The ‘value to the owner’ objective and its implications in the separate recognition of personal and commercial goodwill in Australian Family Law decisions.

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Abstract

The Court is often confused when duelling valuation experts present apparently different evidence. Without a recognised theory, valuation evidence can appear disorderly and potentially contradictory.

In the absence of theory The Family Court of Australia has attempted to clarify the valuation objective, articulating the ‘value to the owner’ concept. Born out of minority shareholder issues this paper reflects on the gestation of ‘value to the owner’ through reviewing the Court’s guidance. However it is noted that there is some tension with this objective when applied to professional services businesses.

This paper explores a particular application of value to the owner in professional services businesses where the distinction between personal and commercial goodwill can be at issue. The importance of this distinction is in the consideration of capitalisation as property or future income as financial capacity. This has implications in Court decisions applying section 79 and/or section 75(2) such that duplication is avoided.

Introduction

Many valuation practitioners shun consideration of valuation theory, believing it to be an abstract diversion from a very practical activity, and, perhaps, with the historic failure of accountants to develop a theory of measurement in their minds. However valuation expertise as recognised by the courts in the role of an expert witness did not miraculously materialise without the techniques and tools valuers employ being devised in a systematic and orderly manner. An expert valuation witness by definition claims to have expertise or specialist knowledge in valuations beyond that of an average person and that body of knowledge is usually developed by training, education experience or skill. However for the expert’s knowledge to be recognised within a specific court it needs to be contextualised to the relevant to the trier of fact.

Whilst the valuations expert has a body of peer recognised knowledge to draw upon, it mainly resides in the methods of establishing the monetary value of what is being valued rather than being contextualised to the purpose or objective of the valuation. Specifically the Family Law Court has endeavoured to provide contextualisation through guidance emanating from decisions in specific case circumstances and explanation of the relative weight and importance of attributes found within
such cases. This has at times lacked clarity and even been contradictory in the application of valuation methods to the decisions required by the court under its section 75(2) and section 17 obligations to do justice to the division of property between the parties to the marriage.

The courts have no role nor have they provided a theoretical interpretation of valuation practice to guide the valuation ‘profession’. Indeed, would the development of a theory of valuation provide more persuasive evidence or improve the consistency of valuation outcomes? Specifically, in the example of valuing the personal and commercial goodwill of professional businesses within the Family Law context, does the hierarchical discipline of a theoretical approach assist in the classification of marital assets as property or as financial capacity.

A Theory?

The absence of a recognised theory of valuation, gives rise to a professional and academic dilemma, with valuations lacking consistency and damaging credibility. Lawson (2008) points out ‘the problem is compounded from a misunderstanding between concepts, doctrines, and various economic theories, ….. heightened through a misunderstanding of the role of the courts when attempting to resolve a dispute.’\(^1\) Smith (1986) in his paper pointing out the inconsistencies in appraisal\(^2\) and real estate valuation, highlights the effects of inconsistencies in valuations stating that:

‘The corollary is, of course, that their continued occurrences weaken appraisal and the appraisal function. They may lead to inaccurate value conclusions, disparities among appraisals, and lowered public confidence in appraisers. Most of the alleged inconsistencies cited in this paper can be easily corrected intellectually. ….. Whatever the source may be, inconsistencies result from a breakdown in logic, and they may lead to inaccurate and disparate appraisals.

Jaffe and Lusht (1985) go further noting:

'When a group of individuals cannot decide upon its own purpose, it is to be expected that the group might have difficulty convincing others that its body of knowledge deserves the acclimation of a "profession". Clearly, the lack of a theory of value precludes a precise measure of worth.'

In his discussion of accounting theory Gaffikin (2008) points out that in taking actions, such as determining a valuation, ‘we would like to be confident that they will in fact lead to desired aims being achieved, but we can never be certain that they will. Therefore, we need to be able to understand the factors that will impact on our decisions: we need to have a soundly reasoned basis for our decisions, and this is where theories come in.’ Lipsey, Langley and Mahoney(1985) point out that "Theories impose order on our observations, explaining how things we see are linked together. Without theories, we would have only a mass of meaningless observations. The choice is not between theory and observation but between better or worse theories to explain our observations." (pg7)

Expert valuation witnesses are people who can offer opinions in court because of their unique and recognised experience, education, training or practice. Theories provide the rational grounding for

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\(^1\) Lawson was referring specifically to real estate appraisal and valuation however his comments pertain to the wider study of valuation.

\(^2\) The International Glossary of Business Valuation Terms 2001 refers the definition of appraisal and related terms such as appraisal approach to the definition of valuation and valuation approach etc.
this recognition, assisting its articulation and understanding beyond the field of expertise, extending to informative communication through understanding and explanation of facts. Valuation expertise has however developed, not from sound research based theory incorporating the proving or disproving of a hypothesis, but largely from the guidance found from the courts and the general practice of a body of quantitative methods not necessarily unique or applicable to any particular valuation purpose.

