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Human Capital as Marital Property

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NOTE

HUMAN CAPITAL AS MARITAL PROPERTY

INTRODUCTION

In 1985, the New York Court of Appeals, in *O'Brien v. O'Brien*,[1] recognized that a professional license obtained during marriage, was marital property subject to equitable distribution. Other jurisdictions, striving to find a suitable way to treat a professional degree in the context of marital dissolution proceedings, have produced divergent judicial responses, with the *O'Brien* approach having little impact.

A possible explanation as to why other jurisdictions have been reluctant to adopt *O'Brien* stems from the myriad of problems New York's highest court created when it held that a professional degree is marital property. Although the *O'Brien* holding was admirable to the extent it attempted to resolve the inequities of the working spouse/student spouse syndrome, in reaching its decision, new dilemmas emerged which remain largely unresolved. Part I of this Note discusses the facts leading up to the 1985 *O'Brien* decision and analyzes the alternative methods that other jurisdictions have chosen in dealing with *O'Brien* type cases.[2] Part II points out the problems left in *O'Brien's* wake, explores the reach of *O'Brien* and offers both legislative and judicial suggestions and recommendations aimed at resolving the inequities created by the *O'Brien* decision.[3]

I. *O'BRIEN*: A NEW ERA

In any marital dissolution proceeding, barring the existence of a

1. 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985).
2. *See infra* notes 4-83 and accompanying text.
3. *See infra* notes 84-238 and accompanying text.

valid prenuptial agreement, a court must address three fundamental questions: (1) is a particular asset marital property?;[4] (2) if so, what is its value?; and (3) how do we equitably distribute this asset?[5] In most states, including New York,[6] only "marital property" may be divided[7] upon divorce and it is therefore vital in a marital dissolution proceeding to determine which of the accumulated assets are "marital property."[8] For example, New York Domestic Relations Law § 236 provides that marital property shall be distributed equitably between the parties considering the circumstances of the case and separate property shall remain vested in the original title holder.

In a society fueled by manufacturing and agriculture, the primary forms of wealth are physical assets such as real estate, buildings and manufactured goods, as well as financial assets such as stocks, bonds and savings.[9] Therefore, dividing the marital "pie" has generally been limited to dividing quantifiable tangibles. However, as the American economy has shifted from one based upon production of goods to one dominated by professional and other services, individuals have become our society's primary income producing assets.[10] The notion that it is the individual's knowledge that is the main marital asset, rather than the material goods he has acquired, is the concept of human capital[11] as marital property.[12]

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4. For example, the equitable distribution law of New York contemplates only two classes of property: marital property and separate property. N.Y. DOM. REL. LAW § 236B[1][b], [c], [d] (McKinney 1988).

5. Florescue, *'Average' Valuation; Equitable Distribution*, N.Y.L.J., Apr. 29, 1988, at 1, col. 1 (citing Brown, Price v. Price: *A Judicial Perspective*, FAM. L. REV., June 1987, at 3, 4).

6. *See* N.Y. DOM. REL. LAW § 236B[5][b], [c] (McKinney 1988).

7. While in some states a court may divide all the property owned by either party, in most states only "marital property" may be divided. J. OLDHAM, DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY § 5.03 (1989).

8. *See* J. GREEN, J. LONG & R. MURAWSKI, DISSOLUTION OF MARRIAGE § 10.04 (1986).

9. Parkman, *The Recognition of Human Capital as Property in Divorce Settlements*, 40 ARK. L. REV. 439, 439-40 (1987).

10. Human capital is a term that has been used to describe the capitalized value of the increased stream of earnings that will flow to an individual who has been the recipient of an investment in skills or knowledge. *Id.* at 440.

11. *Id.*

12. Basically all wealth is a product of investment. Investments are generally a sacrifice of current consumption power (capital) in anticipation of greater future income gained as a result of that sacrifice. For example, an investment in securities or real estate is a forbearance of current capital consumption power with the expectation that the investment will yield an even greater return tomorrow. Similarly, a person who enters a graduate school program, a union apprenticeship program, a training program at a business corporation, or similar personal enhancement program, sacrifices not only tuition and fees today, but also other opportu-

Human capital as marital property first gained recognition by the New York Court of Appeals in *O'Brien v. O'Brien*,[13] where the court held that the enhanced earning capacity created by a medical license, acquired during the marriage, was marital property.[14] Prior to *O'Brien*, an interest in a professional business or practice was recognized as marital property, but a license was not.[15] The issue in *O'Brien* evolved essentially because Dr. O'Brien's medical degree and license had been conferred during his nine year marriage and, at the commencement of the divorce, there was no medical practice and practically no marital assets to distribute.[16]

A. *Facts of* O'Brien

Dr. and Mrs. O'Brien were married in 1971.[17] At that time, Dr. O'Brien had completed three and a half years of undergraduate education and Mrs. O'Brien had obtained a bachelor's degree and temporary teaching certificate.[18] In order to obtain her permanent teaching certificate, Mrs. O'Brien needed eighteen months of postgraduate education, at an approximate cost of $3000.[19] However, rather than pursue her permanent teaching license, she helped Dr.

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nities because they are spending their time trying to gain necessary tools for their future advancement. These tuition and opportunity costs are expended with the expectation that the asset acquired via the training will yield future income gains above and beyond what would have otherwise been earned. Investment in human capital represents the diversion of income from present needs in anticipation of future income gains. To the extent that an investment in such a program results in an identifiable or quantifiable increase in earning capacity, this enhanced earning capacity, whether it be a professional license or a certificate of membership in a recognized business society, may be valued as human capital. King, *Divorce Settlements: The Value of Human Capital*, TRIAL, Aug. 1982, at 48, 49.

13. 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985).

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

15. *See, e.g.*, Arvantides v. Arvantides, 64 N.Y.2d 1033, 478 N.E.2d 199, 489 N.Y.S.2d 58 (1985) (holding that husband's dental practice was marital property); Litman v. Litman, 93 A.D.2d 695, 463 N.Y.S.2d 24 (1983) (holding that while husband's law practice was marital property, his license was not), *aff'd*, 61 N.Y.2d 918, 463 N.E.2d 34, 474 N.Y.S.2d 718 (1984).

16. At trial, the lower court found that the medical license obtained by Dr. O'Brien was the only family asset of substantial value created during their nine year marriage. *See* O'Brien v. O'Brien, 114 Misc. 2d 233, 234, 452 N.Y.S.2d 801, 803 (Sup. Ct. 1982) (finding that since "[t]he breakdown of this marriage relationship occurred shortly after completion of the plaintiff's professional schooling," the only valuable asset was plaintiff's professional license), *rev'd*, 106 A.D.2d 223, 485 N.Y.S.2d 548, *rev'd*, 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985).

17. *O'Brien*, 66 N.Y.2d at 581, 489 N.E.2d at 713, 498 N.Y.S.2d at 744.

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

19. *Id.* at 581, 489 N.E.2d at 713, 498 N.Y.S.2d at 744.

O'Brien complete his bachelor's degree at night.[20] In 1973, Mrs. O'Brien, in lieu of pursuing her permanent teaching certificate, moved to Guadalajara, Mexico so that Dr. O'Brien could enroll in medical school.[21] While he pursued his studies, Mrs. O'Brien held several teaching and tutorial positions and contributed her earnings toward their joint expenses.[22] Although the O'Briens received contributions from both of their parents, the trial court found that, while in Mexico, she earned 76% of the couple's total income.[23] In October of 1980, Dr. O'Brien received his medical license.[24] Two months later, he filed for divorce.[25]

B. *Lower Court Findings*

At trial, Mrs. O'Brien argued that the medical license was marital property and that she was therefore entitled to a portion of its value. The trial court agreed with Mrs. O'Brien and held that Dr. O'Brien's degree and license to practice medicine were property rights subject to equitable distribution.[26] The appellate division reversed, holding that because a degree does not fall within the traditional concepts of property, and the value of a license represented a speculative and uncertain expectancy, a professional license was not marital property.[27] The case was then remanded to the trial court so that appropriate maintenance and rehabilitative awards could be determined.[28] Mrs. O'Brien then filed an appeal.

C. *Court of Appeals*

The court of appeals reversed and held that Dr. O'Brien's medical license was indeed marital property.[29] In doing so, the court became the first high court to call an intangible asset (Dr. O'Brien's medical license) marital property.[30]

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20. *Id.* at 581, 489 N.E.2d at 713-14, 498 N.Y.S.2d at 744-45.
21. *Id.* at 581, 489 N.E.2d at 713, 498 N.Y.S.2d at 744.
22. *Id.*
23. *Id.* at 581-82, 489 N.E.2d at 713, 498 N.Y.S.2d at 744 (excluding a $10,000 loan obtained by Dr. O'Brien).
24. *Id.* at 581, 489 N.E.2d at 713, 498 N.Y.S.2d at 744.
25. *Id.*
26. *See O'Brien*, 114 Misc. 2d at 239, 452 N.Y.S.2d at 806.
27. *See O'Brien*, 106 A.D.2d at 230, 485 N.Y.S.2d at 550.
28. *Id.* at 231-32, 485 N.Y.S.2d at 554-55.
29. *See O'Brien*, 66 N.Y.2d at 585, 489 N.E.2d at 716, 498 N.Y.S.2d at 747.
30. *See, e.g.*, Drapek v. Drapek, 399 Mass. 240, 244, 503 N.E.2d 946, 949 (1987) (acknowledging that, thus far, New York is the only jurisdiction where a professional license is considered marital property).

In reaching its decision, the court of appeals had to circumvent the argument successfully advanced by a number of litigants[31] and specifically argued by Dr. O'Brien — that an educational degree is simply not property. Well known for its analysis on this point, the Supreme Court of Colorado, in an *en banc* decision, noted that:

> [A professional degree] does not have an exchange value or any objective transferable value on an open market. It is personal to the holder. It terminates on death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed, or pledged. An advanced degree is a cumulative product of many years of previous education, combined with diligence and hard work. It may not be acquired by the mere expenditure of money. It is simply an intellectual achievement that may potentially assist in the future acquisition of property. In our view, it has none of the attributes of property in the usual sense of that term.[32]

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31. *See, e.g., In re* Graham, 194 Colo. 429, 432, 574 P.2d 75, 77 (1978) (en banc) (agreeing with the husband's argument that since a license does not have the attributes of property in the traditional sense, a license is not marital property subject to equitable distribution).

32. *Id.* Many other states concur with Colorado's conclusion that a professional degree or license is not marital property. *See, e.g.*, Inman v. Inman, 648 S.W.2d 847 (Ky. 1982) (holding that a dentistry degree is not marital property); Van Bussum v. Van Bussum, 728 S.W.2d 538 (Ky. Ct. App. 1987) (holding that a professional degree is not marital property); Sweeny v. Sweeny, 534 A.2d 1290 (Me. 1987) (holding that a professional degree is not property); Archer v. Archer, 303 Md. 347, 493 A.2d 1074 (1985) (holding that husband's medical degree and license were not marital property); *Drapek*, 399 Mass. at 240, 503 N.E.2d at 946 (holding that professional degrees and licenses acquired during marriage are not property subject to equitable distribution); DeLa Rosa v. DeLa Rosa, 309 N.W.2d 755 (Minn. 1981) (holding that a medical degree is not marital property); Mahoney v. Mahoney, 91 N.J. 488, 453 A.2d 527 (1982) (holding that an MBA degree is not property subject to division upon divorce); Stevens v. Stevens, 23 Ohio St. 3d 115, 492 N.E.2d 131 (1986) (finding neither husband's veterinary degree nor the enhanced earning capacity created by it were marital assets subject to equitable distribution); Hodge v. Hodge, 513 Pa. 264, 520 A.2d 15 (1986) (holding that neither an advanced degree nor a medical license are property subject to equitable distribution under the divorce code); Helm v. Helm, 289 S.C. 169, 345 S.E.2d 720 (1986) (holding that neither a medical degree nor any other professional degree or license are to be classified as marital property subject to equitable distribution); Beeler v. Beeler, 715 S.W.2d 625 (Tenn. Ct. App. 1986) (holding that a professional license is not itself an item of marital property, but one spouse's contribution to the other's professional education is a factor to be considered upon equitable division of a marital estate); Grosskopf v. Grosskopf, 677 P.2d 814 (Wyo. 1984) (finding that a master's degree in accounting is not divisible marital property). *But see O'Brien*, 66 N.Y.2d at 576, 489 N.E.2d at 712, 498 N.Y.S.2d at 743 (holding that a medical license is marital property); Kalnins v. Kalnins, N.Y.L.J., Nov. 16, 1989, at 23, col. 3 (N.Y. Sup. Ct.) (holding that an MBA degree is marital property for purposes of equitable distribution); McGowan v. McGowan, 136 Misc. 2d 225, 518 N.Y.S.2d 346 (Sup. Ct. 1987) (holding a master's degree in science and a teaching certificate to be marital property); Vanasco v. Vanasco, 132 Misc. 2d 227, 503 N.Y.S.2d 480 (Sup. Ct. 1986) (finding that a license to practice accounting is marital property to the extent it was acquired during the marriage);

The New York Court of Appeals rejected this argument and concluded that because marital property was a remedial and equitable concept it should not be confined to the traditional notions of property and should instead be analyzed in terms of the value of the object to its holder.[33] Although a license cannot be sold, to the extent it affords the holder an opportunity to achieve a greater income (i.e. an enhanced earning capacity), it is a thing of value.[34] The court broadly construed § 236B[5][d] of the New York Domestic Relations Law and held that spouses have an equitable right to "all property acquired by either or both spouses . . . regardless of the form in which title is held."[35] Further, in determining an equitable distribution, the court shall consider any direct or indirect contributions.[36] The court also wanted to recognize and resolve the inequities of the student spouse/working spouse syndrome[37] of which the O'Briens are a classic example.[38] The typical student spouse/working spouse

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Cronin v. Cronin, 131 Misc. 2d 879, 502 N.Y.S.2d 368 (Sup. Ct. 1986) (holding that a license to practice law constitutes marital property as it represents possible enhanced earning capacity). *See generally* Freed & Walker, *Family Law in the Fifty States: An Overview*, 21 FAM. L.Q. 417, 487-89 (1988) (collecting cases); Singer, *Divorce Reform and Gender Justice*, 67 N.C.L. REV. 1103, 1116 n.70 (1989).

