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PROFESSIONAL LICENSES AS MARITAL PROPERTY:
RESPONSES TO SOME OF O'BRIEN'S
UNANSWERED QUESTIONS

In *O'Brien v. O'Brien*¹ the New York Court of Appeals determined that a spouse's professional license constituted marital property subject to equitable distribution² under New York's Equitable Distribution Law.³ The *O'Brien* decision makes New York the only jurisdiction where courts consider such a license marital property.⁴

The *O'Brien* decision will greatly reduce the unfairness resulting from the so-called "medical student syndrome," where one spouse, typically the wife,⁵ supports the family during the other's professional education, only to be divorced shortly after the professionally educated spouse obtains a license to practice.⁶ Divorce usually leaves the supporting spouse in a much worse economic position than the educated spouse because, after having expended most of their earnings on the professional education, the couple typically has few marital assets to divide at divorce. The supporting spouse may not receive an adequate maintenance award to compensate the spouse for efforts made toward acquisition of the license.⁷ The educated spouse meanwhile looks forward to a potentially lucrative career.⁸ Although the court correctly concluded that a medical license is marital property according to the factors listed in New York Domestic Relations Law section 236(B)(5)(d),⁹ serious problems may

¹ 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985).

² *Id.* at 580-81, 489 N.E.2d at 713, 498 N.Y.S.2d at 744.

³ N.Y. DOM. REL. LAW § 236(B) (McKinney 1986).

⁴ See *Drapek v. Drapek*, 399 Mass. 240, 244-45, 503 N.E.2d 946, 949 (1987) (New York only jurisdiction where professional license considered marital property).

⁵ See Note, *The Equity/Property Dilemma: Analyzing the Working Spouse's Contributions to the Other's Educational Degree at Divorce*, 23 HOUS. L. REV. 991, 993 n.11 (1986) (authored by W. Bruce Stanfill) (in 68 of 70 cases litigated as of Feb. 1, 1986, husband earned license or degree.).

⁶ Scholars have long recognized this occurrence and most advocate some type of compensation for the supporting spouse. See sources cited *infra* note 25. This "syndrome" is no longer "limited to medical students and their wives; the contagion has spread to college and professional degrees generally." Foster, *Equitable Distribution of Professional Degrees, Licenses and Goodwill* in CONTEMPORARY MATRIMONIAL LAW ISSUES: A GUIDE TO DIVORCE ECONOMICS AND PRACTICE 226, 227 (H. Foster & R. Brown eds. 1985). In addition, the problem seems quite common. In a survey of divorce cases in California, one in six husbands obtained some education while married. L. WEITZMAN, *THE DIVORCE REVOLUTION* 124 (1985). For an excellent description of "the syndrome," see *Washburn v. Washburn*, 101 Wash. 2d 168, 173-74, 677 P.2d 152, 155 (1984).

⁷ See *infra* notes 20-21 and accompanying text.

⁸ See *Washburn*, 101 Wash. 2d at 173-74, 677 P.2d at 155.

⁹ The law states in relevant part:

arise in applying the court's decision.

Section I of this Note describes the controversy regarding the classification of professional licenses as marital property. Section II discusses the *O'Brien* decision. Section III assesses the validity and scope of *O'Brien*. Finally, Section IV proposes changes in the method of valuing the license in New York to make the property distribution more equitable.

I

THE LICENSE-AS-PROPERTY CONTROVERSY

A. The Professional License as Marital Property

Most courts recognize that the supporting spouse suffers inequity when a marriage ends shortly after the other spouse has completed a professional education. Nevertheless, these courts refuse to classify the educated spouse's degree or license as marital property.¹⁰

In determining an equitable disposition of property under paragraph c, the court shall consider:

- (1) the income and property of each party at the time of marriage, and at the time of the commencement of the action;
- (2) the duration of the marriage and the age and health of both parties;
- (3) the need of a custodial parent to occupy or own the marital residence and to use or own its household effects;
- (4) the loss of inheritance and pension rights upon dissolution of the marriage as of the date of dissolution;
- (5) any award of maintenance under subdivision six of this part;
- (6) any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party . . . ;
- (7) the liquid or non-liquid character of all marital property;
- (8) the probable future financial circumstances of each party;
- (9) the impossibility or difficulty of evaluating any component asset or any interest in a business, corporation or profession and the economic desirability of retaining such asset or interest intact and free from any claim or interference by the other party;
- (10) the tax consequences to each party;
- (11) the wasteful dissipation of assets by either spouse;
- (12) any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration;
- (13) any other factor which the court shall expressly find to be just and proper.

N.Y. DOM. REL. LAW § 236(B)(5)(d) (McKinney 1986). The legislature added factors (10), (11), and (12) after the Court of Appeals decided *O'Brien*. Act of Aug. 2, 1986, ch. 884, § 3, 1986 N.Y. Sess. Laws 2172, 2173 (McKinney).

¹⁰ See, e.g., *Jones v. Jones*, 454 So. 2d 1006, 1009 (Ala. Civ. App. 1984) (court "not prepared to hold law degree is marital property"); *In re Marriage of Graham*, 194 Colo. 429, 432, 574 P.2d 75, 76 (1978) (educational degree not "property" within the meaning of statute); *Wright v. Wright*, 469 A.2d 803, 805-06 (Del. Fam. Ct. 1983) (dental degree not marital asset under Delaware alimony statute); *Hughes v. Hughes*, 438 So. 2d 146, 148-50 (Fla. Dist. Ct. App. 1983) (educational degree not marital property be-

Courts typically base this refusal on one of the following reasons: 1) a license is not property in the traditional sense and represents nothing more than a personal achievement;¹¹ 2) a marriage is not a commercial enterprise in which parties expect to have their accounts settled at divorce;¹² 3) the value of a license is too speculative for courts to determine accurately the amount the supporting spouse should receive;¹³ 4) future earnings after divorce are not marital property;¹⁴ and 5) a fixed award of expected future earnings

cause its value is too speculative to calculate and because future earnings are not marital property); *Inman v. Inman*, 648 S.W.2d 847 (Ky. 1982) (dentistry degree not property); *Archer v. Archer*, 303 Md. 347, 358, 493 A.2d 1074, 1079-80 (1985) (neither professional degree nor license is marital property under statute); *Drapek v. Drapek*, 399 Mass. 240, 246, 503 N.E.2d 946, 949 (1987) (same); *Mahoney v. Mahoney*, 91 N.J. 488, 496-97, 453 A.2d 527, 532 (1982) (value of professional degree is only possibility of enhanced earnings and thus not marital property under statute); *Stevens v. Stevens*, 23 Ohio St. 3d 115, 117-20, 492 N.E.2d 131, 133-35 (1986) (degree and enhanced value of future earnings not property because not assignable; value of degree or license not subject to precise valuation); *Hubbard v. Hubbard*, 603 P.2d 747, 750 (Okla. 1979) (professional degree not property; supporting spouse entitled only to restitution based on unjust enrichment); *Lehmicke v. Lehmicke*, 339 Pa. Super. 559, 563-66, 489 A.2d 782, 784-86 (1985) (degree not marital property); *Frausto v. Frausto*, 611 S.W.2d 656, 658-59 (Tex. Civ. App. 1980) (professional education not marital property and not divisible upon divorce); *Grosskopf v. Grosskopf*, 677 P.2d 814, 822 (Wyo. 1984) (college degree not property but permissible to account for increased earnings when determining support); see also *Ruben v. Ruben*, 123 N.H. 358, 361, 461 A.2d 733, 735 (1983) (Ph.D. intellectual achievement, not marital property); *Muckleroy v. Muckleroy*, 84 N.M. 14, 15, 498 P.2d 1357, 1358 (1972) (medical license not marital property because not subject to joint ownership); *Helm v. Helm*, 289 S.C. 169, 171, 345 S.E.2d 720, 721 (1986) (professional degree and license not marital property). For a more extensive list of cases, see *Archer*, 303 Md. at 352 n.1, 493 A.2d at 1077 n.1.

¹¹ See *infra* notes 49-51 and accompanying text (professional degree or license lacks the essential characteristic of property—alienability). Some legal scholars claim this view of “property” is incorrect. They assert that alienability is not necessary to describe something as “property.” The Restatement of Property describes “property” as “legal relations between persons with respect to a thing.” 1 RESTATEMENT (FIRST) OF PROPERTY ch. 1 introductory note, at 3 (1936). The “thing” can be intangible and need not have an exchange value. For an in-depth analysis of this argument, see Note, *Equitable Distribution of Degrees and Licenses: Two Theories Toward Compensating Spousal Contributions*, 49 BROOKLYN L. REV. 301, 309-15 (1983) (authored by Robert Shuman).

