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Do you Promise to Love, Honor and Equitably Divide your Celebrity Status upon Divorce - A Look at the Development and Application of New York's Equitable Distribution Statute

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“DO YOU PROMISE TO LOVE, HONOR AND EQUITABLY DIVIDE YOUR CELEBRITY STATUS UPON DIVORCE?” A LOOK AT THE DEVELOPMENT AND APPLICATION OF NEW YORK’S EQUITABLE DISTRIBUTION STATUTE

I. INTRODUCTION

Andy Warhol once said: “In the future, everyone will be famous for fifteen minutes.”¹ If that fifteen minutes occurs during one’s marriage and is aided by one’s spouse, then New York courts will consider the fame a part of the marital property and upon dissolution, subject to equitable distribution. In *Golub v. Golub*² actress Marisa Berenson and attorney A. Richard Golub divorced after a four year marriage. After entering a joint decree of divorce, the court set about equitably dividing the couple’s marital assets and was faced with the issue of what was “marital property.”³

In briefs submitted in the property distribution phase, Golub sought to include Berenson’s increased celebrity status⁴ as part of the marital property. Golub contended that Berenson’s status as an actress and model was a business capable of valuation and that her earning capacity increased during the marriage as a result of his efforts and contributions. Thus, her increased celebrity status should be considered marital property and subject to equitable distribution.⁵ In addressing this argument,

1. See *ULTRA VIOLET, FAMOUS FOR 15 MINUTES: MY YEARS WITH ANDY WARHOL* at 8 (1988).

2. 139 Misc. 2d 440, 527 N.Y.S.2d 946 (1988). The official reporter only published selected portions of the opinion. The opinion was published in full in the *New York Law Journal*. *Golub v. Golub*, N.Y.L.J., Mar. 18, 1988, at 7, col. 1-4 and 13, col. 1-2.

3. *Golub*, N.Y.L.J. at 3, col. 3.

4. Golub contended that Berenson’s celebrity status was a business which had appreciated by approximately \$152,000 during their marriage, of which he was entitled to 50% because of his direct and indirect contributions as Berenson’s lawyer, business manager, and personal manager. Golub listed over fifty ways in which he added to the increase in Berenson’s celebrity status, including reviewing and preparing three years of her tax returns, negotiating acting and modeling contracts, and negotiating for the removal of a restraining order which the federal government and the State of California had placed on any payments to Berenson from the Screen Actors Guild. Post Trial Memorandum of A. Richard Golub at 12-30; *Golub v. Golub*, 139 Misc. 2d 440, 527 N.Y.S.2d 946 (2706/86)(1988).

5. Post Trial Memorandum of A. Richard Golub at 5; *Golub v. Golub*, 139 Misc. 2d 440, 527 N.Y.S.2d 946 (2706/86)(1988).

the court relied primarily on *O'Brien v. O'Brien*,⁶ where a professional license and the resulting increased earning capacity acquired by one spouse with the support of the other was included as part of the marital property.⁷ In *Golub*, the court was faced with whether to extend the *O'Brien* rule to include celebrity status.

The court accepted Golub's theory and held that an increase in Berenson's celebrity status during the marriage, if that increase was aided by Golub, was an increase in the marital property and thus subject to equitable distribution under New York law.⁸ However, the court declined to subject Berenson's increased celebrity status to equitable distribution because Golub offered no evidence at trial regarding the value of Berenson's career and because the court was not convinced that Golub had given up any of his personal career opportunities to assist Berenson.⁹

II. STATEMENT OF FACTS

Actress/model Marisa Berenson and attorney A. Richard Golub were married amidst much media and television coverage on February 14th, 1982—Valentine's Day. Both were accustomed to luxurious standards of living and brought to the marriage their own notoriety. Berenson, a noted film and television star, had been a model since she was a teenager, appearing on the covers of such magazines as *Vogue*, *Bazaar*, and *Time*. She was respected and admired in both the fashion and art world, working not only in the United States but abroad as well. Berenson spoke several foreign languages fluently and had also authored a book on fashion, entitled *Dressing Up*.¹⁰ Moreover, she enjoyed recognition as the granddaughter of the famous couturier Elsa Schiaparelli.¹¹

Golub was admitted to the New York State Bar in 1972 and was a successful attorney in private practice. The year before his marriage to Berenson, Golub's business grossed over \$250,000 in fees.¹² Formerly a theatrical manager, he was well known both by the media and show business personnel. Thus, many of his clients were celebrities whom he had met during his previous career.¹³ Just prior to his marriage, Golub was

6. 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985).

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

8. *Golub*, 139 Misc. 2d at 447, 527 N.Y.S.2d at 950.

9. *Golub*, N.Y.L.J., Mar. 18, 1988, at 13, col. 1.

10. M. BERENSON, *DRESSING UP* (1984).

11. *Golub*, 139 Misc. 2d at 441, 527 N.Y.S.2d at 947.

12. *Golub*, N.Y.L.J., Mar. 18, 1988, at 13, col. 1.

