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# The Doctrine of *O'Brien v. O'Brien*: A Critical Analysis

Kenneth R. Davis\*

## I. Introduction

In 1985 the New York Court of Appeals held in *O'Brien v. O'Brien*<sup>1</sup> that a medical license is marital property within the meaning of section 236 of the Domestic Relations Law.<sup>2</sup> The *O'Brien* court ruled that a non-licensed spouse may be entitled to a distributive share of the increased lifetime earning potential of the licensed spouse.<sup>3</sup>

Many commentators have applauded *O'Brien* for compensating the unlicensed spouse for contributions, whether financial or otherwise, to the acquisition of a license.<sup>4</sup> *O'Brien* has also been widely criticized, however, for encouraging "unbridled speculation" in valuating the license,<sup>5</sup> and for imposing a finan-

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

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

3. 66 N.Y.2d at 580-81, 489 N.E.2d at 713, 498 N.Y.S.2d at 744. Before adoption of equitable distribution, a spouse who owned property in his or her name during marriage was awarded that property upon divorce. See, e.g., Brian Diamond & William F. Prinsell, Note, *New York's Equitable Distribution Law: A Sweeping Reform*, 47 BROOK. L. REV. 67, 70 (1980); Stephanie Rubino, Note, 17 SETON HALL L. REV. 963, 963 (1987).

4. See, e.g., Leslie F. Burns & Gregg A. Grauer, Note, *Human Capital as Marital Property*, 19 HOFSTRA L. REV. 499 (1990); Michael R. Herman, Note, *Not What the Doctor Ordered - Medical License Declared Marital Property: O'Brien v. O'Brien*, 60 ST. JOHN'S L. REV. 539, 545 (1986); Frances Lynch, Comment, *Family Law: O'Brien v. O'Brien: A Professional Degree As Marital Property*, 29 ARIZ. L. REV. 353, 359 (1987); Scott E. Willoughby, Note, *Professional Licenses as Marital Property: Responses to Some of O'Brien's Unanswered Questions*, 73 CORNELL L. REV. 133, 147 (1987).

5. See, e.g., William A. Callison, Comment, *Professional Licenses and Marital Dissolution in O'Brien v. O'Brien: Expectation Returns in the Marital Partnership*, 72 IOWA L. REV. 445, 460-61 (1987); Herman, *supra* note 4, at 545; Rubino, *supra* note 3, at 978.

cial burden on the licensed spouse that might compel the pursuit of an unwanted or even unattainable lifelong career.<sup>6</sup>

In the landmark decision, *In re Marriage of Graham*,<sup>7</sup> the Supreme Court of Colorado argued cogently that a license is not marital property, because it has none of the attributes of property and represents a uniquely personal accomplishment of its holder.<sup>8</sup> An overwhelming majority of states which have confronted the issue, either at the intermediate appellate court level,<sup>9</sup> or at the high court level,<sup>10</sup> have aligned themselves with

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6. See, e.g., Callison, *supra* note 5, at 462; Herman, *supra* note 4, at 552; Brenda R. Sharton, Note, *Spousal Interest in Professional Degrees: Solving The Compensation Dilemma*, 31 B.C. L. REV. 749, 769 (1990); Willoughby, *supra* note 4, at 153.

7. 574 P.2d 75 (Colo. 1978).

8. *Id.* at 77. In holding that a Master's degree in business administration is not marital property, the court said:

An educational degree, such as an M.B.A., is simply not encompassed even by the broadest view of the concept of "property." It 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 result in the future acquisition of property.

*Id.*; see also Hoak v. Hoak, 370 S.E.2d 473, 477 (W. Va. 1988) (Holding that a medical degree is not marital property, the court said: "On the whole, a degree of any kind results primarily from the efforts of the student who earns it. Financial and emotional support are important, as are homemaker services, but they bear no logical relationship to the value of the resulting degree.").

9. E.g., Jones v. Jones, 454 So. 2d 1006, 1009 (Ala. Civ. App. 1984) (law degree); Wisner v. Wisner, 631 P.2d 115, 122-23 (Ariz. Ct. App. 1981) (medical license); Hughes v. Hughes, 438 So. 2d 146, 149 (Fla. Dist. Ct. App. 1983) (undergraduate degrees); *In re Marriage of Weinstein*, 470 N.E.2d 551, 559 (Ill. App. Ct. 1984) (osteopathic degree and license to practice surgery); *McManama v. McManama*, 386 N.E.2d 953, 955 (Ind. Ct. App. 1979) (law license), *vacated and transferred*, 399 N.E.2d 371 (Ind. 1980); *Scott v. Scott*, 645 S.W.2d 193, 197 (Mo. Ct. App. 1982) (law license); *Beeler v. Beeler*, 715 S.W.2d 625, 627 (Tenn. Ct. App. 1986) (dental license); *Frausto v. Frausto*, 611 S.W.2d 656, 659 (Tex. Civ. App. 1980) (medical license); *Marion v. Marion*, 401 S.E.2d 432, 438 (Va. Ct. App. 1991) (veterinary degree). A lower court in Delaware has rejected the *O'Brien* doctrine. *Wright v. Wright*, 469 A.2d 803, 806 (Del. Fam. Ct. 1983) (dental degree).

10. E.g., *In re Marriage of Sullivan*, 184 Cal. Rptr. 796 (Ct. App. 1982), *super-seded*, 691 P.2d 1020 (Cal. 1984) (statute amended to provide non-titled spouse with reimbursement for financial contributions made to education of titled spouse); *Olar v. Olar*, 747 P.2d 676, 680 (Colo. 1980) (doctoral degrees in physiology and biophysics); *Inman v. Inman*, 648 S.W.2d 847, 852 (Ky. 1982) (dental license); *Sweeny v. Sweeny*, 534 A.2d 1290, 1291 (Me. 1987) (medical license);

*Graham*, disapproving of the *O'Brien* doctrine.<sup>11</sup> Many of these cases were decided under statutes virtually identical to the New York equitable distribution law.<sup>12</sup> A few states have enacted legislation, explicitly or impliedly, rejecting *O'Brien*.<sup>13</sup>

The high court of only one other state, Iowa, has held that a non-licensed spouse should share in the increased earning po-

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Archer v. Archer, 493 A.2d 1074, 1079 (Md. 1985) (medical license); Drapek v. Drapek, 503 N.E.2d 946, 950 (Mass. 1987) (medical license); Ruben v. Ruben, 461 A.2d 733, 735 (N.H. 1983) (doctoral degree and career in electron microscopy); Mahoney v. Mahoney, 453 A.2d 527, 536 (N.J. 1982) (Master's degree in business administration); Muckleroy v. Muckleroy, 498 P.2d 1357, 1358 (N.M. 1972) (medical license); Haywood v. Haywood, 415 S.E.2d 565, 570 (N.C. 1992) (Master's degrees in economics and business); Nastrom v. Nastrom, 262 N.W.2d 487, 493 (N.D. 1978) (expectancy of future earnings as entrepreneur); Stevens v. Stevens, 492 N.E.2d 131, 135 (Ohio 1986) (veterinary degree); Hubbard v. Hubbard, 603 P.2d 747, 750 (Okla. 1979) (per curiam) (medical degree); *In re Marriage of Stuart*, 813 P.2d 49, 51 (Or. 1991) (medical license); Hodge v. Hodge, 520 A.2d 15, 17 (Pa. 1986) (medical degree); Helm v. Helm, 345 S.E.2d 720, 21 (S.C. 1986) (medical degree); Wehrkamp v. Wehrkamp, 357 N.W.2d 264, 266 (S.D. 1984) (dental license); Martinez v. Martinez, 818 P.2d 538, 539-40 (Utah 1991) (medical license); Downs v. Downs, 574 A.2d 156, 158 (Vt. 1990) (medical degree); *In re Marriage of Washburn*, 677 P.2d 152, 158 (Wash. 1984) (veterinary license); Hoak v. Hoak, 370 S.E.2d 473, 474 (W. Va. 1988) (medical license); Lundberg v. Lundberg, 318 N.W.2d 918, 922 (Wis. 1982) (medical degree); Grosskopf v. Grosskopf, 677 P.2d 814, 822 (Wyo. 1984) (Master's degree in accounting).

11. A few courts that have declined to follow the *O'Brien* doctrine have not foreclosed its adoption under compelling circumstances. *Nelson v. Nelson*, 736 P.2d 1145, 1146, 1147 (Alaska 1987) (holding that an accounting degree is not marital property, but intimating that under facts similar to those presented in *O'Brien* a different result might be reached); *DeLa Rosa v. DeLa Rosa*, 309 N.W.2d 755 (Minn. 1981). In *DeLa Rosa*, the husband had begun but had not completed his medical studies when the parties divorced. Holding that the wife had no property interest in the medical degree, awarded after the divorce, the court allowed that, under different circumstances, a degree might be marital property. *Id.* at 758-59.

12. *E.g.*, *Beeler*, 715 S.W.2d at 627 (applying TENN. CODE ANN. § 36-4-121 (1984)); *Hoak*, 370 S.E.2d at 475 (applying W. VA. CODE § 48-2-32 (1986)); *Lundberg*, 318 N.W.2d at 922 (applying WIS. STAT. § 247.255 (1977)). Therefore, one cannot forcefully argue that the New York equitable distribution statute constrained the Court of Appeals to hold that a license is marital property.

13. IND. CODE ANN. § 31-1-11.5-11 (Burns 1986) (providing reimbursement as the exclusive remedy to a non-licensed spouse who contributed, directly or indirectly, to the acquisition of the other spouse's license); N.C. GEN. STAT. § 50-20(b)(2) (1987) (providing that a license is separate property); see CAL. FAM. CODE § 2641 (West Supp. 1994) (a community property statute, which provides, as does the Indiana statute, that reimbursement is the non-licensed spouse's exclusive remedy); for a discussion of the relevant statutes, see generally THOMAS S. OLDHAM, DIVORCE SEPARATION AND THE DISTRIBUTION OF PROPERTY § 9.02, at 9-3 to 9-13 (1987).

tential of the licensed spouse. The Iowa Supreme Court, however, declined to rule that a license is marital property.<sup>14</sup> One other state has a conflict of authority on the issue.<sup>15</sup>

Yet *O'Brien* flourishes in New York. The courts have extended its holding, not only to all licenses and degrees acquired during marriage which enhance earning potential,<sup>16</sup> but also to increases in earning potential arising from professional "distinction" during marriage<sup>17</sup> and celebrity status attained in a career which pre-existed the marriage.<sup>18</sup>

Under certain circumstances the appreciation during marriage of separate property is subject to equitable distribution.<sup>19</sup> Some New York decisions have characterized a spouse's advancement in a career that pre-existed the marriage as appreciation of separate property, and therefore as a distributable marital asset.<sup>20</sup>

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14. In *In re Marriage of Horstman*, 263 N.W.2d 885 (Iowa 1978), the court held that a law license is not marital property, but that "it is the potential for increase in future earning capacity made possible by the law degree and certificate of admission conferred upon the husband with the aid of his wife's efforts which constitute the asset for distribution by the court." *Id.* at 891. Although the court awarded only reimbursement to the wife for actual expenditures, the above quote, along with the court's pronouncement that "other measures . . . could have been used to establish the value of the respondent's education," *id.*, appeared to presage an award based on earning potential. In *In re Marriage of Francis*, 442 N.W.2d 59 (Iowa 1989), the court reaffirmed that a medical license is not marital property. *Id.* at 62. Characterizing its award to the wife as "reimbursement alimony," *id.* at 64, the court based the award on the husband's increased lifetime earning potential. *Id.* at 65. The court assumed, in its calculations, that the process of acquiring the degree accounted for 30% of the increased earning potential occasioned by the degree, and awarded the wife 50% of this sum. *Id.*

15. A Michigan intermediate appellate court has held that a license is marital property. *E.g.*, *Woodworth v. Woodworth*, 337 N.W.2d 332, 334 (Mich. Ct. App. 1983). *Contra, e.g.*, *Olah v. Olah*, 354 N.W.2d 359, 361-62 (Mich. Ct. App. 1984) (holding that a medical degree is not marital property, but that the non-titled spouse should be compensated with alimony). In addition, the *Woodworth* court held that the remedy of the non-licensed spouse is to share in the increased lifetime earning potential of the other spouse's law degree. *Woodworth*, 337 N.W.2d at 337. Most recently, the court has dodged the issue. *Daniels v. Daniels*, 418 N.W.2d 924, 927 (Mich. Ct. App. 1988) (holding that non-titled spouse is entitled to compensation for titled spouse's acquisition of dental degree, whether compensation is characterized as a share of the value of the degree or as maintenance).

16. See *infra* notes 65-71 and accompanying text.

17. See *infra* notes 81-84 and accompanying text.

18. See *infra* notes 85-94 and accompanying text.

19. See *infra* notes 95-126 and accompanying text.

20. See *infra* notes 127-41 and accompanying text.

A spouse may elect not to use a license. At least one court has held that the non-licensed spouse is, nevertheless, entitled to share in the increased earning expectation of the licensed spouse.<sup>21</sup>

When the licensed spouse founds or joins a professional practice, the license or degree may be deemed to have "merged" into the practice. Under the merger doctrine, the non-licensed spouse may be entitled to a distributive share of the value of the licensed spouse's interest in the partnership rather than a share of the value of the license.<sup>22</sup> The purpose of this doctrine is to avoid double recovery, which would result from awarding a share in both the license and the partnership.<sup>23</sup> However, recent authority has eroded this doctrine holding that the non-licensed spouse may be entitled to share in both.<sup>24</sup>

When confronting other issues, the courts have been similarly inclined to take positions affording the non-titled spouse the greatest recovery. One such area concerns whether the non-titled spouse may share in the value of a license earned before the marriage, but not awarded until after the marriage, and whether the non-titled spouse may share in the value of a license partially earned, but not completed, during the marriage.<sup>25</sup> The courts have shown the same predisposition when valuating partnership interests for purposes of equitable distribution,<sup>26</sup> and when determining what events mark the termination of distributive rights of the non-titled spouse.<sup>27</sup>

This article examines the development of the *O'Brien* doctrine in New York, and suggests that the doctrine has failed to balance equitably the interests of the parties involved in divorce. It concludes that fairness and the very language of New York's equitable distribution law require a two-pronged approach to compensating the contributing, non-titled spouse. Such a spouse should be compensated with an increased share of existing marital assets rather than by mischaracterizing a license or career potential as marital property. Alternatively, if

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21. See *infra* notes 72-80 and accompanying text.