This paper reviews the gestation of valuation thinking, specifically in terms of the expert witness role in advising the Family Law Court of Australia. It recognises a socially constructed ontology espoused by the court under the ‘value to the owner’ concept being distinguished from the more realist ontology of ‘market value’ which is perhaps more readily understood by the lay person. The social construction of the ‘value to the owner’ concept is researched through its evolution from the questioning of the Spencer’s (1907) case “hypothetical willing but not anxious purchaser and vendor” principle in the Marriage of Reynolds (1984) 10 Fam LR 388 through the learned judiciary’s guidance in cases such as Hull and Hull (1983) FLC 91-360, Sapir and Sapir (No 2) (1989) FLC 92-047, Turnbull v Turnbull (1991) FLC 92 258, Ramsay and Ramsay (1997) FLC 92-742, Best and Best (1993) FLC 92 418, B&B (No 2) (2000) 26 FLR 437 and Wall and Wall (EA83 of 1999).

Vella (2009) highlights that the concept of ‘value to the owner’ is ‘potentially very confusing for valuers’ citing ‘the blurring in many decided cases of the distinction between market value and value to the owner’ between Family Law and non-Family Law cases as well as transitioning the application of valuation principles in the accounting sense into the Family Law context.

The ‘value to the owner’ concept instructs the epistemology, that is, the obtaining of knowledge and the court’s guidance regarding the ‘rules’ of validating the knowledge contributing to the valuation for the ‘value to the owner’ objective. ‘Value to the owner’ is not a theory as it does not lead to a provable, or otherwise, hypothesis. Instead it is a normative objective. This ontological and epistemological consideration clearly differentiates the ‘value to the owner’ concept as a more senior consideration than both valuation methodology and valuation methods, a clarity often not recognised by practitioners.

Gaffikin (2008) instructs that methodology ‘investigates and evaluates methods of inquiry and thus sets the limits of knowledge’. Therefore this paper, on accepting the validity of the ‘value to the owner’ objective, and guidance from the court, reviews some of the components of methodology that determine the techniques and tools used in defining the general valuation approach in determining a value indication of a business, business ownership interest, security, or intangible asset using one or more valuation methods.

Specifically the paper recognises the difficulty in applying the ‘value to the owner’ objective to valuing professional services businesses within the Family Law context. The social construction of the ‘value to the owner’ ontology has evolved through court decisions including nuances with undefined reference to ‘realist’ outcomes, addressing specific circumstances which often limit the link to methodological considerations such as the segregation of intangibles or consistent consideration of timing effects.

Methodology before Method

Recognition of the higher level objective then consideration of the methodology before selection of the appropriate valuation method is particularly important with reference to the court’s decisions.
under section 75(2) and section 79 of the Family Law Act (1975). Subscribing to the ‘value to the owner ‘ontological objective ‘is not an invitation to abandon principled methodology.’ (Moore J in Barouche v Barouche, 1999).

For example methodological consideration of personal and commercial goodwill gives segregation to the business components available for capitalisation as assets or financial resources under section 75(2)(b). The consequences being that assets of the marriage can be capitalised and proportionally distributed based on point of time valuation whereas the financial resources of the marriage partners cannot be proportionally distributed at a point in time but can be considered with respect to the on-going capacity to contribute to post marital up-keep or maintenance.

Lack of methodological consideration can lead to double counting of both personal and commercial goodwill as capitalisable intangibles for point of time distribution before again considering personal goodwill as contributing to an individual’s capacity to finance on-going marital obligations. This paper reviews Wall and Wall (1999) before exploring some examples, postulating classification difficulties along the continuum where the business valuation includes an increasingly interdependent mixture of personal and commercial goodwill.

Appropriate valuation methods applied separately to asset valuation and financial capacity quantification flow from recognising the methodological differentiation and the specific circumstances and attributes of the business. For example quantification methods include Future Maintainable Earnings, Discounted Cash flow, Industry Benchmark and Comparative Business Sales lose their validity if constraints on alienation limit their methodological validity.

Therefore the importance of this academic contemplation of a hierarchical approach to valuation facilitates a more rigorous and informed assessment of a valuation expert’s evidence, particularly in the valuation of professional practices for family law purposes. However the strength of this understanding falls short of the validation provided by a research based theory or scientific predictability.

Cleansed of academic purity, the differentiated consideration of firstly the ‘value to owner’ objective, followed by the methodology distinguishing asset valuation and financial capacity, then instructing the appropriate recognised calculation method, is informative to:

1. The courts in their decisions pertaining to sections 79 and 75 of the Family Law Act;
2. Legal instructions to valuation experts pertaining to the quantification or valuation of personal and commercial goodwill components;
3. The explanation of specific professional practice valuations by expert witnesses; and
4. The understanding of the parties to proceedings.

Family Law Act 1975 – section 75, section 79

Section 75 of the Australian Family Law Act 1975 prescribes the only matters to be taken into consideration in relation to spousal maintenance when exercising jurisdiction under section 74 of the Act. In particular section 75(2)(b) and (n) state:
(2) **The matters to be so taken into account are:**

(b) the income, property and financial resources of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment; and

(n) the terms of any order made or proposed to be made under section 79 in relation to:

(i) the property of the parties;

"property" means: in relation to the parties to a marriage or either of them—means property to which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion;

Section 79 of the Australian Family Law Act 1975 provides the latitude for the Court to alter property settlements such that the Court may make such orders based upon its decisions (just and equitable) regarding the settlement or transfer of the interests of the parties to the marriage in the property. Including:

(1) (c) an order for a settlement of property in substitution for any interest in the property; and ......