13. *Id.*

in the public spotlight because of his participation in a highly publicized trial involving Brooke Shields.¹⁴

During their marriage, Berenson and Golub jointly bought and sold several properties.¹⁵ While the couple's contributions to the first property were relatively even, with Golub and Berenson contributing approximately fifty-six percent and forty-four percent respectively and jointly assuming a then existing mortgage, the second marital residence was purchased almost entirely by Golub.¹⁶

From the start of their marriage, Berenson spent almost half of each year in Europe. In September 1985, the couple leased a Paris apartment towards which Golub contributed \$32,500.¹⁷ The apartment, however, was solely in Berenson's name and she had exclusive use of the premises.¹⁸ As with the marital residence, the Paris apartment was lavishly decorated and furnished with antiques and expensive art objects.¹⁹ While Berenson was in Paris, Golub supervised housekeeping and care of Berenson's daughter in the United States. He also supervised renovations made to the marital estate and took charge of the negotiations and litigation involved in buying and selling the marital property.²⁰

Berenson had three bank accounts. Only one of the accounts was in her name alone. Most of her funds were deposited into the other two accounts which she held jointly with Golub.²¹ Berenson and Golub produced evidence to show that they pooled their income, using their monies interchangeably to pay for the marital properties, taxes, and general living expenses.²² However, Golub made most of the monetary decisions and assisted Berenson by organizing her financial affairs.²³

The parties showed at trial that the marriage had been in decline

14. *Golub*, 139 Misc. 2d at 441, 527 N.Y.S.2d at 947.

15. *Golub*, N.Y.L.J., Mar. 18, 1988, at 7, col. 2.

16. The first property purchased by Golub and Berenson, a four story townhouse on East 83rd Street in Manhattan, was purchased by jointly assuming a then existing mortgage and contributions of \$75,065.61 by Golub and \$58,000 by Berenson. When the property was sold in February of 1984 for \$950,000, the couple purchased a townhouse on East 64th Street, \$105,000 of which was paid by Golub with the remainder covered by a purchase money mortgage and a bridge loan. *Golub*, 139 Misc. 2d at 441, 527 N.Y.S.2d at 947.

17. *Id.*

18. *Golub*, N.Y.L.J., Mar. 18, 1988, at 7, col. 2.

19. *Id.* at 7, col. 2-3.

20. *Golub*, 139 Misc. 2d at 442, 527 N.Y.S.2d at 948.

21. Berenson's three bank accounts were as follows: 1) the "A. Richard Golub Special Account No. 2," 2) the "Echoes of Eternity" account, and 3) a Paris account. Golub had signatory power on the first two accounts while the third account was held by Berenson individually. *Id.* at 947.

22. The evidence included various checks as well as the parties' testimony. *Id.*

23. *Id.*

since 1984.²⁴ In 1986, the New York Supreme Court granted a dual decree of divorce on the grounds of constructive abandonment and abandonment.²⁵ Subsequently, the same court had the task of equitably distributing the parties' marital property. The court considered, among other things,²⁶ the following assets: 1) the increase in the value of

24. *Golub*, N.Y.L.J., Mar. 18, 1988, at 7, col. 1.

25. *Golub*, 139 Misc. 2d at 441, 527 N.Y.S.2d at 947. Abandonment, or more commonly desertion, is the willful and intentional leaving of one spouse without the intention of returning and without the consent of the spouse abandoned. BLACK'S LAW DICTIONARY 3 (5th ed. 1979). Constructive abandonment occurs where an existing cohabitation is ended by the misconduct of one of the parties, provided that such misconduct is itself a ground for divorce. BLACK'S LAW DICTIONARY 401 (5th ed. 1979).

26. The court also considered the following: 1) Berenson's request for maintenance; 2) the Paris apartment; 3) the marital residence; 4) the furnishings in the marital residence and the Paris apartment; and 5) two Andy Warhol paintings. In considering Berenson's request for maintenance, the court looked to the statutory standards in § 236 of New York's Domestic Relations Law. N.Y. DOM. REL. LAW § 236 (McKinney 1986). The court declined to award Berenson maintenance, noting among other things that the Golubs' marriage was a short, childless one; that both were in excellent health; that Berenson's "talent and beauty have enabled her to become a substantial wage earner," *Golub*, 139 Misc. 2d at 442, 527 N.Y.S.2d at 948; and that her earnings had substantially appreciated during the marriage. The court concluded that Berenson was fully able to maintain herself in the manner to which she had become accustomed during her marriage to Golub. *Id.*

The court denied Golub's assertion that the Paris apartment should be included as part of the marital property, citing the rule that a leasehold estate is not considered to be property for purposes of equitable distribution. See *Golub*, N.Y.L.J., Mar. 18, 1988, at 7, col. 2-3.

In reference to the marital residence, Berenson claimed that she was entitled to 63.25% of it based on her contributions, while Golub claimed that he should receive a 77.46% share based on his contributions. Considering the fact that Berenson had not contributed to the maintenance of the residence since the dissolution action commenced, and Golub's "greater pride and commitment" to the residence as his home and office, the court gave Golub the choice of either keeping the property and giving Berenson 50% of the value of the property less costs or selling the property and splitting the proceeds equally. See *Golub*, N.Y.L.J., Mar. 18, 1988, at 13, col. 1-2.

Because no evidence was presented at trial to show when the furnishings, antiques, and jewelry in the Paris apartment and the marital residence had been purchased, by whom, or for what price, the court concluded that each party would get the personal property they possessed at the time. See *Golub*, N.Y.L.J., Mar. 18, 1988, at 7, col. 2-3.

Considering the Andy Warhol paintings, the court determined that Warhol gave the first of the paintings, a portrait of Berenson, to her alone as a birthday gift and thus it was not subject to distribution. In determining whether the second painting of a dollar sign was separate or marital property, the court looked to the circumstances in which it was acquired. The painting was handed to Golub while the couple was attending a holiday party. Considering that both Berenson and Golub had longstanding friendships with Warhol, and that the painting was small enough to be handed to Berenson if it had been meant only for her, the court determined that the painting, valued at approximately \$12,000, had been given to both parties. The court ordered that the painting either be sold with the proceeds being divided equally or kept by Berenson upon a credit of 50% of its value to Golub. See *Golub*, N.Y.L.J., Mar. 18, 1988, at 7, col. 2-3.

Golub's law practice during the marriage and 2) the increase in Berenson's celebrity status during the marriage.