¹² See, e.g., *Mahoney*, 91 N.J. at 500, 453 A.2d at 533 (“Marriage is not a business arrangement in which the parties keep track of debits and credits, their accounts to be settled upon divorce.”).

¹³ See, e.g., *Todd v. Todd*, 272 Cal. App. 2d 786, 791, 78 Cal. Rptr. 131, 135 (1969) (“At best, education is an intangible property right, the value of which, because of its character, cannot have a monetary value placed upon it for division between spouses.”). California has since enacted a statute granting the supporting spouse reimbursement for costs incurred in financing the educated spouse’s profession. See CAL. CIV. CODE § 4800.3 (West Supp. 1987).

¹⁴ See, e.g., *In re Marriage of Aufmuth*, 89 Cal. App. 3d 446, 152 Cal. Rptr. 668 (1979) (earnings attributable to law degree, acquired after divorce are by definition acquiring spouse’s separate property); *Frausto*, 611 S.W.2d at 656 (property division payments made in future must refer only to property acquired during marriage, not earnings after divorce).

unduly restricts the licensed spouse's career decisions.¹⁵

Some courts attempt to cure the inequity of the situation by considering the professional spouse's potential earnings when making alimony and maintenance awards¹⁶ and when dividing marital assets.¹⁷ Other courts allow reimbursement of the supporting spouse's direct financial costs in financing the other spouse's education.¹⁸ The award fashioned often depends upon the facts of the case and the state's divorce statute.¹⁹

Although courts may attempt to compensate the supporting spouse by considering the value of the license when dividing marital assets, such an approach provides inadequate compensation when the couple has few other marital assets. Different problems arise when courts compensate the supporting spouse with alimony or maintenance awards. First, these awards often terminate upon remarriage of the supporting spouse.²⁰ Second, a supporting spouse who is self-supporting may not receive a maintenance award that would compensate the spouse for his or her efforts because such

¹⁵ See, e.g., *DeWitt v. DeWitt*, 98 Wis. 2d 44, 58, 296 N.W.2d 761, 768 (1980) (spouse may not earn as much as expected or "may practice in a specialty, location or manner which generates less than the average income" and, "[u]nlike an award of alimony, which can be adjusted after divorce to reflect unanticipated changes in the parties circumstances, a property division may not").

¹⁶ See, e.g., *Archer v. Archer*, 303 Md. 347, 359, 493 A.2d 1074, 1080 (1985) (chancellor empowered by statute to consider husband's earning capacity in making alimony award).

¹⁷ See, e.g., *Frausto v. Frausto*, 611 S.W.2d 656, 659 (Tex. Civ. App. 1980) (trial court has discretion to consider potential future earnings when dividing estate). See generally *Hughes v. Hughes*, 438 So. 2d 146, 150 (Fla. Dist. Ct. App. 1983) ("[T]he trial court should consider the husband's education in arriving at the distribution of other assets and in determining the propriety and/or amount of alimony."); *In re Marriage of Graham*, 194 Colo. 429, 433, 574 P.2d 75, 78 (1978) (trial court can consider one spouse's contribution to other's education when determining maintenance and dividing marital property).

¹⁸ See, e.g., *Pyeatte v. Pyeatte*, 135 Ariz. 346, 357, 661 P.2d 196, 207 (Ariz. Ct. App. 1982) (supporting spouse entitled to restitution of her contributions to husband's living expenses and direct educational expenses); *Mahoney v. Mahoney*, 91 N.J. 488, 501, 453 A.2d 527, 538 (1982) (same); *Saint-Pierre v. Saint-Pierre*, 357 N.W.2d 250 (S.D. 1984) (same). Some states have passed legislation granting the supporting spouse reimbursement or restitution for direct expenditures toward the other's education. See CAL. CIV. CODE § 4800.3 (West Supp. 1987); IND. CODE ANN. § 31-1-11.5-11d (Burns Supp. 1986). For an extensive study of why courts refuse to hold that professional licenses are marital property, see Moore, *Should a Professional Degree be Considered a Marital Asset Upon Divorce*, 15 AKRON L. REV. 543, 545-53 (1982).

¹⁹ See, e.g., *Ruben v. Ruben*, 123 N.H. 358, 461 A.2d 733 (1983) (spouse made only minimal contribution toward husband's efforts to obtain Ph.D. and not entitled to share of rewards); *Drapek v. Drapek*, 399 Mass. 240, 248, 503 N.E.2d 946, 949 (1987) (unlike New York, Massachusetts's divorce statute does not mandate considering license as marital property).

²⁰ N.Y. DOM. REL. LAW § 236(B)(6)(c) (McKinney 1986). See generally Moore, *supra* note 18, at 552.

awards may be based on need.²¹ In either case, even when courts include the value of a professional license in making a maintenance award, the licensed spouse receives increased income for life, while the supporting spouse may receive little in return for financing the other spouse's professional education.²²

Some courts, however, have held that professional licenses and graduate degrees constitute marital property.²³ These courts mainly try to reverse the unfairness that results when the supporting spouse receives little for expended efforts on behalf of the licensed spouse. For example, a Michigan appellate court that held that a husband's law degree was marital property noted that the supporting spouse would not have received proper compensation for her contributions to the "concerted family efforts." Few other family assets subject to distribution existed and the supporting spouse could not receive adequate maintenance under Michigan law.²⁴

Most legal scholars who have addressed the issue agree that supporting spouses should receive compensation for their efforts.²⁵

²¹ See, e.g., *Woodworth v. Woodworth*, 126 Mich. App. 258, 260, 337 N.W.2d 332, 336-37 (1983) (considerations for determining alimony are different than those for dividing property; self-supporting spouse may not be entitled to maintenance because maintenance is "basically for . . . support"); UNIF. MARRIAGE AND DIVORCE ACT § 308(a) (as amended 1973); Krauskopf, *Property Distribution Principles* in 3 FAMILY LAW AND PRACTICE § 37.06[3], at 37-70 (A. Rutkin ed. 1985). See also *infra* note 93 for a discussion of New York's maintenance provision. Some states, however, are more liberal in granting alimony awards. See, e.g., *Zahler v. Zahler*, 8 Fam. L. Rep. (BNA) 2694, 2695 (Conn. Super. Ct. 1982) (court's \$42,000 lump-sum alimony award to supporting spouse subject to increase if licensed spouse earned drastically more than projected).

²² See *supra* note 6 and accompanying text for a description of the "medical student syndrome."

²³ There are few such decisions, and courts generally have not followed them. See, e.g., *Reen v. Reen*, 8 Fam. L. Rep. (BNA) 1053 (Mass. P. and Fam. Ct. 1981) (orthodontist's license marital property; wife's sacrifices entitled her to share in value of license; *Reen* no longer good law in light of *Drapek*, 399 Mass. 240, 503 N.E.2d 946); *Woodworth*, 126 Mich. App. 258, 337 N.W.2d 332 (1983) (holding that husband's law degree was marital asset later rejected by *Olah v. Olah*, 135 Mich. App. 404, 410-11, 354 N.W.2d 359, 361-62 (1984)).

²⁴ *Woodworth*, 126 Mich. App. at 260-61, 337 N.W.2d at 334.

²⁵ See, e.g., Fitzpatrick & Doucette, *Can the Economic Value of an Education Really be Measured? A Guide for Marital Property Distribution*, 21 J. FAM. L. 511 (1983) (proposing methods of valuing any given level of education); Herring, *Divisibility of Advanced Degrees in North Carolina: An Examination and Proposal*, 15 N.C. CENT. L.J. 1, 15 (1984) (authored by Judy Rush) (suggesting amendment of equitable distribution act to allow money judgment for supporting spouse not limited to existing property); Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 U. KAN. L. REV. 379 (1980) (courts should prevent unjust enrichment by allowing supporting spouse to realize return on human capital); Moore, *supra* note 18, at 543, 555 (proposing reimbursement award); Mullenix, *The Valuation of an Education at Divorce*, 16 LOY. L.A.L. REV. 227, 274-83 (1983) (labor theory of value analysis, concluding that supporting spouse entitled to one-half value of degree); Comment, *The Interest of the Community in a Professional Education*, 10 CAL. W.L. REV. 590, 602-12 (1974) (authored by Thomas Schaefer); Note, *Property Distribution in Domestic Relations Law: A Proposal for Ex-*

The reasons that a supporting spouse should receive compensation include her reasonable expectation of benefit from the degree or license; the sacrifices incurred in support of the educated spouse; and that the educated spouse will receive most of the benefits from the professional license or degree despite the supporting spouse's sacrifices.²⁶ Some scholars also suggest that the contributing spouse has made an investment in "human capital"²⁷ by helping the educated spouse obtain a license or degree, and that the contributing spouse deserves a return on that investment.