22. See *infra* notes 142-61 and accompanying text.

23. See *infra* notes 142-61 and accompanying text.

24. See *infra* notes 162-89 and accompanying text.

25. See *infra* notes 190-203 and accompanying text.

26. See *infra* notes 228-66 and accompanying text.

27. See *infra* notes 204-27 and accompanying text.

adequate marital assets are unavailable to reach a fair resolution, maintenance should be adjusted to achieve a satisfactory remedy.<sup>28</sup>

## II. *O'Brien v. O'Brien*

### A. *The Facts*

When the O'Briens were married in April of 1971 both were teachers at a private school. The wife, who had a bachelor's degree and a temporary teaching certificate, required eighteen months of post-graduate study to acquire a permanent teaching certificate.<sup>29</sup> The husband had completed three and one-half years of college. After the marriage, he graduated from college, and in 1973 the couple moved to Guadalajara, Mexico, where the husband became a full-time medical student. During the three years the husband studied medicine, the wife held several teaching positions.<sup>30</sup> Her earnings paid for most of the couple's joint expenses including the cost of the husband's education. In December 1976 they returned to New York where the husband completed his medical training, while the wife continued teaching. In 1980, two months after receiving a license to practice medicine, the husband commenced a divorce action.<sup>31</sup>

The court confronted the issue of whether a medical license is marital property within the meaning of New York's Domestic Relations Law. Section 236(B)(1)(c) defines marital property 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, except as otherwise provided in agreement pursuant to subdivision three of this part. Marital property shall not include separate property as hereinafter defined.<sup>32</sup>

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28. See *infra* notes 267-88 and accompanying text.

29. *O'Brien v. O'Brien*, 66 N.Y.2d 576, 581, 489 N.E.2d 712, 713, 498 N.Y.S.2d 743, 744 (1985).

30. *Id.*; 489 N.E.2d at 417, 498 N.Y.S.2d at 745.

31. *Id.* at 581-82, 489 N.E.2d at 714, 498 N.Y.S.2d at 745.

32. N.Y. DOM. REL. LAW § 236(B)(1)(c) (McKinney 1986). Section 236(B)(1)(d) defines separate property as follows:

The term separate property shall mean:

- (1) property acquired before marriage or property acquired by bequest, devise, or descent, or gift from a party other than the spouse;
- (2) compensation for personal injuries;

### B. *The Court's Analysis*

Judge Simons, author of the opinion, began his analysis by observing that the statutory definition of marital property is not bound by traditional "property concepts, because there is no common law property interest remotely resembling marital property."<sup>33</sup> Rather, Judge Simons said, it is a creature of statute, and as such its meaning must be gleaned, to the extent possible, from the statutory language itself. He found guidance as to the statutory meaning in Domestic Relations Law section 236(B)(5)(d).<sup>34</sup> This subsection, which sets forth considerations relevant to determining how marital property should be divided, provides in part:

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 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*.<sup>35</sup>

Judge Simons concluded that this subsection includes professional licenses within the definition of marital property.<sup>36</sup>

To bolster his interpretation of the statute, Judge Simons looked to the legislative history of section 236. He noted that inequities had commonly arisen when traditional property concepts had been applied to divide marital property in divorce proceedings.<sup>37</sup> These inequities spurred a call to reform the law.<sup>38</sup>

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(3) property acquired in exchange for or the increase in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse;

(4) property described as separate property by written agreement of the parties pursuant to subdivision three of this part.

*Id.*

33. *O'Brien*, 66 N.Y.2d at 583, 489 N.E.2d at 715, 498 N.Y.S.2d at 746 (1985).

34. *Id.* at 584, 489 N.E.2d at 715-16, 498 N.Y.S.2d at 746-47.

35. N.Y. DOM. REL. LAW § 236(B)(5)(d) (McKinney 1986) (emphases added).

36. *O'Brien*, 66 N.Y.2d at 584, 489 N.E.2d at 715-16, 498 N.Y.S.2d at 746-47.

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

38. *Id.*



Equitable distribution, a new concept, was created and enacted into law to provide a fairer system for the division of marital assets.<sup>39</sup> This approach recognizes that marriage is an economic partnership in which the achievements of one spouse almost inevitably result from the efforts of both, whether as spouse, parent, wage earner, or homemaker.<sup>40</sup> Judge Simons observed that the non-licensed spouse may have contributed to the acquisition of the license by providing financial support, raising children, or homemaking, and may, in addition, have foregone career opportunities.<sup>41</sup> He concluded, therefore, that the acquisition of a professional license during marriage is marital property.<sup>42</sup>

Applying this standard to the *O'Brien* case, Judge Simons emphasized that the wife had sacrificed her teaching career to follow her husband to Mexico, and that she had provided their principal source of support throughout her husband's education.<sup>43</sup> She was, therefore, entitled to a distributive share of the value of the license, measured by the "enhanced earning capacity it affords its holder."<sup>44</sup> Accordingly, the court remitted the case for a determination of the value of the husband's medical

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39. *Id.* at 585, 489 N.E.2d at 716, 498 N.Y.S.2d at 747.

40. *Id.*; see Governor's Memorandum of Approval of ch. 281, N.Y. Laws (June 19, 1980), reprinted in 1980 N.Y. Laws 1863 (McKinney) ("The bill [proposing the adoption of Act approved June 19, 1980, ch. 281, 1980 N.Y. Laws 1225, the law of equitable distribution] recognizes that the marriage relationship is also an economic partnership."); Memorandum of Ass. Burrows, reprinted in 1980 N.Y. LEGIS. ANN. 129, 130 ("[M]odern marriage should be viewed as a form of partnership.")

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

42. *Id.* Before *O'Brien*, there was a conflict of authority as to whether a license was marital property. Compare *Litman v. Litman*, 93 A.D.2d 695, 696, 463 N.Y.S.2d 24, 25 (2d Dep't 1983) (per curiam) (holding that law license is marital property), *aff'd*, 61 N.Y.2d 918, 463 N.E.2d 34, 474 N.Y.S.2d 718 (1984), with *Conner v. Conner*, 97 A.D.2d 88, 102, 468 N.Y.S.2d 482, 492 (2d Dep't 1983) (holding that M.B.A. is not marital property), and *Lesman v. Lesman*, 88 A.D.2d 153, 157, 452 N.Y.S.2d 935, 938 (4th Dep't) (holding that medical license is not marital property), *appeal dismissed*, 57 N.Y.2d 956 (1982).

43. *O'Brien*, 66 N.Y.2d at 576, 489 N.E.2d at 716, 498 N.Y.S.2d at 743.

44. *Id.* at 588, 489 N.E.2d at 718, 498 N.Y.S.2d at 749. This method of valuation is known as "capitalization of excess earnings." Marguerite H. Cameron, Note, *The Valuation Of A Professional Practice In Equitable Distribution - Poore v. Poore*, 22 WAKE FOREST L. REV. 327, 341 (1987).

license and the distributive share to which the wife was entitled.<sup>45</sup>

Judge Meyer concurred.<sup>46</sup> Though agreeing with the majority that a license is marital property under the equitable distribution law, he voiced concerns about the unfairness that might result from a distributive award imposed against a professional still in training, and he appealed to the legislature to change the law.<sup>47</sup> He noted:

[A] professional in training who is not finally committed to a career choice when the distributive award is made may be locked into a particular kind of practice simply because the monetary obligations imposed by the distributive award made on the basis of the trial judge's conclusion (prophesy may be a better word) as to what the career choice will be leaves him or her no alternative.<sup>48</sup>

Judge Meyer pointed out that a newly licensed professional might be disabled and incapable of practicing his or her profession.<sup>49</sup> Since a distributive award made pursuant to section 236 appears not to be subject to modification,<sup>50</sup> such an award would work injustice.<sup>51</sup>

In *O'Brien*, as soon as the husband received his medical license, he abandoned the wife who had supported him through medical school.<sup>52</sup> It is understandable why the court, given such compelling facts, fashioned the rule that a license earned during a marriage is marital property subject to equitable distribution and that the value of the asset is the increased lifetime earning potential of the licensed spouse. The lower courts of New York, following the lead of the high court, have extended this rule beyond all reasonable bounds.<sup>53</sup>

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45. *O'Brien*, 66 N.Y.2d at 590, 591, 489 N.E.2d at 718, 720, 498 N.Y.S.2d at 749, 751.

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

47. *Id.*

48. *Id.*

49. *Id.* at 592, 489 N.E.2d at 720, 498 N.Y.S.2d at 751.

50. *Id.*; N.Y. DOM. REL. LAW § 236(B)(9)(b) (McKinney 1986).

51. *O'Brien*, 66 N.Y.2d at 592, 489 N.E.2d at 720-21, 498 N.Y.S.2d at 751-52 (Meyer, J., concurring).

52. This situation is a classic example of the so-called "student spouse/working spouse syndrome."

53. See, e.g., *infra* notes 85-94 and accompanying text.

### C. *A Critique of the O'Brien Doctrine*

The failings of *O'Brien*, and cases which have followed it, are threefold. First, the court employed faulty analysis by holding that, under section 236, increased earning potential is marital property. Although the court correctly stated that its task was to determine whether a license is marital property within the meaning of section 236(B)(1)(c),<sup>54</sup> the definitional section, it erroneously relied on section 236(B)(5)(d)(6), the distributional section, to conclude that the legislature's definition of marital property encompassed "a license to practice medicine."<sup>55</sup> Referring to section 236(B)(5)(d)(6), the court asserted that:

The words mean exactly what they say: that an interest in a profession or a 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 non-financial contributions made by caring for the home and family.<sup>56</sup>

This section, however, does not define marital property as suggested by the court.<sup>57</sup> Rather, it prescribes the equitable factors relevant to dividing assets which fall within the definition of marital property set forth in section 236(B)(1)(c).<sup>58</sup> Thus, for example, if a married couple buys a home with funds earned by one spouse, the home is marital property, under section 236(B)(1)(c), even if title is in the name of the working spouse. Under section 236(B)(5)(d)(6), the non-working spouse will be entitled, upon divorce, to a share of the value of the home, based, in part, on contributions as "spouse, parent, . . . and homemaker."<sup>59</sup> Similarly, if one spouse contributes directly or indirectly to the "career or career potential of the other party," the contributing spouse will be entitled to a greater share in the marital property than would otherwise have been the case.<sup>60</sup> However, nothing in section 236(B)(1)(c) of the Domestic Rela-

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54. See N.Y. DOM. REL. LAW § 236(B)(5)(d)(6) (McKinney 1986).

55. See N.Y. DOM. REL. LAW § 236(B)(1)(c) (McKinney 1986); see Herman, *supra* note 4, at 545-46.

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

57. See N.Y. DOM. REL. LAW § 236(B)(5)(d)(6) (McKinney 1986).

58. See N.Y. DOM. REL. LAW § 236(B)(1)(c) (McKinney 1986); see Herman, *supra* note 4, at 545-46.

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

60. *Id.*

tions Law suggests that marital property includes increased earning potential resulting from the acquisition of a license.<sup>61</sup>

Second, measuring increased earning potential by assuming the titled spouse will maximize earnings may have devastating consequences on the life of the titled spouse. A person may become incapacitated and, therefore, unable to use a license,<sup>62</sup> or a person may choose to pursue a career less lucrative than that followed by the "average licensed person."<sup>63</sup> For example, an award under *O'Brien*, based on the average lifetime earnings of a physician, might compel a doctor to abandon plans to conduct medical research.

Third, the magnitude of awards made under *O'Brien* seems to follow from the unrealistic premise that the process of acquiring a license accounts for all the financial benefits that may result, ignoring the importance of years of hard work and dedication.<sup>64</sup>

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61. See *In re Marriage of Weinstein*, 470 N.E.2d 551, 559 (Ill. App. Ct. 1984) (Construing ILL. REV. STAT. ch. 40, para. 503(d) (1981), an equitable distribution provision similar to New York law, the court said: "Rather than being classified as marital assets, a spouse's professional degree or license, earned while married through the financial support of the other spouse, is a relevant factor in distribution of the couple's marital assets and liabilities.").

62. The equitable distribution provisions of the Domestic Relations Law were intended to provide flexibility so that equity could be done. But if the assumption as to career choice on which a distributive award payable over a number of years is based turns out not to be the fact (as, for example, should a general surgery trainee accidentally lose the use of his hand), it should be possible for the court to revise the distributive award to conform to the fact.

*O'Brien*, 66 N.Y.2d at 592, 489 N.E.2d at 720, 498 N.Y.S.2d at 751 (Meyer, J., concurring).