In considering the increase in value of Golub's law practice,²⁷ the court held that the increase was part of the marital assets despite the fact that Berenson presented no direct evidence that she had aided this increase by referring clients to Golub or otherwise.²⁸ The court noted that Berenson's celebrity status attracted media attention to the couple and enabled them to attend many star-studded and media-packed events. The court stated: "In a practice such as [Golub's], this certainly would have had some positive and perhaps lasting effect and should be considered as a contribution to the increase in the value of defendant's practice."²⁹ Relying on previous cases³⁰ and on the fact that the Golubs' marriage was short and childless, the court awarded Berenson ten percent or \$10,840 of the increased value of Golub's practice which accrued during the marriage.³¹

Finally, the court decided the validity of Golub's post trial assertion that the increase in the value of Berenson's celebrity status was marital property. Golub asserted that he deserved part of the increase because it was directly related to his efforts in organizing Berenson's financial affairs and career as well as efforts in supervising the marital residence and Berenson's child while she was out of the country.³² The court agreed that increased celebrity status could be considered as marital property, but declined to equitably divide the value of Berenson's increased celebrity status because Golub had failed to present any evidence at trial as to the value of Berenson's career or that he had given up personal opportunities in generating this increase.³³ The court was unwilling to rule on any argument raised for the first time in post trial papers.³⁴

III. REASONING OF THE COURT

In concluding that Berenson's celebrity status may be marital property, the court noted that the law clearly considers professional licenses

27. Berenson's expert witness testified that Golub's practice had increased in value by \$108,400 between the time the marriage began and the time the dissolution proceeding commenced. *Id.* at 13, col. 1.

28. Post Trial Memorandum of A. Richard Golub at 31-32.

29. *Golub*, N.Y.L.J., Mar. 18, 1988, at 13, col. 1.

30. *See infra* notes 44-61 and accompanying text.

31. *Golub*, N.Y.L.J., Mar. 18, 1988 at 13, col. 1.

32. *Id.* at 7, col. 3.

33. *Id.* at 13, col. 1.

34. *Id.*

in marital property divisions³⁵ and that the law had already been extended to include academic degrees as well.³⁶ In the cases establishing these precedents, the courts stated that the value of the professional license or academic degree was not in the license or degree itself.³⁷ Rather, the value was in the increased earning capacity the license or degree afforded its holder.³⁸ The degree was not itself divisible, but the intangible opportunities that accompany it were divisible.³⁹ The court further stated that professional licenses and academic degrees were logical extensions of the equitable distribution statute and noted that "the right of a spouse to share in other valuable assets must be the next step forward."⁴⁰ Based on these findings, the court held that Golub's law degree and subsequent practice fell squarely under the case law definition of marital property. Accordingly, these were subject to equitable distribution by the court.

The main issue the court analyzed was whether the rule could be extended without adversely affecting a spouse who is married to a non-professional when the marriage dissolved.⁴¹ The court indicated that there were possibilities of unfair results. For example, inequitable distribution would result as the nonprofessional spouse with a high earning potential would reap an economic windfall while the other spouse would be unfairly deprived. Therefore, the court concluded that "the skills of an artisan, actor, professional athlete, or any person whose expertise in his or her career has enabled him or her to become an exceptional wage earner should be valued as marital property subject to equitable distribution."⁴²

IV. PRIOR LEGISLATIVE AND CASE HISTORY

A. *New York Equitable Distribution Statute*

The New York system of property division upon divorce is equitable distribution. Under this system, the court is able to look beyond title and consider the circumstances of each case to achieve "fair" property distri-

35. See *O'Brien*, 66 N.Y.2d 576, 580-81, 489 N.E.2d 712, 713, 498 N.Y.S.2d 743, 744.

36. See *McGowan v. McGowan*, 136 Misc. 2d 225, 230, 518 N.Y.S.2d 346, 350 (Sup. Ct. 1987).

37. *Golub*, N.Y.L.J., Mar. 18, 1988, at 7, col. 3.

38. *Id.*

39. See *O'Brien*, 66 N.Y.2d 576, 586, 489 N.E.2d 712, 717, 498 N.Y.S.2d 743, 748; *McGowan*, 136 Misc. 2d at 228, 518 N.Y.S.2d at 348.

40. *Golub*, N.Y.L.J., Mar. 18, 1988, at 7, col. 3.

41. The term "nonprofessional" in this context refers to a person who holds no specific professional license or academic degree.

42. *Golub*, N.Y.L.J., Mar. 18, 1988, at 7, col. 4 to 13, col. 1.

butions. Thus, all property acquired during the marriage by the husband and wife, regardless of whether title is in their joint or individual names, is within the power of the court to equitably distribute. Such a system is different than that employed in community property jurisdictions, where the court does not have the inherent flexibility to consider the equities of each case. In a community property state, any property acquired by either spouse during the marriage is considered to be jointly owned by husband and wife with each having a one-half interest. Upon divorce, the court views the husband and wife as co-owners of all the community property and in states such as California, divides the property equally.⁴³

The New York equitable distribution statute, section 236,⁴⁴ divides property into marital property and separate property. Marital property is subject to equitable distribution.⁴⁵ Under section 236, marital property is defined as "all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, *regardless of the form in which title is held.*"⁴⁶

In enacting this statute, the legislature indicated that it was a response to the application of traditional common law theories of property that resulted in great inequities in marital property divisions.⁴⁷ Statutory equitable distribution is a directive wherein all circumstances of the case, as well as the parties thereto, are considered in making distributive awards.⁴⁸ The theory behind equitable distribution is a definition of marriage as "an economic partnership to which both parties contribute as spouse, parent, wage earner, or homemaker."⁴⁹

Although the legislature enacted the concept of equitable distribution, it left it up to the courts to define marital property and determine what interests came within that term.⁵⁰ Among other guidelines, section 236 provides:

the court shall consider . . . (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

43. See BLACK'S LAW DICTIONARY 254, 483 (5th ed. 1979).

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

45. N.Y. DOM. REL. LAW § 234[B][5][c] (McKinney 1986).

46. N.Y. DOM. REL. LAW § 236[B][1][c] (McKinney 1986) (emphasis added).

47. *O'Brien*, 66 N.Y.2d 576, 584-85, 489 N.E.2d 712, 716, 498 N.Y.S.2d 743, 747.