33. *See* O'Brien v. OBrien, 66 N.Y.2d 576, 583-84, 489 N.E.2d 712, 715, 498 N.Y.S.2d 743, 746 (1985); *see also* Florescue, *'Market Value,' Professional Licenses and Marital Property: A Dilemma in Search of a Horn*, FAM. L. REV., Dec. 1982, at 13.

34. *See* Parkman, *supra* note 9, at 451 (noting that human capital, here a professional license, has value because it will generate a future income stream).

35. *O'Brien*, 66 N.Y.2d at 583, 489 N.E.2d at 715, 498 N.Y.S.2d at 746.

36. New York Domestic Relations Law § 236B[5][d][6] provides, in relevant part, that in determining an equitable distribution of marital property the court shall consider "any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property . . ., 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." N.Y. DOM. REL. LAW § 236B[5][d][6] (McKinney 1988).

37. The term "student spouse/working spouse syndrome" was coined by Henry Foster. Foster & Freed, *O'Brien v. O'Brien: What Happened on the Way to the Forum?*, N.Y.L.J., Apr. 11, 1985, at 1, col. 1, 4, col. 4 n.2. This syndrome is also known as the "P.H.T." (putting hubby through) program. *See* Erickson, *Spousal Support Toward the Realization of Economic Goals; How the Law Can Ensure Reciprocity*, 1978 WIS. L. REV. 947, 948 n.4. This syndrome has also been called the "diploma dilemma." *See* Downs v. Downs, 574 A.2d 156, 157 (Vt. 1990).

38. The authors understand that in today's society it is just as likely for a man to make social and economic sacrifices to help his wife begin her career as it was for a woman to do so in years past. Throughout this work, however, the "working spouse" is characterized as a female for two important reasons. First, in many of these "working spouse/student spouse" syndrome cases it is, in fact, the wife who made the sacrifices for her husband's career. *See* Singer, *supra* note 32, at 1115. *But see* NATIONAL CENTER FOR EDUC. STATISTICS, OFFICE OF EDUC. RESEARCH AND IMPROVEMENT, U.S. DEP'T OF EDUC., DIGEST OF EDUC. STATISTICS 179 (25th ed. 1989) (noting that, although historically women have put men through professional

case scenario arises when one spouse, in order to put the other spouse through a professional program, works throughout the marriage to defray the costs of that training. The working spouse has often foregone economic and professional opportunities of her own and, instead, has devoted her resources towards the acquisition of the enhanced-spouse's professional degree. Unfortunately, upon dissolution of the marriage, the only real economic asset is the professional license, leaving a tremendous economic disparity between the enhanced-spouse and the non-degree spouse.[39]

Here, nearly all of Mrs. O'Brien's energies were devoted to the acquisition of Dr. O'Brien's medical degree. She sacrificed her own educational goals, performed the majority of household duties, and gave up other marital assets that could have been acquired had Dr. O'Brien been employed.[40] Upon the dissolution of their marriage she was left with nothing to show for her efforts. Yet, Dr. O'Brien was left with a medical degree and a promising career. To remedy this disparity, the court held that Dr. O'Brien's degree was marital property, calculated its value in terms of the enhanced earning capacity generated by the license, and awarded Mrs. O'Brien forty percent of its value.[41] The court specifically stated that Mrs. O'Brien's contributions represented an investment in the "economic partnership" of their marriage and to hold otherwise would be contrary to the underlying precepts of the equitable distribution statute.[42] The policy behind the equitable distribution statute was that marriage is an economic partnership.[43] Therefore, in order to uphold this policy, upon the dissolution of a marriage, there should be a severance of the parties' economic ties by a fair and equitable distribution of the marital assets.

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programs, a change is occurring and now approximately half of all graduate students are women). Second, for reasons of literary consistency and clarity we choose to characterize the female as the "working spouse." No gender-based discrimination is intended.

39. Batts, *Remedy Refocus: In Search of Equity in "Enhanced Spouse/Other Spouse" Divorces*, 63 N.Y.U. L. REV. 751, 752 (1988).

40. *See* O'Brien v. O'Brien, 66 N.Y.2d 576, 581, 489 N.E.2d 712, 714, 498 N.Y.S.2d 743, 745 (1985).

41. *Id.* at 582, 489 N.E.2d at 714, 498 N.Y.S.2d at 745.

42. *Id.* at 585, 489 N.E.2d at 716, 498 N.Y.S.2d at 747 (citing Memorandum of Assemblyman Gordon W. Burrows, *reprinted in* 1980 N.Y. LEGIS. ANN. 129-30.).

43. *See* Ellman, *The Theory of Alimony*, 77 CALIF. L. REV. 3, 10 n.21 (1989); Sharp, *The Partnership Ideal: The Development of Equitable Distribution in North Carolina*, 65 N.C.L. REV. 195, 198-201 (1987); *see also O'Brien*, 66 N.Y.2d at 585, 489 N.E.2d at 716, 498 N.Y.S.2d at 747 (observing that a marital relationship is considered an economic partnership for equitable distribution purposes).

D. *Non-Marital Property Methods of Remedy*

Presently it appears that the New York Court of Appeals is the only high court in the country to consider a professional license marital property.[44] This section surveys how other jurisdictions have struggled to remedy the plight of the non-degree spouse, the methods these jurisdictions have chosen, their strengths and weaknesses, and how these various methods compare to New York's marital property approach.

A majority of state courts have confronted cases factually similar to *O'Brien*.[45] Although none of these states appears to have applied the marital property approach of *O'Brien*,[46] the remedies they have applied can be broken down into four basic types.

1. *Consideration of the Non-degree Spouse's Contribution.*—A majority of the state courts that have considered cases factually similar to *O'Brien* have simply taken the non-degree spouse's contribution into account when awarding the non-degree spouse maintenance.[47] The Supreme Court of Colorado summed up this majority approach:

> [I]f maintenance is sought and a need is demonstrated, the trial court may make an award based on all relevant factors . . . . Certainly, among the relevant factors to be considered is the contribution of the spouse seeking maintenance [non-degree spouse] to the education of the other spouse [enhanced-spouse] from whom the maintenance is sought.[48]

In many student spouse/working spouse cases, however, the non-degree spouse, having failed to demonstrate a need, is ineligible to collect maintenance upon divorce.[49] Typically a non-degree

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44. *See* Batts, *supra* note 39, at 806-08.

45. *Id.* at 758-59.

46. Although some courts have held that a professional license or degree was marital property, there were few such decisions, and all of them were later overruled. *See, e.g.*, Reen v. Reen, 8 FAM. L. REP. (BNA) 1053 (1982) (holding that orthodontist's license was marital property) (overruled by Drapek v. Drapek, 399 Mass. 240, 503 N.E. 946 (1987)). Woodworth v. Woodworth, 126 Mich. App. 258, 337 N.W.2d 332 (1983) (holding that a law degree was marital asset) (overruled by Olah v. Olah, 135 Mich. App. 404, 354 N.W.2d. 359 (1984)).

47. The term "maintenance" is now preferred by many jurisdictions over the term "alimony." *See* Freed & Walker, *supra* note 32, at 487-89.

48. *See In re* Graham, 194 Colo. 429, 431, 574 P.2d 75, 78 (1978); *see also* Donahue v. Donahue, 299 S.C. 353, 384 S.E.2d 741 (1989) (holding that the contribution of one spouse to the education of the other may be "reimbursed" by giving the supporting spouse a larger distributive share of the marital property); Jones v. Jones, 144 Misc. 2d 295, 543 N.Y.S.2d 1016 (Sup. Ct. 1989) (same).

49. In addition, since maintenance is not only based on the enhanced earning capacity,

spouse, like Mrs. O'Brien, contributes most of the family's financial support by working one or more jobs during the marriage.[50] Under these circumstances, ironically, many non-degree spouses may be ineligible for maintenance *because* they were earning income during the marriage. Thus, if a non-degree spouse earns income during the marriage, that income may preclude her from seeking maintenance, even though that income was being contributed to the benefit of the enhanced-spouse's education or vocation. Thus in a majority of the courts that employ a *Graham*-type remedy approach, the non-degree spouse, who is ineligible for maintenance, may be left with absolutely no remedy or compensation for her contributions or forbearances during the marriage.[51]

Even if a non-degree spouse were entitled to a maintenance award and the court were to consider her contributions while making such an award, the non-degree spouse may still not enjoy a full and fair remedy. When making an award in cases factually similar to *O'Brien* many courts rely on projections of the enhanced spouse's future earning capacity.[52]

Reliance on projections of future earning capacity of the enhanced spouse may prove troublesome in many ways. First, while on rare occasions a maintenance award will be increased when the non-degree spouse can show that the enhanced-spouse's income has actu-

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but on the need of the non-degree spouse too, if a non-degree spouse continues to work or proves to be independently wealthy — she may get no maintenance, and thus no compensation for her efforts. *See, e.g., Graham*, 194 Colo. at 431, 574 P.2d at 78 (noting that if maintenance is sought, need must be demonstrated). *But see In re* Olar, 747 P.2d 676 (Colo. 1987) (en banc) (modifying its harsh position and ultimately finding that a self-supporting, non-degree spouse did qualify for maintenance).

50. The court found Mrs. O'Brien contributed 76% of the financial support, worked two jobs, and took out student loans in her own name for the benefit of her husband. O'Brien v. O'Brien, 66 N.Y.2d 576, 581, 489 N.E.2d 712, 714, 498 N.Y.S.2d 743, 745 (1985).

51. In *Graham*, 194 Colo. at 493, 574 P.2d at 77, even though the court said they would consider the contributions of the non-degree spouse, the court nevertheless noted that in this case since the non-degree spouse had not sought maintenance in her pleadings she was not entitled to such recovery.

52. According to Professor Batts' reasoning, courts are willing to rely on projections "because maintenance, unlike property distribution awards, can be subsequently adjusted." Batts, *supra* note 39, at 766; *see, e.g.*, Drapek v. Drapek, 399 Mass. 240, 244, 503 N.E.2d 946, 949 (1987); Mahoney v. Mahoney, 91 N.J. 488, 497, 453 A.2d 527, 532 (1982); O'Brien v. O'Brien, 106 A.D.2d 223, 229, 485 N.Y.S.2d 548, 553, *rev'd*, 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985); Wehrkamp v. Wehrkamp, 357 N.W.2d 264, 266 (S.D. 1984); DeWitt v. DeWitt, 98 Wis. 2d 44, 58, 296 N.W.2d 761, 768 (Ct. App. 1980) (distinguishing between the permanence of property distributions and the adjustability of maintenance awards).

ally exceeded the court's projections,[53] in many instances a maintenance award will be reduced if the enhanced-spouse can show that his actual earnings are less than projected.[54] Inherent in this system of allowing such modifications is the risk that unscrupulous enhanced-spouses will try to hide their actual income in order to lower their maintenance responsibility, but the modification procedure should not be abandoned in order to avoid the occasional system abuser. While modification of a maintenance award may prove troublesome in this way, modification of a marital property award is recommended if correctly regulated by the courts.[55] A second problem, borne of the courts' reliance on projections of enhanced earning capacity in making maintenance awards, is that the typical non-property or support maintenance award expires when the awarded-spouse remarries.[56] Additionally, statutes in some jurisdictions terminate alimony or maintenance payments if the payee cohabitates with an unrelated member of the opposite sex.[57] While it may be true that upon remarriage the non-degree spouse may no longer need the additional support that the maintenance award provides, it may be unfair to terminate the maintenance award if it is also representative of the non-degree spouse's contributions to the enhanced capacity of the enhanced-spouse. By tying the non-degree spouse's remedy to the "revocable at remarriage" maintenance award, many courts are providing a disincentive to the non-degree spouse to remarry.

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53. *See* Lira v. Lira, 12 Ohio App. 3d 69, 70, 465 N.E.2d 1353, 1354 (1983) (increasing monthly maintenance award of $250 to $1000 when the enhanced-spouse's annual income rose from $15,000 to between $90,000 and $100,000 per year).

54. *See* H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 16.5, at 199-203 (2d. ed. 1987).

55. *See infra* notes 193-210 and accompanying text.

56. In general, there are two kinds of alimony/maintenance: (a) Support alimony (also called "periodic," "continuing" or "permanent" alimony) which usually terminates upon the death of either party or remarriage of the payee; and (b) Property-type alimony (also called "lump-sum" or "fixed" alimony) which becomes instantly vested when the divorce decree is fully executed, is not subject to modification, and does not terminate upon death or remarriage if sums remain unpaid. Maxcy v. Estate of Maxcy, 485 So. 2d 1077, 1078 (Miss. 1986). Other states are in accord with *Maxcy's* view. *See, e.g.*, Scoville v. Scoville, 179 Conn. 277, 279, 426 A.2d 271, 273 (1979); Van Riper v. Keim, 437 N.E.2d 130, 132 (Ind. Ct. App. 1982); St. Clair v. St. Clair, 9 Ohio App. 3d 195, 196-97, 459 N.E.2d 243, 246 (1983); Mallery-Sayre v. Mallery, 6 Va. App. 471, 473, 370 S.E.2d 113, 115 (1988).

57. *See, e.g.*, ALA. CODE § 30-2-55 (1989); CAL. CIV. CODE § 4801.5(a)-(b) (West Supp. 1991); CONN. GEN. STAT. ANN. §§ 46(b)-86(b) (West Supp. 1990); GA. CODE ANN. § 19-6-1 (1982); ILL. ANN. STAT. ch. 40, para. 510(c) (Smith-Hurd Supp. 1990); LA. CIV. CODE. ANN. art. 112(A)(4) (West Supp. 1991); N.Y. DOM. REL. LAW § 248 (McKinney 1986); PA. STAT. ANN. tit. 23, § 507 (Purdon Supp. 1990); TENN. CODE ANN. § 36-5-101(3) (Supp. 1990); UTAH CODE ANN. § 30-3-5(5)-(6) (1989).

