his valuation over the valuation of an appraiser); *In re Marriage of Rice*, 96 S.W.3d 642 (Tex. Ct. App. 2003) (approving the testimony of a realtor with eighteen years' experience, who served on local appraisal board and had testified routinely in local divorce and condemnation cases).

⁷² See, e.g., *Skokos v. Skokos*, 40 S.W.3d 768 (Ark. 2001) (finding that the trial court properly accepted testimony of an expert who had substantial experience valuing cellular telephone companies, and who was a member of an association of business appraisers, over the testimony of expert with no experience valuing such companies and no such membership); *In re Marriage of Russell*, 473 N.W.2d 244 (Iowa Ct. App. 1991) (finding that a trial court properly chose a value closer to that given by the husband's experts, who had both valued and operated funeral homes; the wife's expert had no such experience); *Schorer v. Schorer*, 501 N.W.2d 916 (Wis. Ct. App. 1993) (determining it was proper to believe an expert with experience in the canning industry over an accountant with general experience valuing close corporations).

⁷³ E.g., *Kohus v. Kohus*, 2003 WL 21135479 (Ohio Ct. App. 2003) (the trial court refused to admit hearsay appraisal, but properly accepted the owner's personal valuation, based at least partly upon the appraisal, where no other evidence on the value of the property existed).

⁷⁴ See *Miller v. Miller*, 705 S.E.2d 839, 842 (Ga. 2010) ("It is not required that 'only one method be used in isolation'") (quoting *In re Marriage of Hall*, 692 P.2d 175, 180 (Wash. 1984); *Sharp v. Sharp*, 449 S.E.2d 39 (N.C. Ct. App. 1994) (expressly rejecting the argument that a trial court erred by accepting the

that an opinion based upon multiple valuation methods may be more persuasive.⁷⁵

The most persuasive valuation method is usually comparable sales.⁷⁶ The goal of valuation is to determine fair market value, and evidence of the sale price in actual open market transactions speaks directly to fair market value.

The weight of a comparable sale depends upon several factors. First, the ultimate comparable sale is a sale of the very same property being valued. Such a sale, close in time to the date of valuation, is strong evidence of value.⁷⁷

testimony of an expert who used an average of several different valuation methods).

⁷⁵ “The most successful method of appraising a business or professional practice is not for the expert to use only one approach in estimating value, but to use several different approaches, just as a real estate appraiser may estimate one value based on comparable properties and another based on replacement costs.” *In re Marriage of Gunn*, 598 N.E.2d 1013, 102 (Ill. App. Ct. 1992) (quoting 1 H. JOSEPH GITLIN, *GITLIN ON DIVORCE*, § 8.09(E)(6), at 153 (1995); see also *Ballas v. Ballas*, 2004 WL 2334329 (Ohio Ct. App. 2004) (in accepting the testimony of the wife’s expert, the trial court stressed that an expert had used three distinct valuation methods, whereas the husband’s expert (the office manager for his medical practice) had used only one).

⁷⁶ See *Howard v. Howard*, 981 So. 2d 802 (La. Ct. App. 2d Cir. 2008), *writ denied*, 992 So. 2d 932 (La. 2008) (holding that the trial court did not err in finding a comparable sales approach more reliable than replacement cost); *Hanson v. Hanson*, 738 S.W.2d 429 (Mo. 1987) (stressing that comparable sales are highly persuasive evidence); *In re Marriage of Helzer* 102 P.3d 1263, 1267 (Mont. 2004) (“Between the two experts presented, the court found the appraisal of Sherri’s expert to be more reliable, citing his use of comparable sales as justifying its finding”); *Kevdzija v. Kevdzija*, 850 N.E.2d 734, 742 (Ohio Ct. App. 2006) (“The trial court erred, therefore, when it averaged the sale price and the tax appraisal value . . . It should have assigned the sales price established by the sale itself”).

⁷⁷ See *In re Marriage of Antuna*, 8 P.3d 589 (Colo. Ct. App. 2000) (proper to value wife’s medical practice at amount other doctors had paid to purchase similar interest in practice); *Tebbe v. Tebbe*, 815 N.E.2d 180, 184-85 (Ind. Ct. App. 2004), *review denied*, 831 N.E.2d 743 (Ind. 2005) (valuing the husband’s stock at the amount per share his partner invested when the corporation was founded, even though the husband paid nothing for his shares, instead contributing “the knowledge and experience necessary to make the venture successful”); *Nuveen v. Nuveen*, 795 N.W.2d 308, 313 -314 (N.D. 2011) (noting that the purchase price for intangible assets of the same dental practice three and one-half years before the divorce was relevant evidence of its value); *Ward v. Ward*, 895 P.2d 749 (Okla. Ct. App.1995) (relying in part on documents showing the

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If the sale is not of the property itself, but rather of another property which the witness claims is similar, the weight of the sale depends upon the degree of similarity. When the degree of similarity is high, comparable sales of similar property can be very persuasive.⁷⁸ Where the degree of similarity is low, and the expert has not accounted for the difference, comparable sales may carry little weight.⁷⁹ The degree of similarity is ultimately an issue for the court. This issue is not foreign to most judges, as comparable sales are extensively used to value property in eminent domain cases, business cases, and in other areas of the law.

price for which the husband bought half of the partnership within one year of the divorce trial).

⁷⁸ See, e.g., *Johnson v. Johnson*, 471 N.W.2d 156, 161 (S.D. 1991) (affirming valuation based upon “several comparable sales” of similar businesses); *In re Marriage of Perkins*, No. 07-02-0419-CV, 2004 WL 112598 (Tex. App. Jan. 23, 2004) (carefully evaluating a series of comparable sales of similar properties); *Schorer v. Schorer*, 501 N.W.2d 916 (Wis. Ct. App. 1993) (holding it was proper to value a close corporation by comparison to the value of a similar publicly-traded corporation).

⁷⁹ See, e.g., *In re Marriage of Duncan*, 90 Cal. App. 4th 617, 108 Cal. Rptr. 2d 833 (2001) (in valuing a privately held company, the trial court properly preferred valuation based on comparable sales of private companies over one based on comparable sales of publicly traded companies); *Stephens v. Stephens*, 959 So. 2d 388, 389 (Fla. Dist. Ct. App. 2007) (holding that the trial court properly rejected the valuation of an expert who “established a value for the Wyngate lot by using sales prices of undeveloped properties of far greater size without making an adjustment in the value of the Wyngate lot to reflect the price per acre paid for the lots”); *In re Marriage of Patrick*, 201 S.W.3d 591 (Mo. Ct. App. 2006) (rejecting a valuation that did not adjust the sale price sufficiently for differences between the asset being valued and the sales that were allegedly comparable; the valuation also used the listing price rather than the sale price for some of the sales); *Scavone v. Scavone*, 578 A.2d 1230 (N.J. Super. Ct. App. Div. 1990) (the husband’s partner sold a stock exchange seat for \$250,000, but the value was reduced because the partner lived some distance away and could not supervise day to day activities of the lessee of seat; the court ultimately valued the seat at \$350,000); *Sharon v. Sharon*, 504 N.W.2d 415 (Wis. Ct. App. 1993) (finding that the trial court properly refused to adopt the price paid in a previous buy-out of one of the husband’s partners; the price failed to include the value of certain leases).

Differences in comparable sales are not, however, sufficient to render an expert’s opinion inadmissible. See *Miller v. Miller*, 705 S.E.2d 839, 843 (Ga. 2010) (“differences in geographical locations and dates of sale go to the weight, rather than admissibility, of the comparable sales on which Wife’s expert relied”).

Second, the weight of a comparable sale is obviously greater when it occurs closer in time to the date of valuation. As a sale becomes more distant, the weight of the sale drops.⁸⁰ The issue is not only the passage of time, but rather the similarity in market conditions between the date of the sale and the date of valuation.⁸¹ For example, sales of real property just before the real estate crash of 2008-2009 were not good evidence of fair market value after the crash, even though the sale was only a few months old, because market conditions were so different.

Third, a comparable sale carries weight only if the sale was an arms'-length transaction between a willing buyer and a willing seller, with no motivation other than negotiating a fair price for selling the property. Sales that do not meet this ideal will receive less weight.⁸²

One particular recurring issue involving comparable sales is sales of the same or a similar business which included a covenant not to compete. Consideration for a covenant not to compete is not consideration for the sale of the business, but rather consideration for a form of negative service: refraining from competing

⁸⁰ See, e.g., *Shackelford v. Shackelford*, 571 S.E.2d 917 (Va. Ct. App. 2002) (1987 sale of same asset was not evidence of 2001 value, because the 1987 sale price included control of the company, and therefore occurred at a premium price).

⁸¹ See, e.g., *Skokos v. Skokos*, 40 S.W.3d 768 (Ark. 2001) (two separate sales, held 18.5 months and three years respectively after the date of valuation, were not evidence of value; important changes had occurred before the sales took place).

⁸² See *Barnes v. Sherman*, 758 A.2d 936 (D.C. 2000) (finding that the sale to the husband's mother two days before trial was not at arms' length and it was error to accept that price as the value of the company); *Bricker v. Bricker*, 893 N.Y.S.2d 128, 130 (N.Y. App. Div. 2010) (the trial court properly rejected "testimony of the defendant's neighbor that he was willing to purchase [the marital home] for considerably more than the appraised value"); *Terico v. Terico*, 634 N.Y.S.2d 121 (N.Y. App. Div. 1995) (rejecting comparable sales, where the sales in question were not bona fide open-market transactions); *Carter v. Carter*, No 2008 CA 54, 2009 WL 2197055 at *5 (Ohio Ct. App. July 24, 2009) ("We further reject Mr. Carter's argument that his statement that he would purchase the property for \$165,000 constitutes the best evidence of the fair market value . . . Mr. Carter's potential purchase of the marital property from Ms. Carter would hardly constitute an arm's length property transaction"); *Miller v. Miller*, No. 08 JE 26, 2009 WL 1915169 (Ohio Ct. App. June 29, 2009) (where the wife acquired the home in a prior divorce settlement, the settlement was not equivalent to an arms'-length sale).

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with the business. The majority rule is therefore that a sale that includes or assumes a covenant not to compete is *not* a comparable sale.⁸³

Such a sale may be comparable, however, if a fair and reasonable value for the covenant is subtracted from the sale price. An Oregon court noted:

[T]he valuation of Slater Chiropractic as a marital asset could not properly be predicated on an assumption that, at the time of a putative sale, husband would be bound by a noncompetition covenant, thus enhancing the value of the business. *Or, stated conversely, any valuation of Slater Chiropractic so predicated must concomitantly be reduced by the value of the putative noncompetition covenant.*⁸⁴

⁸³ See *Antolik v. Harvey*, 761 P.2d 305 (Haw. Ct. App. 1988); *Gaskill v. Robbins*, 282 S.W.3d 306 (Ky. 2009); *Lowe v. Lowe*, 372 N.W.2d 65 (Minn. Ct. App. 1985); *Gerard v. Gerard*, 825 S.W.2d 21 (Mo. Ct. App. 1992); *Johnston v. Johnston*, 778 S.W.2d 674 (Mo. Ct. App. 1989).

Where an expert testifies that sale would be impossible without a covenant, that testimony has been treated as an indication that the business has no value, apart from the owner's individual goodwill. See *Williams v. Williams*, 667 So.2d 915, 916 (Fla. Dist. Ct. App. 1996); *Walton v. Walton*, 657 So. 2d 1214 (Fla. Dist. Ct. App. 1995); *Kricsfeld v. Kricsfeld*, 588 N.W.2d 210 (Neb. 1999). A fair value for the covenant was not in evidence in any of these cases. Logically, if the sale would require a covenant, but the value of the covenant is subtracted from the sale price, the remainder of the purchase price should be evidence of value. See the cases cited in the next footnote.

It may be possible to assume a covenant in the minority of states that treat individual goodwill as marital property. See *In re Marriage of Duncan*, 90 Cal. App. 4th 617, 108 Cal. Rptr. 2d 833 (2001); *In re Marriage of Czapar*, 232 Cal. App. 3d 1308, 285 Cal. Rptr. 479 (1991); *Carr v. Carr*, 701 P.2d 304 (Idaho Ct. App. 1985); *Mitchell v. Mitchell*, 719 P.2d 432 (N.M. Ct. App. 1986). In these states, the covenant may be simply a device for protecting the value of the owning spouse's individual goodwill.

⁸⁴ *Slater and Slater*, 245 P.3d 676, 684 (Or. Ct. App. 2010) (emphasis added); see also *Baker v. Baker*, 733 N.W.2d 815, 823 (Minn. Ct. App. 2007), *rev'd in part on other grounds*, 753 N.W.2d 644 (Minn. 2008) (the mere fact that a buyer would require a noncompetition agreement does not prevent the court from dividing transferable enterprise goodwill of a business, especially if noncompetition agreement would not actually materially restrict the seller's future employment; "[r]ather than restricting future employment, a noncompetition agreement may be a protective device intended to assure the value of the business' goodwill"); *McReath v. McReath*, 789 N.W.2d 89, 93 (Wis. Ct. App. 2010) (the fact that a buyer would require a covenant does not necessarily mean that no value exists apart from individual goodwill; expressly rejecting the *Williams* case cited in the previous note).

E. Market Reports

Some assets are bought and sold often enough and publicly enough that data on sale prices is actually published. When sales data is published, it is highly reliable evidence of value.

The most common example is publicly-traded securities. Market prices for such securities are widely available, both in newspapers⁸⁵ and on the Internet.⁸⁶ Another common example is used vehicles, which are often valued through use of reference works, either in print⁸⁷ or on line.⁸⁸

Published reports on market prices must of course be applied properly, according to the procedures set for the publication. For example, where a publication on the value of used vehicles requires a mileage discount, it is error not to apply the discount.⁸⁹

The cases in which a sale would be comparable despite the presence of a covenant, as anticipated by *Baker* and *McReath*, are essentially cases presenting the situation anticipated in *Slater* and suggested in the text: where a fair value for the covenant is subtracted from the sale price, and positive value remains.

⁸⁵ See, e.g., *Gravenstine v. Gravenstine*, 472 A.2d 1001 (Md. Ct. Spec. App. 1984) (deciding it was proper to take judicial notice of stock listings in the *Washington Post*).

⁸⁶ See *In re Marriage of Mele*, No. 63603-1-I, 2011 WL 135188, at *4 (Wash. Ct. App. Jan. 10, 2011) (unpublished) (finding it was error to take judicial notice of stock quotations from CNNMoney.com; there was insufficient evidence that the site met the hearsay exception for “market quotations . . . generally used and relied upon by the public”).