Although scholars agree that the supporting spouse deserves compensation for contributions to the other spouse's professional education, they do not agree on the method courts should use to evaluate the appropriate level of that compensation. Scholars and judges have suggested four methods to evaluate the supporting spouse's interest in a professional license or degree: reimbursement, opportunity cost, present value of future increased earnings, and the labor theory of value.²⁸

The reimbursement method compensates the supporting spouse for monetary contributions made to the educated spouse's education.²⁹ The reimbursement method avoids the possible unfairness to the educated spouse of an award based on projected future earnings that may never occur.³⁰

The opportunity cost method, in addition to providing reim-

cluding Educational Degrees and Professional Licenses from the Marital Estate, 11 HOFSTRA L. REV. 1327, 1346-52 (1983) (authored by Ann Weiss) (suggesting courts can achieve equity using existing alimony and maintenance framework); Note, *The Equity/Property Dilemma: Analyzing the Working Spouse's Contributions to the Other's Educational Degree at Divorce*, 23 HOUS. L. REV. 991, 1019-37 (1985) (proposing equitable partnership view of educational degree); Recent Development, *Divorce—The Effect of a Spouse's Professional Degree on a Division of Marital Property and Award of Alimony*, Hubbard v. Hubbard, 15 TULSA L.J. 378, 389 (1980) (authored by Deborah Gronet) (suggesting that courts treat increased earning capacity as property, and dividing it proportionally according to spouses investment); Note, *The Supporting Spouse's Rights in the Other's Professional Degree Upon Divorce*, 35 U. FLA. L. REV. 130, 148-52 (1983) (authored by Judy Rush) (suggesting courts consider professional degree in award to supporting spouse, based either on statute or court's inherent equitable powers); Note, *Family Law: Professional Degrees in 1986—Family Sacrifice Equals Family Asset*, 25 WASHBURN L.J. 276, 301-02 (1986) (suggesting that degree is property and supporting spouse should receive one-half of income from degree for same number of years as was necessary to earn degree).

²⁶ See generally Krauskopf, *supra* note 21, § 37.06(2)(a), at 37-61 to -62.

²⁷ See, e.g., Krauskopf, *supra* note 25, at 381-82; Mullenix, *supra* note 25, at 273-74; Parkman, *The Recognition of Human Capital as Property in Divorce Settlements*, 40 ARK. L. REV. 439 (1987).

²⁸ For a discussion of all of these methods, see Krauskopf, *supra* note 21, § 37-06(4), at 37-75 to -80; Haugan v. Haugan, 117 Wis. 2d 200, 211-14, 343 N.W.2d 796, 802-03 (1984).

²⁹ Moore, *supra* note 18, at 544.

³⁰ For discussion of the reimbursement method, see Herring, *supra* note 25, at 15; Moore, *supra* note 18, at 555. See also *supra* note 18 and accompanying text.

bursament for cost incurred, compensates the supporting spouse for opportunities that were sacrificed in order to permit the professionally educated spouse to attend school. These opportunities might include earnings foregone by the educated spouse as well as educational and employment opportunities foregone by the supporting spouse.³¹

Under the present-value-of-future-increased-earnings approach, courts must project the increased earnings the educated spouse will receive over his lifetime as a result of the professional license. The court then awards the supporting spouse an equitable share of this projected amount, which depends on the spouse's contributions to the educated spouse's training.³² This theory determines the actual economic value of the license to its holder and awards the supporting spouse a fair share,³³ rather than merely returning the supporting spouse's investment in the educated spouse's degree, as under the reimbursement and opportunity cost methods.

Under the labor-theory-of-value method, the supporting spouse receives one-half of the professionally educated spouse's earnings for as many years as he or she supported the educated spouse.³⁴ This method attempts to achieve simplicity and fairness by granting the supporting spouse half of the licensed spouse's income as it is earned, thereby eschewing complex formulae and at the same time returning the supporting spouse's investment.³⁵

The controversy over whether a professional license constitutes marital property and, if so, how to value it set the stage for the New York Court of Appeals' decision in *O'Brien*. By granting the supporting spouse a share of the enhanced future earnings of the licensed spouse, the court expanded the compensation rights of supporting spouses in divorce proceedings.

³¹ For authors advocating the opportunity cost approach, see Comment, *supra* note 25, at 603-04 (advocating opportunity cost along with valuing potential income capacity as alternative valuation methods); Note, Horstmann v. Horstmann: *Present Right to Practice a Profession as Marital Property*, 56 DEN. L.J. 677, 689-90 (1979) (authored by Amy Loper) (awards based on opportunity cost compensate supporting spouse without undue guesswork about either professional spouse's future income or supporting spouse's lost income).

³² See, e.g., *O'Brien v. O'Brien*, 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985). See also Fitzpatrick & Doucette, *supra* note 25, at 514-23; Krauskopf, *supra* note 25, at 382-84. The spouse would receive half of these increased earnings if this method were applied in a community property state. For a general discussion of the community property approach, see W. McCLANAHAN, *COMMUNITY PROPERTY LAW IN THE UNITED STATES* (1982). This Note only discusses the professional-license-as-marital-property issue in the context of equitable distribution.

³³ See *infra* text accompanying note 129.

³⁴ See, Mullenix, *supra* note 25, at 279.

³⁵ *Id.* at 280.

B. The Professional License as Marital Property in New York
Prior to *O'Brien*

The New York Court of Appeals decided *O'Brien* under section 236(B) of New York's Equitable Distribution Law.³⁶ This statute has two purposes: 1) to eliminate all unconstitutional distinctions³⁷ in New York's divorce statute; and 2) to ensure that all assets acquired during marriage are divided equitably, without regard to title.³⁸ The legislation's proponents believed that property accumulated during the marriage "should be distributed in a manner which reflects the individual needs and circumstances of the parties regardless of the name in which such property is held."³⁹ The law reflects the belief that a marriage, at least in part, represents an economic partnership.⁴⁰ The Equitable Distribution Law attempts to distribute all marital property fairly without regard to fault.⁴¹

New York employs a three-step process,⁴² for distributing marital property upon divorce. This process requires that a court: 1) determine what is marital property and what is separate property;⁴³ 2) value the marital property and the separate property, if it has appreciated in value during the marriage because of the efforts

³⁶ N.Y. DOM. REL. LAW § 236(B) (McKinney 1986). At the time of its enactment, Governor Carey described section 236(B) as "the most sweeping reform of the divorce laws in [New York] State since the Divorce Reform Act of 1966." Governor's Memorandum of June 19, 1980, reprinted in 1980 N.Y. Sess. Laws 1863 (McKinney) [hereinafter Governor's Memorandum]. For a general discussion of section 236, see A PRACTICAL GUIDE TO THE NEW YORK EQUITABLE DISTRIBUTION DIVORCE LAW (H. Foster, Jr. ed. 1980); DiLeo & Model, *A Survey of the Law of Property Distribution Upon Divorce in the Tristate Area*, 56 ST. JOHN'S L. REV. 219 (1982); Foster, *Commentary on Equitable Distribution*, 26 N.Y.L. SCH. L. REV. 1 (1981); Note, *New York's Equitable Distribution Law: A Sweeping Reform*, 47 BROOKLYN L. REV. 67 (1980) (authored by Brian Diamond & William Prinsell); Recent Development, *Equitable Distribution in New York*, 45 ALB. L. REV. 483 (1981).

³⁷ The Supreme Court held that gender-based alimony statutes violate the fourteenth amendment's equal protection clause in *Orr v. Orr*, 440 U.S. 268 (1979).

³⁸ See Memorandum of Assemblyman Gordon W. Burrows, 1980 N.Y. STATE LEGIS. ANN. 129 (N.Y. Legis. Serv.) [hereinafter Burrows's Memorandum]; see also Governor's Memorandum, *supra* note 36, at 1863.

³⁹ Governor's Memorandum, *supra* note 36, at 1863.

⁴⁰ *Id.*

⁴¹ See *O'Brien*, 66 N.Y.2d at 589-90, 489 N.E.2d at 719, 498 N.Y.S.2d at 750 ("[e]xcept in egregious cases which shock the conscience of the court, however, [fault] is not a 'just and proper' factor for consideration in the equitable distribution of marital property") (citations omitted).

⁴² H. FOSTER, JR., D. FREED & J. BRANDES, 3 LAW AND THE FAMILY, NEW YORK § 1.1, at 2 (2d ed. 1986).