2. *Alimony Approaches.*—There are a few states that do not adhere to *O'Brien's* marital property approach or to *Graham's* maintenance based approach but still attempt to reward the non-degree spouse for her contributions to the education and support of the enhanced-spouse. These states either award rehabilitative alimony or reimbursement alimony to the non-degree spouse in an attempt to provide a fair remedy.[58]

a. *Rehabilitative Alimony.*—In general, rehabilitative awards are temporary and designed to allow the non-working spouse recipient to become self supporting.[59] The few courts that award rehabilitative alimony[60] attempt, in cases where an enhanced earning capacity is at issue, to compensate the non-degree spouse by directing the enhanced-spouse to make alimony payments designed to help the working spouse achieve a higher income capacity.[61] Therefore, rehabilitative alimony may allow a non-degree spouse to receive money for her own support and further education if both would be necessary to allow her to achieve the higher capacity that she might have enjoyed had she not subordinated her own goals to help the enhanced-spouse reach his.

There are, however, some restrictions on the granting of rehabilitative alimony and in many cases these restrictions may preclude a non-degree spouse like Mrs. O'Brien from receiving such alimony. Typically in order to receive rehabilitative alimony the recipient must: 1) not have been employed during the marriage; or 2) have

58. *See* Freed & Walker, *supra* note 32, at 474-76.

59. *See id.* at 476-78 (compiling cases on rehabilitative awards).

60. The term rehabilitative alimony is somewhat of an oxymoron because alimony (or maintenance) is intended to be a permanent award terminating only upon death or remarriage. *See* Parlow v. Parlow, 145 Misc. 2d 850, 856-57, 548 N.Y.S.2d 373, 377 (Sup. Ct. 1989). Rehabilitative awards, however, are temporary in nature, intending to allow the spouse an opportunity to pursue a career or degree of her own so that she may become self-supporting. *See* Hill v. Hill, 91 N.J. 506, 509, 453 A.2d 537, 538 (1982); Lepis v. Lepis, 83 N.J. 139, 155 n.9, 416 A.2d 45, 53 n.9 (1980); Turner v. Turner, 158 N.J. Super. 313, 314, 385 A.2d 1280, 1280 (Ch. Div. 1978). *See generally* Batts, *supra* note 39, at 767-69 (discussing the principles of rehabilitative alimony).

61. *See In re* Janssen, 348 N.W.2d 251, 254 (Iowa 1984); *see also In re* Francis, 442 N.W.2d 59, 62 (Iowa 1989) (rejecting the trial court's ruling that granted the non-degree spouse a property award of the enhanced-spouse's medical license, the court noted that where a marriage is of short duration and yields the accumulation of few tangible assets, "alimony - rehabilitative, reimbursement, or a combination of the two - rather than an award of property, furnishes a fairer and more logical means of achieving the equity sought."). Notwithstanding their rejection of a property-based analysis, the court nevertheless confirmed the amount of the award. *Francis*, 442 N.W.2d at 67.

left the work force during the marriage because of children.[62] Most non-degree spouses, however, have been working during the marriage in order to help send the enhanced-spouse through training[63] so they, as a general class, would be ineligible to receive rehabilitative alimony because they would have never left the work force or are self supporting. In addition, rehabilitative alimony may not compensate a non-degree spouse who has remained employed at a lesser job and lower rate of pay in order to help the enhanced-spouse get his education.[64] At least one scholar suggests that rehabilitative alimony could be a viable remedy in working spouse/student spouse syndrome cases if self-supporting non-degree spouses were allowed to collect such alimony.[65] However, in the rare circumstance that rehabilitative alimony is awarded to the non-degree spouse, such an award may prove to be an unsatisfactory remedy because in addition to being modifiable and revokable, it is dependant upon speculative future circumstances like the enhanced-spouse's ability to pay.[66]

b. *Reimbursement Alimony.*—By analogizing to the contract theory of unjust enrichment,[67] a handful of courts have allowed the non-degree spouse to recover any actual monies paid out for the education of the enhanced-spouse.[68] In many ways, reimbursement alimony is more flexible than other types of alimony and maintenance awards. Such an award may be made in addition to permanent ali-

62. *See* Mahoney v. Mahoney, 91 N.J. 488, 503, 453 A.2d 527, 535 (1982) (noting that rehabilitative alimony would not be available if the non-degree spouse were either unable to return to work or became self-sufficient).

63. *See* O'Brien v. O'Brien, 66 N.Y.2d 576, 581, 489 N.E.2d 712, 714, 498 N.Y.S.2d 743, 745 (1985). Mrs. O'Brien held two jobs at certain points during the marriage. *Id.*

64. In Wehrkamp v. Wehrkamp, 357 N.W.2d 264 (S.D. 1984), the court did not see any great inequity worth compensation where the non-degree spouse chose a lesser career path, yet was still able to support herself. *See also* McDermott v. McDermott, 129 Ariz. 76, 628 P.2d 959 (Ct. App. 1981) (holding that where a spouse is capable of supporting herself, she is not entitled to rehabilitative [alimony]).

65. *See* Batts, *supra* note 39, at 767-69.

66. *See* Hill v. Hill, 91 N.J. 506, 509, 453 A.2d 537, 538 (1982).

67. *See* Mahoney v. Mahoney, 91 N.J. 488, 502, 453 A.2d 527, 535 n.5 (1982) (recognizing the right to claim reimbursement alimony, the court noted that an award of "reimbursement alimony combines elements relating to the support, standard of living and financial expectations of the parties with notions of marital fairness and *avoidance of unjust enrichment.*" (emphasis added)); *see also* RESTATEMENT (SECOND) OF CONTRACTS §§ 345[c], [d] (1981).

68. Pyeatte v. Pyeatte, 135 Ariz. 346, 353-54, 661 P.2d 196, 202-04 (Ct. App. 1982) (employing an equitable constructive trust to prevent unjust enrichment of the enhanced-spouse to the detriment of the non-degree spouse where there was no other property to divide); *see also Mahoney*, 91 N.J. at 503, 453 A.2d at 535; Saint-Pierre v. Saint-Pierre, 357 N.W.2d 250 (S.D. 1984).

mony[69] and need not terminate upon the awarded spouse's remarriage.[70] In addition, where a non-degree spouse may not be entitled to rehabilitative alimony because she is self-supporting, she may be entitled to reimbursement alimony and therefore recoup the money she has expended to the benefit of the enhanced-spouse.[71] However, as flexible as reimbursement alimony appears to be, in many cases it often leaves a non-degree spouse with an incomplete remedy. Under many states' reimbursement statutes[72] and caselaw the non-degree spouse may only recover money expended toward direct educational expenses.[73] This would include tuition and books, but not the family's living or household expenses incurred as a result of the expenditure for the enhanced spouse's education.[74] Even though the non-

69. *See* Lynn v. Lynn, 91 N.J. 510, 518, 453 A.2d 539, 542 (1982) (stating both an initial lump-sum award of reimbursement alimony and a seperate continuing alimony obligation would be appropriate).

70. *See* Reiss v. Reiss, 205 N.J. Super. 41, 47, 500 A.2d 24, 27 (App. Div. 1985).

71. *See* Batts, *supra* note 39, at 770-71; Hill v. Hill, 91 N.J. 506, 510, 453 A.2d 537, 538 (1982) (finding that rehabilitative alimony and reimbursement alimony are mutually exclusive remedies).

72. At least three state legislatures have codified their views on reimbursement alimony. *Compare* DEL. CODE ANN. tit. 13, § 1512 (Supp. 1990) (stating that reimbursement alimony is not allowable under Delaware law) (citing Wright v. Wright, 469 A.2d 803 (Del. Fam. Ct. 1983)) *with* S.D. CODIFIED LAWS ANN. § 25-4-41 (1984 & Supp. 1990) (stating that in a proper case the trial court should award alimony, as reimbursement, to the supporting spouse for his or her contribution to the non-working spouse's obtaining "advanced training") *with* W. VA. CODE § 48-2-16 (1986 & Supp. 1990) (stating that a trial judge may, in an appropriate case, award reimbursement alimony to a working spouse who contributed financially to the professional education of a student-spouse with the expectation of a higher standard of living and such expectation was not realized due to the divorce).

73. In Mahoney v. Mahoney, 91 N.J. 488, 453 A.2d 527 (1982), the leading case on reimbursement alimony, New Jersey's highest court said that: "[R]eimbursement alimony *should cover all financial contributions towards the former spouse's education*, including household expenses, educational costs, school travel expenses and any other contributions used by the supported spouse in obtaining his or her degree or license." *Id.* at 501, 453 A.2d at 534 (emphasis added). Most of the other states which allow reimbursement alimony are in accord with the New Jersey Supreme Court's view that only money expended towards the former spouse's education is recoverable. *See, e.g., In re* Olar, 747 P.2d 676 (Colo. 1987) (en banc); Wright v. Wright, 469 A.2d 803 (Del. Fam. Ct. 1983); *In re* Francis, 442 N.W.2d 59 (Iowa 1989); *In re* Jennings, 455 N.W.2d 284 (Iowa Ct. App. 1990); Lovett v. Lovett, 688 S.W.2d 329 (Ky. 1985); Sweeney v. Sweeney, 534 A.2d 1290 (Me. 1987); McGowan v. McGowan, 436 Misc. 2d 225, 518 N.Y.S.2d 346 (Sup. Ct. 1987); Stevens v. Stevens, 23 Ohio St. 3d 115, 492 N.E.2d 131 (1986); Zullo v. Zullo, 395 Pa. Super. 113, 576 A.2d 1070 (1990); Donahue v. Donahue, 299 S.C. 353, 384 S.E.2d 741 (1989); Studt v. Studt, 443 N.W.2d 639 (S.D. 1989); Sorensen v. Sorensen, 769 P.2d 820 (Utah App. 1989); Downs v. Downs, 574 A.2d 156 (Vt. 1990); Washburn v. Washburn, 101 Wash. 2d 168, 677 P.2d 152 (1984) (en banc); Chamberlain v. Chamberlain, 383 S.E.2d 100 (W. Va. 1989).

74. *See* Pyeatte v. Pyeatte, 135 Ariz. 346, 661 P.2d 196 (Ct. App. 1982) (holding that non-degree, supporting spouse was entitled to restitution for her contributions to husband's

degree spouse receives compensation for the money she spent educating the enhanced spouse, many scholars feel that this type of remedy proves to be an economic boon to the enhanced spouse.[75] In other words, since the enhanced-spouse is only required to repay the non-degree spouse for direct educational expenses incurred, the enhanced spouse is in no worse a position than if he had to pay for his education himself.[76] Ordering the enhanced spouse to simply repay the non-degree spouse for direct educational expenses, under these circumstances, provides the enhanced-spouse an incentive to temporarily wed a 'disposable work-horse' that can be judicially hushed by the misapplication of restitutionary contract principles. In fact, even if the non-degree spouse were to receive the maximum restitutionary award possible, she would still be undercompensated, because such an award does not represent intangibles such as lost career or educational opportunities that she sacrificed in an effort to provide for the enhanced spouse's education or vocation. Clearly then, it seems that the non-degree spouse is not fully remedied via reimbursement alimony.

3. *Progressive Approaches.*—At least one state, Maryland, allows the chancellor presiding over a student spouse/working spouse syndrome case to consider the enhanced spouse's increased earning capacity in making a general alimony award.[77]

In Wisconsin, where the enhanced earning capacity generated by a license is not considered marital property,[78] the court has made some strides toward solving the inequities inherent in the student spouse/working spouse syndrome cases. In *In re Lundberg*,[79] the court awarded reimbursement maintenance and recognized that the non-degree spouse should be compensated for *both* actual educa-

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living expenses and direct education expenses); *In re* Rubinstein, 145 Ill. App. 3d 31, 40, 495 N.E.2d. 659, 664-65 (1986) (finding that the wife, who had been the primary breadwinner during the nine years her husband was pursuing his medical education, was entitled to compensation for her efforts towards supporting the family). *But see* CAL. CIV. CODE § 4800.3 (West Supp. 1991) (granting the non-degree spouse reimbursement or restitution *only* for direct expenses incurred towards the enhanced-spouse's education); IND. CODE ANN. § 31-1-11.5-11(d) (Burns Supp. 1990) (same).

75. Batts, *supra* note 39, at 771.

76. *Id.* at 770-72.

77. *See* Archer v. Archer, 303 Md. 347, 359, 493 A.2d 1074, 1080 (1985) (empowering a chancellor in a divorce action to make an alimony award, and to take into account the enhanced spouse's earning capacity while doing so). Note, however, in *Archer* the wife did not challenge the amount of her award. *Id.*

78. *In re* Lundberg, 107 Wis. 2d 1, 318 N.W.2d 918 (1982) (holding that husband's medical license was not marital property).

79. *Id.* at 11-12, 318 N.W.2d at 923.

tional expenses and indirect expenses as well.[80]

4. *Division of Marital Assets in Equitable Distribution States.*—In student spouse/working spouse syndrome cases where there are other marital assets to be divided, many courts simply award the non-degree spouse, who has made a contribution to the education and living expenses, a greater share of the marital assets as compensation.[81] This approach is almost a "non-approach" since in the typical student spouse/working spouse syndrome case there are usually no accumulated assets[82] other than the enhanced spouse's license or degree[83] and these states do not recognize the degree or license as an asset in the first place.

II. IN THE WAKE OF *O'BRIEN*

A. *Valuation*

The New York Court of Appeals created a myriad of problems New York, and the rest of the country as well, by calling a professional degree marital property.

One such problem engendered by the *O'Brien* decision and its progeny relates to the valuation of the professional license or degree. Valuation is necessary because once an asset is designated marital property, upon divorce, it must be valued and distributed.[84] Oddly enough, in addressing the issue of valuation, the *O'Brien* Court noted

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80. *See* Roberto v. Brown, 107 Wis. 2d 17, 22 n.1, 318 N.W.2d 358, 360 n.1 (1982) (taking into account all the contributions made by the working spouse including indirect expenses). *But see* CAL. CIV. CODE § 4800.3 (West Supp. 1991) (granting the non-degree spouse reimbursement or restitution for only direct expenses incurred toward the enhanced spouse's education); IND. CODE ANN. § 31-1-11.5-11(d) (Burns Supp. 1990) (same).