63. See *supra* note 6 and accompanying text.

64. See, e.g., *Maloney v. Maloney*, 137 A.D.2d 666, 666, 524 N.Y.S.2d 758, 760-61 (2d Dep't 1988) (awarding the wife 35% of the increased lifetime earning potential of the husband's medical degree earned during marriage where the parties separated after eleven years of marriage and divorced five years later); *Allocco v. Allocco*, 152 Misc. 2d 529, 536-37, 578 N.Y.S.2d 995, 1000 (Sup. Ct. Monroe County 1991) (awarding the wife 50% of the projected increased lifetime earnings resulting from the husband's promotion to police lieutenant during the marriage which lasted twenty-five years); *Madori v. Madori*, 151 Misc. 2d 737, 741, 573 N.Y.S.2d 553, 556 (Sup. Ct. Westchester County 1991) (awarding the wife 40% of the projected increased lifetime earnings arising from husband's expertise gained in emergency room medicine during marriage where the parties separated after three years of marriage, and divorced three years later).

The courts of New York have compounded these problems by expanding the *O'Brien* doctrine with holdings that defy common sense and breed injustice.<sup>65</sup>

### III. Marital Property

#### A. Licenses and Degrees

The courts have held that all income enhancing licenses, even those not customarily associated with professional practices, are marital property.<sup>66</sup>

A more controversial issue was whether academic degrees are sufficiently analogous to professional licenses to be deemed marital property. In *McGowan v. McGowan*<sup>67</sup> the wife, during the twenty-four year marriage, earned a Master's degree. The husband argued that the degree was marital property.<sup>68</sup>

The court recognized the important distinction between licenses and degrees. Earning an academic degree signifies the attainment of a level of proficiency in an area of study which may not confer the right to engage in a profession as would a license.<sup>69</sup> The court observed, however, that *O'Brien* was based on the increased earning capacity resulting from the license, rather than on the right to practice.<sup>70</sup> Therefore, the court reasoned that a degree enhances earning capacity much the same as does a license, and that for purposes of equitable distribution, no distinction should be drawn between the two.<sup>71</sup>

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65. See, e. g., *infra* notes 84-92 and accompanying text.

66. *E.g.*, *Duspiva v. Duspiva*, 181 A.D.2d 810, 811, 581 N.Y.S.2d 376, 377 (2d Dep't 1992) (license to practice as certified public accountant); *Holihan v. Holihan*, 159 A.D.2d 685, 686, 553 N.Y.S.2d 434, 436 (2d Dep't 1990) (license to work as guidance counselor); *Kyle v. Kyle*, 156 A.D.2d 508, 509, 548 N.Y.S.2d 781, 783 (2d Dep't 1989) (school principal license); *Anderson v. Anderson*, 153 A.D.2d 823, 825, 545 N.Y.S.2d 335, 336 (2d Dep't 1989) (degrees and licenses in health administration); *Morimando v. Morimando*, 145 A.D.2d 609, 609, 536 N.Y.S.2d 701, 701 (2d Dep't 1988) (license to practice as a physician's assistant); *DeStefano v. DeStefano*, 119 A.D.2d 793, 793, 501 N.Y.S.2d 419, 420 (2d Dep't 1986) (medical license); *Cronin v. Cronin*, 131 Misc. 2d 879, 880-81, 502 N.Y.S.2d 369-70 (Sup. Ct. Nassau County 1986) (license to practice law).

67. 142 A.D.2d 355, 535 N.Y.S.2d 990 (2d Dep't 1988).

68. *Id.* at 358, 535 N.Y.S.2d at 992.

69. *Id.* at 359, 535 N.Y.S.2d at 993.

70. *Id.*

71. *Id.* at 361, 535 N.Y.S.2d at 993-94; see also *DiCaprio v. DiCaprio*, 162 A.D.2d 944, 945, 556 N.Y.S.2d 1011, 1012 (4th Dep't 1990) (Master's Degree and permanent certificate to work as school administrator is marital property), *appeal*

## B. *Unused Licenses*

A serious failing of the *O'Brien* doctrine is that it awards a share of the earnings of a hypothetical future career to the non-titled spouse even when it is clear that such a career has not and will not materialize.<sup>72</sup> Such was the case in *Savasta v. Savasta*.<sup>73</sup> The husband was a medical student in Belgium, when he met his wife, who was a nurse. The couple married in Canada, while the husband was finishing his internship.<sup>74</sup> Five years later, the husband received board certification to practice internal medicine. During the next seven years, however, until the couple divorced, he never practiced in this specialty, opting instead to practice emergency medicine which is less lucrative.<sup>75</sup>

Holding that the husband's license to practice internal medicine was marital property,<sup>76</sup> the court rejected the husband's argument that because he had never practiced internal medicine, the license was not marital property. The court awarded the wife ten percent of the average annual earnings of an internist less the average annual earnings of a general practitioner multiplied by 25.6 years, the expected duration of the husband's career.<sup>77</sup> To justify this holding, the court observed that the husband was currently only thirty-eight and had expressed an interest in practicing internal medicine, though circumstances prevented him from doing so.<sup>78</sup> While candidly admitting that it could not "foretell the future,"<sup>79</sup> the court divined that the husband would likely practice internal medicine

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*dismissed*, 77 N.Y.2d 802, 567 N.E.2d 981, 566 N.Y.S.2d 587 (1991); *Allocco v. Allocco*, 152 Misc. 2d 529, 534-35, 578 N.Y.S.2d 995, 998-99 (Sup. Ct. Monroe County 1991) (holding that where a policeman earned an Associate's Degree and Bachelor's Degree, which, although not pre-requisites for advancement, may have aided in his promotion to police lieutenant, the increased earning potential resulting from the promotions was a marital asset). *Contra Cronin v. Cronin*, 131 Misc. 2d 879, 883, 502 N.Y.S.2d 368, 371 (Sup. Ct. Nassau County 1986) (holding that undergraduate degree in marketing is not marital property).

72. *See, e.g.*, *O'Brien v. O'Brien*, 66 N.Y.2d 576, 591, 489 N.E.2d 712, 720, 498 N.Y.S.2d 743, 751 (1985) (Meyer, J., concurring); *Sharton*, *supra* note 6, at 766; *Willoughby*, *supra* note 4, at 153.

73. 146 Misc. 2d 101, 549 N.Y.S.2d 544 (Sup. Ct. Nassau County 1989).

74. *Id.* at 102, 549 N.Y.S.2d at 545.

75. *Id.* at 103, 549 N.Y.S.2d at 545-46.

76. *Id.*, 549 N.Y.S.2d at 546.

77. *Id.* at 107-09, 549 N.Y.S.2d at 548-49.

78. *Id.*, 549 N.Y.S.2d at 549.

79. *Id.* at 107, 549 N.Y.S.2d at 548.

sometime in the future. The court acknowledged, however, that if the license had lain dormant for thirty years, an award based on the earning potential of the license would have been inappropriate.<sup>80</sup> Hence, the court penalized a titled spouse who followed a career which failed to optimize earnings.

### C. *Professional Distinction and Celebrity Status*

Subsequent cases, following *O'Brien*, have extended the definition of marital property beyond licenses and degrees. In *McAlpine v. McAlpine*,<sup>81</sup> the court confronted the issue of whether the attainment of professional "distinction" during marriage is a marital asset. The husband was an actuary before marrying. During the marriage he became a fellow in the Society of Actuaries. Because this honor hypothetically brought an enhanced earning capacity, the court held it to be marital property.<sup>82</sup> In so holding, the court said: "[A] trend has developed wherein the court will consider as a marital asset, the enhanced earning capacity that a party has achieved during marriage by virtue of attaining a professional license, academic degree or other accomplishment."<sup>83</sup> Because the wife had not contributed, financially or otherwise, to the husband's achievement of professional distinction, the court did not award her a share of the husband's increased earning potential.<sup>84</sup>

*O'Brien* was expanded even further in *Elkus v. Elkus*.<sup>85</sup> When Frederica von Stade, an opera singer, was married in 1973, she performed minor roles at the Metropolitan Opera, earning an annual income of approximately \$2,000. During the course of her seventeen year marriage, she achieved international acclaim, and her income rose meteorically. In 1989, the year prior to her divorce, she earned over \$600,000. Through much of the marriage, her husband functioned as her voice coach and teacher, travelled with her on tour, critiqued her rehearsals and performances, and photographed her for

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80. *Id.* at 108, 549 N.Y.S.2d at 549.

81. 143 Misc. 2d 30, 539 N.Y.S.2d 680 (Sup. Ct. Suffolk County 1989).

82. *Id.* at 31, 539 N.Y.S.2d at 681.

83. *Id.* at 32, 539 N.Y.S.2d at 681 (emphasis added).

84. *Id.* at 33, 539 N.Y.S.2d at 681.

85. 169 A.D.2d 134, 572 N.Y.S.2d 901 (1st Dep't 1991), *appeal dismissed*, 79 N.Y.2d 851, 588 N.E.2d 99, 580 N.Y.S.2d 201 (1992).

magazines and album covers.<sup>86</sup> The issue was whether the increased earning potential, occasioned by her celebrity status, was marital property. The wife argued that celebrity status is not marital property because (1) it is not licensed, (2) it is not "owned" in the sense that a business is owned, and (3) it is not protected by due process, as are traditional property rights.<sup>87</sup>

The court rejected her arguments, holding that "[t]hings of value acquired during marriage are marital property even though they may fall outside the scope of traditional property concepts."<sup>88</sup> Noting that *O'Brien* is not limited to careers which are licensed or require degrees, the court stated: "Any attempt to limit marital property to professions which are licensed would only serve to discriminate against the spouses of those in other areas of employment."<sup>89</sup> The court also relied heavily, as had the *O'Brien* court, on section 236(B)(5)(d)(6),<sup>90</sup> which provides, "[i]n determining an equitable distribution of property" the court shall consider "any equitable claim to, interest in, or direct or indirect contribution made . . . to the career or the career potential of the other party."<sup>91</sup> Because von Stade's husband had contributed to her rise to stardom, the court held that he was entitled to a share of the "appreciation" of her career.<sup>92</sup>

As in *O'Brien*, the court misinterpreted section 236(B)(5)(d)(6),<sup>93</sup> which does not define marital property, but rather prescribes the factors relevant to dividing it.<sup>94</sup>

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86. *Id.* at 135-36, 571 N.Y.S.2d 901-02.

87. *Id.* at 136, 572 N.Y.S.2d at 902.

88. *Id.*

89. *Id.* at 137, 572 N.Y.S.2d at 903.

90. *Id.* at 140, 572 N.Y.S.2d at 904.

91. See N.Y. DOM. REL. LAW § 236(B)(5)(d)(6) (McKinney 1986).

92. *Elkus*, 169 A.D.2d at 140, 572 N.Y.S.2d at 904-05; see *Golub v. Golub*, 139 Misc. 2d 440, 527 N.Y.S.2d 946 (Sup. Ct. N.Y. County 1988). In *Golub*, the court ruled that the increased earning potential arising from Marisa Berenson's status as a film star and model was marital property subject to equitable distribution. *Id.* at 446-47, 527 N.Y.S.2d at 950. In holding "fame" to be marital property, the court noted that "the right to exploit a celebrity's fame has been held to descend to his heirs." *Id.* at 445, 527 N.Y.S.2d at 949 (citing *Price v. Hal Roach Studios Inc.*, 400 F. Supp. 836 (S.D.N.Y. 1975)).

93. See N.Y. DOM. REL. LAW § 236(B)(5)(d)(6) (McKinney 1986).

94. Equitable distribution involves three phases: classification, valuation and division of marital property. The classification phase, governed by N.Y. DOM. REL. LAW § 236 (B)(5)(d)(6) (McKinney 1986), should not be confused with the distribution phase, governed by N.Y. DOM. REL. LAW § 236 (B)(1)(c) (McKinney 1986). See *Herman*, *supra* note 4, at 545-46.



*Elkus* may also be criticized because it presumes that a celebrity's career will never founder or fail. Frederica von Stade may fall out of favor with the public, her voice may be injured, or she may choose, as should be her prerogative, to renounce her fame. The court's decision denies these possibilities.

#### D. *Appreciation of Separate Property*

Section 236 of the Domestic Relations Law creates two categories of property, marital property<sup>95</sup> and separate property.<sup>96</sup> Marital property is defined as "all property acquired by either or both spouses during the marriage."<sup>97</sup> Separate property, which is described as an exception to marital property,<sup>98</sup> includes, among other things, property "acquired before marriage or property acquired by bequest, devise, or descent, or gift from a party other than the spouse."<sup>99</sup> Separate property also includes "the increase in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse."<sup>100</sup> The relevant subsection, 236(B)(1)(d)(3), makes clear that where the non-titled spouse contributes financially during marriage to the appreciation of separate property owned by the other spouse, the non-titled spouse is entitled to a distributive share of the appreciation.<sup>101</sup>

Section 236(B)(1)(d)(3) does not provide specifically whether contributions or efforts as spouse, homemaker and parent, as opposed to financial contributions, entitle the non-titled spouse to a distributive share of the appreciation. This was the issue in *Price v. Price*.<sup>102</sup> There, the husband received gifts of stock from his father, the value of which appreciated during the marriage. The wife argued that her contributions as homemaker and parent entitled her to a distributive share of the appreciation.<sup>103</sup>

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95. See N.Y. DOM. REL. LAW § 236(B)(1)(c) (McKinney 1986).

96. See *id.* § 236(B)(1)(d).

97. See *id.* § 236(B)(1)(c).

98. See *id.* § 236(B)(1)(c).

99. See *id.* § 236(B)(1)(d)(1).

100. See *id.* § 236(B)(1)(d)(3).

101. See *Vogel v. Vogel*, 149 A.D.2d 501, 503, 539 N.Y.S.2d 982, 984 (2d Dep't 1989).

102. 69 N.Y.2d 8, 503 N.E.2d 684, 511 N.Y.S.2d 219 (1986).