⁴³ N.Y. DOM. REL. LAW § 236(B)(5)(b) (McKinney 1986). Separate property is mainly property acquired before marriage and is not subject to equitable distribution if it has not appreciated in value during the marriage. For a discussion of when appreciation in value of separate property is subject to equitable distribution, see *Price v. Price*, 69 N.Y.2d 8, 503 N.E.2d 684, 511 N.Y.S.2d 219 (1986). Separate property also includes inheritances, gifts from someone other than the spouse, compensation for personal injuries, property exchanged for separate property, increases in the value of separate prop-

of either of the spouses; and 3) determine what proportion of the marital property each spouse should receive.⁴⁴ To facilitate this distribution system, section 236(B) enumerates factors that a court must consider in distributing marital property⁴⁵ and in making maintenance awards.⁴⁶ The section also provides for "distributive awards" when it is impractical or burdensome to divide marital property, or when it is contrary to law to divide an interest in a business, corporation, or profession.⁴⁷ This system provides flexibility by allowing judges to exercise discretion in distributing marital property to achieve fair results.⁴⁸

Prior to *O'Brien*, New York appellate courts regarded neither professional licenses nor educational degrees as marital property.⁴⁹

erty (except for increases due in part to the effort of the other spouse), and property that the parties agreed is separate property. *Id.* § 236(B)(1)(d).

⁴⁴ *See id.* §§ 236(B)(5)(c)-(d) (court must consider each spouse's property at beginning and end of marriage when distributing such property).

⁴⁵ *Id.* § 236(B)(5)(d).

⁴⁶ *Id.* § 236(B)(6)(a). The court must consider:

- (1) the income and property of the respective parties including marital property distributed pursuant to subdivision five of this part;
- (2) the duration of the marriage and the age and health of both parties;
- (3) the present and future earning capacity of both parties;
- (4) the ability of the party seeking maintenance to become self-supporting and, if applicable, the period of time and training necessary therefore;
- (5) reduced or lost lifetime earning capacity of the party seeking maintenance as a result of having foregone or delayed education, training, employment, or career opportunities during the marriage;
- (6) the presence of children of the marriage in the respective homes of the parties;
- (7) the tax consequences to each party;
- (8) contributions and services of the party seeking maintenance as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party;
- (9) the wasteful dissipation of marital property by either spouse;
- (10) any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration; and
- (11) any other factor which the court shall expressly find to be just and proper.

Id. The New York legislature amended factors (3) and (4) and added factors (5) and (10) in 1986. Act of Aug. 2, 1986, ch. 884, § 4, 1986 N.Y. Sess. Laws 2172, 2173-74 (McKinney). *See infra* note 93 for a discussion of these amendments.

⁴⁷ The statute states:

In any action in which the court shall determine that an equitable distribution is appropriate but would be impractical or burdensome or where the distribution of an interest in a business, corporation or profession would be contrary to law, the court in lieu of such equitable distribution shall make a distributive award in order to achieve equity between the parties.

N.Y. DOM. REL. LAW § 236(B)(5)(e) (McKinney 1986).

⁴⁸ *See Burrows's Memorandum, supra* note 38, at 130. ("An important aspect of this legislation is the flexibility which is incorporated due to the tremendous variation in marital situations and the equities involved. Flexibility, rather than rigidity is essential for the fair disposition of a given case.")

⁴⁹ *See, e.g., Kutanovski v. Kutanovski*, 109 A.D.2d 822, 486 N.Y.S.2d 338 (1985),

One such court reasoned that licenses or degrees did "not fall within the traditional concepts of property"⁵⁰ because they represent an "intellectual achievement"⁵¹ rather than a transferable object with an exchange value. Courts further reasoned that enhanced future earnings are only an expectancy and that some professionals may not achieve increased earnings as a result of their licenses.⁵²

II

O'BRIEN V. O'BRIEN

A. The Facts of the Case

The O'Briens married in 1971, at which time Dr. O'Brien had completed three and one-half years of college. Dr. O'Brien continued his education following marriage by attending night school to complete his bachelor's degree and the required pre-medical courses.⁵³ Mrs. O'Brien had a bachelor's degree and a temporary teaching certificate at the time of marriage, but needed eighteen months of graduate school to obtain permanent teaching certification in New York.⁵⁴

In September of 1973, the O'Briens moved to Guadalajara,

vacated in light of O'Brien, 120 A.D.2d 571, 502 N.Y.S.2d 218 (1986) (husband's medical license not marital property); *Conner v. Conner*, 97 A.D.2d 88, 468 N.Y.S.2d 482 (1983) (husband's M.B.A. and M.P.A. degrees not marital property); *Lesman v. Lesman*, 88 A.D.2d 153, 452 N.Y.S.2d 935 (1982) (husband's medical license not marital property because future earning capacity represents no more than an expectancy, dependent on husband's future efforts).

⁵⁰ *Lesman*, 88 A.D.2d at 157, 452 N.Y.S.2d at 938.

⁵¹ *Id.* (quoting *In re Marriage of Graham*, 194 Colo. 429, 432, 574 P.2d 75, 77 (1978)). Courts often cite the portion of *Graham* quoted in *Lesman* as embodying the most persuasive argument against characterizing a professional degree as marital property. See, e.g., *Stevens v. Stevens*, 23 Ohio St. 3d 115, 117-18, 492 N.E.2d 131, 133 (1986); *Hubbard v. Hubbard*, 603 P.2d 747, 750 (Okla. 1979); *Lehmicke v. Lehmicke*, 339 Pa. Super. 559, 563, 489 A.2d 782, 784 (1985); *DeWitt v. DeWitt*, 98 Wis. 2d 44, 54, 296 N.W.2d 761, 766 (1980); *Grosskopf v. Grosskopf*, 677 P.2d 814, 822 (Wyo. 1984).

The *Graham* court stated that a professional degree

does not have an exchange value or any objective transferable value on an open market. It is personal to the holder. It terminates on death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed, or pledged. An advanced degree is a cumulative product of many years of previous education, combined with diligence and hard work. It may not be acquired by the mere expenditure of money. It is simply an intellectual achievement that may potentially assist in the future acquisition of property. In our view, it has none of the attributes of property in the usual sense of that term.

Graham, 194 Colo. at 432, 574 P.2d at 77.

⁵² *Graham*, 194 Colo. at 432, 574 P.2d at 77.

⁵³ *O'Brien*, 66 N.Y.2d at 581, 489 N.E.2d at 713-14, 498 N.Y.S.2d at 744-45.

⁵⁴ The trial court found that Mrs. O'Brien had "relinquished this opportunity so that the . . . husband could obtain his educational goals." *O'Brien v. O'Brien*, 114 Misc. 2d 233, 234, 452 N.Y.S.2d 801, 802 (1982), *rev'd*, 106 A.D.2d 223, 485 N.Y.S.2d 548, *rev'd*, 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 243 (1985).

Mexico so that Dr. O'Brien could enroll in medical school.⁵⁵ As a result, Mrs. O'Brien sacrificed her opportunity to receive permanent teaching certification in New York.⁵⁶ In Mexico, Mrs. O'Brien took several teaching and tutorial positions and earned approximately seventy-six percent of the couple's total income.⁵⁷

The couple moved back to New York in December, 1976 so that Dr. O'Brien could complete his medical training.⁵⁸ Mrs. O'Brien returned to her former teaching position.⁵⁹ Dr. O'Brien filed for divorce in December of 1980, two months after he received his medical license.⁶⁰ At trial, Mrs. O'Brien sought an equitable distribution of the couple's marital property.⁶¹

B. Lower Court Proceedings

The trial court held that Dr. O'Brien's education and degree constituted a property right subject to equitable distribution.⁶² During the trial, Mrs. O'Brien presented expert testimony that the value of Dr. O'Brien's medical license was \$472,000.⁶³ Mrs. O'Brien's expert calculated this figure by subtracting the average lifetime income of a college graduate from that of a general surgeon, Dr. O'Brien's field of medicine.⁶⁴ The court accepted this calculation and awarded⁶⁵ Mrs. O'Brien forty percent of the present value of the license—\$188,800—payable in eleven annual installments.⁶⁶

The Appellate Division reversed the trial court, holding that a

⁵⁵ *O'Brien*, 66 N.Y.2d at 581, 489 N.E.2d at 714, 498 N.Y.S.2d at 745.

⁵⁶ *Id.* at 581, 489 N.E.2d at 713-14, 498 N.Y.S.2d at 744-45.

⁵⁷ *Id.* at 581, 489 N.E.2d at 714, 498 N.Y.S.2d at 745. The O'Briens also received contributions from both spouses' parent. Mr. O'Brien also contributed earnings and the proceeds from educational loans. *Id.* at 581-82, 489 N.E.2d at 714, 498 N.Y.S.2d at 745.

⁵⁸ *Id.* at 581-82, 489 N.E.2d at 714, 490 N.Y.S.2d at 745.

⁵⁹ *Id.*

⁶⁰ *Id.* at 581, 489 N.E.2d at 714, 498 N.Y.S.2d at 745.

⁶¹ *O'Brien v. O'Brien*, 114 Misc. 2d at 234, 452 N.Y.S.2d at 802.

⁶² *Id.* at 241, 452 N.Y.S.2d at 806.