81. *See, e.g., In re* Graham, 194 Colo. 429, 433, 574 P.2d 75, 78 (1979) (en banc) (considering one spouse's contribution to the other's education when determining maintenance and dividing marital property); Hughes v. Hughes, 438 So. 2d 146, 150 (Fla. Dist. Ct. App. 1983) (considering husband's education in arriving at the distribution of other assets and in determining the property and or amount of alimony); Frausto v. Frausto, 611 S.W.2d 656, 659 (Tex. Civ. App. 1980) (considering potential future earnings when dividing the marital estate).

82. Recent research shows that most divorcing couples have little or no tangible property to divide. L. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA 55 (1985).

83. Weitzman's research indicates that, today, most married couples invest heavily in non-traditional assets such as "career assets." *Id.* at 111. Career assets include such things as education, professional training, job seniority, employment security, and future earning capacity. *Id.*

84. Note, *Equitable Distribution Requires Equitable Valuation: A Proposal for Amending New York's Equitable Distribution Law*, 10 CARDOZO L. REV. 2407, 2410 (1989) (authored by Jacqueline B. Stuart) (noting that "[e]quitable distribution can be best understood as a three part process consisting of classification, valuation and distribution.").

that it was the license and not the enhanced earning capacity that was the marital property,[85] although the license derives its value only because of the enhanced earning capacity that it creates.[86] Notwithstanding *O'Brien*, other jurisdictions refuse to value a professional degree or license claiming that such valuation was too "conjectural."[87] The *O'Brien* Court concluded that, while valuation was perhaps speculative, it was not insurmountable.[88] The court specifically noted that:

> [A]lthough fixing the present value of that enhanced earning capacity may present problems . . . [c]ertainly they are no more difficult than computing tort damages for wrongful death or diminished earning capacity resulting from injury and they differ only in degree from . . . valuing a professional practice for purposes of a distributive award, something that courts have not hesitated to do . . . .[89]

Thus, after conceding that there were problems inherent in the valu-

85. *See* O'Brien v. O'Brien, 66 N.Y.2d 576, 585, 489 N.E.2d 712, 716, 498 N.Y.S.2d 743, 747 (1985). Some cases after *O'Brien*, however, have recognized that it was the enhanced earning capacity, rather than the license, that was marital property. *See, e.g.*, McAlpine v. McAlpine, 143 Misc. 2d 30, 539 N.Y.S.2d 680 (Sup. Ct. 1989) (holding that a fellowship in the Society of Actuaries was marital property because of the enhanced earning capacity it created but that the plaintiff wife was not entitled to share in that increased earning capacity as she did not contribute to its attainment); Golub v. Golub, 139 Misc. 2d 440, 527 N.Y.S.2d 946 (Sup. Ct. 1988) (holding that the celebrity status gained during marriage as a result of the other spouse's efforts was considered marital property because of the enhanced earning capacity it generated).

86. *See* Florescue, *Professional Licenses as Marital Property*, N.Y.L.J., Mar. 28, 1989, at 3, col. 3 (arguing that the license itself has value only to the holder).

87. *See, e.g.*, Todd v. Todd, 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (1969); *see also In re* Lundberg, 107 Wis. 2d 1, 16, 318 N.W.2d 918, 925 (1982) (Callow, J., concurring) (observing that "[a]ttempting to value the percentage of future earnings to which the supporting spouse is entitled is too speculative to be judicially recognizable. There is no guarantee that the spouse with the enhanced education will . . . earn the amounts . . . calculated. Too many intangibles are associated with an enhanced education or degree to enable a court to prospectively value it . . . ."). However, Fitzpatrick and Doucette, economic scholars, argue that the valuation of future earnings is a product of well established economic principles and reliable statistical evidence: "There is no problem in measuring earning capacity because both the statistics and methodology have long been available and recognized in courts of law." Fitzpatrick & Doucette, *Can the Economic Value of an Education Really be Measured? A Guide for Marital Property Dissolution*, 21 J. FAM. L. 511, 514 (1982-83).

88. Judge Thompson, in his concurrence, addressed this point as well and pointed out that: "Although the measurement of damages may be an inexact science, the dilemma should be dealt with as a valuation problem and should not serve as a basis for erasing a substantive right." O'Brien v. O'Brien, 106 A.D.2d 223, 237, 485 N.Y.S.2d 548, 558 (Thompson, J., concurring in part and dissenting in part), *rev'd*, 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985).

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

ation method, the *O'Brien* Court, relying on expert testimony,[90] utilized what is known as the "Future Income Stream"[91] approach to distill the value of the enhanced earning capacity created by Dr. O'Brien's medical license.[92]

This value was derived from the capitalized differential in earnings between the present value of the average income of a college graduate and the present value of the average income of a general surgeon (Dr. O'Brien's anticipated specialty).[93] The time span utilized by the expert ranged from 1985, when Dr. O'Brien completed his residency, until 2012, when Dr. O'Brien would turn age sixty-five.[94] The expert then capitalized the differences in average earnings incorporating variables such as an interest rate of three percent, as well as taxes and inflation.[95]

Although the trial record did not include a detailed account of how the expert reached the $472,000 figure, as a general rule, a calculation of the future income stream considers other variables as well.[96] For example, there is the possibility that the professional might not live to actually earn the amount calculated and, thus, the total figure derived must reflect the risk of premature death.[97] Arguably, because the trial court required Dr. O'Brien to maintain a

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90. The expert employed by Mrs. O'Brien was Stanley Goodman, an attorney and certified public accountant. O'Brien v. O'Brien, 114 Misc. 2d 233, 240, 452 N.Y.S.2d 801, 805 (Sup. Ct. 1982), *rev'd*, 106 A.D.2d 223, 485 N.Y.S.2d 548, *rev'd*, 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985). He testified that his professional specialty was evaluating professional practices and property involving equitable distribution. Mr. Goodman, who was employed by Mrs. O'Brien and Dr. O'Brien, failed to introduce any expert testimony on valuation. *Id.*

91. Since statistics support the conclusion that there is a progressive increase in income associated with each ascending level of education, economists have argued that the economic value of an education may be accurately measured by distilling the amount of money earned because of the additional education from the amount of money which would have been earned at the previous level of education. For example, assume that the average lifetime earnings expectancy of a high school graduate is $450,000 (1972 dollars), while the average lifetime earnings expectancy of a college graduate is $725,000 (1972 dollars). The Future Income Stream approach measures the incremental income effect of the college education as $275,000 (1972 dollars), which is the difference between what the college graduate may earn and what the same person would have earned had he graduated high school but not attended college. *See, e.g., O'Brien*, 114 Misc. 2d at 240-42, 452 N.Y.S.2d at 805-06.

92. At trial, the expert testified that the present value of Dr. O'Brien's medical license was $472,000. *O'Brien*, 114 Misc. 2d at 241, 452 N.Y.S.2d at 806.

93. *See* Figure 1, *infra* p. 517; *see also supra* note 91 and accompanying text (explaining the method of calculating the value of a degree).

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

95. *Id.*

96. Batts, *supra* note 39, at 782.

97. *Id.*

life insurance policy in the amount of the balance due to Mrs. O'Brien,[98] they entertained the possibility that Dr. O'Brien might not live until age sixty-five. However, there is no conclusive evidence to support that, in calculating Dr. O'Briens' future income, the figure was adjusted to reflect a "risk of death."[99] Another component of the valuation process that must be accounted for, is the capacity of the money to earn interest over time. To take this into account, future income must be discounted into an equivalent present amount of dollars, better known as the "present value amount."[100] To compute a present value amount a discount rate is selected based on a projected rate of inflation and a projected rate at which money earns interest.[101] Although there is no evidence of which specific discount rate was used by the expert in *O'Brien*, since the court capitalized the earnings differential and it was capitalized to discount for present value, we are left to assume that the court chose the prevailing discount rate. Economists have warned, however, that the selection of a discount rate is crucial because use of an inappropriate rate will produce skewed projections.[102] Even with an appropriate discount rate the present value figure is still somewhat speculative because the projected rate of inflation and the projected interest rate are just that - projections - and there is no way to predict with certainty a proper discount rate.

Below is an illustration of an estimated "future income stream" from the date of divorce to the expected date of return:

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98. *O'Brien*, 114 Misc. 2d at 242, 452 N.Y.S.2d at 807.

99. *But see* Batts, *supra* note 39, at 782 (noting that "[b]ecause the trial court referred to the $472,000 as the differential 'over the productive life expectancy of [Dr. O'Brien],' we can assume that the consideration . . . [of] premature death, was factored in.")

100. The formula used for the present value calculation is:

$$PV = \sum_{n=1}^{N} \frac{R}{(1+i)^n}$$

The variables represent:

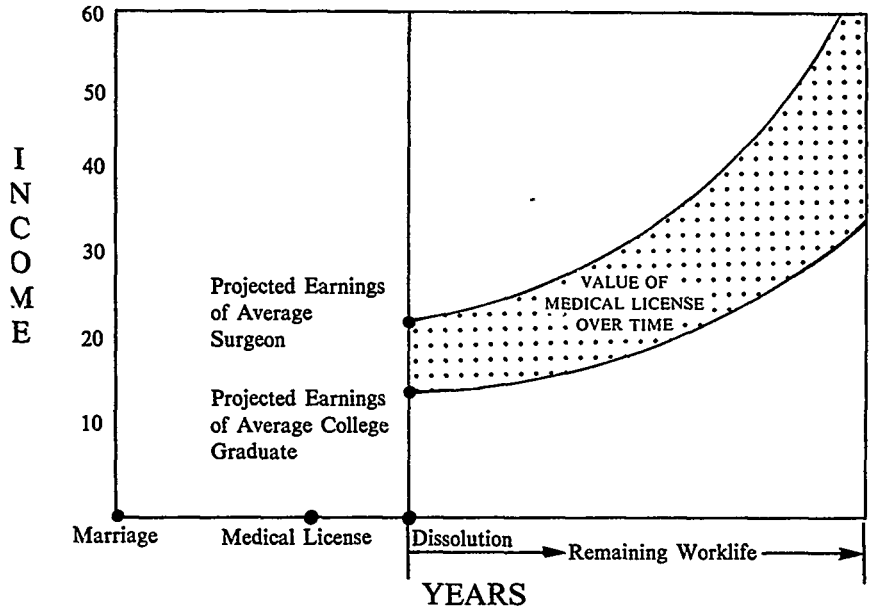
PV = present value
R = rate of return on investment
i = interest rate
n = number of years
N = productive life expectancy

Byrne, *The Economic Valuation of Professional Degrees: A Search for Simplicity*, TRIAL DIPL. J., Fall 1984, at 13, 16 n.6; *see also* M. BRENNAN, THEORY OF ECONOMIC STATICS 364, 375-76 (2d ed. 1970).

101. *Id.* at 15.

102. *See, e.g.*, Fitzpatrick & Doucette, *supra* note 87, at 517.

FIGURE 1[103]



The shaded portion of the graph reflects the value of the average surgeon's medical license over and above the value of the average college graduate's education.[104]

The above components are often immeasurable, therefore the figure upon which an award is based may differ in large measure from the amount of money actually generated. Thus, if the enhanced spouse is actually far more successful than the average surgeon and the distributive award is non-modifiable, the supporting spouse may be undercompensated. Conversely, if the enhanced spouse, for whatever reason, fails to generate the income of an average surgeon, due to the non-modifiable nature of the award, he will be obligated to pay a dollar amount unrelated to the actual value of his particular license. As the concurrence noted in *O'Brien*, valuing a degree is an exercise of judicial speculation falling within the realm of judicial "prophecy."[105]

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103. *See* Comment, *The Interest of the Community in a Professional Education*, 10 CAL. W.L. REV. 590, 608 (1974) (authored by Thomas D. Schaefer).

104. *Id.*

105. Judge Meyer, in support of this point, suggests that because the enhanced spouse is obligated to pay a definitive dollar amount despite what his license actually generates, modification should be available. *See* O'Brien v. O'Brien, 66 N.Y.2d 576, 591-92, 489 N.E.2d 712,

The uncertainties associated with the future income stream approach led economists to develop another valuation theory known as the "cost of acquisition" measure.[106] This approach, rather than measuring the incremental change in the professional's earning power, estimates the cost of attaining that enhanced capacity.[107] This method focuses on calculating the resources expended by the working spouse in an effort to help the enhanced spouse attain their license or degree.[108]

The theory behind the "Cost of Acquisition" method is that if one partner invests in another, that partner, here the working spouse, rightfully deserves a prorated share of the investment costs.[109] Such an approach seems less speculative because this method avoids the dilemmas associated with the future income stream and simply attempts to award the working spouse a "recovery on her investment."[110] Although calculating the cost of acquisition might not yield an exact figure, the uncertainties, as one scholar noted, are at least linear, whereas the uncertainties associated with the future income stream are multidimensional.[111] However, other scholars are critical of this methodology arguing that the method has flaws because lost opportunity costs are ignored.[112]

Additionally, this technique appears to be a restitutionary remedy in disguise. The court in *Woodworth v. Woodworth*[113] observed that restitutionary relief is limited to actual, direct, financial contributions.[114] The court rejected limiting recovery to such relief because

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720, 498 N.Y.S.2d 743, 751 (1985) (Meyer, J., concurring).

106. While most economists and courts have primarily utilized the cost of acquisition and future income stream methods, at least one scholar proposed what is known as the "labor theory of value" method, whereby the "supporting spouse" receives 50% of the enhanced spouse's income for the number of years of labor that the "enhanced spouse" spent in acquiring his enhanced capacity. *See* Mullenix, *The Valuation of an Educational Degree at Divorce*, 16 LOY. L.A.L. REV. 227, 279 (1983).

107. *See* Batts, *supra* note 39, at 784.