103. *Id.* at 14, 503 N.E.2d at 686, 511 N.Y.S.2d at 221.

The court based its analysis on the policy of the Equitable Distribution Law, which recognizes that a marriage is an economic partnership and that non-financial contributions are as significant as financial ones.<sup>104</sup> This policy is evident in section 236(B)(5)(d)(6), which directs the court to consider "contributions and services as a spouse, parent . . . and homemaker" in distributing *marital property*.<sup>105</sup> Although the court found no analogous provision relating specifically to the distribution of appreciation of *separate property*,<sup>106</sup> it believed that to effectuate the statutory policy, it should construe "marital property" broadly<sup>107</sup> and "separate property" narrowly.<sup>108</sup> The court found support for this view in section 236(B)(1)(d)(3) where the words "contributions or efforts" are used in an inclusive and general sense, implying that contributions and efforts as parent, spouse, and homemaker should be considered in distributing appreciation to separate property.<sup>109</sup> By contrast, separate property is described as an exception to marital property,<sup>110</sup> implying a restrictive meaning.<sup>111</sup> The court, therefore, concluded that the efforts of a spouse as parent, spouse, and homemaker entitle that spouse to a distributive share of the appreciation of the other spouse's separate property.<sup>112</sup>

The husband argued that since the legislature had specified that contributions and efforts as parent, spouse, and homemaker be considered in making an equitable distribution of marital property<sup>113</sup> and in awarding maintenance,<sup>114</sup> the legislature's failure to include similar language with respect to the appreciation of separate property indicates the contrary statutory

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104. *Id.*, 503 N.E.2d at 687, 511 N.Y.S.2d at 222.

105. *See* N.Y. DOM. REL. LAW § 236(B)(5)(d)(6) (McKinney 1986).

106. *Price*, 69 N.Y.2d at 15, 503 N.E.2d at 687-88, 511 N.Y.S.2d at 222-23.

107. *Id.*

108. *Id.*

109. *Id.*

110. *See* N.Y. DOM. REL. LAW § 236(B)(1)(c) (McKinney 1986).

111. *Price*, 69 N.Y.2d at 14, 503 N.E.2d at 687-88, 511 N.Y.S.2d at 222-23.

112. *Id.*

113. *Id.* at 16, 503 N.E.2d at 688, 511 N.Y.S.2d at 223; N.Y. DOM. REL. LAW § 236(B)(5)(d)(6) (McKinney 1986).

114. N.Y. DOM. REL. LAW § 236(B)(6)(a)(8) (McKinney 1986), which provides in pertinent part: "In determining the amount and duration of maintenance the court shall consider: . . . (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."

intent.<sup>115</sup> Based on its understanding of the purpose of the statute — to accord the broadest possible meaning to “marital property” — the court rejected this argument.<sup>116</sup> The court limited its ruling, however, to instances where the non-financial contributions of the non-titled spouse facilitated the increase in value.<sup>117</sup> Where appreciation occurs solely as the result of market forces,<sup>118</sup> the non-titled spouse will not share in the appreciation.<sup>119</sup>

In *Mahlab v. Mahlab*,<sup>120</sup> the court followed this rule. There, the husband sought a share of the appreciation of the marital home, although the wife’s father had provided the money for the down payment, closing costs, and mortgage payments. Citing *Price*, the court rejected the husband’s claim, because “the appreciation was ‘passive,’ that is, predicated solely on an improving real estate market.”<sup>121</sup>

The same court confronted a similar issue in *Robinson v. Robinson*.<sup>122</sup> Before marrying, the husband purchased a condo-

115. *Price*, 69 N.Y.2d at 16, 503 N.E.2d at 688, 511 N.Y.S.2d at 223.

116. *Id.*, 503 N.E.2d at 689, 511 N.Y.S.2d at 224.

117. *Accord* Nolan v. Nolan, 107 A.D.2d 190, 193, 486 N.Y.S.2d 415, 419 (3d Dep’t 1985) (awarding share of appreciation of home to non-titled spouse, because marital assets were used to improve it); *DeMarco v. DeMarco*, 143 A.D.2d 328, 331, 532 N.Y.S.2d 293, 296 (2d Dep’t 1988) (holding that appreciation of husband’s personal injury award resulting from prudent investing by both husband and wife is marital property, even if market forces accounted for some of the appreciation); *Rider v. Rider*, 141 A.D.2d 1004, 1005, 531 N.Y.S.2d 44, 45-46 (3d Dep’t 1988) (awarding share of home built on husband’s parcel to wife who had made financial and non-financial contributions to construction of home); *Wegman v. Wegman*, 123 A.D.2d 220, 230, 509 N.Y.S.2d 342, 348 (2d Dep’t 1986) (holding that appreciation during marriage of separate property is marital property, if non-titled spouse contributed to such appreciation).

118. The court noted that a money market account, because of interest accrual, will grow over time, independent of any efforts of the non-titled spouse. Thus, the non-titled spouse should not share in any appreciation of the fund. *Price*, 69 N.Y.2d at 18, 503 N.E.2d at 690, 511 N.Y.S.2d at 225.

119. *Id.*; *accord* Smith v. Smith, 154 A.D.2d 365, 365, 545 N.Y.S.2d 842, 843 (2d Dep’t 1989) (refusing to award non-titled spouse a share of the appreciation of separate property, because no evidence was offered that such appreciation was due, at least in part, to the efforts of the non-titled spouse); *Lisetza v. Lisetza*, 135 A.D.2d 20, 24, 523 N.Y.S.2d 632, 635 (3d Dep’t 1988) (holding that passive appreciation of real property owned separately by one spouse is not marital asset).

120. 143 A.D.2d 116, 531 N.Y.S.2d 580 (2d Dep’t 1988).

121. *Id.* at 117, 531 N.Y.S.2d at 581.

122. 166 A.D.2d 428, 560 N.Y.S.2d 665 (2d Dep’t 1990), *appeal dismissed*, 76 N.Y.2d 1017, 566 N.E.2d 1172, 565 N.Y.S.2d 767 (1990).

minium, which appreciated during the marriage. The wife, a dentist who, until a disabling injury, practiced during part of the four-and-one-half-year marriage, "made financial contributions to the household expenses, often turning over her entire paycheck to the defendant."<sup>123</sup> She also "made significant and vital contributions as a homemaker, spouse and the primary caretaker of the parties' infant children."<sup>124</sup> Based on these facts, the court concluded that the wife was entitled to a distributive share of the appreciation of the condominium.<sup>125</sup> No facts in *Robinson* suggest that the wife's earnings or efforts as parent, spouse and homemaker contributed directly or indirectly to the condominium's appreciation, which apparently resulted from market forces.<sup>126</sup> *Robinson* therefore departs from *Price*, by holding that appreciation to separate property during marriage is subject to equitable distribution, even if the appreciation was the inevitable consequence of market forces and was unrelated to any efforts of the non-titled spouse.

#### E. "Appreciation" of Careers

The courts have applied the rules governing the distribution of appreciation of separate property to increases in the earning potential of a spouse whose license pre-existed the marriage.<sup>127</sup> Even before *Price* and *Robinson*, the court in *Arvantides v. Arvantides*<sup>128</sup> reached an analogous decision concerning the "appreciation" of a dental practice. The husband graduated from dental school and established a practice before marrying. During the marriage the practice flourished.<sup>129</sup> Although finding that the wife's "contribution and efforts as a spouse toward the dental practice were modest," the court, nevertheless, granted the wife twenty-five percent of its value.<sup>130</sup>

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123. *Id.* at 428, 430, 560 N.Y.S.2d at 666, 667.

124. *Id.* at 430, 560 N.Y.S.2d at 667 (citations omitted).

125. *Id.*

126. The court could have reached the same result, without resorting to faulty reasoning, by finding that part of the wife's financial contributions had been applied to mortgage payments, entitling the wife to a share of the equity, and thus, any subsequent appreciation of the equity.

127. See *infra* notes 128-41 and accompanying text.

128. 106 A.D.2d 853, 483 N.Y.S.2d 550 (4th Dep't 1984), *aff'd as modified*, 64 N.Y.2d 1033, 478 N.E.2d 199, 489 N.Y.S.2d 58 (1985).

129. *Id.* at 854, 483 N.Y.S.2d at 551.

130. *Id.*

*Madori v. Madori*<sup>131</sup> involved the “appreciation” of a professional license. The husband earned his medical degree before marrying in 1981. During the three years prior to their separation, the husband acquired experience and credits in emergency room medicine, but never took the examination for certification in that specialty.<sup>132</sup> The wife, who had received a Master’s degree in recreation therapy before the marriage, worked in that field until she assumed the responsibilities of homemaker and caretaker of the couple’s two children. The couple separated in 1984, and the wife commenced the divorce action in 1987.<sup>133</sup>

Although the husband never sat for the examination in emergency room medicine, the court held that his stature as an experienced emergency room practitioner was marital property.<sup>134</sup> Citing *Robinson* and *Price*, the court analogized the enhancement of earning potential of a career that pre-existed the marriage to the appreciation of separate property.<sup>135</sup> The measure of the “appreciation” of the husband’s career in *Madori* was the difference between his earning capacity as a general practitioner and his earning capacity as an experienced, though uncertified, emergency room practitioner.<sup>136</sup> Because the wife sacrificed her career and devoted herself as homemaker and mother, she was awarded forty percent of the husband’s increased earning potential for the projected remainder of his working life.<sup>137</sup>

Similarly, in *Elkus*, discussed above, the court expressly relied on *Price* and its progeny in holding that stardom is marital property.<sup>138</sup>

All these decisions are flawed. Neither *Arvantides*, *Madori*, nor *Elkus* acknowledge that expertise, stature, and a commensurate increase in earning potential accompany the pursuit of almost any career. The court in *Kalisch v. Kalisch*<sup>139</sup> seemed to

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131. 151 Misc. 2d 737, 573 N.Y.S.2d 553 (Sup. Ct. Westchester County 1991).

132. *Id.* at 739, 573 N.Y.S.2d at 553.

133. *Id.* at 741, 573 N.Y.S.2d at 556.

134. *Id.* at 739, 573 N.Y.S.2d at 555.

135. *Id.* at 739-40, 573 N.Y.S.2d at 555.

136. *Id.* at 740, 573 N.Y.S.2d at 555.

137. *Id.* at 741, 573 N.Y.S.2d at 556.

138. *Elkus v. Elkus*, 169 A.D.2d 134, 138-39, 572 N.Y.S.2d 901, 903-04 (1st Dep’t 1991).

139. 184 A.D.2d 751, 585 N.Y.S.2d 476 (2d Dep’t 1992).

recognize this fact. Before marrying, the wife received a law degree and worked as an attorney for the New York City Housing Authority. Her income increased during the marriage. Relying on *Price*, her husband argued that he was entitled to share in the "appreciation" of her career.<sup>140</sup> The court held otherwise, finding that her earnings would have risen even if she had not been married.<sup>141</sup>

#### IV. The Merger Doctrine

##### A. *Development of the Merger Doctrine*

If the licensed spouse founds or joins a professional practice, the issue arises whether the non-licensed spouse is entitled to a distributive share of the license, a distributive share of the practice, or both. In *Marcus v. Marcus*,<sup>142</sup> the court confronted this issue. The parties married in 1948. The wife worked as a full-time social worker until the first of the couple's three children was born. The wife then became a child-rearer and homemaker. Meanwhile, the husband was attending medical school. He graduated in 1950, and over the next thirty years established a successful practice.<sup>143</sup>

Recognizing the wife's significant financial and non-financial contributions to the husband's psychiatric practice, the court determined that the wife was entitled to a distributive share of the practice.<sup>144</sup> The issue which remained was whether the wife was additionally entitled to a share of the value of the husband's license to practice psychiatry. The court held that awarding the wife a share of both the practice and the license would be duplicative and, therefore, unfair.<sup>145</sup> Distinguishing *O'Brien*, which involved a newly-acquired license, rather than a "mature practice," the court said:

The psychiatric practice was an ongoing and viable enterprise at the time the present action was commenced. Certainly in this situation, unlike *O'Brien v. O'Brien*, the medical license should be deemed to have merged with and been subsumed by the practice

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140. *Id.* at 752, 585 N.Y.S.2d at 478.

141. *Id.*

142. 137 A.D.2d 131, 525 N.Y.S.2d 238 (2d Dep't 1988).

143. *Id.* at 134, 525 N.Y.S.2d at 239.

144. *Id.* at 138-39, 525 N.Y.S.2d at 242.

145. *Id.* at 139, 525 N.Y.S.2d at 242.

itself. Thus, if the plaintiff were to receive separate awards representing her share in the value of the defendant's license and medical practice, a double recovery might well result.<sup>146</sup>

The court hastened to add in dictum that if a practice were new and undeveloped, the non-titled spouse might receive a share in both the practice and the license.<sup>147</sup> By like reasoning, the court suggested that if a "mature practice" were sold, the license would be deemed to have "reemerged" and could, therefore, be considered marital property.<sup>148</sup>

The issue of "reemergence" of a license arose in *Behrens v. Behrens*.<sup>149</sup> Before commencement of the divorce action, the husband sold his medical practice, moved to another state, and opened a new practice.<sup>150</sup> Holding that the husband's license to practice medicine had "reemerged as a significant and separate asset,"<sup>151</sup> the court held that the wife was entitled, not only to a distributive share of the husband's first practice, but also to a distributive share of the value of the license.<sup>152</sup>

Another question arising under the merger doctrine is how mature a practice must be to result in a merger of the license into the practice. In *Vanasco v. Vanasco*,<sup>153</sup> the court held that an accounting license had fully merged into a twelve-year accounting practice.<sup>154</sup> A four-year law practice, however, was held in *Wells v. Wells*<sup>155</sup> to be too undeveloped to justify application of the merger doctrine. The *Wells* court said: "Under the present circumstances, it appears that plaintiff had not yet developed a sufficient history of actual earnings in his new practice (open only four years) to warrant the finding that the value

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146. *Id.*

147. *Id.* at 140, 525 N.Y.S.2d at 242.