Mele accepted that Internet sites can be used to value securities. The quotation was rejected on the facts not because it came from the Internet, but because there was insufficient proof that CNNMoney.com is generally used and relied upon by the public.

⁸⁷ See, e.g., *Prahl v. Prahl*, 627 N.W.2d 698 (Minn. Ct. App. 2001); *Shockley v. Shockley*, 560 N.W.2d 777 (Neb. 1997); *Knight v. Knight*, 685 N.Y.S.2d 560 (N.Y. App. Div. 1999); *Fonzi v. Fonzi*, 633 A.2d 634 (Pa. Super. Ct. 1993).

⁸⁸ See, e.g., *Hess v. Riedel-Hess*, 794 N.E.2d 96 (Ohio Ct. App. 2003); *Sheridon v. Sheridan*, 867 So. 2d 38, 45 (La. Ct. App. 2004).

⁸⁹ See *Bostick v. Bostick*, No. 90711, 2008 WL 4434986, *5 (Ohio Ct. App. Oct. 2, 2008) (finding that the trial court properly accepted the husband’s value for vehicle, taken from the *Kelley Blue Book*, and appropriately rejected the wife’s valuation, taken from the *NADA Used Car Guide* when the wife did not use the correct mileage for the cars to compute value). *But see* *Sherrod v. Sherrod*, 709 So. 2d 352 (La. Ct. App. 1998), *writ denied*, 720 So. 2d 687 (La. 1998) (the court unwisely accepted a value that did not include the proper mileage discount).

An interesting practical issue regarding market reports is how they should be authenticated as evidence. Cases dealing with print sources generally find that they are self-authenticating. For example, a Maryland court taking judicial notice of stock prices listed in the *Washington Post* did not expressly require proof that the *Post* is a reliable source.⁹⁰

Printouts from an Internet site are normally authenticated simply by the testimony of the person who printed the document that the printout is an authentic copy of what appeared on the screen.⁹¹ Courts have also held printouts from web sites authenticated when the address of the site appears on the printout, and the court can type that address into a computer and obtain the same information.⁹²

A party who seeks to use a market report obtained from the Internet must also show that it is not hearsay. Most states have a hearsay exception modeled upon Federal Rule of Evidence 803(17), which applies to “Market reports . . . generally used and relied upon by the public or by persons in particular occupations.”⁹³

In the unpublished case of *In re Marriage of Mele*,⁹⁴ a Washington state appellate court held that stock quotations from CNNMoney.com did not meet this exception, because there was no evidence that CNNMoney.com was generally relied upon by the public.

Courts have generally not required specific proof of reliability when a party seeks to introduce in-print market quotations into evidence. Indeed, section 2-274 of the Uniform Commercial Code allows introduction of “reports in official publications or trade journals *or in newspapers or periodicals of general circulation* published as the reports of such market,” without requiring

⁹⁰ Gravenstine v. Gravenstine, 472 A.2d 1001 (Md. Ct. Spec. App. 1984).

⁹¹ See Jay M. Zitter, *Authentication of Electronically Stored Evidence*, § 11, 34 A.L.R.6TH 253 (2008).

⁹² “The exhibit contains the internet domain address from which the table was printed, and the date on which it was printed. The Court has accessed the website using the domain address and has verified that the webpage printed exists at that location.” U.S. E.E.O.C. v. E.I. DuPont de Nemours & Co., No. Civ. A. 03-1605, a at *2 (E.D. La. Oct. 18, 2004).

⁹³ FED. R. EVID. 803(17).

⁹⁴ 2011 WL 135188, 4 (Wash. Ct. App. 2011) (unpublished).

individualized proof of reliability.⁹⁵ In effect, the courts are taking judicial notice of the likely accuracy of stock listings in newspapers of general circulation. Such notice does not prevent a party from arguing that the stock listing is wrong, but it places the burden of making such an objection upon the party who asserts it.

The *Mele* court should likewise have taken judicial notice that CNNMoney.com is a generally reliable web site. It is part of CNN, which is generally known to be large mainstream media news network. It is no less reliable than a major daily newspaper of general circulation.

This is an important practical issue, because daily newspapers are sharply declining. A time will come, very possibly in our lifetimes, when stock quotations are no longer available in newspaper, and are available only on the Internet. The willingness of courts to accept stock listings in newspapers has been of great benefit to litigants, allowing inexpensive proof of a fact (the listed value of a certain security on a certain date) which is capable of objective determination and hardly ever truly contested. That benefit will be lost unless the courts start treating on-line market quotations in the same way that they currently treat in-print market quotations.⁹⁶ *Mele*, unfortunately, is a step in the wrong direction.

If judicial notice cannot be taken of the reliability of CNNMoney.com, how would one go about proving that the public generally relies upon it? Reviewing case law on the market quotations exception to the hearsay rule,⁹⁷ there are no cases other than *Mele* requiring proof that the public relies on the quotations. The courts are acting as if the requirement that the quotations be relied upon by the general public is an issue of law for the court, not an issue of fact for the parties.

⁹⁵ See U.C.C. § 2-274 (Westlaw 2011) (emphasis added).

⁹⁶ “[I]n an age where so much information is calculated, stored and displayed on a computer, massive amounts of evidence would be inadmissible” if the Court were to accept DuPont’s characterization of all information on the Internet as inherently unreliable. U.S. E.E.O.C. v. E.I. DuPont de Nemours & Co., 2004 WL 2347559, at *1, quoting Chapman v. San Francisco Newspaper Agency, No. C 01-02305 CRB, 2002 WL 31119944, at *2 (N.D. Cal. Sept. 20, 2002).

⁹⁷ See generally West’s National Digest System, “Evidence” § 323(4).

If reliance by the public is an issue of fact, how can such reliance be proven? Reliance upon raw data on the number of daily hits is unwise, since hits are no guarantee of reliability. Many opinionated bloggers who get thousands of daily hits have a reputation for playing fast and loose with factual matters. The person who printed out the report would have very little knowledge of whether large numbers of other persons rely on the site. In all likelihood, therefore, proof would require some sort of expert testimony from an expert in websites. That would add materially to the costs of valuing stock. It would likely add very little to the accuracy of the valuation, because there is no basis for claiming that market quotations on the Internet are any less accurate than market quotations in print.

Internet stock quotations are not only as reliable as newspaper stock quotations, but also much easier to use. Stock quotations in newspapers tend to appear in small print, and there is widespread use of abbreviations known only to securities professionals. Internet stock quotations appear in larger print, with fewer abbreviations and more detail. The author has used both types of quotations, and finds the Internet quotations much, much easier to use.

The better approach, therefore, is to give equal treatment to market quotations in both in-print and on-line form. As the amount of information available in print continues to decline, this approach is quickly becoming a practical necessity.

With regard to vehicles, a published report of value is probably less persuasive than an appraisal by an expert who has actually inspected the car at issue.⁹⁸ With regard to publicly-traded securities, the general practice is to treat market reports as conclusive. There are no cases in which a party went to the trouble and expense of obtaining an appraisal, when published stock prices were generally available.

F. *Comparable Offers*

In addition to looking at comparable sales, the court may also look at some types of comparable offers. An offer to

⁹⁸ See *Hammersmith v. Hammersmith*, No. 4-03-15, 2004 WL 765231, *4 (Ohio Ct. App. Apr. 12, 2004) (finding that the trial court properly accepted the husband's appraisal, done in person by a car dealer, over the wife's "*Kelly Blue Book* appraisal done over the internet").

purchase an asset, made at arms' length in good faith by a third party, can be important evidence of value.⁹⁹

Offers to purchase are subject to the same limitations as comparable sales. An offer is therefore not evidence of value when it is unreasonably remote in time,¹⁰⁰ or when it was not made in good faith.¹⁰¹

Conversely, an offer to sell an asset, not yet accepted by a buyer, is not good evidence of value. The fact that no buyer has materialized suggests that the listing price is excessive. The price may reflect, as one court noted, "an amount that [the seller] hoped, but did not expect, to receive."¹⁰²

⁹⁹ See, e.g., *Theberge v. Theberge*, 9 A.3d 809, 814 (Me. 2010) ("The court could properly rely on the amount of a purchase offer to set the net worth of Atkinson"); *Sygrove v. Sygrove*, 791 N.Y.S.2d 73 (N.Y. App. Div. 2005) (valuing real property at the amount of a \$950,000 cash offer to buy submitted to the parties during the pendency of the action); *Houx v. Houx*, 140 P.3d 648 (Wyo. 2006) (finding that the trial court did not err in giving weight to uncontested oral testimony of an offer to purchase a marital asset for \$380,000).

¹⁰⁰ See *Paul v. Paul*, 675 N.Y.S.2d 713 (N.Y. App. Div. 1998) (holding it was proper to reject a four-year-old actual offer, in favor of a more recent appraisal when the record contained evidence that the market for the asset was declining).

The key point is again whether the condition of the asset has changed materially since the offer was made, and not the passage of time in itself. Even a recent offer can be outdated, if economic conditions are different. See *Nunez v. Nunez*, 29 So.3d 1191, 1192 (Fla. Dist. Ct. App. 2010) (finding it was error to value a company at the amount of a prior letter of intent to purchase, where "by the time of trial, both interested [purchasing] parties were defunct and all interest in purchasing ATL had evaporated").

¹⁰¹ See *Signorelli v. Signorelli*, 434 S.E.2d 382, 386 n.3 (W. Va. 1993) (giving little weight to an offer made by the wife's father; "courts have recognized that opinions by interested parties to a divorce action as to the value of assets may be treated with some caution"; the offer had unfavorable payment terms and was subject to a noncompetition agreement).

¹⁰² *Reed v. Reed*, 763 N.W.2d 686, 695 (Neb. 2009); see also *In re Marriage of Baer*, 954 P.2d 1125, 1132 (Mont. 1998) ("without a sale, however, [an offer] price does not necessarily reflect the plane's value"); *Sygrove v. Sygrove*, 791 N.Y.S.2d 73 (N.Y. App. Div. 2005) (where real property was on the market for \$1.2 million, but \$950,000 was the highest offer received, it was proper to value the property at \$950,000); cf. *In re Marriage of Patrick*, 201 S.W.3d 591 (Mo. Ct. App. 2006) (deciding that an expert improperly applied the comparable sales method by looking to the listing rather than the sale price for comparable properties).

G. Buy-Sell Agreements

One particular variant of a comparable offer, occurring in the business context, is a buy-sell agreement. A buy-sell agreement is an agreement signed by the owners of a business, requiring that any owner who wishes to leave the business must first offer it for sale to the other owners, or perhaps to the business itself, for a stated price.

Like other forms of comparable sales and comparable offers, a buy-sell agreement is not entitled to any weight in valuing the business unless the agreement was signed in good faith. The clearest example of an agreement that fails this requirement is one that was adopted for the specific purpose of reducing the value of the business for purposes of divorce.¹⁰³

Courts have also held that a buy-sell agreement was not signed in good faith when it was adopted for a purpose other than giving a fair value to the company. For example, an agreement signed to discourage owners from leaving by undervaluing the business is not evidence of value, as no one intended that the agreement state an accurate value for the business.¹⁰⁴ The agreement may also not be signed in good faith if it arbitrarily fails to consider important assets of the business, such as its goodwill.¹⁰⁵

¹⁰³ See *Houchens v. Boschert*, 758 N.E.2d 585 (Ind. Ct. App. 2001) (the agreement was signed after the date of filing, with retroactive effect; the price term was the book value for two years, and the fair market value after that); *Cox v. Cox*, 775 P.2d 1315 (N.M. Ct. App. 1989) (the agreement was signed twenty-nine days before the filing of divorce action).

¹⁰⁴ See *In re Marriage of Huff*, 834 P.2d 244 (Colo. 1992) (the husband's expert admitted that the purpose of the agreement was to discourage withdrawal by undervaluing the business); *Douglas v. Douglas*, 722 N.Y.S.2d 87 (N.Y. App. Div. 2001) (rejecting a withdrawal formula that was set artificially low to discourage owners from leaving the business); cf. *Barton v. Barton*, 639 S.E.2d 481 (Ga. 2007) ("the buy-sell price in a closely-held corporation can be manipulated and does not necessarily reflect true market value").

¹⁰⁵ See *In re Marriage of Nichols*, 27 Cal. App. 4th 661, 33 Cal. Rptr. 2d 13 (1994); *In re Marriage of Huff*, 834 P.2d 244 (Colo. 1992); *Brody v. Brody*, 758 A.2d 1274 (Pa. Super. Ct. 2000); *Howell v. Howell*, 523 S.E.2d 514 (Va. Ct. App. 2000).

Of course, the failure of the agreement to value individual goodwill is not a problem in states that do not treat individual goodwill as marital property.

An agreement that does not value goodwill is still evidence of value, if the makers of the agreement concluded in good faith that the business had no goodwill. See *Sweeney v. Sweeney*, 534 A.2d 1290 (Me. 1987); *In re Marriage*

The court is especially likely to find that the agreement was not signed in good faith when the owners of the business have a history of disregarding it,¹⁰⁶ or when the agreement value is grossly less than what the value would be without the agreement.¹⁰⁷

Buy-sell agreements are also evidence of value only if the value stated in the agreement is reasonably current. This requirement is not met when the agreement states a fixed price that is more than a few years old, or if a valuation formula has not been periodically reviewed for accuracy.¹⁰⁸

The argument is sometimes made that a buy-sell agreement should be controlling as a matter of law, because it is an absolute limit upon how much the owner can receive for his or her interest.¹⁰⁹ But this is not true. The owners of a business are perfectly free to sell the business to a third party for more than the

of McLean, 849 P.2d 1012 (Mont. 1993). In other words, the agreement is questionable when it *arbitrarily* excludes goodwill, in the face of substantial evidence that the business actually has valuable goodwill which would otherwise be marital property.

¹⁰⁶ See *In re Marriage of Gunn*, 598 N.E.2d 1013 (Ill. App. Ct. 1992) (rejecting the agreement value; a prior sale between the partners had occurred at price higher than the one stated in the buy-sell agreement); *Nill v. Nill*, 584 N.E.2d 602 (Ind. Ct. App. 1992) (a new shareholder had bought stock in the company for a price above that in the buy-sell agreement); *Berenberg v. Berenberg*, 474 N.W.2d 843 (Minn. Ct. App. 1991) (the corporation had redeemed a prior shareholder's interest for more than the agreement value, which was substantially below the fair market value of the stock); *Fausch v. Fausch*, 697 N.W.2d 748 (S.D. 2005) (the practice administrator testified that the owner would not receive less than their original investment upon sale, regardless of the agreement)

¹⁰⁷ See *In re Marriage of Kells*, 897 P.2d 1366, 1371 (Ariz. Ct. App. 1995) (where an expert testified that the value of the agreement was "completely arbitrary," it was error to find the agreement value controlling); *Garcia v. Garcia*, 25 So.3d 687 (Fla. Dist. Ct. App. 2010) (the trial court did not err in valuing the husband's medical practice at \$890,449, where the buy-sell agreement value was only \$45,000).