48. Assembly Memorandum, 1980 N.Y. Legis. Ann. at 129-30, cited in *O'Brien*.

49. *O'Brien*, 66 N.Y.2d at 585, 489 N.E.2d at 716, 498 N.Y.S.2d at 747 (1985).

50. *Id.*

or career potential of the other party [and] . . . (9) the impossibility or difficulty of evaluating any component, asset or any interest in a business, corporation or profession.⁵¹

Additionally, the statute provides that if "the distribution of an interest in a business, corporation, or profession would be contrary to law," the court should make a distributive award instead of actually dividing the property.⁵²

Regarding section 236, the court in *O'Brien v. O'Brien*, a case involving the equitable distribution of a medical license, stated:

The words mean exactly what they say: that an interest in a profession or professional career potential is marital property which may be represented by direct or indirect contributions of the non-title-holding spouse, including financial contributions and nonfinancial contributions made by caring for the home and family.⁵³

Last among the legislative guidelines is a caution that before the court can equitably distribute intangible property, certain statutory factors must be satisfied. Foremost among these and particularly relevant to *Golub* is the requirement that evidence be presented regarding the present value of the license, degree, or celebrity status, and the supporting spouse's contributions toward its acquisition.⁵⁴

B. Division of Marital Property: A Survey of New York Cases

The court in *O'Brien* defined marital property.⁵⁵ In that case, Mrs. O'Brien forewent the opportunity to obtain a permanent teaching certificate to support her husband while he finished college and attended medical school.⁵⁶ Two months after Mr. O'Brien received his license to practice medicine, he filed an action for divorce.⁵⁷

Mr. O'Brien argued that a professional license could not be considered marital property because the license did not fall within the traditional definition of property. A license, he argued, was not something that had exchange value on the open market; nor could it be sold, assigned, or transferred.⁵⁸ The supreme court special term held that Mr.

51. N.Y. DOM. REL. LAW § 236[B][5][d][6],[9] (McKinney 1986).

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

53. *O'Brien*, 66 N.Y.2d at 584, 489 N.E.2d at 716, 498 N.Y.S.2d at 747.

54. N.Y. DOM. REL. LAW § 236[B][5][d][1]-[10] (McKinney 1986).

55. *O'Brien*, 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985).

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

57. *Id.*

58. *Id.* at 586-87, 489 N.E.2d at 717, 498 N.Y.S.2d at 748.

O'Brien's medical license was marital property.⁵⁹ The supreme court appellate division, however, reversed and held that the degree was not marital property.⁶⁰ The court of appeals disagreed, concluding that: 1) the argument ignored the legislative purpose to eliminate inequities of common law property distribution; and 2) it was an overstatement to say that a professional license could not be considered property even outside the context of the statute.⁶¹ The court held that a professional license is a valuable property right reflected in the money, effort, and lost opportunity for employment expended in acquiring the degree, the increased earning capacity it brings its holder, and by the fact that it cannot be revoked without due process of law.⁶² The court further found that it did not matter that the license itself had no market value for it could grant some award in lieu of actual distribution.⁶³

Subsequently, in the New York case *Price v. Price*,⁶⁴ Mrs. Price quit her job as a registered nurse and went to work full-time for six months at a business partially owned by her husband. Later, she worked as a private duty nurse and then gave up outside employment to stay home as a parent and homemaker.⁶⁵ After the commencement of the divorce action, Mr. Price became the sole owner of the business.⁶⁶ The supreme court special term entered a judgment of divorce, and both Mr. and Mrs. Price appealed.⁶⁷ The supreme court appellate division held and the court of appeals affirmed that because Mrs. Price's contributions or efforts as a homemaker and parent added to the increase in the value of her husband's business, those contributions warranted a division at divorce of the increase in Mr. Price's business during the marriage.⁶⁸

The *O'Brien* definition of a license as property was extended in 1985 in *McGowan v. McGowan*.⁶⁹ With her husband's financial support, Mrs. McGowan, a teacher, obtained a Master's Degree during the marriage, enabling her to increase her earning potential.⁷⁰ At trial, the issue was whether an academic degree earned by one spouse with the support of

59. *O'Brien*, 66 N.Y.2d at 576, 489 N.E.2d at 715, 498 N.Y.S.2d at 743.

60. *Id.*

61. *Id.* at 586-87, 489 N.E.2d at 717, 498 N.Y.S.2d at 748.

62. *Id.*

63. *Id.*

64. 69 N.Y.2d 8, 503 N.E.2d 684, 511 N.Y.S.2d 219 (1986).

65. *Id.* at 12, 503 N.E.2d at 686, 511 N.Y.S.2d at 221.

66. *Id.* at 12, 503 N.E.2d at 685-86, 511 N.Y.S.2d at 220-21.

67. *Id.* at 8, 503 N.E.2d at 684, 511 N.Y.S.2d at 219.

68. *Id.* at 13, 503 N.E.2d at 686, 511 N.Y.S.2d at 221.

69. 136 Misc. 2d 225, 518 N.Y.S.2d 346 (Sup. 1987).