148. *Id.*, 525 N.Y.S.2d at 242-43. The license only "reemerges" where the licensed spouse "intends to open or has recently opened another practice" when the divorce action is commenced. *Id.*

149. 143 A.D.2d 617, 532 N.Y.S.2d 893 (2d Dep't 1988).

150. *Id.* at 620, 532 N.Y.S.2d at 896.

151. *Id.*

152. *Id.*

153. 132 Misc. 2d 227, 503 N.Y.S.2d 480 (Sup. Ct. Nassau County 1986).

154. *Id.* at 230, 503 N.Y.S.2d at 482; *accord* *Gardner v. Gardner*, 148 Misc. 2d 215, 216, 560 N.Y.S.2d 586, 588 (Sup. Ct. Allegany County 1991) (holding that a law degree had merged into a twelve-year, part-time law practice).

155. 177 A.D.2d 779, 576 N.Y.S.2d 390 (3d Dep't 1991).

of his professional license had merged into his practice."<sup>156</sup> A "partial merger" having resulted, the court held that the wife, who had contributed financially to the husband's legal education, was entitled to a share of the license as well as a share of the practice.<sup>157</sup>

A similar result was reached in *Jones v. Jones*,<sup>158</sup> wherein the husband, who had received a medical degree during the marriage, worked part-time in his own practice and part-time as a salaried physician. The court held that the six-year, part-time medical practice was still in the formative phase and, consequently, that the medical license had merged only partially into the practice.<sup>159</sup> The unmerged portion of the license was valued by considering the husband's actual earnings as a salaried physician, rather than the average earnings of a physician.<sup>160</sup> The wife was awarded fifty percent of the license, but only thirty percent of the practice, because she had contributed more significantly to the acquisition of the license than she had to the development of the practice.<sup>161</sup>

### B. *Assault on the Merger Doctrine*

The purpose of the merger doctrine is to prevent the non-licensed spouse from gaining double recovery.<sup>162</sup> Recently, however, this sensible doctrine has been reinterpreted and thereby eviscerated. In *Finocchio v. Finocchio*,<sup>163</sup> the husband received a law degree during the marriage and established a practice, which, at the time of the divorce action, was fourteen years old. All five justices on the panel agreed that the practice was "mature," and accordingly that the license had merged into the

156. *Id.* at 780, 576 N.Y.S.2d at 391.

157. *Id.*, 576 N.Y.S.2d at 391-92.

158. 144 Misc. 2d 295, 543 N.Y.S.2d 1016 (Sup. Ct. Kings County 1989).

159. *Id.* at 300, 543 N.Y.S.2d at 1019.

160. *Id.*

161. *Id.* at 304, 543 N.Y.S.2d at 1021. Ironically, the husband was penalized for his industry. If he had not worked simultaneously as both a staff physician and a private practitioner, the wife would have received a less generous award.

162. *Marcus v. Marcus*, 135 A.D.2d 216, 525 N.Y.S.2d 238 (2d Dep't 1988); see generally Robert D. Lang, *Divorce, Separation and Your Law License and Practice: Breaking Up Is Hard to Do*, N.Y. Sr. B.J., July/Aug. 1991, at 46, 47.

163. 162 A.D.2d 1044, 556 N.Y.S.2d 1007 (4th Dep't 1990).



practice.<sup>164</sup> The justices, however, could not agree on how to apply the merger doctrine. Four of them came to the dubious conclusion that, even where there is a mature practice, the non-licensed spouse is entitled to a distributive share of both the practice and the future earning potential of the *practice* over the projected working life of the licensed spouse.<sup>165</sup> According to the majority, *Marcus* did not intend “to apply merger in a way which would deprive the non-licensee spouse of an award of any interest of the marital asset beyond commencement of the matrimonial action.”<sup>166</sup> To support its holding, the court cited rather ambiguous dictum appearing in a footnote in *McGowan*, which says:

It should be noted that once the “student-spouse” embarks on his career and develops a history of *actual* earnings, the methodology outlined above [the difference between the average total lifetime income of a college graduate and the average total lifetime income of a physician reduced to present value] should be discarded and the projections of future earnings should be based on actual past earnings produced by actual practice.<sup>167</sup>

In a persuasive dissent, Justice Lawton argued that, although the majority’s position was based ostensibly on the merger doctrine enunciated in *Marcus*, it was a veiled repudiation of that very doctrine.<sup>168</sup> The majority was, in Justice Lawton’s view, granting the wife double recovery by awarding her a share of both the practice and the future earning capacity of her husband.<sup>169</sup> Justice Lawton said: “In my opinion, since the defendant’s license has fully merged into his practice, the majority incorrectly engrafts the license valuing methodology of en-

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164. *Id.* at 1045, 556 N.Y.S.2d at 1008-09 (majority opinion); *see also id.* at 1047, 556 N.Y.S.2d at 1010 (Lawton, J., dissenting).

165. *Finocchio*, 162 A.D.2d at 1045, 556 N.Y.S.2d at 1009.

166. *Id.*

167. *McGowan v. McGowan*, 142 A.D.2d 355, 359 n.\*, 535 N.Y.S.2d 990, 992-93 n.\* (2d Dep’t 1988), *quoted in Finocchio*, 162 A.D.2d at 1046, 556 N.Y.S.2d at 1009.

168. *Finocchio*, 162 A.D.2d at 1047, 556 N.Y.S.2d at 1010 (Lawton, J., dissenting); *see also* BRETT R. TURNER, *EQUITABLE DISTRIBUTION OF PROPERTY*, § 6.19A, at 208-09 (Cum. Supp. 1992) (arguing that *Finocchio* and *DiCaprio* cannot be reconciled with *Marcus*, but that they, rather than *Marcus*, follow logically from *O’Brien*).

169. *Finocchio*, 162 A.D.2d at 1047, 556 N.Y.S.2d at 1009-10 (Lawton, J., dissenting).

hanced earning capacity onto the methodology used in valuing a practice."<sup>170</sup>

It appears that Justice Lawton's interpretation of the merger doctrine is correct.<sup>171</sup> In remanding the case, the *Marcus* court said, "we direct that the hearing court, in reaching a determination as to the plaintiff's appropriate share in the value of the defendant's license and psychiatric practice, shall value the practice as a single asset and render one distributive award therefor to the plaintiff."<sup>172</sup> The court did not award a share of future earnings generated by the practice.

Justice Lawton's view is also more sensible than that of the majority. Projected lifetime earnings are used to estimate the value of newly-received licenses because no direct means is available for valuating them.<sup>173</sup> By contrast, a mature practice has an ascertainable fair market value. The fair market value of a practice may, for example, be computed by taking a multiple of past earnings.<sup>174</sup> A partnership may be valuated by reference to the withdrawal or death benefits provision of the relevant partnership agreement, which often includes compensation for capital contributions, accounts receivable, work in process, and hypothetical future earnings.<sup>175</sup> Therefore, an

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170. *Id.*

171. A lower court decision, which pre-dates *Finocchio*, reached a result consistent with Justice Lawton's view. In *Parlow v. Parlow*, 145 Misc. 2d 850, 548 N.Y.S.2d 373 (Sup. Ct. Westchester County 1989), the husband received a teacher's license during the marriage which ended fifteen years later. Holding that the license had merged into the husband's career, the court ruled that the wife was not entitled to share in his future earning potential. *Id.* at 855-56, 548 N.Y.S.2d at 376. Although there was no practice in which the wife could share, the court explained that she had benefited from fifteen years of the husband's income as a teacher. *Id.* at 857, 548 N.Y.S.2d at 377. *But see Gardner v. Gardner*, 148 Misc. 2d 215, 560 N.Y.S.2d 586 (Sup. Ct. Allegany County 1990). In *Gardner*, the court held that a law license had fully merged into a part-time practice, *id.* at 217, 560 N.Y.S.2d at 588, and awarded the wife a share of the husband's projected increased lifetime earnings, measured by the earnings generated by the partnership less the earnings of the average college graduate in the husband's ethnic group. *Id.* at 217-18, 560 N.Y.S.2d at 588-89. The court made no separate award for the value of the practice. *Id.* at 216, 560 N.Y.S.2d 587-88.

172. *Marcus*, 137 A.D.2d at 139-140, 525 N.Y.S.2d at 242.

173. *Id.* at 140, 525 N.Y.S.2d at 242.

174. *Finocchio*, 162 A.D.2d at 1046, 556 N.Y.S.2d at 1008; *see supra* notes 128-30 and accompanying text.

175. *See Harmon v. Harmon*, 173 A.D.2d 98, 104, 578 N.Y.S.2d 897, 901 (1st Dep't 1992).

award of a share of both the partnership and projected income is duplicative. Where a mature practice exists, there is no sound reason to award a share of the projected earnings of the practice in addition to the value of the practice.

The same appellate division panel that decided *Finocchio* reached a like result in *DiCaprio v. DiCaprio*.<sup>176</sup> During the twenty-nine year marriage, the husband received a Master's degree and teaching certificate. These credentials enabled him to secure employment as a school administrator. The supreme court held that the degree and certificate were marital property, but declined to award the wife a distributive share in the husband's lifetime potential earnings. Rather, it awarded the wife substantial maintenance.<sup>177</sup> The appellate division modified. Although conceding that the degree and certificate had merged into the husband's career, the majority, as in *Finocchio*, ruled that the wife was entitled to share in the husband's projected earnings.<sup>178</sup> The court measured such earnings by actual past earnings rather than by the hypothetical earnings of a typical school administrator.<sup>179</sup> Because the wife, during the long marriage, had contributed financially and as mother, spouse, and homemaker to the acquisition of her husband's degree and certificate, she was awarded twenty-five percent of the husband's lifetime projected earnings.<sup>180</sup>

Again dissenting, Justice Lawton noted that the majority, while conceding that the husband's degree and certificate had merged into his career, had misapplied the merger doctrine.<sup>181</sup> Justice Lawton observed that once a merger occurs, a degree or certificate no longer has value independent of the career.<sup>182</sup> Where a license merges into a private practice or business, the practice or business becomes marital property and is subject to equitable distribution.<sup>183</sup> Similarly, where the recipient of a license or degree does not go into private practice or business, but rather works for wages, the license or degree merges into the

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176. 162 A.D.2d 944, 556 N.Y.S.2d 1011 (4th Dep't 1990).

177. *Id.* at 944-45, 556 N.Y.S.2d at 1011-12.

178. *Id.* at 945, 556 N.Y.S.2d at 1012.

179. *Id.*

180. *Id.* at 946, 556 N.Y.S.2d at 1012.

181. *Id.* at 946-47, 556 N.Y.S.2d at 1013 (Lawton, J., dissenting).

182. *Id.* at 946, 556 N.Y.S.2d at 1013.

183. *Id.* at 946-47, 556 N.Y.S.2d at 1013.

career.<sup>184</sup> In Justice Lawton's view, however, a career, unlike a professional practice or business, does not constitute marital property and cannot properly be valued or distributed.<sup>185</sup>

Justice Lawton faulted the majority for fashioning a rule which would entitle a non-licensed spouse to share in the lifetime earnings of the licensed spouse whenever the licensed spouse's earning capacity increased during marriage.<sup>186</sup> He argued that since increased earning capacity is a typical if not inevitable consequence of any career, virtually all marriages will, under the majority's position, result in the division of the projected lifetime earnings of the principal wage earner.<sup>187</sup> Such an approach "transmute[s] the bonds of marriage into the bonds of involuntary servitude."<sup>188</sup> Justice Lawton aptly suggested that appropriate maintenance awards are a proper way to compensate non-titled spouses for career advancements of titled spouses.<sup>189</sup>

## V. Accrual Issues

### A. Accrual of Distributive Rights

A license may be earned only partially during a marriage or it may be earned entirely before the marriage, but awarded during the marriage. The courts have been called upon to decide whether such licenses are marital property.<sup>190</sup>

In *McGowan v. McGowan*,<sup>191</sup> the wife completed the requirements for a teaching certificate prior to the marriage, but

184. *Id.* at 947, 556 N.Y.S.2d at 1013.

185. *Id.*

186. *Id.* at 947-48, 556 N.Y.S.2d at 1013-14.

187. *Id.*

188. *Id.* at 947, 556 N.Y.S.2d at 1013 (quoting *Severs v. Severs*, 426 So. 2d 992, 994 (Fla. 1983)); *see also* *Martinez v. Martinez*, 818 P.2d 538, 542 (Utah 1991) (holding that a medical license is not marital property) ("The time has long since passed when a person's personal attributes and talents were thought to be subject to monetary valuation for commercial purposes. In short, we do not recognize a property interest in personal characteristics of another person such as intelligence, skill, judgment, and temperament, however characterized.")

189. *DiCaprio*, 162 A.D.2d at 948, 556 N.Y.S.2d at 1013 (Lawton, J., dissenting).

190. *Cf.* *Majauskas v. Majauskas*, 61 N.Y.2d 481, 490-92, 463 N.E.2d 15, 19-21, 474 N.Y.S.2d 699, 703-05 (1984) (holding that a pension vesting during a marriage was subject to distribution to the extent earned during the marriage).