¹⁰⁸ See *Bowen v. Bowen*, 473 A.2d 73 (N.J. 1984) (the agreement value was based on a formula that had not been reviewed by owners for several years); *Butler v. Butler*, 663 A.2d 148 (Pa. 1995) (a 1984 agreement used a fixed dollar value rather than a valuation formula, and the fixed value had not been updated since an earlier 1974 agreement)

¹⁰⁹ See, e.g., *Dignan v. Dignan*, 549 N.Y.S.2d 539 (N.Y. App. Div. 1989) (*overruled by Burns v. Burns*, 643 N.E.2d 80 (N.Y. 1994)).

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amount stated in the buy-sell agreement. In fact, in many cases, the owners of a business would never consider selling it to a third party for the agreement value. A buy-sell agreement is therefore not a limit on the sale price an owner can receive; it is only a limit on the amount that the owner can receive *now*, without the consent of the other owners. It is therefore essentially a form of liquidation value, which the courts generally refuse to use as a measure of value.¹¹⁰

Because so many buy-sell agreements do not result from a good faith effort to value a business, or are not based upon reasonably current financial information, the strong general rule is that a divorce court is not required to give the business the value stated in a buy-sell agreement.¹¹¹ The agreement value is one relevant factor to be considered, but the court may also consider other evidence.

Some courts have also noted that buy-sell agreements generally control value only in certain stated situations, such as voluntary withdrawal or retirement. Since divorce is not among these situations, the agreement does not control value in a divorce case.¹¹²

¹¹⁰ See *In re Marriage of Dieger*, 584 N.W.2d 567, 569 (Iowa Ct. App. 1998) (“it stretches the bounds of reasonableness to value a goose for slaughter when it lays golden eggs”); see also *infra* Part III(L).

¹¹¹ Ex parte Hartley, 50 So.3d 1102 (Ala. Civ. App. 2010); Money v. Money, 852 P.2d 1158 (Alaska 1993); Molloy v. Molloy, 761 P.2d 138 (Ariz. Ct. App. 1988); Cole v. Cole, 110 S.W.3d 310 (Ark. Ct. App. 2003); *In re Marriage of Micalizio*, 199 Cal. App. 3d 662, 245 Cal. Rptr. 673 (1988); *In re Marriage of Huff*, 834 P.2d 244 (Colo. 1992); *In re Marriage of Keyser*, 820 P.2d 1194 (Colo. Ct. App. 1991); Stearns v. Stearns, 494 A.2d 595 (Conn. App. Ct. 1985); Garcia v. Garcia, 25 So.3d 687 (Fla. Dist. Ct. App. 2010); Barton v. Barton, 639 S.E.2d 481 (Ga. 2007); *In re Marriage of Dieger*, 584 N.W.2d 567 (Iowa Ct. App. 1998); *In re Marriage of Gunn*, 598 N.E.2d 1013 (Ill. App. Ct. 1992); *In re Marriage of Hogeland*, 448 N.W.2d 678 (Iowa Ct. App. 1989); Drake v. Drake, 809 S.W.2d 710 (Ky. Ct. App. 1991); Sweeney v. Sweeney, 534 A.2d 1290 (Me. 1987); Lyon v. Lyon, 439 N.W.2d 18 (Minn. 1989); *In re Marriage of DeCosse*, 936 P.2d 821 (Mont. 1997); Burns v. Burns, 643 N.E.2d 80 (N.Y. 1994); Kluck v. Kluck, 561 N.W.2d 263 (N.D. 1997); Butler v. Butler, 663 A.2d 148 (Pa. 1995); Beavers v. Beavers, 675 S.W.2d 296 (Tex. Ct. App. 1984); Argyle v. Argyle, 688 P.2d 468 (Utah 1984); Bosserman v. Bosserman, 384 S.E.2d 104 (Va. Ct. App. 1989); *In re Marriage of Brooks*, 756 P.2d 161 (Wash. Ct. App. 1988).

¹¹² See *Clark v. Clark*, 58 So.3d 1276 (Ala. Civ. App. 2010) (where a buy-sell agreement was binding only in the event of death, bankruptcy, incompetency, or voluntary conveyance of a member’s interest, the agreement was not

When the agreement does result from a good faith effort to determine value, and when the value stated is reasonably current, the agreement is good evidence of value. Many cases ultimately place considerable weight upon such an agreement.¹¹³ Given this fact, any expert giving a higher value should make certain to explain in some detail why the agreement value has been rejected. If the expert simply ignores the agreement, the valuation may not be persuasive.¹¹⁴

binding upon divorce, which was not a listed triggering condition); *D.K.H. v. L.R.G.*, 102 S.W.3d 93, 102 (Mo. Ct. App. 2003) (“the court is not bound by the methods provided in the shareholders’ agreement, because valuation for purposes of a marriage dissolution is not a situation contemplated by the agreement”); *Von Hohn v. Von Hohn*, 260 S.W.3d 631, 640 (Tex. Ct. App. 2008) (finding that the trial court properly refused to hold that the value of the husband’s interest in a law firm was controlled by a partnership agreement; the agreement stated only the withdrawal value, and the husband had no intention of withdrawing from the firm).

¹¹³ For cases accepting agreement value, as against the nonowning spouse’s argument for a higher value, see, e.g., *Money v. Money*, 852 P.2d 1158 (Alaska 1993) (accepting the agreement value where it was comparable to the value reached by other valuation methods); *In re Marriage of Nevarez*, 170 P.3d 808, 811 (Colo. Ct. App. 2007); *Amodio v. Amodio*, 509 N.E.2d 936 (N.Y. 1987) (accepting the agreement value where the expert could not explain why a higher value was appropriate despite the agreement); *In re Piper*, 820 P.2d 1198 (Colo. Ct. App. 1991) (holding it was error not to accept the value in a buy-sell agreement which expressly included goodwill); *In re Hogeland*, 448 N.W.2d 678 (Iowa Ct. App. 1989) (where the value in an agreement was set every two years and had not changed substantially since before the marital breakdown, the proper value was close to the agreement value, although the agreement was not conclusive); *Fox v. Fox*, 404 S.E.2d 354 (N.C. Ct. App. 1991) (accepting the agreement price where it considered all elements of value, including goodwill); *R.V.K. v. L.L.K.*, 103 S.W.3d 612, 619 (Tex. Ct. App. 2003);

For cases accepting the agreement value, as against the owning spouse’s argument for a lower value, see *In re Lopez*, 841 P.2d 1122 (Mont. 1992) (accepting the agreement value, where the only other evidence was the husband’s own testimony that the business was worth less); *Naddeo v. Naddeo*, 626 A.2d 608 (Pa. Super. Ct. 1993) (where a buy-sell agreement values law firm at its going concern value which includes goodwill, it was error not to value the firm in accordance with the contract); *Harasym v. Harasym*, 614 A.2d 742 (Pa. Super. Ct. 1992) (finding it proper to accept the buy-sell value, even though the husband claimed that the business might not be able to afford to pay the price listed in the agreement).

¹¹⁴ See *In re Marriage of Micalizio*, 199 Cal. App. 3d 662, 245 Cal. Rptr. 673 (1988) (although the agreement is not conclusive, it is error not to consider it at all); *Brooks v. Brooks*, 997 A.2d 504 (Conn. Ct. App. 2010) (holding it an

H. *Prior Valuations*

Assets are valued for many purposes, and divorce is only one of them. If or one both parties have valued an asset in the past, that valuation may be admissible evidence of the value at the time of divorce.

1. *Loan Applications*

Perhaps the most common type of prior valuation is a valuation for purposes of obtaining financing. Many lenders insist upon receiving a financial statement from prospective borrowers, and these financial statements generally require the borrower to value some or all of his or her existing assets. A financial statement or loan application, submitted in the reasonably recent past, is good evidence of value.¹¹⁵

There are powerful reasons, however, why the persuasive value of loan applications is limited. The application is made not for the purpose of valuing assets accurately, but rather for the purpose of obtaining a loan. The maker has strong reasons to state the highest plausible values for the assets involved. Courts have recognized these reasons, and discounted loan applications because of them.¹¹⁶

error to value the business without considering a buy-sell agreement which limited the owners to book value upon withdrawal).

¹¹⁵ For cases accepting the value stated on a loan application, see, e.g., *In re Marriage of Heinze*, 631 N.E.2d 728 (Ill. App. Ct. 1994); *Webb v. Schleutker*, 891 N.E.2d 1144 (Ind. Ct. App. 2008); *Nelson v. Nelson*, 195 S.W.3d 502, 507 (Mo. Ct. App. 2006); *DaMoude v. DaMoude*, 429 N.W.2d 368 (Neb. 1988); cf. *Steinberg v. Steinberg*, 874 N.Y.S.2d 230 (N.Y. App. Div. 2009) (finding it error not to accept the \$4 million value for an office building stated by the husband in a prior sworn loan application).

Some courts give additional weight to a financial statement that was signed under penalty of perjury. For an extreme example, see *Donofrio v. Donofrio*, No. 17405, 1999 WL 600429 (Va. Loudoun Cnty. Cir. Ct. July 9, 1999), where a Virginia trial court held that the husband was bound by a financial statement he had signed under penalty of perjury, even though he testified that the bank's loan officer had actually filled out the statement for him.

¹¹⁶ See *Peters v. Peters*, 697 A.2d 1254 (Me. 1997) (determining that the trial court properly disregarded values set forth in an overly optimistic loan statement); *In re Marriage of Steinbeisser*, 60 P.3d 441 (Mont. 2002) (finding it was error to accept the inflated value on a loan statement); *Davis v. Davis*, 458 N.W.2d 309, 317 (N.D. 1990) (holding that a prior loan statement was not controlling, where it was displayed "extraordinary puffing" which had benefited

Another problem with loan statements is that they are often several years old, so that the value that appears upon them is likely to be outdated.

Some courts have reasoned that if the value stated on a loan application is not accepted, they will be tolerating some sort of fraud on the lender.¹¹⁷ The available evidence suggests, however, that lenders are well aware that buyers tend to inflate the value of their assets on loan applications. For example, in *In re Marriage of Steinbeisser*,¹¹⁸ a bank president testified that bank was well aware that lenders give optimistic value for assets on loan applications. Based on this testimony, the trial court rejected the value provided on a loan application, and the Montana Supreme Court affirmed.¹¹⁹ If lenders expect optimistic values and discount for them, then to use a lower value for divorce purposes is not to tolerate fraud. Also, if unreasonably inflated values are used, a better remedy would be to inform the lender of the overvaluation, so that it can take whatever action it deems appropriate, and not to accept the same overly inflated value in the divorce case. Two wrongs do not necessarily make a right.

2. *Discovery Materials*

Another common type of prior valuation is a financial statement or discovery response filed in the divorce case. Many states require the spouses to submit financial statements which list and value the marital assets. The value that appears upon such a statement is admissible evidence.¹²⁰

both parties by helping them obtain a loan); *Bowers v. Bowers*, 561 S.E.2d 610, 616 (S.C. Ct. App. 2002) (“the court [properly] declined to value Husband’s stock based solely on the documentation he submitted to his bank in recognition that >overvaluation= or >puffing= is often present in financial statements given to financial institutions for purposes of obtaining loans”); *Hanover v. Hanover*, 775 S.W.2d 612, 615 (Tenn. Ct. App. 1989) (while “prior filed financial statements are evidence as to value,” they “cannot be construed to be the only evidence to be considered and binding in every case”).

¹¹⁷ *E.g.*, *Donofrio*, 1999 WL 600429.

¹¹⁸ 60 P.3d 441 (Mont. 2002).

¹¹⁹ *Id.*

¹²⁰ *See In re Marriage of Hubbs*, 843 N.E.2d 478, 486 (Ill. App. Ct. 2006) (“a financial statement is competent evidence of value”); *Hults v. Hults*, 11 So.3d 1273, 1282 (Miss. Ct. App. 2009) (finding that the trial court did not err in valuing a vehicle at \$12,000, where the wife herself gave that value to the vehicle on her financial statement); *Viera v. Viera*, 331 S.W.3d 195, 207 (Tex. App

Of course, a spouse's own financial statement or discovery materials are not worth any more than that spouse's trial testimony. But a favorable valuation given on the *other* spouse's financial statement or discovery materials is an admission against interest, and can be very powerful evidence of value.¹²¹

3. *Prior Litigation*

In some cases, the record will contain evidence of the value given to an asset by one or both parties in prior litigation. This value, if reasonably current, is good evidence of the value of the asset at the time of divorce.¹²²

Indeed, at least one trial court has held that a party was judicially estopped to assert a different value in the divorce case.¹²³ The estoppel theory would seem particularly dependent upon evidence that the value of an asset has not changed since the earlier

2011) (holding that a husband's "sworn inventory . . . is simply another form of testimony").

An unsworn financial statement is still evidence, but perhaps not as persuasive as a sworn statement. *See* Van Heerden v. Van Heerden, 321 S.W.3d 869, 880 (Tex. Ct. App. 2010) (where retirement benefits were valued on both the husband's sworn inventory and the wife's unsworn inventory, the trial court was free to accept either value; the court did not err by accepting the value in a sworn inventory).

¹²¹ *See, e.g.,* Davila v. Davila, 876 P.2d 1089 (Alaska 1994) (the husband argued that the home was worth \$120,000, relying on his own testimony and a \$128,000 tax appraisal, but he valued the home at \$100,000 in a response to a pretrial interrogatory; the trial court did not err by valuing the home at \$100,000); McGowan v. McGowan, 43 S.W.3d 857 (Mo. Ct. App. 2001) (the husband's appraiser valued the home at \$110,000, but the wife valued the home at \$100,000 and the husband used the same figure on a financial statement; it was proper to value the home at \$100,000); *In re* Marriage of Medlock, 990 S.W.2d 186 (Mo. Ct. App. 1999) (relying on the husband's interrogatory response to determine the value of the home on the date of marriage);

¹²² *See* Shumaker v. Shumaker, 559 N.E.2d 315 (Ind. Ct. App. 1990) (the wife valued the claim against the estate at \$18,000 in estate proceedings; it was proper to reject her testimony in divorce proceedings valuing the claim at only \$1,000); Christopher v. Christopher, 766 So. 2d 119 (Miss. Ct. App. 2000) (valuing a home at the amount listed by the husband on two prior financial reports and a prior petition in bankruptcy).