108. *Id.*

109. *See* King, *supra* note 12, at 51. This approach is similar to the concept of reimbursement alimony. For example, if an enhanced spouse spent $50,000 to acquire a medical license, of which $25,000 was contributed by the working spouse, the working spouse would be entitled to recover that $25,000 upon the dissolution of the marriage. *See supra* notes 67-76 and accompanying text.

110. *See* Batts, *supra* note 39, at 785.

111. *Id.*

112. Blumberg, *Intangible Assets Recognition and Valuation*, in 2 VALUATION & DISTRIBUTION OF MARITAL PROPERTY § 23.06[3][a] (J. McCahey ed. 1990).

113. 126 Mich. App. 258, 337 N.W.2d 332 (1983).

114. *See id.* at 268, 337 N.W.2d at 337 (noting that a restitutionary remedy is limited to the amount of money expended towards the student spouse's higher education).

it did not take into account the increased earnings resulting from the asset, and the working spouse may not be fully compensated.[115] The rationale behind *O'Brien* was to allow the working spouse to have an equitable share of the value of the license;[116] the cost of acquisition measure merely frustrates the policies the *O'Brien* Court sought to delineate.

Interestingly, in *Maloney v. Maloney*,[117] one of the first major cases on point since *O'Brien*, the court departed from the traditional valuation approaches set forth by economists, and instead valued the projected annual gross earnings of an average doctor and multiplied the figure by his expected work life.[118] The court then reduced the figure to reflect a "present value" amount and apportioned Mrs. Maloney thirty-five percent of the value of the license.[119]

However, this approach overcompensates the working spouse. In *O'Brien*, when the court employed the future income stream approach, and awarded Mrs. O'Brien a percentage of the enhanced earnings, the court recognized that she contributed to the attainment of Dr. O'Brien's medical license and that she was entitled to part of the incremental income effect that the license generated. She was not entitled to the portion of the money that the college degree generated because she was not a contributor to Dr. O'Brien's college degree.[120] Dr. O'Brien would have earned that amount irrespective of Mrs. O'Brien's later contributions.[121] Similarly, because Mrs. Ma-

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115. *Id.* The court further noted that "[l]imiting the recovery to restitution would provide the supporting spouse [with] no realization of his or her expectation of economic benefit from the career for which the education laid the foundation." *Id.*; *see* Recent Case, 44 Mo. L. Rev. 329, 335 (1979) (authored by Robert E. Pinnell).

116. *See* O'Brien v. O'Brien, 66 N.Y.2d 576, 586, 489 N.E.2d 712, 717, 498 N.Y.S.2d 743, 748 (1985).

117. 137 A.D.2d 666, 524 N.Y.S.2d 758 (1988).

118. Dr. Maloney's projected income, based on American Medical Association average income scales was projected at $144,000 per year. *Id.* at 667, 524 N.Y.S.2d at 760. This figure was multiplied by a projected remaining work life of 14.5 years. *Id.* The resulting gross amount exceeded $2,000,000, which was then reduced, based upon an 8% discount rate, to a present value of $1,307,520. *Id.* Mrs. Maloney was awarded 35% of this present value figure, or $456,632, to be paid in 10 annual installments. *Id.*

119. *Id.*

120. However, Mrs. O'Brien did help support her husband during his final semester of college. Neither Mrs. O'Brien's expert, nor the court, found this fact determinative. The court's final valuation figures gave her no added compensation. *O'Brien*, 66 N.Y.2d at 581, 489 N.E.2d at 714, 498 N.Y.S.2d at 745.

121. O'Brien v. O'Brien, 114 Misc. 2d 233, 241-42, 452 N.Y.S.2d 801, 805-06 (Sup. Ct. 1982) (capitalizing the differential between the earnings of a college graduate and the earnings of a general surgeon, the court found Mrs. O'Brien was only entitled to a percentage of the incremental increase, rather than a percentage of what he would have earned without her

loney did not contribute towards Dr. Maloney's college education, rather than awarding her a percentage of Dr. Maloney's gross earnings, part of which he would have earned without her contributions, she should only be entitled to a percentage of the incremental change in earnings resulting from her contributions toward his medical license. Fortunately, the valuation measures employed by the *Maloney* Court appear to represent an aberration, and recent cases employing valuation techniques have followed the approach utilized by *O'Brien*—namely the future income stream approach.[122]

For example in a recent decision, *Duspiva v. Duspiva*,[123] Mrs. Duspiva, the working spouse, brought in an expert to value Mr. Duspiva's certified public accounting (CPA) license.[124] The methodology employed by the expert witness and ultimately adopted by the court, was a calculation of the husband's enhanced earning capacity created by the license.[125] As a baseline, the expert calculated the average income of a male with two years of college, rather than four, because Mr. Duspiva entered the marriage with only two years of college left to complete.[126] The expert compared the differential between the U.S. national average income for a person with two years of college and the U.S. national average income for a CPA.[127] This figure was multiplied by a thirty year projected work life and discounted to present value taking into account that federal and state income tax remained to be paid.[128] In an even more recent case, the New York County Supreme Court held that a Master's Degree from Harvard Business School was marital property to be valued and divided.[129] In so holding, the court valued the enhanced earning capacity afforded to the husband by the acquisition of his MBA.[130] Not only did the court embrace the future income stream approach, but

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

122. *See, e.g.*, Di Caprio v. Di Caprio, 162 A.D.2d 944, 556 N.Y.S.2d 1011 (1990) (employing the future earnings method to calculate the value of student-spouse's master's degree and certificate in school administration); Finocchio v. Finocchio, 162 A.D.2d 1044, 556 N.Y.S.2d 1007 (1990) (utilizing the future income stream method to value husband's law license).

123. No. 4961/87 (N.Y. Sup. Ct. June 30, 1989).

124. *Id.* slip op. at 2.

125. *Id.* slip op. at 4.

126. *Id.*

127. *Id.*

128. *Id.*

129. Kalnins v. Kalnins, N.Y.L.J., Nov. 16, 1989, at 23, col. 3 (N.Y. Sup. Ct.).

130. *Id.*

specifically rejected the approach adopted by the *Maloney* Court, which was introduced by the wife's expert in *Kalnins*.[131]

In sum, since New York Domestic Relations Law § 236 does not explicitly address valuation of marital property, New York trial courts are given wide latitude in making valuation determinations.[132] Given this leeway, trial courts review the merits of each case and apply the most equitable valuation method. Despite this broad range of discretion, cases like *Duspiva* and *Kalnins* demonstrate that the future income stream approach is the method of choice.[133]

Although admittedly this method has flaws, most notably, the possibility that the projected figure might not reflect the amount of money actually generated, the method nonetheless appears to be the most equitable method available and the one most courts follow.[134]

B. *Merger*

Another area of potential inequity which has emerged from *O'Brien* and its progeny is the predicament of the professional who attained his license and has begun a newly established practice. Prior to *O'Brien*, a spouse was entitled to an equitable share of a professional practice.[135] However, because *O'Brien* allowed a spouse to claim an interest in the enhanced spouse's license,[136] a question arose as to whether the non-degree spouse was entitled to a share of the value of the practice as well, or whether the license will have been deemed "merged" into the practice. This is an important and potentially complex determination because if a court decides a merger has occurred, "[t]he value of the license, if any, is subsumed in the 'value' of the practice so that any residual value of the license is *de minimus*."[137]

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131. Plaintiff's expert, like the expert in Maloney, valued the degree without differentiating between the average salary of MBA holders and the average college graduate salary. *Id.* at 4, col. 1. The court disregarded this testimony and found $70,000 to be an appropriate value of the enhanced earning capacity created by defendant's MBA. *Id.* at 4, col. 2. The court then awarded plaintiff 20% of the $70,000, or $14,000. *Id.*

132. *See* Greenhaus, *Valuation of Marital Property: Choosing an Appropriate Valuation Date*, FAM. L. REV., Mar. 1984, at 6.

133. *See supra* notes 123, 129 and accompanying text.

134. At least it appears to be the method of choice amongst the speculative measures currently employed. For a discussion of the calculation of actual earnings methods and their benefits and disadvantages, see *infra* text accompanying notes 190-91.

135. *See* Litman v. Litman, 93 A.D.2d 695, 463 N.Y.S.2d 24 (1983), *aff'd*, 61 N.Y.2d 918, 463 N.E.2d 34, 474 N.Y.S.2d 718 (1984).

136. *See* O'Brien v. O'Brien, 66 N.Y.2d 576, 585-86, 489 N.E.2d 712, 716, 498 N.Y.S.2d 743, 747 (1985).

137. Vanasco v. Vanasco, 132 Misc. 2d 227, 230, 503 N.Y.S.2d 480, 482 (Sup. Ct.

This issue was initially raised in *Marcus v. Marcus*.[138] In *Marcus*, the husband obtained his medical license, and over a period of thirty years, built up a very successful psychiatric practice.[139] The Appellate Division of the New York Supreme Court, after deciding that the non-degree spouse was entitled to an interest in both the license and the practice, later modified its opinion and ultimately held that to allow an award for both would be duplicitous, since the husband had an established practice.[140] Upon these facts, the court held that the license was merged[141] into the practice and, thus, the practice was valued as a single asset and only one distributive award was made.[142]

In holding that a merger had occurred, the court implied that there are some situations where a merger may not occur, and acknowledged that in such cases two separate awards would probably be appropriate. The *Marcus* Court, in dictum, delineated two situations where merger would be inappropriate: [F]irst, where the licensed spouse's practice is newly established; and second, where the practice has not developed to its full potential.[143]

Thus, while *Marcus* was a relatively easy case to resolve because Dr. Marcus's practice was well established, more difficult cases have arisen where a professional has a fledgling practice that has not yet reached its full potential.[144] In these situations, the non-degree spouse claims a merger has not occurred and that the license should be regarded as a separate asset apart from the practice. If this argument were successful, the non-degree spouse would enjoy a

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1986) (holding that the license of a certified public accountant had merged into his accounting practice resulting in a single distributive award); *see also* Finocchio v. Finocchio, 162 A.D.2d 1044, 1046, 556 N.Y.S.2d 1007, 1010 (1990) (holding that where husband's license had not merged into his professional practice, only the practice should be valued and distributed).

138. 137 A.D.2d 131, 525 N.Y.S.2d 238, *modifying*, 135 A.D.2d 216 (1988).

139. *Id.* at 134-135, 525 N.Y.S.2d at 239.

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

141. Once a merger is achieved, valuation focuses on what the enhanced spouse has actually earned rather than a projected estimate of what the degreed spouse might have earned. *See* Florescue, *Equitable Distribution-Professional Licenses*, N.Y.L.J., Aug. 16, 1988, at 5, col. 3.

142. The court specifically noted that "under the circumstances of this case, the plaintiff [Mrs. Marcus] is not entitled to two separate awards for the defendant's [Dr. Marcus'] license and psychiatric practice." *Marcus*, 137 A.D.2d at 139, 525 N.Y.S.2d at 242.

143. The court pointed out that if the professional sells his practice, moves to another location, and either intends to or actually does begin another practice at the commencement of the divorce action, the "license [will] reemerge [ ] as a significant, and valuable asset." *Id.* at 140, 525 N.Y.S.2d at 242-43.

144. *See* Schoenfeld v. Schoenfeld, N.Y.L.J., July 6, 1988, at 27, col. 6 (N.Y. Sup. Ct).

greater recovery. Conversely, the enhanced spouse, in an effort to limit his liability, argues that a merger has occurred, and to hold otherwise would result in a windfall gain to the non-licensed spouse.[145]

Schoenfeld v. Schoenfeld is a recent case exemplifying the difficulties inherent in determining whether a merger has, or has not, occurred and the problems of valuing a newly established practice.[146] *Schoenfeld* involved a husband who, with his wife's assistance, obtained a medical license and opened a new practice.[147] Just prior to the second anniversary of the opening of his practice his wife filed for divorce.[148] Not surprisingly, the wife contended that the value of the license had not merged into the value of the practice, while the husband argued that a complete merger had occurred.[149] The court held that a merger had not occurred and, therefore, the license and practice would be considered distinct marital assets and be valued separately.[150] The court noted however, that in reaching such a conclusion, caution must be exercised to prevent the non-licensed spouse from receiving a windfall recovery.[151] In a very complicated analysis, the court made an award for both the practice and the license, but deducted the value of the practice from the value of the license.[152]

At least one scholar has noted that the *Schoenfeld* Court unduly complicated matters and that its analysis results in an indirect merger, something the court was trying to avoid.[153] This commentator suggests that where no merger is found, the license and practice

145. *See* Reif v. Reif, N.Y.L.J., Oct. 18, 1990, at 21 (N.Y.Sup. Ct). In rejecting Mrs. Reif's contention that she was entitled to both a share of her husband's architectural business and his license, the court found a merger had occured and awarded Mrs. Reif 50% of his business. *Id.*

146. *Schoenfeld*, N.Y.L.J., July 6, 1988, at 29.

147. *Id.* at 28.

148. *Id.* at 29.

149. *Id.*

150. *Id.*

151. *Id.*; *see also* Vanasco v. Vanasco, 132 Misc. 2d 227, 229, 503 N.Y.S.2d 480, 482 (Sup. Ct. 1986) (stating that "plaintiff may in effect, be seeking 'two bites of the apple.' ").

152. *Schoenfeld*, N.Y.L.J., July 6, 1988, at 27, col. 6. The court valued the practice and the license separately, then deducted the value of the practice from the value of the license in order to avoid providing Mrs. Schoenfeld, the working-spouse, with a double recovery. Since the value of the license is a projection of future earnings and the value of the practice is representative of actual earnings, if the court gave the working-spouse a percentage of each, it would be providing for a double recovery. *Id.* at 29.