191. 142 A.D.2d 355, 535 N.Y.S.2d 990, (2d Dep't 1988).

the certificate was not awarded until after the wedding.<sup>192</sup> After twenty-four years of marriage the wife commenced a divorce action. The husband argued that since the wife's teaching certificate was awarded after the parties had married, it was marital property.<sup>193</sup> Rejecting this argument, the court said that "[t]he real thing of value, that is, the plaintiff's increased skill, knowledge and ability . . . was acquired before the marriage and must therefore be deemed separate property."<sup>194</sup> *O'Brien*, said the court, was intended to remedy the social injustice which occurs when one spouse supports another through an educational program only to face divorce before enjoying the economic fruits of that program.<sup>195</sup> The court concluded that the policy underlying *O'Brien*, to remedy this injustice, would be frustrated rather than served by allowing the non-titled spouse, simply because of fortuitous timing, to share in the benefits of a license or degree earned prior to the marriage but conferred during the marriage.<sup>196</sup> This decision is inconsistent with *Price*, which held that where the non-titled spouse contributes either directly or indirectly to the appreciation of separate property, the non-titled spouse may share in the appreciation.<sup>197</sup> Thus, under *Price*, the court should have considered the husband's contributions to the wife's career advancements during their twenty-four year marriage.

In *Kyle v. Kyle*,<sup>198</sup> the issue was whether a course of study begun, but not completed during marriage, is marital property. The Kyles were married for thirty-two years. The husband, an assistant principal, had nearly completed a course of study culminating in the attainment of a principal's license, when the divorce action was commenced. The court reached a decision at odds with *McGowan*, holding that since he had not completed the requirements for the license during the marriage, the license was not marital property.<sup>199</sup>

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192. *Id.* at 362, 535 N.Y.S.2d at 994.

193. *Id.*

194. *Id.*, 535 N.Y.S.2d at 995.

195. *Id.* at 362-63, 535 N.Y.S.2d at 995.

196. *Id.* at 363, 535 N.Y.S.2d at 995.

197. *See supra* notes 102-19 and accompanying text.

198. 156 A.D.2d 508, 548 N.Y.S.2d 781 (2d Dep't 1989).

199. *Id.* at 510, 548 N.Y.S.2d at 783; *accord* *Berkman v. Berkman*, 149 Misc. 2d 131, 133, 563 N.Y.S.2d 990, 991 (Sup. Ct. Suffolk County 1990) (holding that

A final variation of this issue is when a spouse earns a professional degree before marrying, but is not licensed to practice until satisfying additional requirements, which are completed after marrying. In *Shoenfeld v. Shoenfeld*,<sup>200</sup> the parties married after the husband earned his medical degree in Mexico and returned to this country. During the first year of the marriage only the wife worked, while the husband completed a pathway program enabling him to practice medicine in the United States.<sup>201</sup> The issue was whether the wife, who had contributed to the husband's completion of the pathway program, but not to his attainment of the medical degree, was entitled to a distributive share of the value of the medical license and newly-formed practice. The court held that the wife's contribution was sufficient to entitle her to a share of the value of both the license<sup>202</sup> and practice.<sup>203</sup> Again, the court provided the unlicensed spouse with the broadest possible remedy.

#### B. Cessation of Accrual of Distributive Rights

Section 236(B)(1)(c) defines "marital property" as all property acquired by the spouses "during the marriage and before the execution of a separation agreement or the commencement of a *matrimonial action*."<sup>204</sup> Thus, any property acquired by either spouse after execution of a separation agreement, or after commencement of a "matrimonial action," is not marital property and is consequently not subject to equitable distribution.

The issue in *Anglin v. Anglin*<sup>205</sup> was whether a separation action is a "matrimonial action" for purposes of section 236(B)(1)(c).<sup>206</sup> The wife in *Anglin* commenced a separation ac-

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college course credits earned without a degree do not increase earning capacity and are therefore not marital property and stressing that earning such credits does not demonstrate the "finality of accomplishment [shown by] attainment of a degree. . .").

200. 168 A.D.2d 674, 563 N.Y.S.2d 500 (2d Dep't 1990).

201. *Id.* at 674, 563 N.Y.S.2d at 502.

202. *Id.* at 675, 563 N.Y.S.2d at 502.

203. *Id.* Since the practice had been in existence for less than two years, the court did not apply the merger doctrine. *Id.*; see *supra* notes 142-61 and accompanying text.

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

205. 80 N.Y.2d 553, 607 N.E.2d 777, 592 N.Y.S.2d 630 (1992).

206. Prior to *Anglin*, three of the departments of the appellate division held that a spouse is entitled to share in property acquired by the other spouse after the

tion in 1982, which was not concluded until 1988 when the parties stipulated to a judgment of separation. Thereafter, the wife brought a divorce action.<sup>207</sup> The husband moved for partial summary judgment seeking a determination that property acquired by either spouse, after the commencement of the separation action, was not marital property.<sup>208</sup> The wife opposed the motion arguing that property acquired by either spouse until the commencement of the divorce action was marital property.<sup>209</sup>

The husband relied on section 236(B)(2),<sup>210</sup> which sets forth a general definition of "matrimonial actions." That subsection provides, in pertinent part, that "the provisions of this part shall be applicable to actions for . . . a separation."<sup>211</sup> Based on

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commencement of a separation action. *Id.* at 555-56, 607 N.E.2d at 779, 592 N.Y.S.2d at 632; *Petre v. Petre*, 122 A.D.2d 559, 505 N.Y.S.2d 396, (4th Dep't), *aff'g*, 130 Misc. 2d 333, 334, 496 N.Y.S.2d 335, 336 (Sup. Ct. Erie County 1985) (holding that Domestic Relations Law § 236(B)(2) is inapposite when considering termination of distributive rights, and that a separation action will therefore not cut off such rights); *accord Jolis v. Jolis*, 98 A.D.2d 692, 693, 470 N.Y.S.2d 584, 585-86 (1st Dep't 1983); *see Verrilli v. Verrilli*, 172 A.D.2d 990, 992-93, 568 N.Y.S.2d 495, 497 (3d Dep't 1991) (holding that the non-titled spouse has distributive rights in property acquired by the other spouse after separation, without discussing relevant sections of the Domestic Relations Law); *Greenwald v. Greenwald*, 164 A.D.2d 706, 713-14, 565 N.Y.S.2d 494, 499 (1st Dep't 1991) (awarding wife distributive share of appreciation to property acquired by husband with marital assets after separation, because wife had continued as the caretaker of the couple's son and had maintained a close business and personal relationship with the husband, even after the separation). *Contra Lennon v. Lennon*, 124 A.D.2d 788, 790, 508 N.Y.S.2d 507, 509 (2d Dep't 1986) (applying the definition of marital property in Domestic Relations Law § 236(B)(2) to terminate distributive rights after commencement of separation action). The court in *Lennon* noted that the separation action signalled a clear end of the "economic partnership" of the parties. *Id.*

207. *Anglin*, 80 N.Y.2d at 554-55, 607 N.E.2d at 778, 592 N.Y.S.2d at 631.

208. *Id.* at 555, 607 N.E.2d at 778, 592 N.Y.S.2d at 631.

209. *Id.*

210. *Id.* at 555-56, 607 N.E.2d at 779, 592 N.Y.S.2d at 632.

211. N.Y. DOM. REL. LAW § 236(B)(2) (McKinney 1986) provides in pertinent part:

Matrimonial actions. Except as provided in subdivision five of this part, the provisions of this part shall be applicable to actions for an annulment or dissolution of a marriage, for a divorce, for a separation, for the declaration of the nullity of a void marriage, for a declaration of the validity or nullity of a foreign judgment of divorce, for a declaration of the validity or nullity of a marriage, and to proceedings to obtain maintenance or a distribution of marital property following a foreign judgment of divorce, commenced on and after the effective date of this part.

this subsection, the husband contended that a separation action terminates distributive rights in property acquired after separation.<sup>212</sup>

Judge Bellacosa, writing for a four to two majority, rejected this argument, pointing out that the husband's interpretation of the statute leads to a paradoxical result. The list of "matrimonial actions" in section 236(B)(2) includes actions "for the declaration of the nullity . . . of a foreign judgment of divorce [and] for the declaration of the validity . . . of a marriage."<sup>213</sup> It would be nonsensical for such actions, whose objective is to preserve marriages, to terminate the accrual of marital property rights.<sup>214</sup> The court, therefore, concluded that the list of "matrimonial actions" in section 236(B)(2) is inappropriate for determining what actions terminate a spouse's rights to property acquired by the other spouse.<sup>215</sup>

The husband also argued that an action for separation signals the end of a couple's economic partnership, and thus, that property acquired after such an action should not be subject to equitable distribution.<sup>216</sup> Unpersuaded, the court noted that an action for separation may not sever the economic ties of marriage. "Objective verification" of the end of the economic partnership comes with an action for divorce, dissolution, or annulment, but not with an action for separation.<sup>217</sup> On the other hand, the court noted that, unlike a separation action, a separation agreement often results in the termination of the economic partnership.<sup>218</sup> Thus, the court concluded, it is sensible that section 236(B)(1)(c) provides that property acquired by one spouse after a separation agreement is not marital property.<sup>219</sup> The majority added that its holding promoted the legislative intent, which is to expand the non-titled spouse's property rights.<sup>220</sup>

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*Id.* (footnote omitted).

212. *Anglin*, 80 N.Y.2d at 556-57, 607 N.E.2d at 779, 592 N.Y.S.2d at 632.

213. N.Y. DOM. REL. LAW § 236(B)(2).

214. *Anglin*, 80 N.Y.2d at 556, 607 N.E.2d at 779, 592 N.Y.S.2d at 632.

215. *Id.*

216. *Id.* at 556-57, 607 N.E.2d at 779, 592 N.Y.S.2d at 632.

217. *Id.* at 557, 607 N.E.2d at 779, 592 N.Y.S.2d at 632.

218. *Id.*, 607 N.E.2d at 780, 592 N.Y.S.2d at 633.

219. *Id.* at 557-58, 607 N.E.2d at 780, 592 N.Y.S.2d at 633.

220. *Id.* at 558-59, 607 N.E.2d at 780-81, 592 N.Y.S.2d at 633-34.



Judge Hancock dissented. He urged that an action for separation marks the functional end of a marriage's economic partnership.<sup>221</sup> Once such an action has been commenced, trust and cooperation have been displaced by disunity and conflict. He observed that a separation may last years. It would make no sense to share property acquired during a protracted period when the couple no longer shares a community of interests.<sup>222</sup> He found the majority's premise — that a separation agreement evidences a greater rift in the economic partnership than does a separation action — illogical. Both a separation agreement and a separation action involve living apart, exclusive possession of the marital home, and the payment of maintenance.<sup>223</sup> In fact, a separation agreement demonstrates at least some degree of cooperation between the parties, whereas a separation action indicates more acrimony.<sup>224</sup>

Despite Judge Hancock's persuasive arguments to the contrary, it would appear that the majority in *Anglin* correctly interpreted the equitable distribution statute. Section 236(B)(2), on which the husband relied, is inapplicable. That subsection provides: "Matrimonial actions. *Except as provided in subdivision five of this part*, the provisions of this part shall be applicable to actions for an annulment or dissolution of a marriage, for a divorce, for a separation [and several other actions]."<sup>225</sup> Subdivision five enumerates those actions which trigger rights to equitable distribution. A separation action is not included in this list.<sup>226</sup> The *Anglin* decision, therefore, appears to construe the statute properly.<sup>227</sup> Yet, one must question the wisdom of

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221. *Id.* at 559, 607 N.E.2d at 781, 592 N.Y.S.2d at 634 (Hancock, J., dissenting).

222. *Id.* at 561, 607 N.E.2d at 782, 592 N.Y.S.2d at 635.

223. *Id.* at 563, 607 N.E.2d at 783, 592 N.Y.S.2d at 636.

224. *Id.*, 607 N.E.2d at 783-84, 592 N.Y.S.2d at 636-37.

225. N.Y. DOM. REL. LAW § 236(B)(2) (McKinney 1986) (emphasis added).

226. *Id.* § 236(B)(5).

227. Justice Levine, who wrote for a three to two majority at the appellate division, observed that the husband had disregarded the all-important introductory phrase to section 236(B)(2). *Anglin v. Anglin*, 173 A.D.2d 133, 135, 577 N.Y.S.2d 963, 965 (3d Dep't 1992). Justice Levine reasoned that the purpose of section 236(B)(2) is not to provide a comprehensive definition of matrimonial actions to be applied throughout the statute. *Id.* Rather, the purpose is to provide a more limited definition of matrimonial actions to be applied to the parts of the statute dealing with such matters as maintenance and child support. *Id.* at 135-36, 577 N.Y.S.2d at 965.

the statute itself, which codifies the untenable presumption that the economic partnership of a marriage survives the filing of an action for separation.

## VI. Valuation of Licenses and Practices

In valuating licenses, courts generally compute the difference between the average lifetime earnings expectancy of a person with the license and the average lifetime earnings expectancy of that spouse had he or she not received the license.<sup>228</sup> The court may consider the ethnic group of the licensed spouse in determining anticipated earnings.<sup>229</sup> Ordinarily, the person's working life is deemed to continue until age sixty-five.<sup>230</sup> This projection is adjusted for taxes and inflation and discounted to present value.<sup>231</sup> Where immediate payment would impose a burden on the licensed spouse, the court may permit periodic partial payments.<sup>232</sup> Compound interest

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228. *E.g.*, *O'Brien v. O'Brien*, 66 N.Y.2d 576, 582, 489 N.E.2d 712, 714, 498 N.Y.S.2d 743, 745 (1985); *Madori v. Madori*, 151 Misc. 2d 737, 739, 573 N.Y.S.2d 553, 555 (Sup. Ct. Westchester County 1991), *Jones v. Jones*, 144 Misc. 2d 295, 301, 543 N.Y.S.2d 1016, 1019 (Sup. Ct. Kings County 1989).