70. *Id.* at 226, 518 N.Y.S.2d at 347.

the other during the marriage could be considered marital property.⁷¹ Looking to the *O'Brien* definition of a license's value as an increase in earning capacity for its holder, the *McGowan* court concluded that this same definition held true for academic degrees. The court viewed the degrees as "investments in the economic partnership of the marriage and . . . the product of the parties' joint efforts."⁷² The court noted that although the degree itself was not divisible, the income generated by opportunities that a degree allows was divisible.⁷³ Therefore, the court ordered that the degree be considered a marital asset and that the enhanced earning capacity it afforded its holder be subject to equitable distribution.⁷⁴

V. ANALYSIS

A. Does *Golub* Promote the Goal of the Statute?

Section 236 of the equitable distribution statute provides that the court must consider all circumstances and parties so that any distributive awards will be fair. Applying the legislative goal to the *Golub* facts, the court concluded that Berenson's increased celebrity status could be considered part of the marital property.

The *Golub* court's conclusion was a correct application of legislative directives. Support for this proposition comes directly from the language of section 236, wherein the legislature does not restrict its discussion to narrow interpretations of the term "marital property." In describing what marital property is in terms of equitable distribution, the legislature specified that in regards to the property, "the form in which title is held" is irrelevant.⁷⁵ In advising courts on factors to consider in making equitable distributions, the legislature included the words "direct or indirect," in reference to a spouse's contributions and "career or career potential," in reference to what could be divided.⁷⁶ When considering valuation, the legislature noted in its analysis that it would be necessary to value those interests parties hold in their "professions."⁷⁷ Finally, when the legislature analyzes distributions of interests, the statute refers to "an interest in a . . . profession."⁷⁸ Thus, the legislature appears not

71. *Id.*

72. *Id.* at 230, 518 N.Y.S.2d at 350.

73. *Id.* at 228, 518 N.Y.S.2d at 348.

74. *McGowan*, 136 Misc. 2d at 228, 230, 518 N.Y.S.2d at 348, 350.

75. N.Y. DOM. REL. LAW § 236[B][1][c] (McKinney 1986).

76. N.Y. DOM. REL. LAW § 236[B][5][d][6] (McKinney 1986).

77. N.Y. DOM. REL. LAW § 236[B][5][d][6],[9] (McKinney, 1986).

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

only to decrease the form or amount of contribution one spouse needs to make but also broadens the definition of the increased earning potential which will be considered marital property.

The statute does not define "professions." Further, the law does not define "direct" or "indirect" contributions. This necessarily makes it the court's responsibility to fill in the parameters of the statute. By deciding that Berenson's celebrity status qualifies as a "profession," the court appears to be well within the legislative bounds mandated by the words of section 236.

The *Golub* court's conclusion is also supported by the legislative intent behind section 236. The legislature adopted equitable distribution as a response to the inequitable results of common law property classifications and to allow courts to consider all circumstances and parties involved.⁷⁹ In *Golub*, the parties and circumstances were crucial in the court's decision. Regarding Berenson, the court noted that there is a "proprietary interest in the product of a celebrity's labors" which gives a celebrity's fame a property nature.⁸⁰ The court went on to analogize a celebrity's right of publicity to the professional goodwill of a business. In both instances, it is a "name" that becomes a source of revenue.⁸¹ Accordingly, the court concluded that Berenson's increased celebrity status could be considered marital property. The legislature intended to give the courts broad scope in interpreting the statute so that the most equitable dissolution distributions would result.⁸² The *Golub* decision satisfied the legislative directives because the court did not apply a patent formula but rather considered Berenson's unique position as a nonprofessional who had an exceptional potential for increased earnings.

Lastly, the *Golub* court satisfied the legislative mandates in that it declined to actually divide Berenson's celebrity status. The statute requires that evidence must be presented as to the valuation of the asset which a party is seeking to have equitably divided as well as that party's contribution towards attainment of that asset. The correct time to present such evidence is at trial. Because *Golub* waited until the property division phase to assert his argument that Berenson's increased celebrity status should be considered marital property and present evidence of his contributions to her status, the court was correct in declining to consider Berenson's celebrity status in the distribution.

79. Assembly Memorandum, 1980 N.Y. Legis. Ann. at 129-30, cited in *O'Brien*.

80. *Golub*, N.Y.L.J., Mar. 18, 1988, at 7, col. 3.

81. *Id.* at 7, col. 4.

82. *O'Brien*, 66 N.Y.2d at 593, 489 N.E.2d at 720, 498 N.Y.S.2d at 751.

B. *Golub Comports with O'Brien, McGowan, and Price*

The *O'Brien* rule, that a medical license acquired by one spouse during the marriage is part of the marital property and subject to equitable distribution,⁸³ was extended by the *Golub* court. In *Golub*, the court held that the increase in the value of Berenson's celebrity status during her marriage to Golub was marital property.⁸⁴ Analyzing the *Golub* facts in light of the holdings in *O'Brien*, *Price*, and *McGowan*, the holding in *Golub* appears to be appropriate. The court carefully analyzed the characteristics set forth in the precedents in terms of considering whether celebrity status constitutes marital property.⁸⁵ The court analogized the value of a license or degree to the ability of a celebrity to commercially exploit her fame and the increased earning capacity resulting from such exploitation, and stated that it was logical to include increased celebrity status as marital property.⁸⁶ As did the license in *O'Brien*, Berenson's celebrity status had traditional property characteristics; celebrity status can be sold, assigned, or transferred in the sense that a celebrity can "sell" her name to promote a product.⁸⁷ Furthermore, in some jurisdictions it has been held that the right to exploit a celebrity's fame can pass to her heirs.⁸⁸ Thus, not only does celebrity status have the traditional characteristics of property, but it can be characterized as a valuable property right. The *O'Brien* court held that one who acquires a license obtains a valuable property right which is reflected in the money, effort, and lost opportunity for alternate careers or employment.⁸⁹ This is also true for an actress or model who acquires a certain status in show business.