153. *See* N.Y. DOM. REL. LAW § 236B(6) practice comment C236B:6 (McKinney Supp. 1988) (Marital Property-Professional Licenses and Degrees).

must be separately valued.[154] To avoid duplicity, the time the enhanced-spouse devoted to his practice must be deducted from his work life expectancy.[155] This would recognize that the enhanced spouse has already realized some portion of the projected earnings, while simultaneously awarding money for the enhanced earnings not yet realized.[156]

Despite this suggestion, it has been argued that some merger occurs on "day-one" of the practice and on every day thereafter.[157] This concept is known as either a "gradual" or "partial" merger and the cumulative effect of this, in terms of valuation methodologies, is quite complex.[158] The rationale for allowing the working spouse to recover an interest in the enhanced spouse's increased earning capacity was that the attainment of the license represented an investment by an economic partnership.[159] Since the working spouse contributed towards the investment, here the medical license, she ought to receive a return on that investment.[160] By analogy, if the spouses invested $10,000 in securities which had a fair market value of $25,000 upon commencement of the divorce action,[161] the court would simply distribute the value of the stock.[162] It would be absurd for a spouse to argue that she is entitled to a share of the original investment as well, because the $10,000 has been converted into an income stream and has ceased to exist.[163] Similarly, once the license has been "invested" into a practice, the license ceases to exist as a separate asset and the working spouse should be precluded from asserting an interest in the license. This is a more appropriate analysis because the valuation shifts from a projected earning capacity to

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154. *Id.*

155. *Id.*

156. *Id.*

157. *See* Florescue, *supra* note 141, at 3.

158. *See* Jones v. Jones, 144 Misc. 2d 295, 543 N.Y.S.2d 1016 (Sup. Ct. 1989) (finding a partial merger of defendant's medical license and his part-time practice). In its holding, the *Jones* Court specifically noted that this is a good example of the complexity of equitable distribution issues, even when a matrimonial action may not involve an unusually large amount of assets. *Id.* at 296, 543 N.Y.S.2d at 1017.

159. *See* O'Brien v. O'Brien, 66 N.Y.2d 576, 585, 488 N.E.2d 712, 716, 498 N.Y.S. 743, 747 (1985).

160. *See* King, *supra* note 12, at 51.

161. The valuation date or the date the court uses to determine the value of an asset can, at the court's discretion, be either the trial date or the commencement date of the action. *See* Wegman v. Wegman, 129 Misc. 2d 968, 494 N.Y.S.2d 933 (Sup. Ct. 1985), *aff'd*, 123 A.D.2d 220, 509 N.Y.S.2d 342 (1987).

162. *See* Florescue, *supra* note 5, at 1.

163. *Id.*

what actually happens over a professional's career. The flaw in this analysis, however, is that the working spouse may be severely undercompensated for her efforts, especially in the case of a newly established practice, because the value of the newly established practice is obviously less than the value of a well established practice. Also, the enhanced spouse, in anticipation of a divorce, may purposely undermine the success of his own practice so as to limit the working-spouse's recovery.[164] The questions of merger are complex and remain largely unresolved, but serve as an excellent illustration of the potential inequities created by the *O'Brien* decision.

C. *The Unvested License*

Another potential problem engendered by the *O'Brien* decision is the predicament of the spouse who, throughout the marriage, works toward the attainment of a professional license but actually acquires it *after* commencement of the matrimonial action. In *Freyer v. Freyer*,[165] the court held that the wife's medical license, acquired six months after she initiated divorce proceedings, should still be regarded as marital property.[166] The court reasoned that since Mr. Freyer had made significant contributions towards his wife's effort at obtaining her license it would be unjust to hold otherwise.[167] The court also reasoned that since a non-vested pension is an asset subject to equitable distribution,[168] a non-vested license or degree should be considered a marital asset as well. "Otherwise, with the simple stroke of serving a summons immediately prior to graduation day, a spouse contemplating divorce could prevent a spouse who assisted in his or her spouse's attaining such degree or license from receiving that which he or she is entitled to."[169]

Again, although the court endeavored to reach the most equitable result possible, clearly it neglected to see the potential problems which could unfold. Specifically, the court failed to specify at what point a non-degree spouse obtains an interest in the enhanced-spouse's degree. *Freyer* was an easy case to resolve because the wife acquired her license shortly after she commenced divorce proceed-

164. *Id.* In reality, however, the authors feel it is unlikely that any rational professional would intentionally undermine the future success of his own practice.

165. 138 Misc. 2d 158, 524 N.Y.S.2d 147 (Sup. Ct. 1987).

166. *Id.* at 160, 524 N.Y.S.2d at 149.

167. *Id.*

168. *See* Lentz v. Lentz, 103 A.D.2d 822, 478 N.Y.S.2d 56 (1984); Damiano v. Damiano, 94 A.D.2d 132, 463 N.Y.S.2d 477 (1983).

169. *Freyer*, 138 Misc. 2d at 160, 524 N.Y.S.2d at 149.

ings. She had already finished medical school[170] and almost completed her residency.[171] The court, however, never addressed the difficult questions raised by future *Freyer*-like situations. For example, how should the court deal with a student who has completed law school, but has yet to take the bar? Will a working spouse acquire an interest in her spouse's license after the bar exam is taken or will an interest accrue after the first year of school? Additional unresolved problems are raised where the non-degree spouse is given an interest in her enhanced-spouse's license, but the enhanced-spouse never obtains his or her license, i.e. the enhanced-spouse never passes the bar exam. Given the non-modifiable nature of property awards, it is unclear how the courts will resolve these issues.

D. *Distribution*

Once a court decides what is marital property, the court, with assistance from experts, will value it and then distribute it on a percentage basis, to each spouse.[172] Thus a court may award a husband seventy percent of the proceeds of the sale of the primary residence and only forty percent of the proceeds of the sale of a vacation residence in the same dissolution proceeding.[173] While the court has discretion to make "percentage distributions" based upon the particular circumstances of each case,[174] N.Y. Domestic Relations Law § 236B(5)(d) sets forth a list of thirteen factors for the court to consider when issuing a distributive award.[175] In most instances, where

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170. *Id.*

171. *Id.*

172. *See supra* notes 1-6 and accompanying text.

173. *See, e.g.*, McAlpine v. McAlpine, 143 Misc. 2d 30, 539 N.Y.S.2d 680 (Sup. Ct. 1989) (awarding the husband 70% of the proceeds from the sale of the marital residence because he earned approximately 70% of the couples total income during their marriage).

174. *See, e.g.*, Cappiello v. Cappiello, 110 A.D.2d 608, 488 N.Y.S.2d 399, *aff'd*, 66 N.Y.2d 107, 485 N.E.2d 983, 495 N.Y.S.2d 318 (1985).

175. Under N.Y. DOM. REL. LAW § 236B(5)(d) (McKinney 1988), when attempting to determine an equitable disposition of marital property, the court is to consider the following factors:

> 1. the income and property of each party at the time of marriage, and at the time of the commencement of the action;
> 2. the duration of the marriage and the age and health of both parties;
> 3. the need of a custodial parent to occupy or own the marital residence . . . ;
> 4. the loss of inheritance and pension rights . . . ;
> 5. any award of maintenance . . . ;
> 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*;

the bulk of the marital property is tangible, the court will value the property, utilize the thirteen factors laid out in § 236B(5)(d), and then award each spouse a percentage of the property.[176] However, if the nature of the property distributed does not lend itself to a physical division, the court may force such an asset to be sold at fair market value with the proceeds of such a sale divided according to a distributive decree.[177] Such a distribution is procedurally complex, but practically easy because such property has a market value. For example, marital assets like homes, cars, furs, jewelry, real estate, and other tangibles like certain securities, have a fair market value. While the decision of how to distribute these assets is not an easy one, once determined it is not difficult to extract value from these tangibles and complete the process. The distribution of a professional degree or license, unlike the distribution of ordinary tangible property, is both procedurally and practically complex. Two basic problems arise in such distributions: First, deciding what percentage share the non-degree spouse is entitled to; and second, how to extract the value of a professional license that represents many future years worth of enhanced earning capacity. In deciding what percentage share is due the working spouse, many courts merely follow the guidelines of § 236B(5)(d).[178] Not surprisingly, in these cases, courts are less willing to award the non-degree spouse an equal share of the value of the degree. In fact, a number of courts have awarded the working spouse less than a fifty percent share of the enhanced

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7. the liquid or non liquid character of all marital property;

8. the probable future financial circumstances of each party;

9. *the impossibility or difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest intact and free from any claim or interference by the other party*;

10. the tax consequences to each party;

11. the wasteful dissipation of assets by either spouse;

12. any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration;

13. *any other factor which the court shall expressly find to be just and proper.*

Id. (emphasis added).

176. *See* Capiello v. Capiello, 66 N.Y.2d 107, 110, 485 N.E.2d 983, 986, 495 N.Y.S.2d 318, 321 (1985) (awarding the wife 25% of the couple's marital assets).

177. *See, e.g.*, Steigman v. Steigman, 112 A.D.2d 215, 490 N.Y.S.2d 867 (1985) (ordering ex-wife to place marital residence on market so that proceeds of the sale could be distributed amongst the spouses).

178. *See* Di Caprio v. Di Caprio, 162 A.2d 944, 945, 556 N.Y.S.2d 1011, 1012 (1990) (taking into account the relevant statutory factors in deciding what percentage is due the working spouse).

spouse's future earning capacity.[179] The second and more complex problem of setting up an appropriate payment schedule has led many courts to inconsistent and sometimes unjust results. Because a professional license or educational degree is a personal, intangible representation of achievement or skill, it does not itself have a value on the open market.[180] The skill or scholarly acumen of the person who holds the license is valuable and saleable only as labor. Such labor will only generate income to the extent it is expended. Thus, while a professional license may have a lifetime earnings value of three million dollars, such value will only be realized as the professional's labor is expended. Therefore, unlike a three million dollar piece of real property, which could be sold on the open market, a license is only worth three million dollars if the license holder labors enough hours to generate three million dollars worth of income. The fact that this income may only be realized over time, renders a lump sum distribution unfair in that the professional license or degree holder may not have sufficient liquidity to pay an award based on projected income not yet realized. Despite the potential inequities inherent in a lump sum distributive award, at least two courts have given such awards.[181] Such injustices may be further amplified if the enhanced

179. *See id.* 946, 556 N.Y.S.2d at 1012. In *Di Caprio*, the court awarded the wife (working-spouse) only 25% of the value of Mr. Di Caprio's degree and certificate in school administration. *Id.* Similarly, other courts have awarded the working spouse less than a fifty percent share of the enhanced spouse's license. Perhaps the reason for this is that while courts seek to remedy the plight of the working spouse, they are equally sensitive to the reality that the enhanced spouse is the one that has expended the labor required to attain the license and the enhanced earning capacity that it has generated. *See, e.g.*, Duspiva v. Duspiva, No. 4961/87 (N.Y. Sup. Ct. June 30, 1989) (awarding the working spouse 40% of the value of the enhanced spouse's license); O'Brien v. O'Brien, 114 Misc. 2d 233, 241, 452 N.Y.S.2d 801, 806 (Sup. Ct. 1982) (awarding Mrs. O'Brien 40% of Dr. O'Brien's enhanced earning capacity), *rev'd*, 106 A.D.2d 233, 485 N.Y.S.2d 548, *rev'd*, 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985); Kalnins v. Kalnins, N.Y.L.J., Nov. 16, 1989, at 23, col. 3 (N.Y. Sup. Ct.) (awarding Mrs. Kalnins only 20% of the enhanced earning capacity represented by her husband's MBA); Maloney v. Maloney, 137 A.D.2d 666, 666, 524 N.Y.S.2d 758, 759 (1988) (upholding the trial court's determination that working spouse was entitled to 35% of the value of the enhanced spouse's medical license). *But see* Morrongiello v. Paulsen, N.Y.L.J., June 29, 1990, at 21 (awarding Mrs. Morrongiello 50% of the value of her husband's law degree).

180. This view, that a license is a non-liquid asset representing a personal achievement, is the primary reason that courts have been reluctant to call a license "property." *See supra* notes 31-32 and accompanying text.

181. *See* Freyer v. Freyer, 138 Misc. 2d 158, 524 N.Y.S.2d 147 (Sup. Ct. 1987); Schoenfeld v. Schoenfeld, N.Y.L.J., July 6, 1988, at 27 (N.Y. Sup. Ct.). In each case the court instructed that the percentage value of the license be paid in either a lump sum award up front or in equal installments, over time, with the prevailing rate of interest added on as a penalty.

spouse is forced to borrow money to pay the lump sum judgment. If forced to borrow money, the enhanced spouse, who cannot afford to pay the lump sum out of existing funds, would be punished by the additional cost of interest on the loan. The effect of such a distribution would be punitive and that is not the intended goal of equitable distribution. Two people who are miserable together should not be bound to each other merely to avoid the financial repercussions of divorce.

Other courts, sensing the inherent injustice of lump sum awards of future earnings not yet realized, have allowed enhanced spouses to pay off these judgments over time without added interest. In *Duspiva v. Duspiva,*[182] the court allowed the enhanced spouse to pay off his judgment in equal, monthly installments over a ten year period.[183] Such an extension of time would allow the enhanced spouse to pay the award as he earned the money it represented. While the payment schedule employed by the *Duspiva* Court was a step in the direction of reducing potential inequities inherent in a lump sum award,[184] other courts have gone even further to protect enhanced spouses/judgment debtors.

In *O'Brien,*[185] for example, the trial court, seemingly wary of the time value of money and the newly graduated doctor's ability to pay the large award, employed a graduated payment, extended time

182. No. 4961/87, slip op. at 17 (N.Y. Sup. Ct. June 30, 1989).

183. *Id.* Even though the court was relatively benevolent, Mr. Duspiva, only a CPA employee, not a partner or solo professional, was ordered to pay his ex-wife over $22,000 per year for 10 years. *Id.* at 7. The year prior to the suit, Mr. Duspiva earned only $44,000. *Id.* at 1. Thus, after paying child support, insurance premiums required by the court for the benefit of the child in case of his death prior to the child's emancipation and expenses on the family home, Mr. Duspiva was left with approximately $12,000 per year to pay his income taxes and living expenses. *Id.* at 15. Granted, there is a great probability that his income would rise over time. However, in the mean time, Mr. Duspiva would be forced to live a life style well below his income.