(4) In considering what order (if any) should be made under this section in property settlement proceedings, the court shall take into account:

(e) the matters referred to in subsection 75(2) so far as they are relevant;

The Court can grant an adjournment in the property settlement proceedings (sec 5(a)), grant interim orders (sec 6), and generally take into account if there is likely to be significant change in the financial circumstances of the parties or change any of the property of the parties if that change is more likely to do justice as between the parties to the marriage than an order that the court could make immediately.

The section 75 and section 79 decision making process is one for the judge, whose ultimate aim is to divide the property between parties. The valuation issues are a step in the process that may or may not be material to the ultimate decision. The expert valuation role is to assist the court, not to make the decision for the court.

**The ‘value to the owner’ concept in Family Law**

Past colloquial expressions of valuation theory have in fact been unrestrained expressions of ontology through to methodology, largely transported from the courts as transcribed from Justices in their deliberations. It has been claimed that ‘considerable judicial commentary provides a framework for reviewing and critically analysing valuation theory.’ (Valuation Principals and Practise, 2008), however this is to subscribe a role to the courts they neither play nor wish to acquire.

One of these manifestations is that the ‘Spencer’ doctrine is quoted incorrectly, as theory .Whipple in his book has done much to expose the inappropriate use of this doctrine that adopts the definition of ‘fair market value’ and the concept of ‘willing buyer willing seller’.

The term valuation is understood in predominantly two ways, being the positivist ‘market valuation’ and the normative ‘value to the owner’. Both have inherited several titles such as exchange value,
sale price or market value for the former and realistic value, just price, cost of reproduction, fair market value for the latter.

Whilst it is noted that the Full Family Court first questioned the then generally accepted principle espoused in Spencer’s Case (1907) of a ‘hypothetical willing but not too anxious purchaser and vendor’ in the Marriage of Reynolds (1984), the concept of ‘value to the owner’ was not new. Indeed Bonbright (1937) argues that:

‘..... it would seem to follow that the value of property should always be taken to mean value to some specific individual, or group of individuals, who have or may have an ownership interest in the thing.’(pp15,16)

Bonbright points out that ‘any object of wealth may be capable of conferring different advantages on different owners’ and therefore should not be referred to as the value of property ‘in general’. He notes that ‘in many reported cases’ the reference to the value of property to a specific group is differentiated as its ‘real value’ rather than its ‘market price’.

Bonbright highlights two ‘distinct but related’ concepts of value being ‘the one referring to sale price and the other referring to value to a specific owner’. He counsels that:

‘the value concepts of the courts betray a tendency to slide over unconsciously from the idea of value as a mere sale price to the idea of value as worth to the owner’

Spencer’s case was regarding compensation for land resumption by the Commonwealth whereas in the Marriage of Reynolds the Full Court said:

‘We are doubtful, however, whether valuation methods which have been developed for commercial purposes are entirely appropriate for the purposes of family law. The present commercial capital value of shares in a proprietary company may not reflect their value to the spouse who either has control after the divorce or who stands ultimately to benefit from them or control them after the death of generous parents, as appears the case here’

APES 225, Valuation Services (2008), instructs members to clearly define the valuation terms used, encouraging reference to:

‘the International Glossary of Business Valuation Terms which are included in the valuation standards of the American Institute of Certified Public Accountants and the Canadian Institute of Chartered Business Valuators’ (para 7.2)

This Glossary defines ‘value to the owner’ as ‘investment value’ being ‘the value to a particular investor based on individual investment requirements and expectations’. The alternative use of the term ‘value to owner’ in the Canadian context is noted. This is in contrast to the definition of a market based approach to valuation being:

‘a general way of determining a value indication of a business, business ownership interest, security, or intangible asset by using one or more methods that compare
the subject to similar businesses, business ownership interests, securities, or intangible assets that have been sold.’

Vella (2009) provides a working definition of ‘value to owner’ as:

‘what a reasonable, prudent business person, in the position of the holder [husband or wife], willing but not anxious to exchange the asset for cash, and reasonably informed of the relevant facts, would see as the cash equivalent of the relevant asset to him/her’ (pg 43)

Vella’s definition is espoused after consideration of the following case material and notably removes any reference to a ‘hypothetical’ or ‘notional’ buyer. It includes a ‘relevant facts’ catch all to allow for a range of factors such as market conditions, timing variances and future pertinent risks.

Most of the early judicial instruction regarding ‘value to owner’ comes from cases involving minority share holdings, however the Family Court has been reticent to say what ‘value to the owner’ means other than alignment with the term ‘realistic’. Warnick J turned to the question of what earlier judgments meant by the word ‘realistic’ in Ramsay (1997), reflecting that in a number of cases the term had been seen simply as ‘shorthand’ for the expression ‘value to shareholder’. The judge noted an area of tension in this usage, commenting that value to the shareholder (in Family Law) includes a ‘number of assumptions about the receipt of benefits (often not attaching to the shareholding ‘per se’) over the value that can be achieved on sale’. ‘Thus it has a strong ‘notional’ aspect, in contrast to the reality of the market as well as recognition of what can be achieved on sale.’