The court in *O'Brien* did not state that the license itself was valuable, but that the increased earning capacity that accompanies the license was valuable.⁹⁰ The *Golub* court held analogously that it was not Berenson's increased celebrity status itself that was of value, but rather it was the increase in earning capacity that accompanied it that was of value.⁹¹ Such a finding renders unnecessary Berenson's argument that because her celebrity status was not a "license" nor was it "professional," it could not be considered an "investment in human capital subject to equi-

83. *Id.* at 576, 489 N.E.2d at 712, 498 N.Y.S.2d at 743.

84. *Golub*, N.Y.L.J., Mar. 18, 1988, at 13, col. 1.

85. *Id.* at 7, col. 3-4, 13, col. 1.

86. *Id.* at 7, col. 3.

87. *Id.*

88. *Id.*

89. *O'Brien*, 66 N.Y.2d at 586, 489 N.E.2d at 717, 498 N.Y.S.2d at 748.

90. *Id.*

91. *Golub*, N.Y.L.J., Mar. 18, 1988, at 7, col. 3.

table distribution.”⁹² The value of Berenson’s celebrity status did not come from the mere fact that people saw her as a celebrity, but rather came from the great earning potential resulting from people viewing her as a celebrity who would, for example, increase the public’s attraction for a movie or magazine.

Furthermore, the courts in *O’Brien* and *McGowan* recognize that the spouse holding the degree or license may never use that asset to secure work, and even if they do, they will not always be successful. So, while it is true that show business is volatile, the same can be said about all occupations.⁹³ Yet, because one spouse has a degree or a license or celebrity status, that party will always have the potential for increased earning capacity. If in gaining that potential the professional or licensed or celebrated spouse, was in some way aided by the other spouse, then that “property” is subject to equitable distribution according to New York precedents.

The *Price* court held that “any increase in the value of separate property of a spouse occurring during the marriage which is due in part to the direct or indirect contributions of the other spouse, may be considered property.”⁹⁴ The court in *Golub* found that throughout the marriage, Golub made most of the financial decisions, supervised the marital home, and assisted in organizing Berenson’s career.⁹⁵ However, the court did not find that Golub had given up any of his own career opportunities to further Berenson’s celebrity status or that he had devoted himself solely to his family during the marriage.⁹⁶ Thus, even had Golub presented his argument when he should have during trial, because the court could not directly attribute any increase in Berenson’s celebrity status to his efforts, it still would not have divided her increased status as part of the marital property.

C. *The Effect of Golub on Other Jurisdictions*

Surveying different states’ definitions of marital property might provide insight as to how they would respond to expanding marital property to include celebrity status. Representative cases analyzing spousal interest in professional degrees show that most states do not have statutes

92. *Id.* at 7, col. 3.

93. Although concededly not as fickle as show business, other professions are subject to fluctuations. An example is the trial lawyer who loses “the big case,” gets very bad press, and consequently gets no further business.

94. *Golub*, N.Y.L.J., Mar. 18, 1988, at 7, col. 3. See *Price* 69 N.Y.2d 8, 503 N.E.2d 684, 511 N.Y.S.2d 219 (1986).

95. *Golub*, N.Y.L.J., Mar. 18, 1988, at 7, col. 3.

96. *Id.* at 13, col. 1.

requiring consideration of spousal contributions.⁹⁷ Many states, however, will consider the contributions of one spouse in helping the other obtain the degree or license when granting alimony or dividing other assets.⁹⁸ Accordingly, because many states do not even recognize professional licenses or degrees as marital property, it seems highly improbable that they would follow *Golub* and declare celebrity status, property even more intangible than professional degrees and licenses, as marital property.

In New Jersey, a court followed the *Golub* decision in comedian Joe Piscopo's divorce action.⁹⁹ The superior court judge found that Piscopo's celebrity status was property and noted that because the former Mrs. Piscopo had made significant contributions in helping Piscopo become a celebrity, she was entitled to a division of his celebrity status.¹⁰⁰ The value of his celebrity status was included in the overall valuation of Piscopo's business assets, of which Mrs. Piscopo was awarded forty-eight percent.¹⁰¹

In California, a community property state, the supreme court de-

97. D. Freed & T. Walker, *Family Law In The Fifty States: An Overview*, 21 FAM. L.Q. 488 (Winter 1988).

98. See e.g. *Jones v. Jones*, 454 So. 2d 1006 (Ala. Civ. App. 1984) (the court refused to hold "as a matter of law" that a professional degree earned by one spouse with the support of the other was marital property upon divorce); *In re Marriage of Rubinstein*, 145 Ill. App. 3d 31, 495 N.E.2d 659 (1986) (a wife who for nine years had been the primary financial supporter while her husband pursued his medical education was not entitled to any portion of his medical degree; however, she was entitled to compensation for her contributions); *Drapek v. Drapek*, 399 Mass. 240, 503 N.E.2d 946 (1987) (professional degrees, licenses, and the present value of future earning potential were not property or assets and were therefore not subject to division); *Olah v. Olah*, 135 Mich. App. 404, 354 N.W.2d 359 (1984) (husband's medical degree was not property subject to division but the court awarded the wife a lump sum amount each month until she completed her degree, since she had financed her husband's medical education); *Ruben v. Ruben*, 123 N.J. 358, 461 A.2d 733 (1983) (graduate degree of one spouse acquired during the marriage was not an asset subject to distribution upon dissolution); *Hodge v. Hodge*, 337 Pa. Super. 151, 486 A.2d 951 (1984) (an advanced degree was not marital property subject to equitable distribution under the Pennsylvania divorce code and even if it was, the increased earning capacity that comes as a result of the attainment of a degree or license is not included in the category of marital property for the purpose of division); *Helm v. Helm*, 289 S.C. 169, 345 S.E.2d 720 (S.C. 1986); *Beeler v. Beeler*, 715 S.W.2d 625, (Tenn. Ct. App. 1986); *Grosskoph v. Grosskoph*, 677 P.2d 814 (Wyo. 1984) (an accounting degree was not divisible property, but it should be considered with respect to the equities involved); Freed & Walker, *Family Law In The Fifty States: An Overview*, 19 FAM. L.Q. at 376-79 (Winter 1986) and 21 FAM. L.Q. at 487-89 (Winter 1988).