184. *Id.* The court, in Duspiva, was concerned with "a lack of available assets from which the spouse with the enhanced earnings might satisfy or make immediate payment to the other spouse of his or her right to share in marital property, which is not yet in existence." *Id.* at 16. The court further noted that it would be inequitable to require the enhanced spouse to pay interest "on moneys not yet earned by him." *Id.* at 17. *But see* Morrongiello v. Paulsen, N.Y.L.J., June 29, 1990, at 33, col. 5 (N.Y. Sup. Ct.) (ordering the defendant to pay plaintiff $100,000 within twenty days of the entry of the judgment and another $64,927 within ninety days). The *Morrongiello* Court, unlike the court in *Duspiva*, was obviously unconcerned with whether or not the defendant had assets available to make immediate payment.

185. *See* O'Brien v. O'Brien, 114 Misc. 2d 233, 452 N.Y.S.2d 801 (Sup. Ct. 1982), *rev'd*, 106 A.D.2d 223, 485 N.Y.S.2d 548, *rev'd*, 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985).

period, no interest judgment payoff schedule.[186] Dr. O'Brien's first payment under the plan was set at $3,000 and each following year, for the first five years, the amount due would increase a few thousand dollars.[187] After that the increases would take greater leaps until Dr. O'Brien was required to pay a maximum of $35,000 per year.[188] This plan as implemented by the court, is clearly the most efficient and equitable way to require an enhanced spouse/judgment debtor to satisfy their debt.

Additionally, the enhanced spouse/judgment debtor is only required to pay greater sums as his projected ability to pay rises. In other words, as Dr. O'Brien's career and salary ripens, so does the value of the award. This is clearly a more linear, livable plan than even the *Duspiva* plan. Here a judgment debtor like Dr. O'Brien could maintain a satisfactory lifestyle while paying off the judgment over time.[189] While it is true that the *O'Brien* repayment schedule reduced many of the pitfalls associated with lump sum and fixed payment type awards, all enhanced earning capacity awards must still be carefully scrutinized to prevent hidden windfall effects. The valuation section of this Note[190] discussed the speculative nature of the variables used to calculate the enhanced earning capacity figure and concluded that this figure itself is entirely speculative. Thus, no matter how equitable a given court's payment schedule, the projected figure may be either grossly overstated or understated. The *O'Brien* Court defended the speculative nature of calculating the value of the license by analogizing to the calculation of wrongful

186. *See id.* at 241, 452 N.Y.S.2d at 806.

187. *Id.*

188. The actual payment schedule ordered by the trial court in *O'Brien* was as follows:

November 1, 1982	$ 3,000
November 1, 1983	$ 5,000
November 1, 1984	$ 5,000
November 1, 1985	$ 7,000
November 1, 1986	$ 10,000
November 1, 1987	$ 15,000
November 1, 1988	$ 25,000
November 1, 1989	$ 35,000
November 1, 1990	$ 35,000
November 1, 1991	$ 35,000
November 1, 1992	$ 13,800
Total amount due:	$188,800 (40% of the total estimated enhanced earning capacity of $472,000).

Id. at 241-42, 452 N.Y.S.2d at 806.

189. *See supra* notes 123 and 178-83 and accompanying text.

190. *See supra* notes 84-119 and accompanying text.

death damages or diminished earning capacity cases.[191]

While it is true that courts frequently make speculative awards for wrongful death and diminished capacity, these types of awards *must* be speculative as a life or capacity is *lost*. Thus, the court is forced to speculate and, based on averages, estimate what might have resulted if no such loss had occurred. In enhanced earning capacity cases, however, an ability is *gained*, not lost and this ability, in all probability, will materialize and become quantifiable. The newly licensed individual will now be able to produce more than he once could have and upon dissolution of the marriage, the working spouse will seek a share of that expectancy. Similarly, wrongful death and diminished capacity claimants also have an expectancy, but one that will never come to fruition, so that speculation of damages is both necessary and proper. In most cases, a doctor, lawyer, or other professional who begins a practice will increase their earning capacity over time, and because the incremental increases are measurable, income speculation can be measured against actual income.

To remedy the discrepancy between the *projected* enhanced earning capacity and the *actual* enhanced earnings, a court, or other administrative agency, could review and possibly modify the distributive award to better reflect the licensed spouse's *actual* earnings. By reviewing the licensed spouse's tax returns, actual earnings could be determined with realistic precision. In this way, enhanced earning capacity cases lend themselves to actual determinations of future income and, thus, true equity could be achieved.

Finally, in cases where assets, other than the degree or license, were accumulated during marriage, the court, in equitable distribution proceedings, may distribute whole items of property to the parties and thereby offset one item of marital property against another. For example, if in addition to the husband's professional license or practice, the parties have accumulated a house and investment property, then upon divorce the husband may be able to keep his license and practice intact and collect all future earnings himself, if the wife is given an "offsetting" and possibly greater equitable interest in the house and investment property.[192]

E. *Modification*

Whether a court uses the speculative enhanced earning capacity

191. *See* O'Brien v. O'Brien, 66 N.Y.2d 576, 588, 489 N.E.2d 712, 718, 498 N.Y.S.2d 743, 749 (1985).

192. *See* Jones v. Jones, 144 Misc. 2d 295, 543 N.Y.S.2d 1016 (Sup. Ct. 1989).

(future income stream) method as in *O'Brien*,[193] or the actual earnings method, the question of whether the award should be modifiable remains unanswered and controversial. Judge Meyer, in his concurrence in *O'Brien*,[194] noted that future income stream awards are speculative in that it is impossible to determine whether an enhanced spouse will actually practice his craft, earn as much as predicted, or even live a healthy and productive life for the remainder of his estimated work life.[195] Stating that "an equity court normally has the power to 'change its decrees where there has been a change of circumstances,' "[196] Judge Meyer opined that "it should be possible for the court to revise [a] distributive award to conform to the fact[s]" of each case if the circumstances were to change.[197] Understanding that a universal policy of all equitable distribution statutes was to prevent lengthy litigation and avoid continuing judicial intervention, Judge Meyer still recommended that a policy of modification be adopted by the court.[198] Unimpressed, his peers on the court of appeals did not accept his notion of modification.

Granted, the availability of modification would mean a greater commitment of judicial resources to enhanced earning capacity cases, lengthier and more complex litigation, and the possibility of perennial court review, but the benefits of modification may still outweigh the burdens. At base level lies a fundamental question: Should a person be free to choose his or her career?[199] The answer to this question is complex and beyond the scope of this Note, however, this may be a fundamental, threshold question for the court to ask at the outset of an enhanced earning capacity case. If the court speculates that a medical license holder will become a surgeon, as in *O'Brien*, his estimated lifetime earnings will be much higher than if he instead chose to be a medical researcher. Yet, by awarding a working spouse an interest in the projected earnings of a surgeon, the court

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

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

195. *Id.*

196. *Id.* (quoting People v. Scanlon, 11 N.Y.2d 459, 462, 184 N.E.2d 302, 303, 230 N.Y.S.2d 708, 709 (1962)).

197. *O'Brien*, 66 N.Y.2d at 592, 489 N.E.2d at 720, 498 N.Y.S.2d at 751.

198. *Id.*

199. Judge Meyer, in his *O'Brien* concurrence, noted that such a professional still in training, yet not committed to a career choice, "may be locked into a particular kind of practice simply because the monetary obligations imposed by the distributive award . . . leaves him or her no alternative." *Id.* at 591, 489 N.E.2d at 720, 498 N.Y.S.2d at 751 (Meyer, J., concurring). Judge Meyer further noted that equitable distribution was not intended to permit a judge to make a career decision for a licensed spouse still in training. *Id.*

may in fact be "ordering" the enhanced spouse to pursue a more profitable career path than he would like. This question of whether the courts have the authority to economically coerce a civil litigant into a particular career path requires further review. Additionally, if equity truly is a goal of equitable distribution, then courts should be allowed to modify such distributive awards if circumstances should change.[200]

As previously mentioned, the primary barrier to modification is the policy that equitable distribution should be a one time, finite process.[201] The modification process could peacefully coexist with the goals of equitable distribution if the following measures were adopted: In light of the fact that vengeful spouses could file nuisance suits, a state administrative body could be structured so that as a prerequisite for court review a claim must first be filed with the administrative agency.[202] Much like the procedures employed by other state administrative agencies,[203] a party contesting or seeking modification of a property distribution award may petition the agency to conduct a hearing. An administrative law judge will then conduct a hearing and decide the merits of the petition. If after such a determination an aggrieved party is dissatisfied with the agency's ruling, they could then appeal that decision to the agency's internal appeals board. Once these avenues have been exhausted, a party still aggrieved may invoke an action similar to an article seventy-eight proceeding under New York law.[204] This proceeding is the uniform de-

200. In some cases, maintenance awards have been increased or decreased accordingly as the enhanced spouse's income rose or fell. *See, e.g.*, Lira v. Lira, 12 Ohio App. 3d 69, 70, 465 N.E.2d 1353, 1354 (1983) (increasing a monthly maintenance award from $250 to over $1000 when the enhanced spouse's annual income rose from $17,000 to over $95,000).

201. The court in *O'Brien* specifically noted that, "implicit in the statutory scheme . . . is the view that upon dissolution of the marriage there should be a winding up of the parties economic affairs and a severance of their economic ties by an equitable distribution of the marital assets." *See* O'Brien v. O'Brien, 66 N.Y.2d 576, 585, 489 N.E.2d 712, 716, 498 N.Y.S.2d 743, 747 (1985).

202. This notion, that a party must file a claim with an administrative agency before going to court, is known as "exhaust[ion] of administrative remedies." *See* S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 1144 (2d ed. 1985).

203. For example, the New York State Division of Human Rights, The Industrial Board of Appeals, and the Workman's Compensation Board all comply with procedures set up by the New York State Administrative Procedure Act. *See infra* note 204 and accompanying text.

204. *See, e.g.*, N.Y. STATE ADMIN. PROC. ACT § 205 (McKinney 1984) (providing that "judicial review of rules may be had upon petition presented under article seventy-eight of the civil practice law and rules"). This statute was enacted with the intentions of providing state administrative agencies with simple, uniform procedures. *See* S. BREYER & R. STEWART, *supra* note 202.

vice for challenging or reviewing administrative actions in the state courts.[205] Many frivolous and vexatious suits would be deterred if the parties were required to first exhaust all such administrative remedies,[206] particularly if the administrative agency had the power to impose sanctions on a party initiating a nuisance suit.[207] Such an administrative hurdle would allow the courts to remain free from protracted litigation unless such action were worthy. Thus, true equity could be achieved and, simultaneously, court calendars would remain free of vexatious modification suits.

There is always the possibility that plaintiffs who were denied access to an administrative hearing will appeal their dismissal, thus engendering more litigation. However, it may be safe to assume that only a confident plaintiff with a meritorious cause of action would pursue his case to this level. Otherwise, it would be illogical for a plaintiff to assume the expenses associated with such lengthy litigation. Such a plan may be financially impractical, but if it were properly structured so as to be cost efficient, then it could bridge the gap between true equity and judicial efficiency.

Modification, however, may not be necessary if the court were to award a spouse a percentage share of the enhanced spouse's actual earnings. If the court were to do so, many of the problems associated with the future income stream approach could be obviated. First, the question of whether a court should have the power to economically coerce an enhanced spouse to pursue a lucrative career need not be addressed as the enhanced spouse could pursue any career path he desired. Further, the probability that an enhanced

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205. Under an article seventy-eight proceeding, courts are empowered to set aside agency determinations found to be "arbitrary and capricious." N.Y. CIV. PRAC. L. & R. § 78 (McKinney 1984).

206. While this proposal is novel in the area of equitable distribution, such procedures are routinely followed in other areas of law. *See, e.g.*, Labor Management Relations Act § 10(e), 29 U.S.C. § 160(e) (1988) (providing that before proceeding to federal court, a petitioner must exhaust the administrative remedies of the National Labor Relations Board); *see also* Meyers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 51 (1938) (stating that administrative remedies of the National Labor Relations Board must be exhausted before judicial enforcement may be sought).

207. The Administrative Procedure Act (APA), for example, empowers agencies to impose sanctions on individuals subject to the agency's jurisdiction. N.Y. STATE ADMIN. PROC. ACT § 205 (McKinney 1984). Note, however, that it is not the APA, but the agency's own enabling legislation that controls the type of sanction that may be levied. 5 U.S.C. § 558(b) (1988); *see also* FED. R. CIV. P. 11 (empowering judges with authority to levy sanctions upon attorneys for wilfully failing to act in good faith); N.Y. CIV. PRAC. L. & R. § 8303-a (McKinney 1990) (providing for the awarding of costs, to be paid by a party or counsel, in the event of a frivolous claim).

spouse would choose a less lucrative career simply to thwart the working spouse/judgment creditor's expectations seems remote. Second, the need for expert testimony would also be eliminated and thus, trials would be shorter and less complex. Third, the true goal of equitable distribution would be met in that the working spouse would get a percentage of the actual earnings over the course of the professional's career, rather than an amount arrived at by mere conjecture.

Post trial supervision by an administrative body would be necessary in order to ensure that the working spouse receives the correct percentage of the enhanced spouse's actual earnings. Given access to the enhanced spouse's income tax returns or revised statements of a spouse's net worth,[208] the working spouse/judgment creditor could determine whether the enhanced spouse is complying with the order of the trial court. If the working spouse is dissatisfied with the accuracy of the enhanced spouse's income tax return, or believes that the return was the product of fraud or deception, then she could invoke the jurisdiction of the administrative agency. If instead the enhanced spouse fails to comply with the distributive award by failing to tender payment, then the working spouse could seek enforcement of the judgment in a separate court proceeding as in any other action to satisfy a judgment.