Similarly the courts have not been clear on handling ‘special benefits’, particularly where speculation regarding future events may be required (Warnick J in Ramsay). The Glossary defines a special interest purchaser as an ‘acquirer who believes they can enjoy post-acquisition economies of scale, synergies, or strategic advantages by combining the acquired business interest with their own’. In Family Law terms this definition extends to special value associated with elements of worth (benefits) or of a going concern.

In Dunbar and Dunbar (1987) the Full Court seemed to generally advocate the willing buyer, willing seller objective stating: ‘The object of any valuation exercise is to establish what a willing but not anxious purchaser would be prepared to pay and a willing but not anxious seller would be prepared to accept’, in line with Spencer (1907). However a line of decisions commencing with Hull and Hull (1983) the Family Court modified that approach.

In Hull and Hull (1983) and in Bowman and Bowman (1984) Nygh J commented that ‘the Court must approach a question of valuation on a realistic basis .... The test laid down in Spencer’s case ... can only be applied where there is a ready and available market.’ Judgement was passed that the willing buyer, willing seller foundation was not appropriate because it was ‘artificial’ to say that the wife’s interest in the company was ‘valueless’ even though the shares currently did not provide dividend earnings. The judge attributed a value to the shares of asset backing without further explanation.

In Reynolds and Reynolds (1985) the Full Court confirmed his Honour’s questioning of ‘whether valuation methods which have been developed for commercial purposes are entirely appropriate for
the purposes of family law’, recognising that the value of a minority shareholding had a value to the husband even though the present commercial value did not reflect its value to the husband. Similarly in Sapir and Sapir Young J agreed that the value of shares should be discounted at a lower rate, reflecting their sub-ordinance to her parents shareholding, in order to establish the value of the shares to the wife rather than a higher discount factor should the shares have been marketed to a third party.

In Turnbull v Turnbull (1991) the appeal Court agreed with the approach taken in Reynolds, Sapir and Hull noting:

‘It is not appropriate in the context of Family Law proceedings to value shares in private family companies on the basis of what a hypothetical purchase may pay for them. Similarly it is quite inappropriate to adopt the approach taken in the revenue and resumption cases.

I am satisfied therefor in the context of proceedings under the Family Law Act that when a judge is determining the value of shares held by a party in a family company, he must look at the reality of the situation and value the shares on the basis of their worth to the shareholder. Turning to the facts of the present case, the husband’s shares can only be valued, in my view, on the basis of their worth to the husband in the context of the Turnbull family as a whole.’

In Harrison and Harrison (1996) the Full Court stated:

‘the value to be ascribed to shares in a family company must be a realistic one, based upon the worth of the shares to the party himself or herself.’

Does ‘value to the owner’ mean realistic, and if so, what does realistic mean? In Ramsay v Ramsay (1997) Warnick J made some observations about the term ‘realistic’ after first recognising earlier cases including those above.

‘In a number of cases in which it was stated that the value to be ascertained was that to the shareholding party, it was also stated that the value must be ‘realistic’, as if these terms are synonymous. If the use of the term ‘realistic’ is seen as simply ‘shorthand’ for the expression ‘value to the shareholder’, then no doubt there is no inconsistency.

It seems arguable however that what is ‘realistic’ (literally taken) may not be the same as the value to the shareholder. The latter is often not the value that can be achieved on sale and also often takes account of a number of assumptions about the receipt of benefits (often not attached to the shareholding ‘per se’). Thus it has a strong ‘notional’ aspect, in contrast to the reality of the market. It seems arguable that the concept of ‘realistic’ value to the shareholder ought include a recognition of what can be achieved on sale. Alternatively such recognition ought be granted some other place in the decision –making process.

It is in this area of tension, between what I suggest is realism and what might be assessed as the value to the shareholder, that the failure to identify factors
pertinent to the valuation exercise being undertaken and in particular the failure to identify those factors, the import of which ought be left to the discretion of the Court, causes particular difficulty’

Further his honour proffered the following observations:

‘(a) a question to be answered in each case, and as to which expert evidence may be admissible, is whether there is a market for the shareholding;

(b) if there is a market, evidence of the market value is highly likely to be relevant, even if there is no intention to sell;

(c) it is however, unhelpful for valuations to focus on the lack of a market in establishing a value to the shareholder. Any allowance for lack of realisable value is best made by the Court, in all the circumstances of the case, particularly the presence or absence of other assets which are disposable;

(d) in cases where there are no realisable assets, the lack of market value of the shareholding will usually be critical, not only to the “division” of property, but perhaps even more so, to the orders made;

(e) if, on the facts of the case, there is any prospect of the minority shareholding party gaining control of the company, the question of the probabilities of that event is likely a question for the Court. If that is so, all that the valuers ought be concerned with is the value to the party if he/she gains control, as well of course as the value if the party remains a minority shareholder;

(f) similarly, if there is any issue about them, questions of the probabilities of particular benefits being received by a shareholding party in the future, are likely best left to the Court, but again valuers ought assess the value of the shareholding, both on the basis that the benefit is received and that it is not.” [at p 83,999]

In a later case AJW v JMW (2002), Warnick J, before stating that the value to owner concept was not a methodology but an objective noted that:

‘This value known as ‘value to the owner’ considers and takes into account the additional economic benefits that ownership confers to the owners which, at the same time, would not enhance the market value of the shares to the purchaser. These benefits arise from special attributes or advantages which are peculiar to the owner and which may not necessarily be available to a potential third party.