99. Joe Piscopo is known for his appearances on the television show *Saturday Night Live* and on television commercials for Miller Lite Beer. See Amy Dockser, *Celebrity Status Ruled Property In Divorce Case*, Wall St. J., Aug. 26, 1988, at 13, col. 3.

100. *Id.*

101. *Id.*

cided *In re Sullivan*.¹⁰² In that case, Mr. Sullivan entered medical school the year after he and Mrs. Sullivan were married.¹⁰³ After completing her undergraduate education, Mrs. Sullivan worked various full and part-time jobs while Mr. Sullivan completed his internship and residency in Oregon. Upon their return to California, they separated and Mr. Sullivan petitioned for divorce.¹⁰⁴ The superior court entered a dissolution judgment, but denied Mrs. Sullivan any compensation for her contributions to her husband's medical education during the marriage.¹⁰⁵ The California Supreme Court reversed.¹⁰⁶ Because the property settlement of the case would not be finalized until the beginning of the next year, the court applied an amendment to the California Family Law Act even though that amendment was not effective until the day after the *Sullivan* decision.¹⁰⁷ Section 4800.3 of the California Civil Code provides that if community contributions to training and education enhance the earning capacity of the noncontributing spouse, those contributions shall be reimbursed to the community.¹⁰⁸ Thus, the court held that a wife who put her husband through medical school should be reimbursed for her contributions towards his medical degree.¹⁰⁹

Given that the court in *Sullivan* was only willing to allow reimbursement in a case involving a professional degree, it does not seem likely that California courts will decide that celebrity status is property in the *Golub* sense. California Civil Code section 4800.3, which the *Sullivan* court employed to reach its decision, specifically addresses community contributions to education and training. The provisions of the statute specifically discuss community payments for education or training or for

102. 37 Cal. 3d 762, 691 P.2d 1020, 209 Cal. Rptr. 354 (1984).

103. *Id.* at 765, 691 P.2d at 1021, 209 Cal. Rptr. at 355-57.

104. *Id.* at 766, 691 P.2d at 1022, 209 Cal. Rptr. at 356.

105. *Id.*

106. *Sullivan*, 37 Cal. 3d at 768, 691 P.2d at 1023, 209 Cal. Rptr. at 357.

107. *Id.* at 767-68, 691 P.2d at 1022-23, 209 Cal. Rptr. at 356-57.

108. CAL. CIV. CODE § 4800.3(b)(1),(d) (West Supp. 1988). Relevant subsections provide:

.....
 (b) Subject to the limitations provided in this section, upon dissolution of marriage or legal separation:

(1) The community shall be reimbursed for community contributions to education or training of a party that substantially enhances the earning capacity of the party. The amount reimbursed shall be with interest at the legal rate, accruing from the end of the calendar year in which the contributions were made.

(d) Reimbursement for community contributions . . . pursuant to this section is the exclusive remedy of the community or a party for the education or training and any resulting enhancement of the earning capacity of the party. However, nothing in this subdivision shall limit consideration of the effect of the education, training, or enhancement, or the amount reimbursed pursuant to this section, on the circumstances of the parties for the purpose of an order for support pursuant to Section 4801.

109. *Sullivan*, 37 Cal. 3d at 768, 691 P.2d at 1023, 209 Cal. Rptr. at 357.

the repayment of loans incurred by the community toward that end.¹¹⁰ Thus, neither the statute nor *Sullivan* would be directly applicable in a fact situation similar to *Golub*. Applying the *Sullivan* rule to the *Golub* facts, it seems that California courts would deny *Golub* relief for reasons similar to the New York court. In *Sullivan*, one spouse had made economic sacrifices to allow the other to obtain an education.¹¹¹ *Golub*, however, did not prove that he had sacrificed to allow Berenson to increase her celebrity status.

VI. CONSEQUENCES

A. *Defining an Exceptional Wage Earner*

One significant aspect of the court's holding in *Golub* is that the court extended marital property to include any person's expertise which has enabled him or her to become an "exceptional wage earner." The court, however, did not state a definition or a rule concerning what, exactly, is an "exceptional wage earner." Because there are no definitive guidelines, subsequent courts presented with facts similar to *Golub* will face the problem of determining what an "exceptional wage earner" is on a case-by-case basis. If and when courts are forced to make such determinations, however, one factor that they must consider is the need for uniformity so that different interpretations and decisions regarding the meaning of an "exceptional wage earner" will not result within one jurisdiction. Uniformity could be accomplished through legislative measures. The legislature could specify a variety of factors that courts should consider to ensure that inequitable definitions are not employed. Included in the factors would be the socio-economic status as well as the geographic locations of the parties. Thus, individual circumstances of each case would be considered in light of specific legislatively mandated factors, allowing equitable determinations of who is an "exceptional wage earner."