229. *Gardner v. Gardner*, 148 Misc. 2d 215, 217, 560 N.Y.S.2d 586, 588 (Sup. Ct. Allegany County 1990) (basing earning potential on ethnic group of lawyer-husband); *Jones*, 144 Misc. 2d at 301, 543 N.Y.S.2d at 1019-20 (basing earning potential of black physician on lifetime income of average black physician).

230. *E.g.*, *Madori*, 151 Misc. 2d at 740, 573 N.Y.S.2d at 555. *But see Savasta v. Savasta*, 146 Misc. 2d 101, 108, 549 N.Y.S.2d 544, 549 (Sup. Ct. Nassau County 1989) (expecting 38-year old to work 25 more years).

231. *E.g.*, *O'Brien*, 66 N.Y.2d at 588, 489 N.E.2d at 714, 498 N.Y.S.2d at 749; *McGowan v. McGowan*, 142 A.D.2d 355, 358, 362, 535 N.Y.S.2d 990, 992, 994 (2d Dep't 1988); *see Jones*, 144 Misc. 2d at 300, 543 N.Y.S.2d at 1019. In *Jones*, the husband's projected earnings were based on his salary as a part-time physician working for a hospital. The court used a 5% inflation rate to project his salary until age 65, and a 10% inflation rate to discount his lifetime earnings to present value. *Id.* at 301-02, 543 N.Y.S.2d at 1020; *see also Gardner*, 148 Misc. 2d at 218, 560 N.Y.S.2d at 58 (applying a 10% inflation rate to discount future earnings to present value).

232. *E.g.*, *DiCaprio v. DiCaprio*, 162 A.D.2d 944, 946, 556 N.Y.S.2d 1011, 1012 (4th Dep't 1990) (ordering husband to pay wife \$19,487.50, representing 25% interest in certificate in school administration, in four yearly installments); *Maloney v. Maloney*, 137 A.D.2d 666, 667, 524 N.Y.S.2d 758, 760 (2d Dep't 1988) (ordering that husband pay wife \$456,632, representing 35% interest in medical license, in ten yearly installments); *see, e.g.*, *Harmon v. Harmon*, 173 A.D.2d 98, 106, 112, 578 N.Y.S.2d 897, 901, 905 (1st Dep't 1992) (ordering husband to pay wife \$292,870, representing 50% interest in law partnership, in six equal payments over three years).

may be added to such payments.<sup>233</sup>

Once merger has occurred, the courts must value the professional practice. In *Neyhorayoff v. Neyhorayoff*,<sup>234</sup> the husband had an interest in a closely held professional corporation. Noting that the asset value of the business was negligible,<sup>235</sup> the court adopted the "capitalization of earnings" method, under which yearly earnings are multiplied by a factor determined by the nature, history, and prospects of the enterprise.<sup>236</sup>

Facing an essentially identical problem, the trial court in *Matsuo v. Matsuo*<sup>237</sup> valued a medical practice, also doing business as a professional corporation, by determining its "book value," computed by subtracting liabilities from depreciated tangible assets.<sup>238</sup> The appellate division reversed, holding that the lower court had erred in failing to consider income.<sup>239</sup>

The court took a different approach in *Gardner v. Gardner*.<sup>240</sup> There, the husband devoted one-quarter of his working time to a law practice, which yielded twenty-four percent of his income.<sup>241</sup> To value the practice, the court calculated the difference between the income the practice generated and twenty-four percent of the average income of a college graduate of the same age and race as the husband.<sup>242</sup> It then multiplied this figure by the remainder of the husband's expected working life,

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233. *Maloney*, 137 A.D.2d at 667, 524 N.Y.S.2d at 760 (providing for an 8% rate of compound interest on periodic payments).

234. 108 Misc. 2d 311, 437 N.Y.S.2d 584 (Sup. Ct. Nassau County 1981).

235. *Id.* at 318, 437 N.Y.S.2d at 589.

236. *Id.* at 319, 437 N.Y.S.2d at 590.

237. 124 A.D.2d 864, 508 N.Y.S.2d 630 (3d Dep't 1986).

238. *Id.* at 865, 508 N.Y.S.2d at 632.

239. *Id.*

240. 148 Misc. 2d 215, 560 N.Y.S.2d 586 (Sup. Ct. Allegany County 1991).

241. *Id.* at 218, 560 N.Y.S.2d at 588-89. The court held that the license had fully merged into the practice. *Id.* at 217, 560 N.Y.S.2d at 588. Yet it employed the methodology recommended in *O'Brien* for valuating licenses, overlooking or disregarding *Marcus v. Marcus*, 135 A.D.2d 216, 525 N.Y.S.2d 238 (2d Dep't 1988), which instructs that after merger future earnings should not be considered in valuating a practice. *Gardner*, 148 Misc. 2d at 217, 560 N.Y.S.2d at 588; see *supra* notes 142-61 and accompanying text.

242. *Gardner*, 148 Misc. 2d at 218, 560 N.Y.S.2d at 589. The court employed faulty reasoning in basing its calculation on the percentage of the husband's earnings which the practice generated, rather than on the percentage of the husband's working time devoted to the practice. In *Gardner*, since the two percentages were nearly identical, the error was slight.

and discounted to present value.<sup>243</sup> Because the evidence indicated that the income generated by the practice would not grow faster than the income of the average college graduate, the court's computations did not reflect an increasing yearly differential.<sup>244</sup>

The courts have held that where a partnership agreement exists, such agreement may be determinative in valuating the practice.<sup>245</sup> In *Dignan v. Dignan*,<sup>246</sup> the wife sought through discovery, various documents, including partnership tax returns, relating to the husband's law practice, to aid her in valuating the practice. The court denied the request.<sup>247</sup> Because the partnership agreement limited the husband's interest in the partnership to his capital account, no other factors, such as work in process, accounts receivable, or goodwill, were relevant.<sup>248</sup>

A more detailed analysis of problems encountered when using an agreement to value a partner's interest in a practice was presented in *Harmon v. Harmon*.<sup>249</sup> This case is yet another example of the court's predilection to redistribute wealth upon divorce, rather than to effect a fair division of property. The parties married in 1966. One year later, the husband graduated from law school, after which he became associated with a law firm.<sup>250</sup> Some years later he became a partner. In the year preceding the divorce action the husband earned \$127,000.<sup>251</sup> The wife worked at least part-time during most of the marriage, and forewent promising career opportunities so that she could devote substantial attention to one of the couple's two children, a boy who had autistic characteristics.<sup>252</sup>

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243. *Id.*

244. *Id.* at 219, 560 N.Y.S.2d at 589.

245. See *infra* notes 257-74 and accompanying text; cf. *Rosenberg v. Rosenberg*, 126 A.D.2d 537, 539, 510 N.Y.S.2d 659, 662 (2d Dep't 1987) (holding that a buy-sell agreement with respect to restricted stock should be used to value interest in corporation).

246. 156 A.D.2d 995, 549 N.Y.S.2d 539 (4th Dep't 1989).

247. *Id.* at 995, 549 N.Y.S.2d at 539-40.

248. *Id.* at 996, 549 N.Y.S.2d at 540.

249. 173 A.D.2d 98, 578 N.Y.S.2d 897 (1st Dep't 1992).

250. *Id.* at 101, 578 N.Y.S.2d at 898-99.

251. *Id.*, 578 N.Y.S.2d at 899.

252. *Id.*

The issue in *Harmon* was how to value the husband's interest in the law firm. The husband argued that section 11(b) of the partnership agreement, titled "Return of Capital," was controlling.<sup>253</sup> That provision provided a retiring, disabled, or withdrawing partner with his or her capital account.<sup>254</sup> Section 18(c) of the agreement did not provide a withdrawing partner with any interest in "work in process, uncollected accounts, good will or any other matter or cause."<sup>255</sup> Reading these two provisions together, the husband argued that, as in *Dignan*, his interest in the partnership was limited to the value of his capital account, which was approximately \$85,000.<sup>256</sup>

The wife relied on sections 12(a) and (d) of the partnership agreement, the death benefits provision, which provided for the payment of the deceased partner's capital account plus 1.75 times the average salary of the deceased partner over the three years preceding death.<sup>257</sup> This method resulted in a figure of approximately \$293,000.<sup>258</sup> According to the wife's expert, the salary component of death benefits implicitly provided compensation for work in process, accounts receivable, and goodwill.<sup>259</sup>

The court favored the wife's approach, agreeing that, unlike the withdrawal provision, the death benefits provision<sup>260</sup> included compensation for work in process, uncollected accounts, and goodwill,<sup>261</sup> and therefore set a realistic value on the hus-

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253. *Id.* at 104, 578 N.Y.S.2d at 900.

254. *Id.*

255. *Id.*

256. *Id.* at 106, 578 N.Y.S.2d at 900-01.

257. *Id.* at 105, 578 N.Y.S.2d at 901.

258. *Id.* at 106, 578 N.Y.S.2d at 901.

259. *Id.* at 105, 578 N.Y.S.2d at 901. The husband contended that, were the court to adopt this approach, estate taxes theoretically owed should be subtracted from the value of his partnership interest. *Id.* The court disagreed because the event triggering tax liability, the death of the husband, had not occurred. *Id.* See generally Leonard G. Florescue, *Harmon and Economic Reality*, N.Y. L.J., Feb. 10, 1992, at 3, 14 (suggesting that the court erred in refusing to consider the effect of estate taxes on the husband's partnership interest).

260. *Harmon*, 173 A.D.2d at 106-07, 578 N.Y.S.2d at 901; see also *Stolowitz v. Stolowitz*, 106 Misc. 2d 853, 858, 435 N.Y.S.2d 882, 886 (Sup. Ct. Nassau County 1980) (stating that a death benefits provision in a partnership agreement is appropriate for valuing an interest in the partnership for purposes of equitable distribution).

261. Some experts consider goodwill to be an essential component of the value of a professional practice. See Cameron, *supra* note 44, at 340; Gary B. Cheifetz, *Valuing the Attorney's Law Practice*, 720 ALI-ABA COURSE OF STUDY 57, 59-60

band's interest in the partnership.<sup>262</sup> In so holding, the court declared that "[t]he valuation of a marital asset, particularly an intangible asset such as an interest in a professional partnership, must be founded in economic reality."<sup>263</sup> Unsupported by any express language in the partnership agreement or any extrinsic evidence, the court's inference that the death benefits provision included compensation for work in process, uncollected accounts, and good will appears to have been based solely on its desire to award the wife more than the relatively small sum which would have resulted from division of the husband's capital account.<sup>264</sup>

The husband argued that using the death benefits provision was employing a fiction and was, therefore, inappropriate.<sup>265</sup> The court responded that the husband's proposed method of valuation, using the "withdrawal provision," was no less a fiction, because he had not withdrawn from the partnership.<sup>266</sup> The court, however, failed to recognize that an objective of a death benefits provision is to ensure the financial security of the deceased partner's family. Thus, such a provision may reflect an inflated estimate of the deceased partner's interest in the firm. One may question whether the court adhered to the very test of "economic reality" that it espoused.

## VII. A Proposal for Change

Faced with the inequities spawned by *O'Brien* and cases which have followed and expanded it, one must consider alternatives which might lead to fairer results. Some have argued that the speculative nature of a distributive award based on the projected lifetime earnings occasioned by the acquisition of a license would be ameliorated if the award could be modified to

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(1991). This view, however, is not universal. See generally JOHN D. GREGORY, *THE LAW OF EQUITABLE DISTRIBUTION*, ¶ 6.03[2], at 6-8 to 6-17 (1989).

262. *Harmon*, 173 A.D.2d at 107, 578 N.Y.S.2d at 902. While it is appropriate to value an interest in a partnership by reference to the withdrawal, death or retirement provisions of a partnership agreement, the value of good will must ordinarily be separately valued, since few agreements provide compensation for goodwill. See generally Cameron, *supra* note 44, at 339.

263. *Harmon*, 173 A.D.2d at 107, 578 N.Y.S.2d at 902.

264. See *id.* at 105, 578 N.Y.S.2d at 901.

265. *Id.* at 106, 578 N.Y.S.2d at 901-02.

266. *Id.*, 578 N.Y.S.2d at 902.

accord with changed circumstances.<sup>267</sup> However, as Judge Meyer pointed out in his concurrence in *O'Brien*, Domestic Relations Law section 236(B)(9)(b), which expressly allows modifications in maintenance and child support,<sup>268</sup> seems by implication to foreclose modification with respect to distributive awards.<sup>269</sup>

One alternative to *O'Brien* is providing the non-titled spouse with restitution or "reimbursement alimony."<sup>270</sup> Under this view, the non-licensed spouse is repaid for financial contributions to the other spouse's acquisition of the license.<sup>271</sup> This remedy, although avoiding the pitfall of being speculative, is inadequate. Having contributed to the acquisition of a valuable license, the non-licensed spouse deserves more than mere restitution.<sup>272</sup>

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267. *E.g.*, *O'Brien v. O'Brien*, 66 N.Y.2d 576, 592, 489 N.E.2d 712, 720-21, 498 N.Y.S.2d 743, 751-52 (1985) (Meyer, J. concurring); *see generally* Burns & Grauer, *supra* note 4, at 532; Lynch, *supra* note 4, at 359; Willoughby, *supra* note 4, at 153-55.