...... as noted that definition contains within it, the reason for its selection, namely, the existence of special benefits.’
Whilst its gestation may have been in non-controlling interest cases, the ‘value to the owner’ concept has been broadly applied under Family Law, particularly evident in professional practice cases. For example accounting in Hegarty v Hegarty (2002); law in Best and Best (1992,) and in B and B (2000); and medical in Scott and Scott (2006).

In Best and Best (1993) the husband was a solicitor in a large legal firm which was clearly a no goodwill firm (partnership not transferable or realisable on sale, death or retirement). The court was presented with two valuations based upon the balance of capital and current accounts, however the wife’s valuation included a further amount being the ‘capitalised value of future earnings’ calculated from a super profit calculation method.

The Court opined of the capitalised proportion above that ‘such an interest is in my opinion a financial resource, albeit a defined one, and not ‘property’. The husband’s interest in the partnership is … not a valuable asset or marketable commodity in the sense of ‘property’ under the Act , but basically an expectation , albeit very real and very imminent, of future income or gain.’ Gee J went on to treat the husband’s partnership interest as a financial resource under section 75(2).

On appeal the Full Court reviewed decisions in FC of T v Everett (1980), FC of T v Galland (1986) and Reynolds and Reynolds (1984), discussing the concept of property in the Family Law context. The valuer for the husband had stated that treating the husband’s interest as property was illusory, lacking a sense of reality because the interest was not really transferable, not saleable and not capable of being mortgaged as a security’, nevertheless the Full Court referred to the husband’s interest in the partnership as property. The husband was noted to have rights under the partnership agreement even if those rights were truncated and would present difficulties in valuation and in the application of orders under section 79.

Consequently we have tension between the value concept applied by Gee J in the original case where he described his valuation of ‘capitalised value of future earnings’ applied as a financial resource of the husband and the counsel for the wife’s valuation as ‘the value to Best of his interest as a partner’ applied as property favoured on appeal. The Court was not called upon to instruct on consequent methodologies or the valuation flowing from this discussion.

Similarly in B and B (2000), where the husband was a partner in a large legal practice, the valuer for the wife followed the decision in Best, applying a valuation in excess of the capital account value using a discounted cash flow method applied to ‘super profits’ and calling it ‘capitalised value of future earnings’. The husband’s expert put forward that any value in excess of the capital accounts constituted notional goodwill reflecting a financial resource of the husband.

Moss J distinguished Best on the basis that whilst transfer of partnership rights were limited they were not inalienable as they were in B and B. Consequently his honour discussed the suggestion that ‘an interest must be capable of alienation or assumption by a third party in order that it be characterised as property’. His honour concluded:
a. In Everett and Galland the relevant partnership interests were assignable so that, in concluding that the relevant interest in Best was property, the Full Court of the Family Court was simply applying the earlier High Court decisions. No case referred to by before the Full Court decided that a partnership interest which was unassignable was property (para 77);

b. assignability is not in all circumstances the crucial test as to whether an interest constituted property. However, said his Honour, unassignable interests are held to be property only where the condition of unassignability has been imposed by statute, or by the document creating and evidencing the property or by taking into account reasons of public policy: “The distinction turns, therefore, on whether the particular interest is inalienable by reason of its nature, in which case it will be excluded from the category of property (para 80);

c. His Honour acknowledged again the distinction between “value in exchange” and value to the holder after citing the following passage from the decision of the High Court in Kelly91: “The learned trial Judge found that both the Applicant and the Respondent believed that under the law as it then stood the permit was personal to the Respondent, could not be transferred to anybody else, would lapse if the Respondent died ‘and was therefore a valueless asset’. That is not, of course to deny that the permit was of considerable value to the Respondent personally for so long as he desired to continue to dive for abalone and remained medically fit (para 101);

d. the partnership interest in the present case “is to be classified as a non-assignable chose in action and therefore as a personal right in the [husband] rather than a right of a proprietary nature.” (para 105);

e. that did not mean that the interest had no value but it did mean that it had no value in exchange. Thus, no order could be made pursuant to sec 79 of the Family Law Act in respect of the interest because it was not property93. However, in the present case, that made no difference because his Honour had taken account of the full value of the interest being only the capital accounts.’

On appeal (though outside any valuation issues) the Court stated that they ‘should not be taken to endorse Moss J’s conclusions’ with respect to the positions where a ‘partnership interest is to be classified as a non-assignable chose-in action and therefore as a personal right in the Respondent, rather than a right of a proprietary nature, does not mean it has no value.’ The Full Court also appears to have shown reservations with regard to the concept that because such rights are not property they cannot be the subject of an order under section 79.