⁶³ *Id.* at 241, 452 N.Y.S.2d at 805-06.

⁶⁴ *O'Brien*, 66 N.Y.2d at 582, 489 N.E.2d at 714, 498 N.Y.S.2d at 745. The expert also accounted for federal income taxes, a real interest rate of three percent, and an inflation rate of ten percent. *Id.*

⁶⁵ A distributive award is an award of money to one spouse that is used in lieu of dividing other marital assets. N.Y. DOM. REL. LAW § 236(B)(1)(b) (McKinney 1986). These awards may be in a lump sum or over a period of time in fixed amounts, and are not to be treated as ordinary income to the recipient under the United States Internal Revenue Code. *Id.* Such awards give courts added flexibility when dividing property, or when supplementing such divisions.

⁶⁶ *O'Brien v. O'Brien*, 114 Misc. 2d at 242, 452 N.Y.S.2d at 806. Mrs. O'Brien also was awarded expert witness and attorney's fees. Dr. O'Brien was ordered to obtain a life insurance policy for her benefit as well. *Id.*

professional license is not marital property⁶⁷ because it does not fall within the traditional concepts of property⁶⁸ and because the legislature had not intended to designate such licenses as property under the Equitable Distribution Law.⁶⁹ The court further stated that an enhanced earning capacity valuation⁷⁰ represented only "a speculative and uncertain expectancy."⁷¹ Judge Thompson's strong dissent suggested that a professional license is marital property because a license embodies a privilege to practice in a regulated profession and thus is similar to a franchise right.⁷² The Appellate Division remitted the case so that the trial court could grant Mrs. O'Brien maintenance and rehabilitative awards.⁷³ Mrs. O'Brien appealed, and the case went to the Court of Appeals by leave of the Appellate Division.⁷⁴

C. The Court of Appeals' Decision

The Court of Appeals reversed the Appellate Division, holding that Dr. O'Brien's medical license constituted marital property under section 236(B) of the New York Domestic Relations Law.⁷⁵ The court reasoned that section 236(B)'s definition of marital property was not tied to common law concepts of property.⁷⁶ Because the statute controlled the definition of marital property, Dr. O'Brien's principal argument that a professional license did not fall within the traditional definition of property was irrelevant.⁷⁷

The court focused on sections 236(B)(5)(d)(6), 236(B)(5)(d)(9),⁷⁸ and 236(B)(5)(e),⁷⁹ stating that "[t]he words mean exactly what they say: that an interest in a profession or professional career potential is marital property which may be repre-

⁶⁷ O'Brien v. O'Brien, 106 A.D.2d 223, 225-26, 485 N.Y.S.2d 548, 550, *rev'd*, 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985).

⁶⁸ *Id.* at 227, 485 N.Y.S.2d at 550.

⁶⁹ *Id.* at 227-28, 485 N.Y.S.2d at 551-52.

⁷⁰ See *supra* notes 64-66 and accompanying text.

⁷¹ O'Brien v. O'Brien, 106 A.D.2d at 225, 485 N.Y.S.2d at 550.

⁷² *Id.* at 240, 485 N.Y.S.2d at 560 (Thompson, J., concurring in part and dissenting in part).

⁷³ *Id.* at 231-32, 485 N.Y.S.2d at 554-55 (majority opinion).

⁷⁴ O'Brien, 66 N.Y.2d at 580, 489 N.E.2d at 713, 498 N.Y.S.2d at 744.

⁷⁵ *Id.* at 580-81, 489 N.E.2d at 713, 498 N.Y.S.2d at 744. The court remitted the case to the Appellate Division to determine the factors the trial court considered in granting the distributive award as required by N.Y. DOM. REL. LAW § 236(B)(5)(g) (McKinney 1986). *Id.* at 589-90, 489 N.E.2d at 719-20, 498 N.Y.S.2d at 750-51.

⁷⁶ *Id.* at 583, 489 N.E.2d at 715, 498 N.Y.S.2d at 746 ("[T]he New York Legislature deliberately went beyond traditional property concepts when it formulated the Equitable Distribution Law. . . . [T]here is no common-law property interest remotely resembling marital property.").

⁷⁷ *Id.* at 586, 489 N.E.2d at 717, 498 N.Y.S.2d at 748.

⁷⁸ See *supra* note 9 for the text of § 236(B)(5)(d).

⁷⁹ See *supra* note 47 for the text of § 236(B)(5)(e).

sented by direct or indirect contributions of the non-title-holding spouse.”⁸⁰ Subparagraph 6 specifically states that courts must consider a spouse’s contribution to the other’s “career or career potential” when distributing marital assets.⁸¹ Subparagraph 9 implies that an interest in a profession is an asset subject to distribution,⁸² and section 236(B)(5)(e) states that a court should use a distributive award when dividing an interest in a profession would be contrary to law.⁸³ The court held that the statute mandated the conclusion that a professional license acquired during marriage constitutes marital property.⁸⁴

The court also found that its conclusion corresponded to the legislative policy behind the equitable distribution system of section 236(B).⁸⁵ The legislature enacted this equitable distribution system because the common-law title method had resulted in unfair distributions.⁸⁶ Under section 236(B), the division of property rests on “all the circumstances of the case and the respective parties to the marriage.”⁸⁷ Marriage is viewed as an economic partnership; after its demise, courts should ensure that each partner receives a just portion of the assets.⁸⁸ The court concluded that “few undertakings during a marriage better qualify as the type of joint effort that the statute’s economic partnership theory is intended to address than contributions toward one spouse’s acquisition of a professional license.”⁸⁹

The court also upheld the present-value-of-future earnings method of valuing the license,⁹⁰ rejecting Dr. O’Brien’s argument that the court should award either rehabilitative maintenance or reimbursement for direct financial contributions, if it found that the

⁸⁰ 66 N.Y.2d at 584, 489 N.E.2d at 716, 498 N.Y.S.2d at 747.

⁸¹ N.Y. DOM. REL. LAW § 236(B)(5)(d)(6). For the complete text of this subsection, see *supra* note 9.

⁸² N.Y. DOM. REL. LAW § 236(B)(5)(d)(9). For the complete text of this subsection, see *supra* note 9.

⁸³ N.Y. DOM. REL. LAW § 236(B)(5)(e). For the complete text of this section, see *supra* note 47.

⁸⁴ *O’Brien*, 66 N.Y.2d at 587, 489 N.E.2d at 715, 498 N.Y.S.2d at 746. The Court noted that even outside the context of section 236(B), a professional license embodies a property right. “A professional license is a valuable property right, reflected in the money, effort and lost opportunity for employment expended in its acquisition, and also in the enhanced earning capacity it affords its holder, which may not be revoked without due process of law.” *Id.* at 586, 489 N.E.2d at 717, 498 N.Y.S.2d at 748 (citations omitted).

⁸⁵ *Id.* at 584, 489 N.E.2d at 716, 498 N.Y.S.2d at 747.

⁸⁶ *Id.* at 584-85, 489 N.E.2d at 716, 498 N.Y.S.2d at 747. See also *supra* notes 37-41 and accompanying text.

⁸⁷ *O’Brien*, 66 N.Y.2d at 585, 489 N.E.2d at 716, 498 N.Y.S.2d at 747.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 588, 489 N.E.2d at 718, 498 N.Y.S.2d at 749.

license constituted marital property.⁹¹ The court found that a maintenance award would be inappropriate because maintenance is subject to termination if the recipient remarries; thus, the supporting spouse might never receive an adequate return for her contribution to the professional spouse's career.⁹² Because the license was a marital asset, Mrs. O'Brien's share was independent of her marital status.⁹³ The court also rejected reimbursement as the proper method of valuing the license because this method neither accounted for appreciation in the value of the license nor complied with the statute's requirement that courts consider "contributions and services as a spouse, parent, wage earner and homemaker" in making property distributions.⁹⁴

Although the court concluded that the trial court correctly valued the license as the increased earning potential of the license holder,⁹⁵ it recognized the difficulty of fixing the present value of the license. The court stated, however, that such problems were "no more difficult than computing tort damages for wrongful death or diminished earning capacity resulting from injury and they differ only in degree from the problems presented when valuing a professional practice."⁹⁶

In his concurring opinion, Judge Meyer worried about the potential burden the decision might place on some licensed spouses.⁹⁷ He expressed concern that obligations created by a distributive award, which is not modifiable under current law,⁹⁸ could force the

⁹¹ *Id.* at 587, 489 N.E.2d at 717, 498 N.Y.S.2d at 748 ("The statute does not expressly authorize retrospective maintenance or rehabilitative awards and we have no occasion to decide in this case whether the authority to do so may ever be implied from its provisions.").