268. N.Y. DOM. REL. LAW § 236(B)(9)(b) (McKinney 1986) provides in pertinent part: "Upon application by either party, the court may annul or modify any prior order or judgment as to maintenance or child support, upon a showing of the recipient's inability to be self-supporting or a substantial change in circumstance, including financial hardship."

269. *O'Brien*, 66 N.Y.2d at 591, 489 N.E.2d at 720, 498 N.Y.S.2d at 751 (Meyer, J. concurring); *see* Willoughby, *supra* note 4, at 153-54 (agreeing with the *O'Brien* court that licenses are marital property, and suggesting that, to prevent the injustices imposed by awarding the non-licensed spouse a share of projected lifetime earnings of the licensed spouse, the legislature amend the law of equitable distribution to permit the modification of distributive awards).

270. The terms "alimony" and "maintenance" are used in this article interchangeably.

271. A number of courts have awarded reimbursement alimony as compensation for a spouse's contributions to the other spouse's acquisition of a license or degree. *E.g.*, *DeLa Rosa v. DeLa Rosa*, 309 N.W.2d 755, 759 (Minn. 1981); *Pacht v. Jadd*, 469 N.E.2d 918, 921 (Ohio Ct. App. 1983); *Hoak v. Hoak*, 370 S.E.2d 473, 478 (W. Va. 1988); *see also In re Marriage of Sullivan*, 184 Cal. Rptr. 796 (Ct. App. 1982), *superseded*, 691 P.2d 1020 (Cal. 1984) (applying newly amended CAL. CIV. CODE § 4800.3(a)(1), (d) (West 1983) (providing reimbursement as the exclusive remedy to non-licensed spouse for contributions made to education of the licensed spouse), *repealed and reenacted* by Act approved July 11, 1992, ch. 162, §§ 5, 10, 1992 Cal. Legis. Serv. 412, 412, 463 (West) (codified at CAL. FAM. CODE § 2641 (West Supp. 1994))); *see generally*, Lynch, *supra* note 4, at 553; Bruce W. Stanfill, Comment, *The Equity/Property Dilemma: Analyzing The Working Spouse's Contributions To The Other's Educational Degree At Divorce*, 23 HOUS. L. REV. 991, 1011 (1986).

272. Judge Simons found maintenance unsatisfactory, regardless of its form, because it implicitly contradicts the policy that marriage is an economic partnership. He also stressed that, since maintenance terminates upon remarriage, "a

Another perhaps more acceptable alternative is to add to the award of restitution an award of "rehabilitative alimony"<sup>273</sup> to compensate the non-licensed spouse for career opportunities sacrificed.<sup>274</sup> Even this remedy provides too little.<sup>275</sup> The non-licensed spouse deserves compensation which

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working spouse [a spouse who supported the other spouse through an educational program] may never receive adequate consideration . . . for the decision to remarry." *O'Brien v. O'Brien*, 66 N.Y.2d 576, 587, 489 N.E.2d 712, 717, 498 N.Y.S.2d 743, 748 (1985). See generally HENRY H. FOSTER & RONALD L. BROWN, *CONTEMPORARY MATRIMONIAL LAW ISSUES: A GUIDE TO DIVORCE ECONOMICS & PRACTICE* 237 (1985) (arguing that an "out-of-pocket" rule fails to compensate a working spouse for lost expectations); Daniel E. Burke, Comment, *'Til Graduation Do We Part - The Professional Degree Acquired During Marriage As Marital Property Upon Dissolution: An Evaluation And Recommendation For Ohio*, 56 U. CIN. L. REV. 227, 238 (1987) (criticizing reimbursement alimony because the amount is discretionary and therefore often inadequate); Herman, *supra* note 4, at 553 (questioning the adequacy of reimbursement alimony, even if it includes a component for non-financial contributions); Stanfill, *supra* note 271, at 1011 (describing reimbursement as a minimally adequate remedy); Willoughby, *supra* note 4, at 148 (arguing that a maintenance award would not have sufficiently compensated Mrs. O'Brien for her contributions to her husband's career).

273. Rehabilitative alimony is a temporary measure aimed at affording its recipient the opportunity to become self-supporting. See Rosemary S. Sackett & Cheryl K. Munyon, *Alimony: A Retreat From Traditional Concepts Of Spousal Support*, 35 DRAKE L. REV. 297, 314-15 (1985-86). Such an award pays for training and educating a divorced spouse who would otherwise encounter difficulty in finding suitable employment. Joan M. Krauskopf, *Rehabilitative Alimony: Uses And Abuses Of Limited Duration Alimony*, 21 FAM. L. Q. 573, 581 (1988).

274. *Grosskopf v. Grosskopf*, 677 P.2d 814, 822-23 (Wyo. 1984):

[The court observed that] where the working spouse supports the family while the other spouse attends college, obtains an advanced professional degree, and promptly seeks a no-fault divorce, there is no property accumulated to divide. . . . In this situation, an award to [the working spouse] which would afford an opportunity to obtain the same degree under the same circumstances, or in the alternative, a sum of money equal to that benefit seems equitable.

*Accord Mahoney v. Mahoney*, 453 A.2d 527, 535 (N.J. 1982); *Saint-Pierre v. Saint-Pierre*, 357 N.W.2d 250, 261 (S.D. 1984); see also Sharton, *supra* note 6, at 754.

275. See *O'Brien*, 66 N.Y.2d at 587, 489 N.E.2d at 717, 498 N.Y.S.2d at 748 (observing that an award of rehabilitative maintenance "frustrates the purposes underlying the Equitable Distribution Law"); see also Krauskopf, *supra* note 273, at 581 (arguing that strict time limitations on rehabilitative alimony may defeat its purpose); Burns & Grauer, *supra* note 4, at 510 (questioning the adequacy of rehabilitative maintenance because it is modifiable and revocable); Sharton, *supra* note 6, at 754 (pointing out that rehabilitative maintenance is criticized for not fully crediting the contributing spouse for contributions to the acquisition of the license). But see Diamond, *supra* note 3, at 90-91 (cautioning that rehabilitative maintenance is subject to abuse in that a recipient who is already capable of self-support may use the award to train for a new career).



takes into account the increased earning power of the other spouse, but not by pretending that the license is property and shackling the licensed spouse with an unjust burden.<sup>276</sup>

The most preferable alternative is a two-pronged approach: to divide marital property so as to recognize the non-licensed spouse's contributions to the acquisition of a license, but if there is insufficient property to achieve a satisfactory distribution, to award and adjust maintenance to reflect the contributions of the non-licensed spouse.<sup>277</sup>

New York's equitable distribution law mandates this approach. As noted above,<sup>278</sup> section 236(B)(5)(d)(6),<sup>279</sup> upon which the *O'Brien* court placed primary emphasis, does not define marital property, nor does it say or even imply that a career or earning potential is marital property.<sup>280</sup> Rather, it instructs

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276. The labor theory of value proposes that the supporting spouse receive 50% of the licensed spouse's income for as many years as the supporting spouse contributed to the education of the licensed spouse. See Linda S. Mullinex, *The Valuation Of An Education At Divorce*, 16 LOY. L.A. L. REV. 227, 274-79 (1983). This approach, which has not gained acceptance with the courts, fails to consider the relative contributions of the spouses, although it could be modified to do so. *Id.* at 279, 282. In addition, the licensed spouse may, in the early stage of his or her career, put the license to minimal use, with the result that the non-licensed spouse would receive inadequate compensation. See also Callison, *supra* note 5, at 461-62, wherein the author suggests that distributive awards to the contributing spouse be based on the licensed spouse's actual, rather than hypothetical, earnings. Courts have, on occasion, followed this approach. *E.g.*, *Jones v. Jones*, 144 Misc. 2d 295, 300-02, 543 N.Y.S.2d 1016, 1019-20 (Sup. Ct. Kings County 1989).

277. Several jurisdictions, governed by equitable distribution statutes, have followed this approach. *E.g.*, *Nelson v. Nelson*, 736 P.2d 1145, 1147 (Alaska 1987); *In re Marriage of Stuart*, 813 P.2d 49, 51 (Or. 1991); *Beeler v. Beeler*, 715 S.W.2d 625, 627 (Tenn. Ct. App. 1986); *Lundberg v. Lundberg*, 318 N.W.2d 918, 924 (Wis. 1982). This position has also been adopted in states that have adopted community property law. *Frausto v. Frausto*, 611 S.W.2d 656, 659 (Tex. Civ. App. 1980); *In re Marriage of Washburn*, 677 P.2d 152, 158 (Wash. 1984). Other courts have favored one of the two prongs of this approach, either awarding alimony to compensate the non-licensed spouse, *e.g.*, *In re Marriage of Weinstein*, 470 N.E.2d 551, 559 (Ill. App. Ct. 1984); *Drapek v. Drapek*, 503 N.E.2d 946, 950 (Mass. 1987); *Mahoney v. Mahoney*, 453 A.2d 527, 536 (N.J. 1982); *Stevens v. Stevens*, 492 N.E.2d 131, 135 (Ohio 1986); see generally *Burns & Grauer, supra* note 4, at 506, or adjusting the division of marital property to reach an equitable result, *e.g.*, *Scott v. Scott*, 645 S.W.2d 193, 197 (Mo. Ct. App. 1982), *Haywood v. Haywood*, 415 S.E.2d 565, 570-71 (N.C. Ct. App. 1992), *rev'd on other grounds*, 425 S.E.2d 696 (N.C. 1993).

278. See *supra* notes 54-61 and accompanying text.

279. See N.Y. DOM. REL. LAW § 236(B)(5)(d)(6) (McKinney 1986).

280. "Marital Property" is defined in N.Y. DOM. REL. LAW § 236(B)(1)(c) (McKinney 1986).

the court to consider "direct or indirect contribution[s] made . . . to the career or career potential of the other party" in distributing marital assets.<sup>281</sup> Thus, under this subsection, when a spouse contributes to the education or career potential of the other spouse, the contributing spouse becomes entitled to a greater share of marital property than would otherwise have been the case.

When divorce occurs before the couple has accumulated significant assets, as was the case in *O'Brien*, adjusting the division of marital property may not provide the contributing spouse with fair compensation. In such a case, the court should consider awarding maintenance to compensate the contributing spouse. Such a maintenance award conforms with the statutory purpose of maintenance, which the judge awards "as justice requires" based on the "circumstances of the case."<sup>282</sup> Maintenance awards have the added benefit of being subject to modification.<sup>283</sup> Thus, if the income of the licensed spouse rises after the initial award, maintenance may be adjusted accordingly. More critically, however, the statute directs the court, in establishing a maintenance award, to consider "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 . . ." <sup>284</sup> Maintenance is, therefore, the statutory mechanism designed to compensate a non-titled spouse for contributions made to the career potential of the other spouse when sufficient marital property is unavailable to fashion an appropriate remedy.

Awarding maintenance to compensate the contributing spouse has been criticized as inadequate and regressive.<sup>285</sup> Since maintenance terminates upon remarriage,<sup>286</sup> some, including the *O'Brien* court, have argued, notwithstanding the language of the statute, that maintenance does not provide a

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281. See N.Y. DOM. REL. LAW § 236(B)(5)(d)(6) (McKinney 1986).

282. *Id.* § 236(B)(6)(a).

283. See *id.* § 236(B)(9)(b).

284. *Id.* § 236(B)(6)(a)(8).

285. See *e.g.*, *O'Brien*, 66 N.Y.2d at 587, 489 N.E.2d at 717, 498 N.Y.S.2d at 748; Sharton, *supra* note 6, at 763.

286. N.Y. DOM. REL. LAW § 236(B)(6)(c) (McKinney 1986).

suitable remedy for the non-licensed spouse.<sup>287</sup> However, contributions, whether financial, emotional, or otherwise, to the development of a spouse's potential are an inevitable consequence of marriage and should not create a right to perpetual compensation.

The *O'Brien* court also believed that the use of maintenance in this context violated the policy of the equitable distribution law. That policy, the court emphasized, is to award a share of marital assets to the non-titled spouse, "not because that share is needed, but because those assets represent the capital product of what was essentially a partnership entity."<sup>288</sup> The circularity of the *O'Brien* argument is apparent: the statute does not subsume licenses, degrees, professional distinction, and fame under the definition of marital property. The courts have reshaped the meaning of this term. In their zeal to assure that economic justice will be done, the courts have usurped the legislative function, expanding the definition of marital property to the point where, under the most recent extensions of the *O'Brien* rule, the result is not justice but absurdity.

### VIII. Conclusion

The *O'Brien* court sought to remedy the injustice suffered by a divorced spouse who supported the other spouse through professional school only to be denied the benefits of the degree. Though its objective is laudable, the doctrine, as an overwhelming number of jurisdictions have recognized, imposes an unreasonable burden on the licensed spouse. In eliminating one injustice, the court created another. The courts of New York can temper the harsh effects of the doctrine by reversing the trend to expand it, but the solution must ultimately come from acknowledgement by the New York Court of Appeals or the legislature that the doctrine must be discarded.

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287. See e.g., *O'Brien*, 66 N.Y.2d at 587, 489 N.E.2d at 717, 498 N.Y.S.2d at 748; Sharton, *supra* note 6, at 767-68.

288. *O'Brien*, 66 N.Y.2d at 587, 489 N.E.2d at 717, 498 N.Y.S.2d at 748 (quoting *Wood v. Wood*, 119 Misc. 2d 1076, 1079, 465 N.Y.S.2d 475, 477 (Sup. Ct. Suffolk County 1983)).