Mulling Over Miller:

The Impact of a Finding of Personal Goodwill on the Scope of the Marital Estate and on a Potential Alimony Award When One Spouse Owns a Professional Practice in a Georgia Divorce

by Sarah McCormack

Until the recent Georgia Supreme Court decision of *Miller v. Miller*, 288 Ga. 274 (2010), Georgia remained one of a handful of states that had not yet addressed, in any form or fashion, whether the value of personal goodwill in a professional practice was properly includible in the scope of a marital estate to be divided upon divorce. With the benefit of that recent decision, however, it appears that Georgia intends to join the majority of states that hold that personal, or individual, goodwill, is a non-marital asset that is not subject to equitable division. See *Miller*, 288 Ga. at 278 ("[W]e resolve this contention by assuming for purposes of this appeal only that individual goodwill does not constitute marital property in Georgia.").

As most attorneys who have dealt with the issue of valuation of a closely held corporation or professional practice know, personal goodwill consists of customer loyalty and patronage that derives from a particular individual's personality and unique skill set. For example, a doctor may trace a certain level of his patient volume to his warm bedside manner, or an attorney may accumulate a particular client base because of his reputation as a bulldog in the courtroom. Because the concept of personal goodwill is so inseparable from the person himself or herself, it is considered non-marketable (stated differently, illiquid / incapable of being sold for a certain dollar value) and therefore, under the majority rule, is excluded from the marital estate – presumably because the professional practice owner could not simply sell his or her personal goodwill so as to give a soon-to-be-ex-spouse his or her share.

If this type of goodwill is not considered an asset, but rather a kind of personality-driven future income stream, it can still be factored into a determination of spousal support. What was not dealt with in *Miller*, however, and what will be interesting to see on a going-forward basis, is whether spouses married to a professional practice owner in Georgia will be considered to possess an enhanced alimony claim. For example, if a doctor pays himself $300,000 every year, but also has the benefit of additional business income attributable to personal goodwill, should his wife have a superior alimony claim in comparison to a similarly situated wife married to a W-2 employee making $300,000? The proper answer appears to be, "yes," especially where the alimony-seeking spouse had his or her marital lifestyle elevated, all or in part, based upon the personal goodwill value (and resulting income stream) related to that professional practice. At least two of the cases cited by the *Miller* decision support this concept. See *Steneken v. Steneken*, 843 A.2d 344, 352 (2004) (noting that "excess earnings" can be considered a source of income for the purposes of alimony); *May v. May*, 589 S.E.2d 536, 547 (2003) ("It is not a divisible asset. It is more properly considered as the individual's earning capacity that may affect property division and alimony.").

Whether or not the Supreme Court of Georgia extends its *Miller* personal goodwill holding beyond the scope of "this appeal only," and whether or not they find such goodwill to augment a divorcing spouse's alimony claim beyond what would otherwise be the case, *Miller* does stand for certain clear propositions. Under *Miller*, a trial court's valuation of a professional practice is a fact-finding exercise, and any value that results from that exercise will be upheld so long as it is based upon competent evidence and one or more sound valuation methods that are generally acceptable in the financial community. The Supreme Court of Georgia emphasized that valuation of these types of businesses is more of an art than a science, and that even the price found in a buy-sell agreement will not necessarily be binding upon the trial court. Finally, the opinion indicates that, while it would be impermissible double-dipping to include personal goodwill in a business value (that is then divided as part of equitable division) and in the determination of the level of alimony, this "double-dip" does not exist with respect to child support. A professional practitioner's salary as well as his or her additional business income may therefore be included when determining the proper amount of child support under the Georgia child support guidelines.

Suffice it to say that, more than anything else, *Miller* excites Georgia family law practitioners because of its promise of additional development of appellate law with respect to professional practices. Where we go from here remains to be seen . . . . ***FLR***

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