⁹² *Id.*

⁹³ *Id.* After *O'Brien*, the legislature amended section 236(B)(6) to favor a spouse who contributes to her partner's education. When making maintenance awards, courts may consider future earning capacities of both parties, N.Y. DOM. REL. LAW § 236(B)(6)(a)(3) (McKinney 1986), and reduced earning capacity of a party resulting from foregone career opportunities, *id.* § 236(B)(6)(a)(5). It also allows retrospective maintenance. *Id.* § 236(B)(6). These changes make it more likely that self-supporting spouses will receive maintenance awards that could adequately compensate them for their efforts. These awards, however, still terminate upon remarriage, *id.* § 236(B)(6)(c), and therefore do not provide adequate compensation when the supporting spouse remarries prior to receiving a fair share of the license.

⁹⁴ *O'Brien*, 66 N.Y.2d at 587-88, 489 N.E.2d at 718, 498 N.Y.S.2d at 749 (quoting § 236(B)(5)(d)(6)).

⁹⁵ For a discussion of the trial court's valuation analysis, see *supra* notes 64-65 and accompanying text.

⁹⁶ *O'Brien*, 66 N.Y.2d at 588, 489 N.E.2d at 718, 498 N.Y.S.2d at 749.

⁹⁷ *Id.* at 591, 489 N.E.2d at 720, 498 N.Y.S.2d at 751 (Meyer, J., concurring).

⁹⁸ The Domestic Relations Law describes a distributive award as being "payable either in a lump sum or over a period of time in fixed amounts." N.Y. DOM. REL. LAW § 236(B)(1)(b) (McKinney 1986). This language precludes the possibility of modifying a distributive award. Further, the section of the Domestic Relations Law which deals spe-

licensed spouse to choose an undesired field of practice.⁹⁹ He suggested that the legislature change the law to allow courts to modify distributive awards if the professional spouse enters a field other than that used to determine the original award.¹⁰⁰

To deter abuse of this provision, Judge Meyer proposed that if the licensed spouse's claim later proved false, the supporting spouse could seek reinstatement of the original award plus attorney's fees.¹⁰¹

III

O'BRIEN AND ITS LIMITS

A. The Court of Appeals Correctly Held that Professional Licenses Are Marital Property

The Court of Appeals correctly held that a professional license earned during marriage constitutes marital property. The decision, however, may have limited effects. Section 236(B)(5)(d)(6) of the Domestic Relations Law specifically requires courts to consider contributions to a spouse's career or career potential when dividing marital property.¹⁰² Sections 236(B)(5)(d)(9) and 236(B)(5)(e) imply that an interest in a profession is marital property.¹⁰³ The statute also states that courts must grant distributive awards when it would be "impractical or burdensome or . . . contrary to law" to divide an interest in a profession.¹⁰⁴

Even without the statutory language, the court reached the proper conclusion. To compensate Mrs. O'Brien fairly, the court had to grant a distributive award of the property right embodied in the medical license because Mrs. O'Brien had invested in her husband's future¹⁰⁵ and had made a number of sacrifices on his behalf.¹⁰⁶ Allowing Dr. O'Brien to receive almost all of the benefits flowing from the license would have been unjust. Because the O'Briens had few tangible marital assets,¹⁰⁷ a determination that the license did not constitute marital property would have restricted

cifically with the modification of court awards, speaks only of maintenance and child support awards. *Id.* § 236(B)(9)(b).

⁹⁹ *O'Brien*, 66 N.Y.2d at 591, 489 N.E.2d at 720, 498 N.Y.S.2d at 751 (Meyer, J., concurring).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 592, 489 N.E.2d at 720-21, 498 N.Y.S.2d at 751-52.

¹⁰² See *supra* note 9 for the text of § 236(B)(5)(d)(6).

¹⁰³ See *supra* note 9 for the text of § 236(B)(5)(d)(9). For the text of § 236(B)(5)(e), see *supra* note 47.

¹⁰⁴ N.Y. DOM. REL. LAW § 236(B)(5)(e). For the text of this section, see *supra* note 47.

¹⁰⁵ See *supra* notes 55-57 and accompanying text.

¹⁰⁶ *Id.*

¹⁰⁷ *O'Brien v. O'Brien*, 114 Misc. 2d 233, 234, 452 N.Y.S.2d 801, 802 (1982), *rev'd*,

Mrs. O'Brien's compensation solely to a maintenance award. Because maintenance awards terminate upon remarriage, Mrs. O'Brien would only realize her expected return on the investment in her husband's medical degree if she remained single. Such a result is unacceptable. Supporting spouses such as Mrs. O'Brien should receive a fair share of the family's joint efforts regardless of marital status or need.

B. *O'Brien's Limits*

1. *O'Brien is Limited to Professional Licenses*

Although the trial court asserted that both Dr. O'Brien's medical license and his "education and degree" constituted marital property under section 236(B),¹⁰⁸ the Court of Appeals characterized only the professional license as marital property.¹⁰⁹ The issue remains whether the Court of Appeals' holding in *O'Brien* also applies to either nonprofessional graduate degrees or undergraduate degrees.

Certain relevant distinctions exist between professional licenses and educational degrees that may justify limiting *O'Brien* to professional licenses. For example, in *Cronin v. Cronin*,¹¹⁰ decided in light of *O'Brien*, the court held that only the wife's law degree earned during the marriage, and not the husband's bachelor's degree, constituted marital property under section 236(B). The court stated that "[t]he holding in *O'Brien* was . . . limited to professional licenses. The Court of Appeals [in *O'Brien*] did not overrule prior court rulings that educational degrees are not subject to equitable distribution."¹¹¹ The court reasoned that material differences exist between educational degrees, which realistically are not "reified marital property,"¹¹² and professional licenses, which "in the nature of a franchise" translate an education into a right to practice in a regulated field.¹¹³

O'Brien, however, should apply to all educational degrees. First, all of the economic and equitable arguments that persuaded the Court of Appeals in *O'Brien* apply with equal force to nonprofes-

106 A.D.2d 223, 485 N.Y.S.2d 548, *rev'd*, 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985).

¹⁰⁸ *Id.* at 241, 452 N.Y.S.2d at 806.

¹⁰⁹ *O'Brien*, 66 N.Y.2d at 590, 489 N.E.2d at 720, 498 N.Y.S.2d at 751.

¹¹⁰ 131 Misc. 2d 879, 502 N.Y.S.2d 368 (1986).

¹¹¹ *Id.* at 882, 502 N.Y.S.2d at 371.

¹¹² *Id.* (quoting *Connor v. Connor*, 97 A.D.2d 88, 102, 468 N.Y.S.2d 482, 492 (1983)).

¹¹³ *Id.* at 883, 502 N.Y.S.2d at 371 (quoting *O'Brien v. O'Brien*, 106 A.D.2d 223, 240, 485 N.Y.S.2d 548, 560 (Thompson, J., concurring in part and dissenting in part), *rev'd*, 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985)).

sional educational degrees.¹¹⁴ For example, a spouse may make sacrifices and forego opportunities to allow the other spouse to pursue a nonprofessional education. Second, the supporting spouse may expect rewards to result from his or her investment in the nonprofessional degree. Third, section 236(B) requires courts to consider all contributions by one spouse to the other's career or career potential in dividing marital property¹¹⁵ and in determining maintenance.¹¹⁶ This section does not distinguish between contributions to professional careers and nonprofessional careers.

One New York court recognized the inequity of limiting the *O'Brien* doctrine to professional licenses. In *McGowan v. McGowan*,¹¹⁷ the trial court held that a spouse's master's degree was a marital asset subject to equitable distribution. The court stated that "at least certain degrees may, as a practical matter, enhance the earning capacity of the holder."¹¹⁸ The court relied on sections 236(B)(5)(d)(6) and 236(B)(5)(d)(9), stating that the legislature intended courts to consider contributions by one spouse to the other's career.¹¹⁹ The court concluded that the degree was the product of the parties' joint efforts and should be considered marital property.¹²⁰

Although conceptual distinctions exist between licenses and degrees, these distinctions should not outweigh equitable considerations. Thus, New York courts should follow the *McGowan* precedent because it comports with the reasoning behind *O'Brien* and the legislative intent of section 236(B).¹²¹ Otherwise, a supporting spouse could recover his or her investment in a nonprofessional degree only if the couple has existing marital assets to adequately cover the investment.

¹¹⁴ See *supra* notes 25 & 86-89 and accompanying text. See also L. GOLDEN, *EQUITABLE DISTRIBUTION OF PROPERTY* 182 n.192 (1983) ("[I]n theory, the arguments [for finding a professional education to be marital property] are equally applicable to other types of education. It would be hard to justify a rule of law which only applied to certain educational degrees."); *O'Brien v. O'Brien*, 106 A.D.2d 223, 225, 485 N.Y.S.2d 548, 550 ("It would defy all law, logic and reason to declare . . . that a college degree is not marital property, and to now hold . . . that a professional license is marital property."), *rev'd*, 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985).