Given the value to the owner objective and the case where the fair salary is less than the maintainable earnings before salary it would appear that despite alienability restrictions there may be significant value to the owner albeit that it is not achievable in exchange.

In Hegarty and Hegarty (2002), dealing with the husband’s 50% share in an accounting practice, it was restated that by ‘having an established practice, a client base, and infrastructure which enables
him, albeit only as a consequence of hard work and long hours to do so, an income stream, must be worth something to the husband.’ The husband’s practice relied upon a narrow stream of customers, being McDonalds franchisees, and hence it had minimal marketability which was a focus of the court when assessing both prospective earnings and the capitalisation rate.

The judgement is somewhat opaque through mixed references as to the calculation’s purpose of establishing market value or ‘value to the owner’ however it is distinctive in its recognition regarding the adoption of the present value of the income stream to the husband on the assumption that he will not sell the interest. His honour did not canvas the possibility of a future sale of the practice nor the structured transfer of business constructed to reduce the risk of loss of clients in such a sale.

In Scott and Scott (2006) where a medical partnership was being valued in the presence of a partnership agreement stating an exit ‘goodwill’ price of $84,400 the Court was asked:

‘whether in the face of the partnership agreement that stated a goodwill figure, and a history of partners entering and leaving the partnership in accordance with that agreement, capitalisation of future maintainable earnings was an inappropriate methodology.’

The Full Court found that her Honour:

‘was not bound to accept the valuation methodology expressed in the partnership agreement, as opposed to the capitalisation of maintainable earnings’.

Her Honour had taken reference in Harrison and Harrison (1996) which supports the view that the husband’s interests in the partnership and medical trust ‘can only be valued on the basis of their worth to him’.

Value to the Owner, Personal and Commercial Goodwill

The application of the value to the owner objective, based upon super profit methodology with particular relevance to professional practice valuations may be problematic where the business may rely upon significant personal goodwill rather than commercial goodwill.

Delbridge-Bailey (2004) warns that:

‘as the majority of professional practice valuation undertaken for Family Law purposes utilise the super profit approach’ (methodology) when combined with the value to owner objective (ontology) ‘at risk is the potential double count of a professional’s capacity to derive income, as both a capitalised value in the property pool and a future financial resource’.

Goodwill is an intangible asset representing the premium an informed buyer is prepared to pay for the ownership of a business, over and above the value of its net assets or ‘book value’. Goodwill has two components, being the commercial goodwill and personal goodwill. Commercial goodwill includes the tradable branding of a business, assignable supply contracts, established business
system, established product range, location, supplier and associate affiliations, corporate memory and positive customer retention. A key feature of commercial goodwill is that it is alienable, albeit that any transfer may be subject to conditions and limitations which in turn may require qualification with a discount factor.

In effect personal goodwill exists when the husband/wife or both parties’ reputation, expertise or contacts gives the business its intrinsic value. Its prevalence is most likely in closely held businesses, professional practices, specialised businesses or businesses with few customers and suppliers. It is owned personally rather than by the business and its characterisation is the subject of some dispute, in particular the subset of professional goodwill.

By way of example the relative balance between commercial and professional goodwill exists on a continuum where the attributes of alienability vary from strong to weak. The stronger commercial goodwill is found in businesses with a strong brand such as well-known franchises, proven and documented operating systems, larger and diverse management roles, replaceable individuals, prime locations, independent traffic flow, reliable suppliers and processes supporting a profitable track record. In short there is a ready market of purchasers that can relatively seamlessly take over the business. At the other end of the continuum high personal goodwill is more prevalent in smaller, unique businesses that depend on individual knowledge and relationships, may be limited in their marketability by agreement, dependent on a narrow and/or complex skill set for which there is little or no replacement.

Therefore at the high commercial goodwill end a well received and located franchise would be highly capitalisable with willing purchasers able to pay the seller for the business capital (both tangible and non-tangible) within a relatively short period. At the high personal goodwill end the business being dependent on the individual owners relationships, management, skills and qualifications independent of structure would have low prospects to find a willing purchaser able to pay the seller for the business capital. Whilst there may be a super profit earned (above reasonable salaries) in either business, the high personal goodwill business is unable to realise that super profit as prospective profits brought forward under capitalisation. Instead the super profits can only be realised (under the ‘value to the owner’ objective) over time in the form of financial earnings. The super profits become irrelevant under the market price objective because by definition there is no purchaser, the end result of for example a retirement would be that the business would ‘shut its doors’.

Take for example a highly qualified medical professional in a low capital intensive, plentifully supplied, regional specialist area such as a rheumatologist, neurologist or gastroenterologist. The business may have a name and be established with clerical and administrative support however the referrals are personally addressed to the specialist, have a limited life-cycle, the business depends on repeat and continuing referrals based on individual medical circumstances, the patients and their medical records are not transferable in their own right. Furthermore the skills and qualifications required to run the business are complex and rare, with any potential buyer possessing appropriate skills, having a choice in action to commence ‘from scratch’ a start-up alternative practice. The desire to operate the business in the existing location is also scarce. Whilst such a medical specialist can, no doubt, earn a significant premium through the business rather than available to a similar
specialist employed, say, with a government department or hospital, such a premium can be quantified through a super profits method however it is not alienable and hence not methodologically capitalisable.