In sum, while determining which property is marital property and how to value that property are always concerns to litigants, the distributive process is perhaps the most crucial phase of a marital dissolution proceeding because it determines the real economic effect of a divorce. As such, if reform is needed, distribution methods and valuation procedures must be reevaluated and reformed accordingly. Additionally, if the court refuses to accept the actual earnings method and instead chooses to struggle with the speculative future earnings approach, then implementation of modification procedures

208. N.Y. DOM. REL. LAW § 236(A)(2) (McKinney 1988) provides that in all matrimonial actions in which alimony, maintenance or support is in issue, there shall be compulsory disclosure by both parties of their respective financial positions. This disclosure is made in the form of a "net worth" statement and consists of a list, executed under oath, of each spouse's assets, liabilities, and income. Moreover, the Office of Court Administration in New York has issued rules and forms governing disclosure of financial information. *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 202.16 (1986). If such forms are routinely filed in anticipation of the initial equitable distribution of assets, the non-degree spouse should clearly be able to gain access to the enhanced spouse's net worth statements in anticipation of a modification order under the procedures this Note has suggested.

appears to be necessary,[209] particularly in instances where the enhanced spouse becomes ill or debilitated. Under *O'Brien*, Dr. O'Brien would still be liable for the entire judgment even if he were to lose the use of a hand.[210] Such a result is ludicrous, and modification is, therefore, necessary to achieve equity under such changed circumstances.

F. *Extension of* O'Brien

While the language of this Note is limited to professional licenses, the logic and reasoning applies to many types of enhanced earning capacities, each presenting its own complexities. As one scholar noted, the key to *O'Brien* is that " 'spouses have an equitable claim to things of value arising out of the marital relationship' and these 'things of value' need not necessarily 'fall within traditional property concepts.' "[211]

While the New York Court of Appeals has not definitively addressed the reach of *O'Brien*, lower courts have extended this analysis to include academic degrees, such as a master's degree in business administration (MBA),[212] a master's degree in health care administration,[213] as well as membership in a professional association (Society of Actuaries).[214] In doing so, the reasoning of *O'Brien* was extended, but only in a limited sense, because the efforts of both spouses were only recognized to the extent there was formal documentation of an enhanced earning capacity.[215]

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209. If the future earnings method of valuation were retained by courts, implementation of a modification procedure would ameliorate at least some of the injustices inherent in such a valuation method. Modification would enable an enhanced spouse whose financial condition has soured to seek a reduction of the award while concomitantly allowing the working spouse to seek an increase if she has evidence that the enhanced spouse's financial condition has improved.

210. *See* O'Brien v. O'Brien, 66 N.Y.2d 576, 592, 489 N.E.2d 712, 720, 498 N.Y.S.2d 743, 751 (1985) (Meyer, J., concurring).

211. N.Y. DOM. REL. LAW § 236B(6) practice comment C236B:6 (McKinney Supp. 1988) (Marital Property-Professional Licenses and Degrees) (quoting *O'Brien*, 66 N.Y.2d at 583, 489 N.E.2d at 715, 498 N.Y.S.2d at 746).

212. *See* Kalnins v. Kalnins, N.Y.L.J., Nov. 16, 1989, at 23, col. 3 (N.Y. Sup. Ct.) (declaring that the husband's Harvard MBA degree was marital property).

213. *See* Anderson v. Anderson, 153 A.D.2d 823, 545 N.Y.S.2d 335 (1989) (holding that husband's master's degree in health care administration and labor and industrial relations was marital property).

214. *See* McAlpine v. McAlpine, 143 Misc. 2d 30, 539 N.Y.S.2d 680 (Sup. Ct. 1989) (finding husband's membership in the Society of Actuaries constituted marital property).

215. *See* N.Y. DOM. REL. LAW § 236B(6) practice comment C236B:6 (McKinney Supp. 1988) (Marital Property-Professional Licenses and Degrees) (discussing formal documentation).

For example, in *McGowan v. McGowan*,[216] the court opined that a master's degree in science was marital property.[217] In so holding, the court noted that it was the enhanced earning capacity represented by the degree, and *not* the degree itself, that was the thing of value.[218] Despite the fact that a degree merely represents a certification by an educational institution, while the license actually authorizes a party to engage in a particular profession,[219] to the extent the degree holder's earning capacity is increased, that increase will be deemed marital property.

Similarly, in *Kalnins v. Kalnins*,[220] the New York County Supreme Court addressed the question of whether an MBA was marital property. Applying the *O'Brien* reasoning, the court answered in the affirmative that the husband's Harvard MBA was marital property.[221]

Taking this analysis one step further, the New York Supreme Court in *McAlpine v. McAlpine*, recognized that membership in a professional association, namely The Society of Actuaries, was a marital asset subject to equitable distribution.[222] Again, the court focused upon the money-making potential generated by his membership rather than his membership per se.[223]

It is arguable that to limit the application of *O'Brien* to areas where there is formal documentation (i.e. academic certification or a state license) is illogical:

> Where efforts of the parties, during marriage, have resulted in a demonstrated economic benefit, that benefit should belong to both, no matter the shape or form the asset takes. Indeed it would be indefensible elitism and offensive snobbery to insist that the remedial *O'Brien* doctrine be restricted in its application to . . .

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216. 136 Misc. 2d 225, 518 N.Y.S.2d 346 (Sup. Ct. 1987).

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

218. *Id.* at 229, 518 N.Y.S.2d at 349.

219. *Id.*

220. N.Y.L.J., Nov. 16, 1990, at 23, col. 3 (N.Y. Sup. Ct.).

221. *Id.* In so holding, the court essentially neglected to heed its own prior decision which held that an MBA was not marital property. *See* Conner v. Conner, 97 A.D.2d 88, 468 N.Y.S.2d 482 (1983) (holding that husband's academic degree was not property susceptible to distribution). Since the *O'Brien* Court referred to, but neither overruled nor reaffirmed *Conner* or *Kalnins*, the issue of whether an MBA is marital property has not been answered definitevely in New York. If such a case were to reach the court of appeals, it would serve as a perfect opportunity for the court to either expand or restrict the scope of *O'Brien*.

222. *McAlpine*, 143 Misc. 2d at 30, 32, 539 N.Y.S.2d at 680, 681.

223. In this particular instance, the wife was not entitled to an interest in her husband's enhanced capacity because she did not prove that her contributions warranted a share in the enhanced earning capacity. *Id.*

profession[al]s.[224]

Accordingly, in a radical expansion of *O'Brien*, the New York County Supreme Court, in *Golub v. Golub*,[225] held that actress Marisa Berenson's celebrity status was marital property.[226] At trial, the court found that her husband, "by dint of his legal skills and business acumen," helped her boost her modeling and acting career, and, thus, her annual earnings.[227] The court reasoned that there was "no rational basis to distinguish between a degree, a license, or any other special skill that generates substantial income."[228] Specifically, the court held that "the skills of an artisan, actor, professional athlete or any person whose expertise in his or her career has *enabled him or her to become an exceptional wage earner* should be valued as marital property subject to equitable distribution."[229] In order to justify such a radical extension of *O'Brien*, Judge Silbermann observed that, in the cases that followed *O'Brien*, the thing of value was neither the license nor the degree; it was the enhanced earning capacity each represented.[230] In *Golub*, the enhanced earning capacity was Marisa Berenson's "unique ability to commercially exploit . . . her fame."[231] In essence, the *Golub* Court took the step that the *O'Brien* Court was so careful to avoid. The court in *Golub* sought to "treat all matrimonial litigants equally" and thought it unfair to "prejudice or penalize a spouse who is married to a non-professional who may nevertheless become an exceptional wage earner."[232] The *Golub* Court recognized the injustice in restricting recovery only to cases where formal documentation exists.[233] By expanding the reach

224. N.Y. DOM. REL. LAW § 236B(6) practice comment C236B:6 (McKinney Supp. 1988) (Marital Property-Professional Licenses and Degrees).

225. 139 Misc. 2d 440, 527 N.Y.S.2d 946 (Sup. Ct. 1988).

226. *Id.* at 443, 527 N.Y.S.2d at 948; *see also* Piscopo v. Piscopo, 232 N.J. Super. 559, 557 A.2d 1040 (1989) (holding that comedian Joe Piscopo's celebrity good will, attributable to his celebrity status, was an asset subject to equitable distribution).

227. *Golub*, 139 Misc. 2d at 443, 527 N.Y.S.2d at 948.

228. *Id.* at 446, 527 N.Y.S.2d at 950.

229. *Id.* at 447, 527 N.Y.S.2d at 950 (emphasis added). The court found the husband assisted the wife by "cleaning up" her personal finances and making efforts throughout the marriage to advance her career.

230. *Id.* at 444, 527 N.Y.S.2d at 949.

231. *Id.* at 445, 527 N.Y.S.2d at 949.

232. *Id.* Note, however, that in *Golub* no distributive award was issued because neither the plaintiff nor the defendant introduced evidence of the value of plaintiff's enhanced earning capacity. *Id.*; *see also* Weinstein, *Decision Expands Equitable Distribution*, AM. LAW., Mar. 29, 1988, at 3.

233. *Golub*, 139 Misc. 2d at 445, 527 N.Y.S.2d at 949 (stating that "it was the privileges conferred by the license that were critical to the court's decision [in *O'Brien*], not the

of *O'Brien*, the court in *Golub* sought to eradicate any class-based barriers inadvertently erected by *O'Brien* and its progeny.[234] If *Golub* remains in force, all contributing spouses, whether married to fledgling attorneys, doctors, or even entrepreneurs, may, upon divorce, have an interest in the enhanced spouse's increased capacity.[235]

The equality promised by *Golub* may be more suitable in theory than in practice. The most obvious barrier to effecting practical equality is complexity in valuing the enhanced capacity. While it would be theoretically ideal to follow *Golub's* brazen lead toward recognition of all forms of enhanced capacity as marital property, placing a value on the enhanced earning capacity of an entrepreneur, for instance, is more complex than calculating the enhanced capacity of a professional. While there are published indicia of a professional's average earnings,[236] there may be no reliable data about an entrepreneur's average earnings — nor may there really be an average entrepreneur. With these complexities in mind, the *O'Brien* Court may have been duly restrictive in the scope of its opinion by limiting its ruling to professional licenses and warning that the opinion was based on a narrow set of facts. Possibly fearing a Pandora's box of litigation, the *O'Brien* Court may have chosen to temper its bold expansion of marital property by limiting its application to more easily valued professional licenses. It is possible that, in reaching its decision, the *O'Brien* Court considered the impact of "*Golub*-like" reasoning, and rejected it as too broad and problematic to adjudicate.[237]

Yet, it could be maintained that the possibility that courts may be forced to make complex valuation determinations should not have

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piece of paper itself.").

234. *Id.* (stating that "[t]he courts should treat all matrimonial litigants equally"); *see also* Piscopo v. Piscopo, 232 N.J. Super. 559, 557 A.2d 1040 (1989).

235. *See* Brown v. Brown, N.Y.L.J., July 16, 1990, at 30 (N.Y. Sup. Ct.) (awarding plaintiff title to the marital residence in exchange for a waiver of her interest in her husband's electrician's license and business).

236. *See, e.g.*, BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SERIES P-60, NO. 162, CURRENT POPULATION REPORTS, CONSUMER INCOME, MONEY INCOME OF HOUSEHOLDS, FAMILIES, AND PERSONS IN THE UNITED STATES: 1987, at 137-44 (1989).

237. *See, e.g.*, Anderson, *Opera Career Not Marital Property: von Stade's Celebrity Status Held Not Distributable in Divorce*, N.Y.L.J., Sept. 26, 1990, at 1, col. 3, 5, col. 3 (suggesting that in rejecting Mr. Elkus' claim that his wife's opera career was marital property, the New York Supreme Court, in Elkus v. Elkus, N.Y.L.J., Sept. 27, 1990, at 23, col. 4 (N.Y. Sup. Ct.), seemed to be pointing out that valuation was nebulous and that extending marital property to include celebrity status would be too complex to adjudicate).

influenced the *O'Brien* Court to restrict its holding to professional licenses. While it is easier to project the enhanced capacity where a professional license or educational degree is representative of that future capacity, courts should not make recovery dependant upon the presence of such formal documentation — particularly if all of the other relevant factors indicate that such an award is deserved. In simple terms, the wife of an entrepreneur who makes financial and social sacrifices in order to help her husband expand his business is just as deserving as the wife of a professional who makes similar sacrifices to put her husband through graduate school. Thus, the wife of a successful plumbing contractor may be just as entitled to share in her husband's enhanced earning capacity as Mrs. O'Brien was entitled to share in Dr. O'Brien's enhanced capacity. Any other result may appear to be class biased.

The complexities of future valuation may be avoided if recovery were based upon an enhanced spouse's *actual*, rather than *projected* earnings. This, however, may be thought to counter the underlying goal New York's legislature sought to achieve by enacting § 236 of the Domestic Relations Law — namely the complete economic severance of the parties.[238]

CONCLUSION

If the logic and reasoning delineated by the *O'Brien* Court were to be applied evenhandedly, so that all forms of human capital cultivated during marriage were recognized as marital property, such an extension would run counter to the underlying goals of equitable distribution. If, however, *O'Brien* were limited in its application to instances of formal certification of enhanced earning capacity, like professional licenses and educational degrees, such a limitation would be illogical and unjust.[239] Thus, eventually New York's highest court or its legislature will have to grapple with where to draw the line; they will have to decide whether all increases in human capital generated by both spouses during marriage should be recognized as marital property subject to equitable distribution, or whether the scope of *O'Brien* will be limited to instances of formal documentation.

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238. *See supra* note 201 and accompanying text.

239. Commentators have speculated that, "perhaps an alternative approach to avoiding the potential for unfairness . . . is to treat all careers with proven economic value as marital property, when acquired during marriage." N.Y. DOM. REL. LAW § 236B(6) practice comment C236B:6 (McKinney Supp. 1988) (Marital Property-Professional Licenses and Degrees).

Finally, regardless of whether *O'Brien* is limited to instances of formal documentation, perhaps the courts should further consider whether a working spouse's recovery should be confined to a percentage of projected earnings or may be modified to reflect actual earnings. The inequities inherent in the projected earnings method of valuation clearly mandate that the actual earnings method is the method of choice whether the court is ordering a distributive share of a professional license, educational degree, or any other human capital cultivated during marriage.

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