B. *Forum Shopping and Prenuptial Agreements*

Because *Golub* has created a new precedent by defining celebrity status as property, a number of repercussions may occur in the show business world. If other states follow the lead of New York and New Jersey, forum shopping may result. Many celebrities are quite wealthy, and in the age of high divorce rates, are likely to consult attorneys before getting married. To protect their assets, attorneys may advise celebrities to

110. CAL. CIV. CODE § 4800.3(a) (West Supp. 1988).

111. *Sullivan*, 37 Cal. 3d at 766, 691 P.2d at 1022, 209 Cal. Rptr. at 356.

marry and reside in states where the law is clear that their celebrity status will not be divided in the event of a divorce proceeding.

A possible solution to prevent potential forum shopping may be to implement a plan whereby in a community property state a value is placed on a supporting spouse's contributions and the community is reimbursed by that amount before the court makes a final property division. The community, then, is reimbursed for the value of the supporting spouse's contributions before assets are divided, rather than allowing the contributing spouse a separate award. The contributions which would be valued and then reimbursed would not be those that an "ordinary" spouse performs, such as housekeeping. For example, a reimbursable contribution could be that of a spouse who gave up his own career to manage his wife's career, when his management was the sole or primary reason that his wife gained celebrity status. In this situation, although the supporting spouse would probably get less than the amount alluded to in *Golub*, at least this method would act as some shield against unjust enrichment of the celebrity spouse.

To avoid the situation altogether, celebrities may instead decide to enter into prenuptial agreements. Because good faith prenuptial agreements are usually honored,¹¹² the celebrity could "contract" before the marriage not to divide her status upon divorce. Of course, if one spouse's contributions during a marriage enable the celebrity spouse to obtain a substantially better financial position than before the marriage, the supporting spouse could claim that the prenuptial agreement was not entered into with complete knowledge and contest its enforcement. The celebrity, however, would at least have the agreement as concrete evidence on which to fight to preserve her status as indivisible.

C. *Problems of Valuation and an Alternative Remedy*

Golub did not address the valuation of Berenson's celebrity status. There are several potential problems a court will have in valuing such status. In show business, it is almost impossible to attribute fame to any one factor. Thus, it is difficult to ascertain whether a spouse's contributions had any effect on the other's celebrity status and if so, how much. Courts are therefore faced with a question of direct causation.

Another problem in valuation the court will encounter in making a

112. A prenuptial agreement is "an agreement entered into by two people who intend to marry each other which sets forth the rights of each person in the property of the other in the event of divorce or death. Generally, entering into marriage constitutes sufficient consideration to make a prenuptial agreement enforceable." BARRON'S LAW DICTIONARY 359 (2d ed. 1984).

distributive award is that a celebrity's increase in monetary worth may not adequately reflect the amount that their celebrity status has increased. Exposure in one film today may lead to many roles in the future. Future fame however, is uncertain and cannot be guaranteed. Thus, any division awarding future earnings of a celebrity to her spouse is also uncertain. In that sense, Berenson's argument that an increase in celebrity status is not an investment in human capital has some merit. In *O'Brien* and *McGowan*, the parties retained their academic degrees or professional licenses. As the court in *O'Brien* noted, a professional license is a property right that can only be revoked with due process of law.¹¹³ A celebrity's status, however, is not a lifelong attainment and can be taken away with one critic's pen. A valuation in this instance may be overstated.

To avoid these and other valuation problems, a court faced with facts similar to *Golub* may find it easier as well as more equitable to employ "reimbursement." In *O'Brien*, the husband did not begin pursuit of his medical career until after he and his wife were married. She supported him, enabling him to obtain his medical degree. Division of his degree, therefore, seems appropriate. In *Golub*, however, Berenson had already obtained celebrity status before her marriage to Golub. Likewise, Golub had already obtained a successful law practice as well as celebrity clients before the marriage. Perhaps this instance calls not for division of Golub's law practice or Berenson's celebrity status, but reimbursement of the supporting spouse's contributions to each as the most equitable measure since neither of the Golubs could claim to have been an enabling factor behind the others' "business."

The legislative support for employing such a proposition in *Golub* comes from the Domestic Relations Law which states that at times when a distribution of a business upon divorce would bring inequitable results, the court should grant an alternate award instead of actually dividing the property.¹¹⁴ In the instant case, if Golub had proven that he was actually responsible for an increase in Berenson's celebrity status because, for example, he gave up his own career to manage hers (to his economic detriment), the court could add up all the hours Golub claimed to have worked in managing Berenson's career, compare these to the time a professional manager may have spent (averaging the two accordingly), multiply that amount by an hourly rate such as that which Golub would charge one of his legal clients, and award that amount to him for his contributions to Berenson's career. Similarly, the court could employ a

113. *O'Brien*, 66 N.Y.2d at 586, 489 N.E.2d at 717, 498 N.Y.S.2d at 748.

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

comparable formula to compensate Berenson for the amount she contributed to Golub's practice by taking into account such factors as how much time she spent entertaining prospective clients or the amount of media exposure she gave her husband. Though such a method would also present problems in valuation, it would appear that a more equitable resolution of the marital property would be achieved without giving either party a windfall award.

VII. CONCLUSION

In the divorce action of actress Marisa Berenson and attorney A. Richard Golub, a New York court held that an increase in celebrity status during a marriage could be marital property. In so doing, the court extended a trend that began with the legislative intent behind "equitable distribution" and continued through such cases as *O'Brien*, *Price*, and *McGowan*. Although the court's decision may present some future application problems in such areas as valuation of a "celebrity status," these problems need not be insurmountable.

The decision seems to be sound in the policy reflected—that upon divorce the parties should equitably divide marital assets as if a partnership has just broken up. This policy appears to be legislatively mandated. Furthermore, the court's holding is socially reasonable considering that film and television personalities usually have enormous earning potential, yet possess no tangible license or degree.

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