Realistically the earnings premium cannot be brought forward to any significant extent without the alternative choice in action of commencing a start-up practice becoming a viable and attractive option. Under the ‘value to the owner’ objective however the premium the specialist earns does have a value in that it is indicative of an earning capacity.

As noted above section 75(2)(b) the income, property and financial resources of the parties are to be considered in the settlement process hence it is important to differentiate between the property and the financial resources of the parties particularly with respect to the characterisation of goodwill. Failure to do so may lead the court to double count the one income source as both property and a financial resource.

In the unreported matter of Wall and Wall (2002) concerning the husband and wife’s shares in a company carrying on the business of film producers and directors, the Court initially valued the business attributing goodwill using the super profits method and dividing by the shareholders 50:50 equity. The Full Court subsequently held that the trial judge had erred in not separately treating the personal goodwill of the parties as commercial goodwill, explaining that the personal goodwill was an element of the husband’s earning capacity which represented a significant section 75(2) factor.

The Full Court accepted Cohen J’s recognition that the value should be ascertained ‘in the husband’s hand’ and that it was open to His Honour to reject the husband’s submission that because the business relies wholly on the skills of the directors the goodwill is worth nothing; quoting Wayne Lonergan:

‘The reality is that goodwill exists because a business has a demonstrated capacity to earn cash flows exceeding the cash flow which one would normally expect if one were to invest the same level of tangible and identifiable intangible net assets in a similar business starting from scratch’ (in evidence at paragraph 71)

However the Full court also rejected the earlier treatment in valuing the goodwill of the company pointing out ‘that there is a significant element of personal goodwill attaching to both the husband and Ms Lee in this case, which is clearly not transferable, and which, in the case of the husband at least, is really part of his earning capacity rather than property.’ Again, with reference to Lonergan, the Full Court outlined the varying attributes of commercial and personal goodwill highlighting that the judge had accepted a grossly inflated value for the business by not differentiating between the two types of goodwill.

Delbridge-Bailey (2004) summarises that:

‘while still having the objective of arriving at the ‘value to the party’, the Full Court has made a clear distinction between the value of commercial goodwill and personal goodwill and earning capacity versus property.’ She counsels that ‘in applying a value to the owner objective it is therefore necessary to carefully consider the appropriate
methodology and also the origins of any resulting goodwill. A clear distinction needs to be made between personal and commercial goodwill together with an appropriate allocation of an income stream between property and financial resources’ (at pg 6)

It is contended then that personal goodwill, or particularly professional goodwill, is inextricably attached to the individual, representing the present value of future earnings potential. However distinguishing personal goodwill from commercial goodwill is always fact specific and the relative prevalence of commercial goodwill in the legal context compared with personal goodwill carries the danger that all goodwill is treated as commercial goodwill.

There are practical steps that run contrary to the argument that what is personal to one individual cannot be transferred to another. To revisit Warnick J the expert can relieve the tension of the future earnings versus property debate by ‘identifying those factors, the import of which ought to be left to the discretion of the Court’. For example contractual bargaining such as non-competition agreements recognising that personal goodwill promising probability of future business has a value in being neutralised.

Further an individual possessing personal goodwill can effectively transfer it to a buyer through education, advertising, introduction or otherwise. If value to the owner is grounded in reality then such transfer is a reality commonly recognised and regularly transferred between professionals. Ibrahim (2005) commenting on the United States context asserts that courts ‘have exaggerated the differences between commercial and professional goodwill in holding that professional goodwill, unlike commercial goodwill, cannot be a business asset’ … observing that ‘…subject to possible ethical restrictions, professional goodwill is regularly bought and sold among professional practitioners’.

Revisiting section 97 as outlined above, where the court has the latitude to take into account if there is likely to be significant change in the financial circumstances of the parties, or change any of the property of the parties, the opportunity and obligation exists for the valuation expert to comment upon the likelihood or propensity for the transfer of personal goodwill to commercial goodwill in the future. This of course depends on the specific circumstances of the matter at hand however it is worthy of note that the valuation of the cases providing guidance on the ‘value to the owner’ objective appear to do so ‘regardless of whether that value can be achieved by the party at the present time’ (Delbridge-Bailey, 2004, pg 9). In this regard the courts’ stress on capitalised equity feeds a liquidity myth where the spouse holding the interest has neither the cash flow nor sale value to satisfy the obligation of dissolution (Hitchener, 2003)

Perhaps a parallel can be drawn in the comparison with the Court’s treatment on the application of tax and other realisation costs to the consideration of the future conversion of personal to commercial goodwill. In recent years the Court has been called upon to consider the relevance of a potential or future liability for Capital Gains Tax (CGT) in relation to the property of the marriage. The court has taken a stricter view than in general accounting practice when recognising such liabilities.