¹²³ *Reiss v. Reiss*, 708 S.E.2d 799 (S.C. Ct. App. 2011) (where the husband had previously claimed in a salvage action in federal court that a fishing vessel was worth \$450,000, the trial court held that the husband was judicially estopped from arguing in state court that the vessel was worth only \$100,000; also holding that the issue was not properly raised on appeal).

litigation. Given the speed at which some assets can change in value, especially businesses, serious injustice could result if a party were estopped from updating a stale valuation.

4. *Internal Valuations*

Businesses will sometimes value themselves for their own internal purposes, such as to evaluate an offer to buy, prepare an offer to sell, obtain loans or insurance, or even to satisfy the simple curiosity of the business's managers. An internal valuation, if reasonably recent, is good evidence of value.¹²⁴

An internal valuation is not good evidence of value when the condition of the business has changed materially between the date of the internal valuation and the time of divorce.¹²⁵

5. *Tax Returns*

Tax returns do not ordinarily state value, but they do report income. The income figure appearing on a tax return is some evidence of the business's income, for purposes of applying one of the income-based valuation methods discussed below in Part III(M).¹²⁶

6. *Tax Assessments*

Assessments of real property for tax purposes are never ideal evidence of value, because they are not based upon a full and detailed review of the property. In many jurisdictions, com-

¹²⁴ See *Hoffa v. Hoffa*, 382 N.W.2d 522 (Minn. Ct. App. 1986) (accepting the book value as stated on a company's 1983 internal balance sheet); *Peterson v. Peterson*, 600 N.W.2d 851 (N.D. 1999) (relying in part on valuation of real estate on prior balance sheets prepared by the husband five years before the divorce); *Matter of Marriage of Arends*, 917 P.2d 1060 (Or. Ct. App. 1996) (considering internal valuation letters prepared by the business's accountant as some relevant evidence of value).

¹²⁵ See *Lewis v. Lewis*, 54 So.3d 233 (Miss. Ct. App. 2009), *aff'd*, 54 So.3d 216 (Miss. 2011) (holding that the trial court erred in accepting a value for the husband's business from a financial statement the wife found on the home computer, where the wife admitted that the statement contained errors, and the statement did not indicate how the value was computed; the statement may also have predated serious financial problems the business suffered in the five years before trial).

¹²⁶ See *Shewbart v. Shewbart*, 64 So.3d 1080, 1086 (Ala. Civ. App. 2010) ("the trial court reasonably could have concluded that the income-tax returns accurately state the earnings of the business").

mon experience suggests that tax assessments often understate fair market value. An appraisal is therefore generally better evidence of the value than the assessment.¹²⁷

Where credible appraisals are lacking, a tax assessment is some evidence of value.¹²⁸ This point is important in divorce cases between parties of limited means. A valuation based upon the parties' respective opinions, plus the tax assessment, is more reliable than a valuation based upon the parties' opinions alone. The best evidence is still an appraisal, but some parties are not financially able to afford an appraisal for every asset.

A few courts regard tax assessments as so inherently unreliable that they will order an appraisal when the parties do not pre-

¹²⁷ “We caution trial judges against fixing market value of real property without the benefit of expert appraisal evidence.” *Jacobitti v. Jacobitti*, 623 A.2d 794 (N.J. Super. Ct. App. Div. 1993), *aff'd*, 641 A.2d 535 (N.J. 1994). “[T]ax assessments ordinarily are not good evidence of value.” *Sparks v. Sparks*, 233 P.3d 1091, 1098 (Alaska 2010).

For sample cases accepting a appraisal and rejecting a tax assessment, see, e.g., *In re Marriage of Johnson*, 499 N.W.2d 326 (Iowa Ct. App. 1993); *Melrod v. Melrod*, 574 A.2d 1 (Md. Ct. Spec. App. 1990); *Greenman v. Greenman*, 572 N.Y.S.2d 95 (N.Y. App. Div. 1991); *In re Marriage of Scott*, 117 S.W.3d 580 (Tex. Ct. App. 2003).

¹²⁸ “[R]eal estate appraisals for tax purposes are competent, credible evidence of the value of real property.” *Jackson v. Jackson*, No. 2003CA36, 2003 WL 23011368, at *3 (Ohio Ct. App. Dec. 24, 2003).

For sample cases accepting a tax assessment, see *Harrower v. Harrower*, 71 P.3d 854 (Alaska 2003) (despite prior nondomestic case law casting doubt on the reliability of tax assessments, the trial court did not err by using assessed value, where neither party objected to use of the assessment at trial or introduced better evidence); *Smith v. Smith*, 896 So. 2d 818 (Fla. Dist. Ct. App. 2005); *Walker v. Walker*, 36 So.3d 483, 488 (Miss. Ct. App. 2010) (holding it was proper to accept a tax assessment and reject values testified to by both parties, without documentary support); *In re Marriage of Stuart*, 805 S.W.2d 309 (Mo. Ct. App. 1991); *Plummer v. Plummer*, 680 S.E.2d 746, 749 (N.C. Ct. App. 2009); *Matter of Marriage of Robertson*, 836 P.2d 149 (Or. Ct. App. 1992) (finding that it was error to accept a 1988 bank appraisal over a 1990 tax assessment); *Tallman v. Tallman*, 438 S.E.2d 853 (W. Va. 1993).

An unusual example of a court accepting a tax assessment is *Miller v. Miller*, No. 08 JE 26, 2009 WL 1915169 (Ohio Ct. App. June 29, 2009), where the county auditor actually testified as a witness in support of the assessment. Testimony from the assessor may make a tax assessment somewhat more reliable evidence of value.

sent one.¹²⁹ In effect, these courts force the parties to accept and pay for an expert again their wills.

On the opposite end of the issue, a few jurisdictions give the trial court discretion to accept a tax assessment, even as against contrary expert testimony.¹³⁰ Unless the tax assessment process is unusually detailed or the expert testimony is unusually non-credible, this result is contrary to general experience with tax assessments. A tax assessment should be strong evidence of value only when there is no expert testimony, or when the expert testimony presented has serious credibility problems. But the courts should not force the parties to obtain an appraisal if they do not wish to do so.

7. Amount of Insurance

A few cases hold that the amount for which an asset is insured is some evidence of value.¹³¹ A comparable sale or ap-

¹²⁹ See, e.g., *Delozier v. Delozier*, 724 So. 2d 984 (Miss. Ct. App. 1998); *Spenello v. Spenello*, 710 N.Y.S.2d 478 (N.Y. App. Div. 2000); see also *Gravenstine v. Gravenstine*, 472 A.2d 1001 (Md. Ct. Spec. App. 1984) (finding it was error to place any reliance upon a tax assessment).

For a wiser contrary result, see *Jacobitti v. Jacobitti*, 623 A.2d 794 (N.J. Super. Ct. App. Div. 1993), *aff'd*, 641 A.2d 535 (N.J. 1994). After holding that appraisals are the preferred method of valuing real property, the court nevertheless refused to remand for an appraisal, noting that “[i]t is at least partly [husband-appellant’s] fault that no appraisal proofs were offered.” *Id.* at 797. An appraisal the best valuation evidence, but they are not so clearly superior that the parties should be forced to obtain one.

¹³⁰ See *Huelskamp v. Huelskamp*, 925 N.E. 2d 167 (Ohio Ct. App. 2009) (holding that the trial court did not err in rejecting both parties’ appraisals, and valuing the property in accordance with its tax assessment, which was between the competing appraisals); *Miller v. Miller*, 2009 WL 1915169 (rejecting the argument that a comparative market analysis is inherently more persuasive than an appraisal; holding that the court has discretion to accept either); *Smith v. Smith*, 486 S.E.2d 516 (S.C. Ct. App. 1997) (finding that the trial court properly accepted the owner’s testimony about the value of real property, which value was substantially in agreement with the tax assessment, over the testimony of a qualified appraiser); *Davis v. Davis*, 980 P.2d 322 (Wyo. 1999) (where the wife worked in an assessor’s office, it was proper to accept her valuation, which was based on a standard assessment formula, over the lower value in the appraisal).

¹³¹ See *In re Marriage of Gubbels*, 767 N.W.2d 421 (Iowa Ct. App. 2009)(unpublished table opinion) (finding that the trial court did not err in valuing the husband’s car at the amount for which he insured it); *Ross v. Ross*, 734 N.E.2d 1192 (Mass. App. Ct. 2000) (valuing personal property at its insurance

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praisal is obviously much better evidence, and the cases accepting insurance value tend to involve situations in which better evidence was not presented, or was not credible on the facts.

I. *Purchase Price*

The price for which an asset was purchased is not ideal evidence of value, since the value of most assets changes after they are acquired.¹³² Many cases therefore refuse to value assets at their purchase price.¹³³ But if no better evidence is available, the court may be permitted to give the purchase price at least some weight.¹³⁴

value, where no better evidence appeared in the record); *Patton v. Patton*, 337 S.E.2d 607 (N.C. Ct. App. 1985), *rev'd in part*, 348 S.E.2d 593 (N.C. 1986) (relying in part upon an insurance proposal submitted by the husband which contained an estimate of the corporation's value).

¹³² See *Teller v. Teller*, 53 P.3d 240, 251 (Haw. 2002) (holding that the cost approach has not been found to be the best approach when actual values of property are available“).

¹³³ See *Richmond v. Richmond*, 779 P.2d 1211 (Alaska 1989); *Furbee v. Barrow*, 45 So.3d 22, 24-25 (Fla. Dist. Ct. App. 2010) (deciding that it was error to use a 1993 purchase price as evidence of the value of a chiropractic practice in 2007); *Teller v. Teller*, 53 P.3d 240; *Blackstone v. Blackstone*, 681 N.E.2d 72 (Ill. App. Ct. 1997) (determining that the initial capitalization cost of company was not sufficient evidence of value; substantial evidence existed that the business had encountered financial problems during the six-year period between formation and divorce); *In re Marriage of Reib*, 449 N.E.2d 919 (Ill. App. Ct. 1983) (deciding it was error to value a business at its initial investment cost); *Lenz v. Lenz*, 409 N.W.2d 68 (Minn. Ct. App. 1987); *In re Marriage of Canady*, 180 S.W.3d 534, 537 n.1 (Mo. Ct. App. 2006) (“there is some question as to whether the purchase price of real estate acquired in 1988 would be competent evidence of its value in 1998“); *London v. London*, 799 N.Y.S.2d 646, 649 (N.Y. App. Div. 2005) (“While only about six months elapsed between those events, in a rapidly rising real estate market, evidence of a possible purchase price may not be the equivalent of the actual value of the property at the time of the commencement of the action“).

Use of the original cost to value a vehicle is especially questionable, because most vehicles depreciate substantially after purchase. See *Winter v. Winter*, 857 N.Y.S.2d 69 (N.Y. App. Div. 2008) (where the wife's net worth statement valued the vehicle at \$11,000, the trial court erred by valuing the vehicle at its \$15,000 purchase price).

¹³⁴ See, e.g., *Gulbrandsen v. Gulbrandsen*, 22 So.3d 640, 643 (Fla. Dist. Ct. App. 2009) (finding that the trial court did not err in valuing a boat and a watch based upon cost, where the appellant “did not present expert valuation testimony that might have been more probative”); *In re Marriage of Swanson*, 656

Purchase price may be a better valuation tool if adjustments are made for later changes in value.¹³⁵ The accuracy of the valuation, of course, is heavily dependent upon the accuracy of the adjustments.

J. *Book Value*

The book value of a business is also not ideal evidence of value, because book value for most assets is their original cost.¹³⁶

N.E.2d 215 (Ill. App. Ct. 1995) (holding it was proper to value land at its purchase price; the purchase was made only three years previously, only minor improvement had been made, and neither party submitted a current appraisal); Lyon v. Lyon, 439 N.W.2d 18 (Minn. 1989) (finding it was proper to value certain highly speculative tax shelters at their original cost, where no better valuation was possible); Spradling v. Spradling, 959 S.W.2d 908 (Mo. Ct. App. 1998) (holding that the trial court did not err by accepting the purchase price, and rejecting both parties' subjective estimates of current value); Spilman-Conklin v. Conklin, 783 N.Y.S.2d 114 (N.Y. App. Div. 2004).

¹³⁵ See Goldberg v. Goldberg, 626 A.2d 1062 (Md. Ct. Spec. App. 1993) (using the adjusted historical cost to value businesses without reliable earnings history; considerable evidence existed that the husband invested in those businesses to minimize his apparent wealth for purposes of the divorce case); Gibbons v. Gibbons, 619 A.2d 432 (R.I. 1993) (valuing property at cost plus improvements, where there was no better evidence in the record).

¹³⁶ See, e.g., Blackstone v. Blackstone, 681 N.E.2d 72 (Ill. App. Ct. 1997) (holding that the book value is questionable, but not entirely irrelevant); Zatsky v. Zatsky, 627 N.E.2d 474, 477 (Mass. App. Ct. 1994) (deciding that the valuation of business at the shareholder's equity as shown on corporate balance sheet is a "coarse, unsophisticated" valuation method, but not necessarily error per se).

For cases rejecting book value on the facts, see, e.g., Nelson v. Jones, 781 P.2d 964 (Alaska 1989); Trost-Steffen v. Steffen, 772 N.E.2d 500 (Ind. Ct. App. 2002); Cleary v. Cleary, 582 N.E.2d 851 (Ind. Ct. App. 1991) (the business had a positive value even though its book value was negative); *In re Marriage of Claar*, 713 N.W.2d 247 (Iowa Ct. App. 2006); Prah v. Prah, 627 N.W.2d 698 (Minn. Ct. App. 2001); Vohsen v. Vohsen, 801 S.W.2d 789 (Mo. Ct. App. 1991); Heine v. Heine, 580 N.Y.S.2d 231 (N.Y. App. Div. 1992) (finding it was error to accept the capital account value where evidence of actual prior sales was available); Kluck v. Kluck, 561 N.W.2d 263 (N.D. 1997) (holding it was error to accept the book value, where the result was to give no value to corporation with \$1.1 million in gross revenues); Bowers v. Bowers, 561 S.E.2d 610 (S.C. Ct. App. 2002); Wright-Miller v. Miller, 984 S.W.2d 936 (Tenn. Ct. App. 1998) (deciding it was error to accept the husband's expert's testimony that the business had not increased in value during the marriage; the expert valued the assets at book value (original cost), and not fair market value).

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Cost, as noted above, is not the best evidence of value.¹³⁷ But the court may be permitted to give some weight to book value.¹³⁸

A few states even hold that book value can be used as the starting point for valuing a business.¹³⁹ Given that the present value of most assets differs materially from their original cost, it is generally unsound to use book value as a starting point. Most states give book value only limited weight in valuing a business.