¹¹⁵ N.Y. DOM. REL. LAW § 236(B)(5)(d). See *supra* note 9 for the text of this section.

¹¹⁶ N.Y. DOM. REL. LAW § 236(B)(6). See *supra* note 46 for the factors a court should consider in providing a maintenance award.

¹¹⁷ 136 Misc. 2d 225, 518 N.Y.S.2d 346 (1987).

¹¹⁸ *Id.* at 229-30, 518 N.Y.S.2d at 349.

¹¹⁹ *Id.* at 230, 518 N.Y.S.2d at 349-50.

¹²⁰ *Id.* at 229-30, 518 N.Y.S.2d at 349-50.

¹²¹ See N.Y. DOM. REL. LAW § 236 practice commentary, at 205 (McKinney 1986) (suggesting that *O'Brien* applies whenever educational degree has economic value).

2. O'Brien's Valuation Method Applies Only to Unestablished Professional Practices

The court's method of valuing the professional degree further limits *O'Brien*.¹²² Although this method is proper where the licensed spouse has not yet established a practice, it may be inappropriate in other cases. The *O'Brien* court recognized that the proper valuation method may differ depending upon whether the licensed spouse has begun to practice.¹²³ In *O'Brien*, the court used the average earnings in Dr. O'Brien's field of medicine to estimate his future earnings because he had not yet established a practice.¹²⁴ After a professional establishes a practice, however, a court can determine future earnings more accurately and can grant a more appropriate award to the supporting spouse by using the professional spouse's earnings history as a guide.¹²⁵

In *Vanasco v. Vanasco*,¹²⁶ the husband, an accountant, had an established practice. The court held that the value of the husband's accounting license had "merged" with his practice and that the wife was entitled to receive only a share of that practice.¹²⁷ The court stated that the husband had "already established a track record as an accountant—good, bad, or otherwise—which is far more practical, and less speculative, to measure and gauge. The value of the license, if any, is subsumed in the 'value' of the practice so that any residual value of the license is *de minimis*."¹²⁸

¹²² For a discussion of the *O'Brien* court's method of valuation, see *supra* notes 90-96 and accompanying text.

¹²³ *O'Brien*, 66 N.Y.2d at 586, 489 N.E.2d at 717, 498 N.Y.S.2d at 748. Cf. *Vanasco v. Vanasco*, 132 Misc. 2d 227, 229, 503 N.Y.S.2d 480, 482 (1986) ("the license itself becomes somewhat less significant where it appears to have merged in the business and the danger arises wherein . . . [the] plaintiff may, in effect, be seeking 'two bites of the same apple'"). See also N.Y. DOM. REL. LAW § 236 practice commentary, at 203 (McKinney 1986) (to permit spouse to receive share of practice and license would amount to "double recovery").

¹²⁴ *O'Brien*, 66 N.Y.2d at 582, 489 N.E.2d at 714, 498 N.Y.S.2d at 745.

¹²⁵ Courts must use care when the educated spouse has a fledgling practice that has yet to mature economically. The practice commentary to N.Y. DOM. REL. LAW § 236 suggests that when a practice has not reached its full economic potential the court should still consider the license's value, or allow the supporting spouse to elect to take the award based on the license or the practice. N.Y. DOM. REL. LAW § 236 practice commentary, at 203-04 (McKinney 1986).

¹²⁶ 132 Misc. 2d 227, 503 N.Y.S.2d 480 (1986).

¹²⁷ *Id.* at 229-30, 503 N.Y.S.2d at 482 ("[T]he court concludes that marital property encompasses a license to practice accounting . . . but that the value of said license may, as in the case at bar, merge into the business conducted through said license so that an evaluation of said business, rather than the license is a truer measure of the value of said property.").

¹²⁸ *Id.* at 230, 503 N.Y.S.2d at 482.

IV

O'BRIEN: ITS PROBLEMS AND A PROPOSAL

Although *O'Brien* correctly interprets section 236(B), the decision poses questions and presents problems. Part A of this section discusses *O'Brien's* valuation method and proposes that courts consider additional factors in valuing a license. It further suggests that courts allow different valuation methods in different factual circumstances. Part B discusses the issue of modification of the property award that Judge Meyer raised in his concurring opinion.

A. The Valuation of a Professional License

The Court of Appeals valued Dr. O'Brien's license based on the present value of the enhanced earnings it would likely create. This valuation method comports with that used by most economists who base the value of an asset on its future or potential earnings rather than on the cost of the asset.¹²⁹ The main advantage of the present-value-of-enhanced-earnings method over the cost method is that "value is essentially a prospective concept, based upon the earning, or potential earning power, that an entity possesses. Thus, any evaluation which fails to include a reasonable determination of an entity's capacity to draw a prospective stream of income may not, in fact, be a true evaluation at all."¹³⁰ For this reason, the present-value-of-enhanced-future-earnings method compensates a supporting spouse more accurately than either a reimbursement¹³¹ or an opportunity cost award.¹³²

Although the Court of Appeals used the present value method in *O'Brien*, other valuation methods may be appropriate in other circumstances.¹³³ Section 236(B) is a flexible statute, and courts should use different formulae in different factual circumstances. In particular, a court should use the reimbursement or opportunity cost method when it is uncertain that the professional license or degree will increase the license-holder's income perceptibly and the supporting spouse made a significant sacrifice. For example, a pro-

¹²⁹ Parkman, *supra* note 27, at 442; Comment, *supra* note 25, at 604; *see also* Krauskopf, *supra* note 25, at 381-84 (discussing ways to measure return on investment in education).

¹³⁰ Comment, *supra* note 25, at 604.

¹³¹ For a discussion of reimbursement awards, *see supra* text accompanying notes 29-30.

¹³² For a discussion of opportunity cost awards, *see supra* note 31 and accompanying text. Both reimbursement and opportunity cost awards only compensate a supporting spouse for that spouse's costs.

¹³³ *See Haugan v. Haugan*, 117 Wis. 2d 200, 214, 343 N.W.2d 796, 803 (1984) ("[N]o mathematical formula or theory of valuation settles the case. Each must be decided on its own facts. . . . [F]lexibility will maximize the fairness achieved in each case.").

professionally educated spouse whose future earnings are uncertain may nevertheless receive intangible benefits from his education.¹³⁴ Courts should take these intangible benefits into account when determining the value of an education.

The *O'Brien* court's use of the present value method to value Dr. O'Brien's medical license also presents an analytical dilemma. The court described the value of the license as "the enhanced earning capacity it affords the holder."¹³⁵ The court did not discuss any factor other than the license that enhances a surgeon's earnings. It thus apparently assumed that a surgeon's greater than average income flows solely from the surgeon's professional license. Several other factors, however, may in fact increase a surgeon's income.¹³⁶ For example, a surgeon may work longer hours, experience more pressure, or accept more responsibility than the average college graduate does in his job.

If a professional's higher wages are partly attributable to other factors related to his or her position, rather than solely to the professional license, a court must alter its award accordingly. That part of the professional's income not flowing from the license does not represent marital property, but rather a reward for efforts outside the marriage.¹³⁷ Although courts may have difficulty quantifying such intangible factors, they should nevertheless consider the professional's lifestyle and working conditions when calculating the enhanced earning capacity resulting from the license.

B. Modification of the Property Award

Courts cannot presently modify distributive awards.¹³⁸ Judge Meyer pointed out that prior to training in surgery, Dr. O'Brien had completed one year of a residency in internal medicine and was con-

¹³⁴ The education could still have value to the educated spouse, although not quantifiable in economic terms. For instance, the education may lead to greater personal fulfillment, to greater job security, or to greater prestige.

¹³⁵ *O'Brien*, 66 N.Y.2d at 588, 489 N.E.2d at 718, 498 N.Y.S.2d at 749.

¹³⁶ One author suggests that a court should consider the affect of increased skill and experience of the licensed spouse. Accordingly, early in the spouse's career his or her increased income results mostly from education. Later in the professional's career, his or her income results mostly from experience rather than the knowledge acquired during professional's education. Comment, *supra* note 25, at 609-10.

¹³⁷ An example of this phenomenon is a truck driver who makes long drives. He or she is paid in part for driving expertise, embodied in most states in a special driver's license. The driver is also paid because the job requires driving long hours at all times of the day and night. The driver often must sleep in the truck, and may be away from his or her family for days at a time. Certainly the driver is paid, in part, for the various lifestyle sacrifices that the job requires.