Until the Rosati Principles (1998) were enunciated the Court variously applied decisions with regard to potential tax liabilities based on their own facts, however of particular importance was the relative immediacy of the CGT event, that is, if a sale to a third party was reasonably contemplated
or the Court’s orders would precipitate the same. Finlayson JA stated in McPherson v McPherson (1988):

‘The cases appear to turn on their own facts and, if I might hazard a broad distinction, an allowance should be made in the case where there is evidence that the disposition will involve a sale or transfer of property ....

 .......... and it should not be made in the case where it is clear when, if ever, a sale or transfer of property will be made and thus the tax consequences of such occurrence are so speculative that they can be safely ignored.’

The full Court in Rosati and Rosati (1998) recognised a ‘degree of confusion, and possibly conflict, in the reported cases’ and therefore espoused the proper approach to be adopted by the Court (known as the Rosati Principles):

‘(1) Whether the incidence of capital gains tax should be taken not account in valuing a particular asset varies according to the circumstances of the case, including the method of valuation applied to the particular asset, the likelihood or otherwise of that asset being realised in the foreseeable future, the circumstances of its acquisitions and the evidence of the parties as to their intentions in relation to that asset .......

(2) If the Court orders the sale of an asset ..... 

(3) ..... but the Court is satisfied that there is a significant risk that the asset will have to be sold in the short to medium term ..... may take that risk into account as a relevant s 75(2) factor, the weight to be attributed to that factor varying according to the degree of the risk and the length of the period within which the sale may occur.

(4) ...........it may be appropriate to take the capital gains tax into account at its full rate, or at some discounted rate having regard to the degree of risk of a sale occurring and/or the length of time which is likely to elapse before that occurs. (at 85,043)

Consequently the parallel with personal goodwill would be that the expert valuation should, having assessed the relative potential of personal and commercial goodwill on the facts and specified the method used, should inform the court of the means, relative propensity and likelihood of converting personal goodwill to commercial goodwill. The Court can then factor that information into assessment of section 75(2) decisions.

Conclusions and Further Research

The evolution of a philosophically sound valuation theory has not taken place. Instead the Family Court has provided guidance with respect to the objective, methodology and methods, a paradigm suitable for its jurisdiction. The Court has not attempted to define theory with its ‘value to the
owner’ objective however the guidance needs to be interpreted hierarchically in order to appropriately and purposefully apply the methods and tools of the valuation expert.

This is particularly relevant to its application to the valuation of goodwill and its two main variables, personal and commercial goodwill. Often an issue in the valuation of professional practices, consideration of personal goodwill without consideration of alienability at the methodological level can lead to clouded or no differentiation between the capitalisation of commercial goodwill and the financial capacity aided by personal goodwill. Basing decisions on the method of valuation without prior methodological consideration can have effect the parties by leading to double counting of property and earning capacity, and cash flow limitations.

Potential exists for expert valuation reports to inform the Court as to the separation of the types of goodwill, the attributes defining such separation and the future potential for conversion of personal goodwill to capitalisable commercial goodwill.

As professional discipline a research based theory of business valuations would serve to enhance the credibility of practitioners, replacing the collection of generally accepted concepts drawn from field practice and subsequently adopted by academics. Such theory provides the basis for clearer, more consistent and credible evidence to be placed before the Court.
References:

AJW v JMW, 2002, FLC 93-103

APES 225, 2008, Valuation Services, Accounting Professional and Ethical Standards Board.

B and B (No 2) (2000) 26 FLR 437

Barouche and Barouche, 1999,

Best and Best, 1993, FLC 92 418

Bonbright, J.C.1937, The Valuation of Property, Charlottesville, The Michie Company

Bowman and Bowman, 1984, FLC 91-574; 1984, 9 Fam. L. R. 619

Delbridge-Bailey, S. 2004, Application of the ‘value to the owner’ approach and the importance of the decision in ‘Wall and Wall’, 8th Australian Family Lawyers Conference.

Dunbar and Dunbar (1987) FLC 91-846

Family Law Act ,1975, Commonwealth of Australia

FC of T v Everett 80 ATC 4076

FC of T v Galland 86 ATC 4885


Harrison and Harrison, 1996, FLC 92-682

Hegarty v Hegarty, 2002, Fam CA 883

Hitchener, J.R. 2003, Financial Valuation: applications and models, John Wiley and Sons New Jersey

Hull and Hull, 1983, FLC 91-360 9 Fam LR 241


Lawson, J. 2008’ “The time for a tested and adopted valuation theory has arrived” RMIT Researchbank

McPherson v McPherson, 1988, 63 O.R. (2d) 641
Ramsay and Ramsay, 1997, FLC 92-742,
Reynolds and Reynolds, 1984, 10 Fam LR 388; 1985, 1-632
Rosati and Rosati, 1998 FamCA 38
Sapir and Sapir, No 2, 1989, FLC 92-047
Scott and Scott, 2006, Fam CA 1379
Turnbull v Turnbull, 1991, FLC 92 258
Vella, T. 2009, ‘Value to the owner in the context of family law forensic accounting practice’ *ICAA Forensic Accounting Conference*, Melbourne
*Valuation Principals and Practise*, 1997, Australian Institute of Valuers & Land Economists
Wall and Wall, 1999 EA83