K. *Replacement Cost*

Some decisions give a degree of weight to replacement cost in valuing property.¹⁴⁰ Replacement cost is the cost to acquire a similar asset on the date of valuation. But the court is not valuing a newly-acquired asset; it is valuing an asset that was acquired at some point in the past. Depreciation is a fact of life, and it certainly reduces the fair market value of most assets. Likewise, it also reduces the intrinsic value of an asset in the hands of the owner. An older asset is simply worth less than a newly-acquired

¹³⁷ See *supra* Part III(I).

¹³⁸ See *In re* Marriage of Reib, 449 N.E.2d 919 (Ill. App. Ct. 1983); Cronin v. Cronin, 372 N.W.2d 778 (Minn. Ct. App. 1985); Bryan v. Bryan, 382 N.W.2d 603 (Neb. 1986); Wald v. Wald, 556 N.W.2d 291 (N.D. 1996) (finding it was proper to accept the unadjusted book value for the husband's business, where the wife submitted no expert testimony); Popp v. Popp, 432 N.W.2d 600 (Wis. Ct. App. 1988).

The cases giving weight to book value are mostly from the 1980s and 1990s. As courts have become more familiar with other valuation methods, use of book value seems to be declining.

¹³⁹ See *In re* Marriage of Kaplan, 490 N.E.2d 69 (Ill. App. Ct. 1986); Robison v. Robison, 691 P.2d 451 (Nev. 1984); Covert v. Covert, No. 03CA778, 2004 WL 1486093 (Ohio Ct. App. June 28, 2004) (finding that the trial court did not err by accepting the opinion of an expert who used book value as a starting point). *But see In re* Marriage of Dieger, 584 N.W.2d 567 (Iowa Ct. App. 1998) (expressly rejecting a book value presumption).

¹⁴⁰ See *Nadeau v. Nadeau*, 957 A.2d 108, 121 (Me. 2008) (holding that the trial court did not err in accepting values that lay between the husband's "replacement cost value" and the wife's "garage sale value"); *In re* Marriage of Becker, 798 P.2d 124, 128 (Mont. 1990) (accepting a \$37,000 value computed under a "cost approach analysis based on replacement cost," even though the appraised value of the property was only \$30,000); *see also In re* Marriage of Baide, 99 P.3d 178 (Mont. 2004) (stating that replacement cost is one possible measure of value, although it was not used on the facts).

asset. Most courts therefore do not give much weight to replacement cost.¹⁴¹

L. Liquidation Value

The liquidation value of an asset is its value upon immediate sale, with the buyer under considerable time pressure to complete the sale in a very short period of time. Fair market value, however, assumes a sale without any particular time pressure on either side. Because liquidation value assumes time pressure, it is generally not the proper standard for valuing assets in a divorce case.¹⁴²

As an exception, the court may accept liquidation value where there is proof that the asset will actually be liquidated in the near future.¹⁴³ The exception applies only where there is no alternative to liquidation.¹⁴⁴

¹⁴¹ See *Howard v. Howard*, 981 So. 2d 802 (La. Ct. App. 2008), *writ denied*, 992 So. 2d 932 (La. 2008) (deciding that the trial court did not err in finding a comparable sales approach more reliable than replacement cost); *Doyle v. Doyle*, 55 So.3d 1097 (Miss. Ct. App. 2010) (holding that the trial court properly rejected the wife's argument for replacement cost of dissipated marital furniture; awarding fair market value); *In re Marriage of Barton*, 158 S.W.3d 879, 892 (Mo. Ct. App. 2005) (stating that the trial court did not err in failing to value the wife's beauty salon at its replacement cost); *Wagoner v. Wagoner*, 76 S.W.3d 288 (Mo. Ct. App. 2002) (finding that it was error to accept testimony based upon replacement value as evidence of fair market value); *Schaefer v. Schaefer*, No. 2007CA00283, 2008 WL 3009856, at *7 (Ohio Ct. App. Aug. 4, 2008) ("replacement value is not equivalent to actual value"); *Altman v. Altman*, 181 S.W.3d 676, 681 (Tenn. Ct. App. 2005) (holding that the trial court did not err by rejecting replacement cost as evidence of the value of a home).

¹⁴² See *Kowalesky v. Kowalesky*, 384 N.W.2d 112 (Mich. Ct. App. 1986); *Shelby v. Shelby*, 130 S.W.3d 674 (Mo. Ct. App. 2004) (holding that a valuation based upon liquidation value was not even admissible into evidence); *Doubleday v. Doubleday*, 551 A.2d 525 (N.H. 1988); *Kaiser v. Kaiser*, 555 N.W.2d 585 (N.D. 1996) (finding that the trial court properly rejected liquidation value); *Heggen v. Heggen*, 452 N.W.2d 96 (N.D. 1990); *Hunsinger v. Hunsinger*, 554 A.2d 89 (Pa. Super. Ct. 1989).

¹⁴³ The obvious situation is when the asset being valued is already in foreclosure. See *Clarke v. Clarke*, 478 N.W.2d 834 (S.D. 1991) (where an asset was in foreclosure, the trial court should have used its liquidation value rather than face value).

¹⁴⁴ *Sommers v. Sommers*, 660 N.W.2d 586, 590 (N.D. 2003) (determining it was error to use liquidation value, where the owner testified that "my hope is

M. *Income Methods*

The methods discussed so far have essentially been methods for determining the fair market value of an asset—its transferable value between a willing seller and a willing buyer, without time pressure. We now move to methods for determining the intrinsic value of an asset, its worth in the hands of the present owner, without sale.

Apart from retirement benefits, which are a special case, intrinsic value is used most often to value a business that has not been the subject of a recent comparable sale. Intrinsic value methods can also be used to double-check the price of a recent comparable sale. A large difference between intrinsic value and the sale price could be a good indication that the sale might not be comparable, or might not have been conducted at arms' length.

1. *Capitalization of Earnings*

One common method used to determine the intrinsic value of a business is capitalization of earnings.¹⁴⁵ The valuator begins by determining the annual net income of business—gross revenue minus operating expenses. Operating expenses are subtracted only if they are reasonable; excessive operating expenses are ignored.¹⁴⁶ Taxes may¹⁴⁷ or may not¹⁴⁸ be subtracted. To minimize the effect of annual variations, the valuator will often

that I can continue to work until I can't do it anymore, but I can't maintain the same schedule," and a sale was not imminent).

¹⁴⁵ See generally *Dunn v. Dunn*, 911 So. 2d 591 (Miss. Ct. App. 2005) (setting forth the basic elements of the method); *Smith v. Smith*, 433 S.E.2d 196 (N.C. Ct. App. 1993), *rev'd on other grounds*, 444 S.E.2d 420 (N.C. 1994) (citing substantial evidence that capitalization of earnings is frequently used to value automobile dealerships in a variety of contexts).

¹⁴⁶ See *Turgeon v. Turgeon*, 460 A.2d 1260, 1265 (Conn. 1983) (disregarding a drop in income in the last year before the divorce, where the husband "put his elderly retired father on the payroll at the rate of \$200 per week," even though the father apparently did little or no work for the company).

¹⁴⁷ See *Bernier v. Bernier*, 873 N.E.2d 216 (Mass. 2007); *cf. infra* note 174 (citing similar case law under the capitalization of excess earnings method).

Bernier involved an S corporation, which paid no taxes as an entity, instead passing tax through to the shareholders. The court refused to subtract the taxes that would be imposed if the business were not an S corporation. Instead, it held that the trial court should compute and use the hypothetical corporate tax rate which would result in the same net benefit to the shareholders as S corpo-

use average net income over a period of three to five years, rather than income from a single year alone.¹⁴⁹ The average is sometimes weighted to give more weight to recent years,¹⁵⁰ and unusually good or bad years are sometimes excluded.¹⁵¹ The average annual net income of the business is then *capitalized*—either divided by a percentage (the *capitalization rate*) or multiplied by a number (the *factor*). The result is the value of the business.

When determining operating expenses, it is extremely important that a fair and reasonable salary for the owner be in-

ration status. Due to the tax advantages of S corporation status, this rate will generally be less than the tax rate for non-S corporations.

Where an S corporation is involved, failure to consider taxes at all is clearly error. The taxes may not be paid by the business, but they are certainly paid by the shareholders. *See Money v. Money*, 852 P.2d 1158 (Alaska 1993).

¹⁴⁸ *See Adams v. Adams*, 945 N.E.2d 844, 864 (Mass. 2011) (“the direct capitalization of income methodology first determines the average normalized pretax income of a business entity”); *Drohan v. Drohan*, 599 N.Y.S.2d 200 (N.Y. App. Div. 1993); *Smith v. Smith*, 433 S.E.2d 196 (N.C. Ct. App. 1993), *rev’d on other grounds*, 444 S.E.2d 420 (N.C. 1994).

¹⁴⁹ *See Shewbart v. Shewbart*, 64 So. 3d 1080 (Ala. Civ. App. 2010) (three-year average); *Drohan*, 599 N.Y.S.2d 200 (three year average); *see also Krize v. Krize*, 145 P.3d 481 (Alaska 2006) (finding that the trial court erred in accepting the wife’s valuation of her own business, where the estimate was based upon a belief that the business could consistently earn the \$10,000 annual profit which it earned in the past year, when it had lost money for four consecutive years before that; capitalization of income should be based upon an average of several years of income). *But see Evenson v. Evenson*, 742 N.W.2d 829 (N.D. 2007) (deciding that the trial court did not err by accepting the valuation of an expert who capitalized only one year of earnings); *Covert v. Covert*, 2004 WL 1486093, at *5 (holding that the trial court did not err by computing yearly income at twice the income for the first six months; the prevailing expert “acknowledged that the optometry business is not seasonal”).

¹⁵⁰ *See Block v. Block*, 685 N.Y.S.2d 443 (N.Y. App. Div. 1999); *Schorer v. Schorer*, 501 N.W.2d 916 (Wis. Ct. App. 1993); *cf. Turgeon v. Turgeon*, 460 A.2d 1260, 1265 (Conn. 1983) (“resort to arbitrary five or ten year averages without regard to recent trends is not likely to produce a realistic valuation”).

¹⁵¹ *See Sommer v. Sommer*, 575 N.Y.S.2d 178 (N.Y. App. Div. 1991); *cf. Shackelford v. Shackelford*, 571 S.E.2d 917 (Va. Ct. App. 2002) (holding that the trial court did not err in rejecting the testimony of an expert who increased the value of business from \$43,500 to \$683,738 based upon income for first three months of 2001; other evidence suggested that those were traditionally the best three months of the business’ year, and the computation of income may not have accounted for all of the company’s expenses).

cluded.¹⁵² If this subtraction is not made, the value will include the owning spouse's future post divorce earnings. Since those earnings are not marital property, it is error to include them in the valuation.

The capitalization rate or factor is determined by an expert witness after considering a number of different points.¹⁵³ Among the points are the rates of return available for capital invested in similar assets, the state of the economy,¹⁵⁴ and the degree of risk that the income of the business will drop in the future.¹⁵⁵

Capitalization of historical past earnings is a generally accepted valuation method. Some courts are reluctant to capitalize projected future earnings, because such capitalization has an appearance of dividing future earnings.¹⁵⁶ So long as a reasonable

¹⁵² See *Sampson v. Sampson*, 816 N.E.2d 999 (Mass. App. Ct. 2004), *review denied*, 820 N.E.2d 259 (Mass. 2004) (stating that a reasonable salary for the owner must be subtracted; it was error to subtract the income of a business employee with lesser duties and lesser salary than the owner); *Matter of Marriage of Cookson*, 895 P.2d 345 (Or. Ct. App. 1995) (finding it was error not to subtract a reasonable salary for the owner before capitalizing earnings); *cf. Burnham-Steptoe v. Steptoe*, 755 So. 2d 1225 (Miss. Ct. App. 1999) (the salary of the owner was properly treated as an expense in valuing business, even though the owner was the key man; the exact valuation method was not stated, but was apparently some form of capitalization of net earnings).

¹⁵³ "The multiple chosen is subjective and is based upon factors such as the type of franchise, its market performance, location, demographics, median income, economy status, sales, and number of locations." *Smith*, 433 S.E.2d at 218; *see also Barnes v. Sherman*, 758 A.2d 936 (D.C. 2000) (stating that expert testimony is needed to establish capitalization factor); *Schorer v. Schorer*, 501 N.W.2d 916 (Wis. Ct. App. 1993) (noting that selection of a capitalization rate is discretionary with the expert, and holding that this discretion does not make the entire method erroneous).

¹⁵⁴ See *Shewbart*, 64 So. 3d 1080 (using a multiple of two, to account for the husband's long working hours and the poor state of the local economy); *Smith*, 433 S.E.2d at 218 (affirming the trial court decision which rejected the expert's proposed multiple of five, and used a multiple of three, where "the dealership declined in value in the two years preceding the trial due to a decrease in earnings and a slowdown in the economy").

¹⁵⁵ See *Hiatt v. Hiatt*, 776 N.Y.S.2d 112 (N.Y. App. Div. 2004) (using a lower multiplier because the wife's title insurance business "was highly dependant on her personal attributes and her rapport with a handful of local attorneys").

¹⁵⁶ This reluctance is particularly evident in California, which does not allow capitalization of projected future earnings. See *In re Marriage of Rives*, 130 Cal. App. 3d 138, 181 Cal. Rptr. 572 (1982); *In re Marriage of Fortier*, 34 Cal.

salary for the owner is treated as an expense, this appearance is not real. The amount of future income that an asset is likely to produce is always a factor in determining its present value. Even under a pure comparable sales approach, if two businesses have equal assets, but one produces more income, buyers will pay more for the first business. Capitalization of projected future earnings makes this relationship more visible, but it does not create the relationship. The court does not divide future earnings by acknowledging that a business with greater earning capacity has greater value.¹⁵⁷

It is critical to understand that the value of a business, when determined by capitalization of earnings, is the value of the *entire* business, including its tangible assets. If the court accepts a value based upon capitalization of earnings, and then adds the value of the business' hard assets, it has committed serious error by counting the assets twice.¹⁵⁸ By contrast, if the expert capitalizes only the *excess* earnings of the business, it *must* add the value of the business' tangible assets.¹⁵⁹

Caution must be used in applying capitalization of earnings to a business that benefits from the individual goodwill of the owner, in states that do not treat individual goodwill as marital property. If total net earnings are capitalized, the result will include the present value of earnings attributable to individual

App. 3d 384, 109 Cal. Rptr. 915 (1973). California does, however, allow capitalization of historical past earnings. See *In re Marriage of King*, 150 Cal. App. 3d 304, 197 Cal. Rptr. 716 (1983); *In re Marriage of Foster*, 42 Cal. App. 3d 577, 117 Cal. Rptr. 49 (1974).