¹³⁸ See *supra* note 98.

sidering returning to that specialty.¹³⁹ Nevertheless, the trial court based its award on the average surgeon's earnings.¹⁴⁰ By not allowing modification, the legislature prevents some licensed spouses from altering their career paths before they have even settled in their chosen field of practice. Limiting a spouse's future career choices in such a manner is unfair.¹⁴¹

Further, courts base awards on the assumption that the licensed spouse will continue to earn an income from his profession. If events occur that render this assumption false, courts may create hardship to the licensed spouse by requiring continued payments based on that assumption. For example, if a surgeon becomes unable to practice because he loses an arm, his income would drop considerably. It then would be unfair to force the surgeon to continue to pay an award based on an obviously incorrect projection of future income.¹⁴² The spouse may also enter an economically depressed profession, resulting in lower than expected income or an inability to find employment at all. Or, the spouse may simply fail to attain average earnings in the chosen profession; or the spouse may choose a lower-paying specialization in the profession (such as a lawyer working as a public defender); or the state may disqualify the spouse from practicing in the profession.

In addition, because section 236(B) does not permit modification of property awards, the original award to the supporting spouse may not reflect the true value of the enhanced future earnings. Many courts believe that enhanced future earnings are merely an expectancy,¹⁴³ and some judges might discount the awards to reflect the uncertainty of the increased earnings. Allowing modification of awards would eliminate this concern and could result in more accurate valuations of the supporting spouse's share of the license.

To ameliorate these problems, the legislature should provide for modification of distributive awards in which a supporting spouse receives a share of a professional license. Courts should modify a distributive award of a newly-received professional license only when either spouse proves: 1) a change of specialization by the

¹³⁹ *O'Brien*, 66 N.Y.2d at 591, 489 N.E.2d at 720, 498 N.Y.S.2d at 751 (Meyer, J., concurring).

¹⁴⁰ *O'Brien v. O'Brien*, 114 Misc. 2d 233, 241, 452 N.Y.S.2d 801, 806 (1982), *rev'd*, 106 A.D.2d 223, 485 N.Y.S.2d 548, *rev'd*, 66 N.Y.S.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 243 (1985).

¹⁴¹ *See O'Brien*, 66 N.Y.2d at 591, 489 N.E.2d at 720, 498 N.Y.S.2d at 751 (Meyer, J., concurring) ("[E]quitable distribution was not intended to permit a judge to make a career decision for a licensed spouse still in training.").

¹⁴² For a discussion of factors which may affect a professional's earning capacity, see Mullenix, *supra* note 25, at 271-72; Comment, *supra* note 25, at 611.

¹⁴³ *See, e.g.*, *Todd v. Todd*, 272 Cal. App. 2d 786, 791, 78 Cal. Rptr. 131, 135 (1969); *Lesman v. Lesman*, 88 A.D.2d 153, 452 N.Y.S.2d 935 (1982).

professional spouse that will likely alter significantly the future earnings of the licensed spouse; or 2) substantially different earnings than the court had projected when it made the award.¹⁴⁴ Allowing courts to modify an award is better than forcing the licensed spouse into bankruptcy.¹⁴⁵ In addition, allowing courts to modify awards adds a greater degree of flexibility to the payment process. For example, payments could later be amortized over a longer or shorter period of time if a court finds a temporary change in income.

Courts should not modify awards simply because the recipient's marital status changes. The supporting spouse has earned a share of the license and should receive this share regardless of need or later remarriage. This is why the award should be a distributive, rather than a maintenance, award. If maintenance did not end upon remarriage of the recipient spouse, a maintenance award could be fashioned using the *O'Brien* criteria. Further, because of administrative concerns, modification should not be permitted if circumstances change after the licensed spouse completes payment. To allow otherwise would prevent a court from closing a case until the licensed spouse died.

This proposal does have some drawbacks. The major drawback is the burden it would place on the judicial system if licensed spouses went to court every time their income dropped. Another problem is that a licensed spouse might falsify his income or use the courts to harass the supporting spouse. To combat these problems, the legislature could provide the supporting spouse with the right to have the award reinstated and to receive attorney's fees "should the purported circumstance on which a change is made turn out to have been feigned or to be illusory."¹⁴⁶

The way some courts are authorized to distribute nonvested pension plans upon divorce supports the conclusion that the legisla-

¹⁴⁴ To meet the "substantial" standard, the licensed spouse would have to prove that because his or her earnings are considerably less than the court had projected, requiring the licensed spouse to make the remaining payments would impose an inequitable burden. The supporting spouse could receive an upward modification if he or she were suffering a hardship and the educated spouse was earning more than predicted. The latter scenario might occur if the economy suffered double-digit inflation for several years.

¹⁴⁵ Unlike maintenance, which is not dischargeable in bankruptcy, 11 U.S.C. § 523(a)(5) (1982), a property settlement can be discharged. New York considers a distributive award a property settlement. See Note, *Compensation for Financing a Spouse's Education: The Means of Economic Justice in Maine*, 35 ME. L. REV. 341, 346-47 & n.22 (1983) (authored by William Kany) (arguing for structuring awards for spouse's contribution to educational degree as "gross alimony" because "maintaining the award in an alimony form will retain one of the primary benefits of ordinary alimony—its nondischargeability in bankruptcy").

¹⁴⁶ *O'Brien*, 66 N.Y.2d at 592, 489 N.E.2d at 721, 498 N.Y.S.2d at 752 (Meyer, J., concurring).

ture should allow courts to modify property awards. When dividing nonvested pensions plans, some courts may retain jurisdiction over the divorce action if the likelihood that the pension will vest is so uncertain that discerning the present value of the pension rights is impossible.¹⁴⁷ In such a situation, courts may award a percentage of the pension payments as they accrue. This analogy demonstrates that courts can retain jurisdiction over distribution awards without overburdening the judicial system.

Although this proposal conflicts with the traditional notion that property distributions are almost never modifiable,¹⁴⁸ the professional license is not a traditional form of property. In the more familiar case of a distribution of a professional practice, the professional spouse may be able to sell the practice if at some point he can no longer work.¹⁴⁹ The professional cannot, however, sell his license, even if he can no longer use it to generate income. Further, in the case of a professional practice, a court can estimate future earnings based upon past earnings.¹⁵⁰ With a professional license, however, the court must base its award upon a prediction of the expected enhanced earnings that the license will produce rather than an established pattern of earnings. These differences, as well as the chance that the professional may not have taken a job within his profession, suggest that a court should be able to modify its distributive award of a professional license where the licensed spouse has not yet established a career.

¹⁴⁷ *In re Brown*, 15 Cal. 3d 838, 848, 544 P.2d 561, 567, 126 Cal. Rptr. 633, 639 (1976) (“[I]f the court concludes that because of uncertainties affecting the vesting or maturation of the pension that it should not attempt to divide the present value of the pension rights, it can instead award each spouse an appropriate portion of each pension payment as it is paid.”). In discussing the need for the court to maintain jurisdiction in these cases rather than to allow no award, the court noted that “the claim of mere administrative burden surely cannot serve as support for an inequitable substantive rule.” *Id.* at 849, 544 P.2d at 567, 126 Cal. Rptr. at 639. See also *Majauskas v. Majauskas*, 61 N.Y.2d 481, 486, 463 N.E.2d 15, 17, 474 N.Y.S.2d 699, 701 (1984) (court “may provide that upon maturity of the pension rights the recipient pay a portion of each payment received to his or her former spouse”).

¹⁴⁸ New York does not provide for modification of property awards under any circumstances, see *supra* note 98 and accompanying text. Indiana allows modification only in cases of fraud. See IND. CODE ANN. § 31-1-11.5-17 (Burns Supp. 1986). See generally Gold-Bikin, *Modification of Matrimonial Determinations*, in 4 FAMILY LAW AND PRACTICE, *supra* note 21, § 52.04, at 52-59 (property distributions modifiable only in cases of mistake, fraud, duress, or where additional property revealed after granting of award).

¹⁴⁹ Cf. *Herring*, *supra* note 25, at 15 (Noting in a discussion of workman’s compensation awards that “if goodwill is valued at a certain sum, the business may be sold to pay the award. . . . In making an award based on the future earnings of a degree holder, there is no existing fund from which to pay the award.”).

¹⁵⁰ See *supra* notes 126-28 and accompanying text.

CONCLUSION

By declaring that professional licenses are marital property, the New York Court of Appeals in *O'Brien* took a major step toward protecting the rights of those who support their spouse through professional school. Although *O'Brien* is a relatively narrow decision that applies only to professionals, its protection should extend to all spouses who support their spouses through any form of higher education.

Courts should be able to modify awards given to supporting spouses if the licensed spouse can prove that he or she no longer works in the field upon which the award was based or if the spouse has a substantially lower income than the court had expected when it calculated the award. When a court attempts to determine the value of a professional license by calculating a spouse's earning potential, it should consider all the factors that affect a professional's income. A professional's income is often attributable to factors in addition to the license; he or she should be entitled to keep that part of his or her income attributable solely to the added demands of his or her profession.

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