¹⁵⁷ See *Bernier v. Bernier*, 873 N.E.2d 216, 232 (Mass. 2007) (finding that the trial court erred by capitalizing expected future earnings without including a future growth rate; the trial court should have increased the expected future earnings by 2.5% per year, in accordance with the testimony of the wife's expert).

¹⁵⁸ See *Popowich v. Korman*, 900 N.Y.S.2d 297 (N.Y. App. Div. 2010) (holding it was error to treat the assets of a business as distinct marital assets, where the business had been valued by capitalization of total earnings); *Kaplan v. Kaplan*, 857 N.Y.S.2d 677, 679 (N.Y. App. Div. 2008) (determining it was error to divide both the dental practice and its bank accounts; "[t]he value of the dental practice, as determined by a neutral business evaluator, already included the value of these accounts").

¹⁵⁹ See *infra* note 166.

goodwill, which is not marital property.¹⁶⁰ The expert should capitalize only the earnings attributable to factors other than individual goodwill, or separately subtract the value of individual goodwill from the value reached by capitalization of earnings.¹⁶¹ Because of the individual goodwill problem, capitalization of earnings is not commonly used to value small service-oriented businesses, such as professional practices.

It is error, however, to subtract the same individual goodwill more than once. For instance, in *Hough v. Hough*,¹⁶² the expert excluded from the actual income of the business certain accounts which were loyal to the husband individually, because the future earnings from these accounts would be attributable to individual goodwill. But he then also used a higher capitalization rate to reflect the risk that the husband would leave the business and take his personal accounts with him. Either of these adjustments would have been perfectly appropriate, but to apply both was to subtract the individual goodwill twice. A trial court decision accepting the expert's valuation was reversed on appeal.

2. *Discounted Cash Flow*

Somewhat related to the capitalization of total earnings method is the discounted cash flow method. "Unlike the direct capitalization of income approach, which assumes a perpetual stream of income, the discounted cash flow method uses a more complex equation to reduce a finite period of future income . . . to present valuation."¹⁶³ The valuator takes the present value of the predicted future income of the business, but only for a defined period of years, generally equal to the owning spouse's time until retirement. A residual value is then determined, and also reduced to present value. The residual value is analogous to the payment that the owner would receive from selling the business.

¹⁶⁰ *E.g.*, *In re Marriage of Trull*, 626 N.E.2d 252 (Ill. App. Ct. 1993); *Hazard v. Hazard*, 833 S.W.2d 911 (Tenn. Ct. App. 1991).

¹⁶¹ *E.g.*, *Hough v. Hough*, 793 So. 2d 57 (Fla. Dist. Ct. App. 2001) (holding that a capitalization of total earnings approach could properly be used to value a vending business, so long as appropriate modifications addressed excluding the husband's individual goodwill).

¹⁶² 793 So. 2d 57 (Fla. Dist. Ct. App. 2001).

¹⁶³ *Adams v. Adams*, 945 N.E.2d 844, 865 (Mass. 2011).

A Massachusetts court expressed a preference for the discounted cash flow method over capitalization of earnings, because the former method might capitalize earnings beyond the owning spouse's lifetime.¹⁶⁴ This difference is more in appearance than in reality. The earning capacity of a business is a major factor in determining its sale price, and therefore in determining the residual value under the discounted cash flow method. Ultimately, therefore, the discounted cash flow method *does* consider income beyond the current owner's lifetime, by computing residual value on the assumption that the earnings of the business will continue after a future sale. A valid valuation method must consider indefinite future earnings to some extent, as buyers and sellers of businesses obviously know that the income of the business may well outlast their lifetimes, and they factor this knowledge into the purchase price. An assumption that all future earnings will stop upon the owner's death or retirement is fundamentally artificial, and a method that makes such an assumption would reach materially lower values than comparable open-market sales. In truth, both capitalization of earnings and discounted cash flow assume that the income of the business will extend beyond the owner's lifetime.

The discounted cash flow method may better reflect the *manner* in which future earnings are considered, by using them to determine a separate residual value, rather than simply assuming that the earnings continue forever. Even then, however, if some form of capitalization formula is applied to determine residual value, the discounted cash flow method really is assuming the same indefinite future earnings as capitalization of earnings, and simply doing so in two steps (periodic income and residual value) rather than one. Ultimately, therefore, the capitalization of earnings method and the discounted cash flow method both give very similar treatment to the future earnings of the business.

3. *Capitalization of Excess Earnings*

The valuation most commonly used to value professional practices is capitalization of excess earnings.¹⁶⁵ Capitalization of

¹⁶⁴ *Id.*

¹⁶⁵ For cases using capitalization of excess earnings, see, e.g., *Hunt v. Hunt*, 698 P.2d 1168 (Alaska 1985); *In re Marriage of Ackerman*, 146 Cal. App. 4th 191, 52 Cal. Rptr. 3d 744 (2006); *In re Marriage of Rosen*, 105 Cal. App. 4th

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excess earnings is just similar enough to capitalization of earnings to create a serious potential for confusion.

To begin with, capitalization of excess earnings is not a method for valuing the entire business. Rather, it is a method for valuing only the *goodwill* of the business. After applying the method, therefore, the valuator must add the total net tangible assets (assets less liabilities) of the business. Failure to add this number results in a value that includes only goodwill, and therefore undervalues the business.¹⁶⁶

Capitalization of excess earnings begins by computing the annual net income of the business. This computation is done in essentially the same way as for capitalization of earnings. The process begins with the gross earnings of the business.¹⁶⁷ The general practice is to use an average of earnings over several years to minimize the effect of random fluctuations.¹⁶⁸ Projected

808, 130 Cal. Rptr. 2d 1 (2002); *In re Marriage of Banning*, 971 P.2d 289 (Colo. Ct. App. 1998); *Eslami v. Eslami*, 591 A.2d 411 (Conn. 1991); *Held v. Held*, 912 So. 2d 637 (Fla. Dist. Ct. App. 2005), *review denied*, 928 So. 2d 335 (Fla. 2006); *Olsen v. Olsen*, 873 P.2d 857 (Idaho 1994); *Clark v. Clark*, 782 S.W.2d 56 (Ky. Ct. App. 1990); *Nelson v. Nelson*, 411 N.W.2d 868 (Minn. Ct. App. 1987); *Schwartz v. Schwartz*, 864 N.Y.S.2d 35, 38 (N.Y. App. Div. 2008) (“‘excess earning methodology’ is an acceptable means of valuing a ‘professional partnership’”); *Smith*, 433 S.E.2d 196; *McCoy v. McCoy*, 632 N.E.2d 1358; *Endres v. Endres*, 532 N.W.2d 65 (S.D. 1995); *Sharon v. Sharon*, 504 N.W.2d 415 (Wis. Ct. App. 1993).

¹⁶⁶ See *In re Marriage of Banning*, 971 P.2d 289 (Colo. Ct. App. 1998); *Chandler v. Chandler*, 32 P.3d 140 (Idaho 2001).

As a corollary of this point, a business with no excess earnings can still have positive value. The asset is worth at least the total net value of its tangible assets. See *In re Marriage of Garrity and Bishton*, 181 Cal. App. 3d 675, 226 Cal. Rptr. 485 (1986); *McAffee v. McAfee*, 971 P.2d 734 (Idaho Ct. App. 1999); *cf. Dunaway v. Dunaway*, 749 So. 2d 1112, 1117-18 (Miss. Ct. App. 1999) (“[a]n individual operating an unprofitable business in a half-million dollar building cannot use the balance sheet of his poorly-conceived business venture to demonstrate that the building is without value”).

¹⁶⁷ The average earnings of a business are emphatically not the owning spouse’s personal salary. “The mere fact that the practitioner is paid a normal salary hardly means that there are no excess earnings in the practice.” *Miller v. Miller*, 705 S.E.2d 839, 843 (Ga. 2010). By basing the valuation upon the earnings of the business, “the amount of excess earnings is properly adjusted for those practices which increase or decrease their retained earnings by means of a lower or higher salary for the practitioner than is normal.” *Id.*

¹⁶⁸ “It is best to make this calculation using the average annual earnings of the professional practice over a period of several years in order to reduce the

future earnings can be used, unless they are unreasonably speculative.¹⁶⁹ Fringe benefits, such as business funds spent to pay personal expenses of the owner, should be included.¹⁷⁰

Reasonable operating expenses, including a fair and reasonable salary for the owner,¹⁷¹ must then be subtracted.¹⁷² Unreasonably excessive operating expenses should not be subtracted.¹⁷³ The valuator may¹⁷⁴ or may not¹⁷⁵ subtract taxes.

impact of unusual financial successes or set-backs.” *In re Marriage of Kapusta*, 491 N.E.2d 48, 52 (Ill. App. Ct. 1986); *see also In re Marriage of Rosen*, 105 Cal. App. 4th 808, 820, 130 Cal. Rptr. 2d 1, 7-8 (2002) (“[a] reasonable trier of fact could not help but conclude the expert chose to use Bruce’s net income from 1995—one of Bruce’s highest earning years—solely to inflate the value of goodwill”; the expert should use the average figure which is “reasonably illustrative of the current rate of earnings”); *In re Marriage of King*, 150 Cal. App. 3d 304, 197 Cal. Rptr. 716 (1983) (holding it was error to use earnings for only one year, where earnings for that year were abnormally high compared to the business’ actual earning capacity); *Dugan v. Dugan*, 457 A.2d 1 (N.J. 1983) (suggesting that five years’ earnings be used); *cf. Matter of Marriage of Arends*, 917 P.2d 1060 (Or. Ct. App. 1996) (finding it was proper to reject the testimony of an expert whose actual earnings figure did not include the most recent year of earnings, where the business was growing rapidly).

¹⁶⁹ *Conway v. Conway*, 508 S.E.2d 812 (N.C. Ct. App. 1998) (using projected earnings). *But cf. Shooltz v. Shooltz*, 498 S.E.2d 437 (Va. Ct. App. 1998) (determining that use of an unreasonably speculative projection was error).

¹⁷⁰ *See Head v. Head*, 714 So. 2d 231 (La. Ct. App. 1998) (holding it was error not to include in computing earnings certain excessive life insurance premiums and certain lease expenses for vehicles used by the owner personally, but that it was proper not to include other fringe benefits, where the value of those benefits was not sufficiently proven by the evidence); *Lewis v. Lewis*, 739 P.2d 974 (N.M. Ct. App. 1987); *Stolow v. Stolow*, 540 N.Y.S.2d 484 (N.Y. App. Div. 1989); *Siegel v. Siegel*, 523 N.Y.S.2d 517 (N.Y. App. Div. 1987).

¹⁷¹ *See Moffitt v. Moffitt*, 813 P.2d 674 (Alaska 1991); *In re Marriage of Brenner*, 601 N.E.2d 1270 (Ill. App. Ct. 1992); *Olsen v. Olsen*, 873 P.2d 857 (Idaho 1994); *In re Marriage of Stephens*, 954 S.W.2d 672 (Mo. Ct. App. 1997).

For a case finding that the owner’s salary was unreasonably high, and refusing to subtract the excessive portion, see *Rattee v. Rattee*, 767 A.2d 415 (N.H. 2001).

¹⁷² *See In re Marriage of Rosen*, 105 Cal. App. 4th 808, 130 Cal. Rptr. 2d 1 (2002) (stating that the expert must capitalize net earnings, not gross earnings).

Actual depreciation is a reasonable expenses, but accelerated depreciation is an unreasonable expense. *Moffitt v. Moffitt*, 813 P.2d 674 (Alaska 1991).

¹⁷³ *See In re Marriage of Banning*, 971 P.2d 289 (Colo. Ct. App. 1998) (including only reasonable salaries as expenses); *Eslami v. Eslami*, 591 A.2d 411 (Conn. 1991); *White v. White*, 204 A.D.2d 825, 611 N.Y.S.2d 951 (1994) (decid-

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After computing the actual average net income of the business, the valuator then computes the average earnings of a similarly-situated business. A similarly-situated business ideally means one operating in at least the same state, if not the same local community.¹⁷⁶ But the expert may use nationwide data if it is adjusted to reflect local conditions, or if an expert testifies that no adjustment is needed.¹⁷⁷ Use of nationwide data, without consideration of local conditions, is probably error.¹⁷⁸

ing that where the business's actual rental expenses were excessive, the court included only reasonable expenses in computing actual income).

¹⁷⁴ See *Lewis v. Lewis*, 739 P.2d 974 (N.M. Ct. App. 1987); *White v. White*, 611 N.Y.S.2d 951 (N.Y. App. Div. 1994); *Sharp v. Sharp*, 449 S.E.2d 39 (N.C. Ct. App. 1994); see also *infra* note 147 (citing similar case law under the capitalization of earnings method).

¹⁷⁵ See *Wright v. Wright*, 904 P.2d 403 (Alaska 1995); *Stolow*, 540 N.Y.S.2d 484; *Siegel v. Siegel*, 523 N.Y.S.2d 517 (N.Y. App. Div. 1987); *Clark v. Clark*, 782 S.W.2d 56 (Ky. Ct. App. 1990); *Smith*, 433 S.E.2d 196 (1993).

¹⁷⁶ See *In re Marriage of Rosen*, 105 Cal. App. 4th 808, 822, 130 Cal. Rptr. 2d 1 (2002) (“we question whether a national survey of lawyer compensation (such as the Altman Weil survey), even if statistically sound, is a proper basis for offering an opinion on average lawyer compensation in Southern California”; noting also that the survey was not limited to practices specializing in state-funded criminal appeals); *Douglas v. Douglas*, 722 N.Y.S.2d 87 (N.Y. App. Div. 2001) (in valuing the husband's interest in law firm, using the average earnings of senior associates in large New York city law firms was improper because such associates had similar skills to the husband, but did not have ownership interests in their firms); *Rochelle G. v. Harold M.G.*, 649 N.Y.S.2d 632 (N.Y. Sup. Ct. 1996), *aff'd*, 688 N.Y.S.2d 77 (N.Y. App. Div. 1999), *aff'd*, 731 N.E.2d 142 (N.Y. 2000) (noting that the average nationwide earnings may not be accurate for a specific practice located in the northeast; suggesting by implication that average earnings tailored to the northeast might be sufficient for a practice specifically located in New York).

¹⁷⁷ See *In re Marriage of Ackerman*, 146 Cal. App. 4th 191, 201, 52 Cal. Rptr. 3d 744, 751 (2006) (affirming valuation based upon nationwide data, where the expert confirmed the applicability of that data with a personal survey of cosmetic surgeons in the area); *In re Marriage of Keyser*, 820 P.2d 1194 (Colo. Ct. App. 1991) (deciding it was proper to use nationwide data where the expert testified that such data was consistent with the local market); *Stewart v. Stewart*, 152 P.3d 544, 550 (Idaho 2007) (“In determining the average income of a local dermatologist, the expert consulted the [a nationwide survey] and also relied on his own familiarity with the local market”); *Carlson v. Carlson*, 487 S.E.2d 784 (N.C. Ct. App. 1997) (using nationwide data, modified for local conditions).

¹⁷⁸ See *In re Marriage of Kapusta*, 491 N.E.2d 48, 52 (Ill. App. Ct. 1986) (“[t]here was no showing that surgeons in George's specialty with the same age,

In any application of the excess earnings method, there is tension between the need for the most accurate average earnings figure possible and the need for a sufficiently large sample size. If the relevant geographical area for average earnings is defined too narrowly, the result may be to make the sample size so small that the average income figure is unreliable.

The clear general guideline is to use the narrowest geographical area sufficient to produce a reasonably-sized sample. Beyond this point, much must depend upon the discretion of the expert. Where the business is highly specialized,¹⁷⁹ or where the local community is too small to generate a sufficient sample size,¹⁸⁰ there may be no reasonable alternative to using nationwide average earnings. When a broader area is used, however, it is critical that the expert explain his reasoning to the court, and do everything possible to adjust the nationwide data for local conditions.

Average earnings are most frequently drawn from statistical surveys of incomes earned by businesses or practitioners in cer-

qualifications and experience in the Chicagoland area were receiving salaries approximately equivalent to the [nationwide] averages shown”); *Dugan v. Dugan*, 457 A.2d 1, 11 (N.J. 1983) (“The comparative group was attorneys generally throughout the United States. There was no showing how New Jersey or northern New Jersey attorneys fit into that milieu”); *Johnson v. Johnson*, 771 P.2d 696 (Utah Ct. App. 1989) (use of nationwide data distorted the value of a highly specialized local practice); *Howell v. Howell*, 523 S.E.2d 514 (Va. Ct. App. 2000) (in valuing the interest in a large law firm located in Richmond, Virginia, the trial court properly rejected average earnings figure limited to large firms in New York and San Francisco).

¹⁷⁹ A classic example is *Nelson v. Nelson*, 411 N.W.2d 868 (Minn. Ct. App. 1987), where the husband was a highly specialized certified engineer, one of only 95 such engineers in the country. His business was so specialized that there essentially was no distinctive local market, and a valuation relying upon nationwide average earnings was affirmed.

¹⁸⁰ See *Carlson v. Carlson*, 127 N.C. App. 87, 487 S.E.2d 784 (N.C. Ct. App. 1997) (where the husband one was of only six interventional cardiologists in the local community, it was proper to use modified data from a nationwide survey; the expert expressly testified that six cardiologists was not a sufficiently reliable sample size).

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tain areas.¹⁸¹ It is unwise to draw average earnings data from general media reports.¹⁸²

The average earnings used should be tailored as narrowly as possible to persons with similar skills. For instance, when valuing the practice of an attorney who is a partner, the court should look at the earnings of other partners.¹⁸³ When the attorney is less experienced, it may be appropriate to look at the earnings of associates.¹⁸⁴ If it is possible to use earnings data from persons who work as employees, without owning their own businesses, that data is more accurate than earnings data from persons who own their own businesses.¹⁸⁵ But in any situation involving an experienced owner, it may not be possible to avoid using data on other owners. There are not, for example, many persons with the skill set of a senior partner who do not own an interest in their law firms.

Average earnings should be based upon a work week of the same size as the owner's actual work week. The excess earnings method seeks to value earnings that are attributable to goodwill,

¹⁸¹ See *In re Marriage of Bookout*, 833 P.2d 800 (Colo. Ct. App. 1991) (using data from survey by the American Physical Therapists Association); *Clark v. Clark*, 782 S.W.2d 56 (Ky. Ct. App. 1990) (using data from an American Medical Association survey of obstetrical practices); *In re Marriage of Hull*, 712 P.2d 1317 (Mont. 1986) (using data from a survey of eight western states in valuing an anesthesiology practice).

¹⁸² See *McCoy v. McCoy*, 632 N.E.2d 1358 (Ohio Ct. App. 1993) (finding it was error to rely on earnings data from an article in *U.S. News and World Report*).

¹⁸³ See *In re Marriage of Iredale, Cates*, 121 Cal. App. 4th 321, 16, 16 Cal. Rptr. 3d 505 (2004) (finding that the trial court properly used average earnings for similar partners in Los Angeles area law firms, and rejected a figure based upon the earnings of associates, where the wife was a partner in her firm). *But cf.* *Howell v. Howell*, 523 S.E.2d 514 (Va. Ct. App. 2000) (holding that the average earnings figure need not be limited to those with the owner's unique "special talents").

¹⁸⁴ *Douglas v. Douglas*, 722 N.Y.S.2d 87 (N.Y. App. Div. 2001) (in valuing the husband's interest in a law firm, using average earnings of senior associates in large New York city law firms was proper if such associates had similar skills to the husband).

¹⁸⁵ See *In re Marriage of Bookout*, 833 P.2d 800 (Colo. Ct. App. 1991) (preferring data for salaried physical therapists); *McCoy v. McCoy*, 632 N.E.2d 1358 (Ohio Ct. App. 1993) (where a physical therapy practice being valued employed multiple therapists, it was error to use average income figures for physical therapists in solo practice).

not earnings that are attributable to a voluntary decision to work longer or harder.¹⁸⁶

Once both actual and average earnings are computed, the valuator then subtracts average earnings from actual earnings. The result is the *excess earnings* of the business—the difference between the actual net income of the business, and the income that would be earned by an average owner under similar conditions.

The excess earnings are then capitalized—divided by a percentage¹⁸⁷ or multiplied by a factor.¹⁸⁸ The percentage or factor is discretionary, and is normally selected by an expert after considering the same series of points that are considered under the capitalization of earnings method. In general, the factor or rate depends heavily on the degree of risk associated with the future earnings of the business.¹⁸⁹ There is some authority that a factor of three, or a percentage of 33%, should be regarded as a starting point.¹⁹⁰

Like capitalization of earnings, capitalization of excess earnings must be used with caution in states that do not treat individual goodwill as marital property. If an expert uses the method without accounting in any way for individual goodwill, the result may well be error, since some of the excess earnings capitalized

¹⁸⁶ See *In re Marriage of Kapusta*, 491 N.E.2d 48, 52 (Ill. App. Ct. 1986) (“Because George worked from 50 to 70 hours a week, he may have a significantly greater income than a hypothetical employee who regularly worked a forty-hour week; but that increased income may be due solely to longer hours and greater productivity”); *Dugan v. Dugan*, 457 A.2d 1 (N.J. 1983) (noting that otherwise, the difference between actual and average earnings “may be due to greater productivity rather than the realization of income on the sole practitioner’s goodwill”).

¹⁸⁷ See, e.g., *In re Marriage of Hull*, 712 P.2d 1317 (Mont. 1986).

¹⁸⁸ E.g., *Dugan*, 457 A.2d 1.

¹⁸⁹ See *In re Marriage of Hull*, 712 P.2d 1317 (selecting a more conservative 40% rate because the husband’s anesthesiology practice generated little repeat business); *Rice v. Rice*, 634 N.Y.S.2d 761 (N.Y. App. Div. 1995) (finding it was an error to accept the capitalization rate of expert who did not consider declining trend in earnings of business; accepting instead the rate suggested by the expert who had considered that fact); *Smith*, 433 S.E.2d 196 (using a 16% rate, because the business had a higher degree of risk than normal; finding it was proper to use 16% even though no expert had used precisely that figure).

¹⁹⁰ See *Dugan*, 457 A.2d 1.

may result from individual goodwill.¹⁹¹ Ideally, an expert using the method should either testify persuasively that the business has no individual goodwill, or state the value of that goodwill (or the amount of earnings arising from that goodwill), and then subtract that value (or those earnings) from the valuation.¹⁹²

IV. Discounting Value

The valuation methods set forth above, when applied properly, produce a prima facie value for the asset at issue. When a business is involved, however, it may be necessary to discount that value.

A. Minority Discount

When businesses are bought and sold upon the open market, a minority interest is generally worth less per share than a majority interest. This difference exists because a majority interest gives the owner control of the corporation, and control has an economic value. When the owning spouse does not have the benefit of control, it may be necessary to discount the value of the interest to reflect minority status.

Courts are divided as to whether the concept of a minority discount applies in divorce cases. In states which favor an intrinsic value standard—value in the hands of the present owner, without sale—minority discounts are usually not applied.¹⁹³ The

¹⁹¹ See, e.g., *Manelick v. Manelick*, 59 P.3d 259 (Alaska 2002) (where wife testified that her goodwill was not marketable, and husband failed to address the question, trial court erred by attaching any value to wife's goodwill); *Smith v. Smith*, 904 A.2d 15, 23-24 (Pa. Super. Ct. 2006) (“[w]hile we suspect that much, if not all, of the goodwill was that of the enterprise as part of the overall going-concern value of the business, in absence of testimony to that effect we cannot be certain. Therefore, we must also remand for further proceedings in this regard”).

¹⁹² E.g., *Gupta v. Gupta*, No. 03-09-00018-CV, 2010 WL 2540487 (Tex. App. June 24, 2010) (unpublished) (accepting an expert valuation that included an express subtraction for individual goodwill).

¹⁹³ See *Grelier v. Grelier*, 44 So. 2d 1092 (Ala. Civ. App. 2009) (following *Brown*); *Fogel v. Fogel*, No. FA990171687S, 2002 WL 653318 (Conn. Super. Ct. Mar. 22, 2002); *Head v. Head*, 714 So. 2d 231 (La. Ct. App. 1998); *Brown v. Brown*, 792 A.2d 463 (N.J. Super Ct. App. Div. 2002); *Drumheller v. Drumheller*, 972 A.2d 176, 190 (Vt. 2009) (where “[t]here was no evidence that any interest would be disposed of or that the partnership would cease to be the way

reasoning is that minority status does not actually reduce the value of the asset in the hands of the present owner. It may well never reduce the value of the asset, since the owners are likely to eventually sell the business to a third party, and in that context, the minority owners would receive the proceeds of sale times their percentage interests in the business, without any discount for lack of control. Under an intrinsic value standard, unless actual sale of the business is imminent, a minority discount is artificial.

In states that favor a fair market value standard—an assumed hypothetical sale of the owner's interest at the time of divorce—a minority discount is usually necessary, because such a discount would almost certainly reduce the actual proceeds of selling a minority interest.¹⁹⁴

In most situations, the dispute over application of a minority discount is therefore not a debate between economists or valuation experts. It is, rather, a logical consequence of the ongoing legal debate over whether the proper measure of value for purposes of divorce is intrinsic value or fair market value. The dispute is therefore mostly an issue of law.

In states that apply a fair market value standard, a minority discount is generally permitted, but it is never automatic. To begin with, it is obviously error to apply a minority discount to a valuation that already incorporates minority status. The point is most often applied when a minority interest is being valued by looking to prices of comparable sales of other minority interests. Those sale prices obviously take into account the fact that a mi-

the family derived income from Lane Press," trial court properly refused to apply a minority discount); *Howell v. Howell*, 523 S.E.2d 514 (Va. Ct. App. 2000).

¹⁹⁴ See *Hayes v. Hayes*, 756 P.2d 298 (Alaska 1988); *Crismon v. Crismon*, 34 S.W.3d 763 (Ark. Ct. App. 2000); *Trost-Steffen v. Steffen*, 772 N.E.2d 500 (Ind. Ct. App. 2002); *In re Marriage of Muelhaupt*, 439 N.W.2d 656 (Iowa 1989); *Rattee v. Rattee*, 767 A.2d 415 (N.H. 2001); *Haymes v. Haymes*, 748 N.Y.S.2d 542 (N.Y. App. Div. 2002), *review denied*, 798 N.E.2d 347 (N.Y. 2003); *Hartman v. Hartman*, 346 S.E.2d 196 (N.C. Ct. App. 1986), *aff'd*, 354 S.E.2d 239 (N.C. 1987); *In re Marriage of Triperinas*, 59 P.3d 586 (Or. Ct. App. 2002); *R.V.K. v. L.L.K.*, 103 S.W.3d 612 (Tex. App. 2003); *Arneson v. Arneson*, 355 N.W.2d 16 (Wis. Ct. App. 1984).

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nority interest is being transferred. To apply a separate discount would be to consider minority status twice.¹⁹⁵

Further, a minority discount is generally applied only where minority status is actually reducing the value of the owner's interest. Thus, where the spouses together own a majority interest, no discount should be applied, even if one spouse alone holds a minority interest.¹⁹⁶ The court is valuing *the marital estate's* interest in the business, not the interests titled in the names of the individual spouses. Likewise, if the business is being awarded to a spouse who owns a separate property interest, that interest probably must be considered in determining whether a majority interest exists. If the spouse to whom the business is awarded will own a majority interest after divorce, that spouse will not actually suffer the disadvantages of minority status.

In addition, if the majority interest is held by friendly owners,¹⁹⁷ and especially when the majority interest is held by friendly family members,¹⁹⁸ the valuator is not required to apply

¹⁹⁵ See *infra* notes 208 and 217.

¹⁹⁶ See *Hanson v. Hanson*, 125 P.3d 299 (Alaska 2005); *Siracusa v. Siracusa*, 621 A.2d 309 (Conn. App. Ct. 1993); *Eyler v. Eyler*, 492 N.E.2d 1071 (Ind. 1986) (where the parties together owned 90% of corporation, it was error to apply a minority discount to the wife's portion of the 90%); *Nardini v. Nardini*, 414 N.W.2d 184 (Minn. 1987); *Fisher v. Fisher*, 568 N.W.2d 728 (N.D. 1997) (refusing to apply a minority discount where the husband owned majority interest and the wife owned a minority interest).

¹⁹⁷ See *Howell v. Howell*, 523 S.E.2d 514 (Va. Ct. App. 2000) (refusing to apply a discount where the husband was one of many partners in large law firm, but the other partners were cooperative and not hostile toward his interest)

¹⁹⁸ See *Redding v. Redding*, 372 N.W.2d 31, 36 (Minn. Ct. App. 1985) ("because of the lengthy history of a father facilitating his son's stock ownership, the trial court had an acceptable factual basis to determine that the son's interest would be afforded the benefits of a majority interest in subsequent corporation transactions"); *Matter of Marriage of Batt*, 945 P.2d 517 (Or. Ct. App. 1997) (finding it was proper to make no discount, where any sale of the family farm would be to other family members for full value); *Matter of Marriage of Webber*, 784 P.2d 111 (Or. Ct. App. 1989); *Fields v. Fields*, 536 S.E.2d 684 (S.C. Ct. App. 2000) (where the wife and her father controlled a company, it was proper to make no minority discount); *Barrup v. Barrup*, No. 2008-036, 2008 WL 3976562, at *1 (Vt. Aug. 2008) (unpublished) (finding that the trial court did not err in adopting the valuation of expert who did not apply a minority discount where the business "is controlled entirely by family and the family acts harmoniously"). *But see Rattee v. Rattee*, 767 A.2d 415 (N.H. 2001) (applying a 28.5% minority discount in valuing the husband's 49.6% interest in business,

a discount. If the other owners are friendly, there is a reduced likelihood that minority status will actually result in a disadvantage.

There are also cases refusing to apply a minority discount where the minority owner had effective de facto control of the company, despite his minority status.¹⁹⁹

Conversely, if spouses own a minority interest, and the record shows actual past oppression by the majority, a minority discount is very important. This is one of the few situations in which a minority discount is probably appropriate even under an intrinsic value approach, since the actual likelihood of future oppression clearly reduces the value of the interest in the hands of the present owner.²⁰⁰

The amount of a minority discount must be determined by expert testimony.²⁰¹ Discounts in the 25%-35% range are most common.²⁰²

A minority discount cannot reduce the value of a business to less than the total net value of its tangible assets.²⁰³

even though the husband's mother owned the remainder of the company; an expert testified that the discount was appropriate despite the family relationship).

¹⁹⁹ See *In re Marriage of Davies*, 880 P.2d 1368 (Mont. 1994) (the minority owner was the CEO of the company); *In re Marriage of Harrington*, 935 P.2d 1357 (Wash. Ct. App. 1997) (the minority owner had option to purchase a majority interest).

²⁰⁰ Cf. *Owens v. Owens*, 589 S.E.2d 488 (Va. Ct. App. 2003) (recognizing that actual oppression might justify a minority discount, but suggesting that a discount might still not be appropriate if a minority owner had sufficient remedies for the oppression under the law of close corporations).

²⁰¹ E.g., *Bosserman v. Bosserman*, 384 S.E.2d 104 (Va. Ct. App. 1989); *Popp v. Popp*, 432 N.W.2d 600 (Wis. Ct. App. 1988).

²⁰² *Crismon v. Crismon*, 34 S.W.3d 763 (Ark. Ct. App. 2000) (12%); *Trost-Steffen v. Steffen*, 772 N.E.2d 500 (Ind. Ct. App. 2002) (30%); *In re Marriage of Muelhaupt*, 439 N.W.2d 656 (Iowa 1989) (20%); *Rattee v. Rattee*, 767 A.2d 415 (N.H. 2001) (28.5%); *Cerretani v. Cerretani*, 734 N.Y.S.2d 324 (N.Y. App. Div. 2001) (30%); *Hartman v. Hartman*, 346 S.E.2d 196 (N.C. Ct. App. 1986), *aff'd*, 354 S.E.2d 239 (N.C. 1987) (36%); *In re Marriage of Triperinas*, 59 P.3d 586 (Or. Ct. App. 2002) (25%); *Priebe v. Priebe*, 556 N.W.2d 78 (S.D. 1996) (40%); *Kasser v. Kasser*, 895 A.2d 134 (Vt. 2006) (25%-33% discount); *Arneson v. Arneson*, 355 N.W.2d 16 (Wis. Ct. App. 1984) (25%).

²⁰³ See *In re Marriage of Taylor*, 848 P.2d 478 (Mont. 1993); *Buxbaum v. Buxbaum*, 692 P.2d 411 (Mont. 1984); *Matter of Marriage of Webber*, 784 P.2d 111 (Or. Ct. App. 1989).

B. *Lack of Marketability*

Some businesses, especially close corporations, are difficult to sell on the open market. In states that apply a fair market value standard, the value of a business may be discounted to reflect the difficulty of finding a willing buyer.²⁰⁴ In states that apply an intrinsic value standard, the value of a business is generally not discounted for lack of marketability, because the lack of marketability does not reduce the value of the business in the hands of the present owner, without sale.²⁰⁵

There is obviously a considerable degree of overlap between minority and lack-of-marketability discounts, but the two discounts are conceptually separate.²⁰⁶ A minority discount reflects all of the disadvantages of minority status. A lack-of-marketability discount reflects the disadvantages of interests that are difficult to market, *for reasons other than their minority status*. A lack-of-marketability discount can be applied even to a majority interest, if there is reason to find that the interest would be difficult to market.²⁰⁷

A lack-of-marketability discount should not be applied to a value reached by looking at comparable sales of other businesses which are likewise difficult to market.²⁰⁸ The effect of limited marketability has already been factored into that sort of sale price.

²⁰⁴ See *In re Marriage of Thornhill*, 232 P.3d 782, 787 (Colo. 2010); *Erp v. Erp*, 976 So. 2d 1234 (Fla. Dist. Ct. App. 2008); *Parry v. Parry*, 933 So. 2d 9 (Fla. Dist. Ct. App. 2006); *Trost-Steffen v. Steffen*, 772 N.E.2d 500 (Ind. Ct. App. 2002); *Fechtor v. Fechter*, 534 N.E.2d 1 (Mass. App. Ct. 1989); *In re Marriage of Muelhaupt*, 439 N.W.2d 656 (Iowa 1989) (20%); *Myers v. Myers*, 680 N.Y.S.2d 690 (N.Y. App. Div. 1998); *Kalisch v. Kalisch*, 585 N.Y.S.2d 476 (N.Y. App. Div. 1992); *Crowder v. Crowder*, 556 S.E.2d 639 (N.C. Ct. App. 2001); *May v. May*, 589 S.E.2d 536 (W. Va. 2003); *Schorer v. Schorer*, 501 N.W.2d 916 (Wis. Ct. App. 1993).

²⁰⁵ See *Brown v. Brown*, 792 A.2d 463 (N.J. Super. Ct. App. Div. 2002); *Owens v. Owens*, 589 S.E.2d 488 (Va. Ct. App. 2003); *Hoebelheinrich v. Hoebelheinrich*, 600 S.E.2d 152, 156 n.2 (Va. Ct. App. 2004).

²⁰⁶ For cases stressing the distinction between the two discounts, see *Rattee v. Rattee*, 767 A.2d 415 (N.H. 2001); *Matter of Marriage of Tofte*, 895 P.2d 1387 (Or. Ct. App. 1995).

²⁰⁷ See, e.g., *Sommer v. Sommer*, 575 N.Y.S.2d 178 (N.Y. App. Div. 1991); *Schorer v. Schorer*, 501 N.W.2d 916 (Wis. Ct. App. 1993).

²⁰⁸ See *In re Marriage of Hanson*, 86 P.3d 94 (Or. Ct. App. 2004), *review denied*, 94 P.3d 877 (Or. 2004).

A lack-of-marketability discount must normally be supported with specific evidence that the interest at issue would be hard to market. If the evidence shows that the interest would not be hard to market, the discount is not appropriate.²⁰⁹ This test may be met when other owners of the business would be willing to buy any interests that were available for purchase.²¹⁰

The amount of a lack-of-marketability discount must be established by expert testimony.²¹¹ Most of the reported discounts are in the 20%-30% range.²¹²

²⁰⁹ See *Miller v. Miller*, 662 So. 2d 391 (Fla. Dist. Ct. App. 51995) (holding it was error to apply a lack-of-marketability discount, where the expert testified that the business was marketable); *Fausch v. Fausch*, 697 N.W.2d 748 (S.D. 2005) (holding that the trial court did not err in refusing to apply a lack-of-marketability discount, where the court accepted expert testimony that the purchase of the husband's interest in practice would be an attractive investment and that the practice would not have difficulty finding a buyer); *May v. May*, 214 W. Va. 394, 589 S.E.2d 536 (2003) (where expert did not explain why business would not be marketable, it was error to apply a discount).

Publicly-traded stock is normally marketable. See, e.g., *Maguire v. Maguire*, 608 A.2d 79 (Conn. 1992). But cf. *In re Marriage of Hoak*, 364 N.W.2d 185 (Iowa 1985) (applying a lack-of-marketability discount to stock listed on the New York Stock Exchange, where the sale was limited by federal restrictions on sales of stock by officers of corporation).

²¹⁰ See *Weston v. Weston*, 773 P.2d 408 (Utah Ct. App. 1989) (holding that it was proper to reject a lack-of-marketability discount where the husband's family owned the remainder of the stock in a close corporation; implying that other family members would readily buy the husband's stock if he decided to sell it).

²¹¹ See *In re Marriage of Conner*, 713 N.E.2d 883 (Ind. Ct. App. 1999) (finding it an error to make a marketability discount without evidence; holding that a discount was not an appropriate subject for judicial notice).

²¹² See *Erp v. Erp*, 976 So. 2d 1234 (Fla. Dist. Ct. App. 2d 2008) (10%); *Trost-Steffen v. Steffen*, 772 N.E.2d 500 (Ind. Ct. App. 2002) (30% discount for minority status and lack of marketability); *Fechtor v. Fechter*, 534 N.E.2d 1 (Mass. App. Ct. 1989) (15%); *In re Marriage of Muelhaupt*, 439 N.W.2d 656 (Iowa 1989) (20%); *Myers v. Myers*, 680 N.Y.S.2d 690 (N.Y. App. Div. 1998) (finding it was an error not to apply a 25% discount); *Kalisch v. Kalisch*, 585 N.Y.S.2d 476 (N.Y. App. Div. 1992) (finding it was an error to make no discount, but determining that the claimed discount of 35% was excessive and reducing it to 25%); *Crowder v. Crowder*, 556 S.E.2d 639 (N.C. Ct. App. 2001) (25%); *Schorer v. Schorer*, 501 N.W.2d 916 (Wis. Ct. App. 1993) (20%).

Two cases make a much larger discount. See *Cox v. Cox*, No. 2009-CA-01233-COA, 2011 WL 208312, at *4 (Miss. Ct. App. Jan. 25, 2011) (applying an unusually large 50% discount based heavily upon evidence that the economy was in recession and the buyer would have trouble borrowing);

A lack-of-marketability discount cannot reduce the value of a business to less than the total net value of its tangible assets.²¹³

C. Key Person

There is authority discounting the value of a business that is unduly dependent upon the services of one particular person, if that person is not contractually bound to remain with the company for a substantial period of time.²¹⁴ There are also cases using the presence of a key person as a factor tending to limit the value of the company, without making a specific discount.²¹⁵ There must, of course, be supporting evidence that the business actually has a key person.²¹⁶

The valuator must be careful not to account for key person status more than once. If the business is valued using comparable sales, and all of the comparable sales involved businesses who had a key person, the discount has already been factored into the sale prices.²¹⁷ If the expert considers the presence of a key person in setting a capitalization rate under capitalization of earn-

Caldas v. Caldas, No. 20691, 2005 WL 2077783 (Ohio Ct. App. Aug. 19, 2005) (applying an extremely high 75% discount for lack of marketability, where many of the business' contracts could not be transferred as a matter of federal law, the business was unusually dependent upon husband's personal efforts, and the husband had just lost security clearance which was essential to some of the contracts involved).

²¹³ See *Wagner v. Dunetz*, 749 N.Y.S.2d 545 (N.Y. App. Div. 2002).

²¹⁴ See *Eyler v. Eyler*, 492 N.E.2d 1071 (Ind. 1986); *Rogers v. Rogers*, 296 N.W.2d 849 (Minn. 1980); *Hoffa v. Hoffa*, 382 N.W.2d 522 (Minn. Ct. App. 1986); *Nemitz v. Nemitz*, 376 N.W.2d 243 (Minn. Ct. App. 1985).

²¹⁵ See *Burnham-Steptoe v. Steptoe*, 755 So. 2d 1225 (Miss. Ct. App. 1999) (finding that key man status properly factored into valuation, however the exact method of consideration was not stated); *Frazer v. Frazer*, 477 S.E.2d 290 (Va. Ct. App. 1996) (holding that where the husband was the key man in a business, the business should be valued conservatively, but making no specific discount); *Signorelli v. Signorelli*, 434 S.E.2d 382 (W. Va. 1993) (holding that a court can consider key man factors, but making no specific discount).

²¹⁶ See *Bernier v. Bernier*, 873 N.E.2d 216, 232 (Mass. 2007) ("The husband's role in the supermarkets, in contrast, is that of chief executive; his services are critical but not unique or irreplaceable, and in any event, as we have previously noted, the husband was not likely to be >lost= to the enterprise"; holding that it was an error to apply the key man discount).

²¹⁷ *Miller v. Miller*, 705 S.E.2d 839 (Ga. 2010)

ings or capitalization of excess earnings, a separate discount is improper double-counting.²¹⁸

V. Conclusion

The fundamental debate between the fair market value standard and the intrinsic value standard is a foundational issue in the law of valuation of marital property. But resolving that dispute is not a simple matter of choosing one standard over the other. Some assets, such as retirement benefits, cannot be sold on the open market, and must necessarily be governed by an intrinsic value approach. Other assets, such as small businesses, are so difficult to market that recent comparable sales rarely exist. These assets also must therefore be governed by the intrinsic value standard, which normally requires an income-based valuation formula.

In some ways, the application of minority and lack of marketability discounts are the fair market value standard's reaction to the practical need for using income formulas for valuing small businesses. The income formula is used, but it is not fully trusted, and the value reached is therefore discounted. The degree to which a state applies the various exceptions to these discounts—particularly the rule that the discounts are not required if the owner or his family controls the company—also tends to correspond directly to the degree to which the court emphasizes the fair market value standard as a matter of policy. Courts that are most committed to fair market value, as opposed to intrinsic value, tend to apply the exceptions more narrowly.

When discounting the value produced by an income formula, therefore, an important factor not addressed directly in the cases is the degree to which the court trusts the results of the income formula. If the court senses that the formula value is removed from reality, and especially if the court senses that the income formula is being used to reach an inflated value, the chance are good that the formula value will either be rejected or heavily discounted.

Spouses who wish to have the court accept an income formula should therefore make certain to defend the formula itself. Ideally, an expert should testify that the formula is actually

²¹⁸ *Id.*

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used by buyers and sellers in actual open-market transactions outside the divorce setting. If the court is convinced that formula is a valid tool for estimating what a comparable sale would be if a comparable sale existed, the formula will be given more weight. Conversely, if the court senses that the formula would not be used by anyone not representing the nonowning spouse in a divorce case, the formula is likely to be rejected or discounted. In states that prefer fair market value, income-based valuation formulas are tools for determining fair market value when comparable sales are lacking, and they must be applied with that purpose firmly in mind.