Not What the Doctor Ordered--Medical License Declared Marital Property: O'Brien v. O'Brien

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Under the common law, property division upon divorce often resulted in an unjust distribution of marital assets. Modern divorce legislation seeks to remedy this financial inequity by recognizing the wife's financial and non-financial contributions to the marital relationship.

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1 L. Golden, Equitable Distribution of Property § 1.03, at 4 (1983). Under the title approach, the marriage relation itself does not alter property rights; title alone determines asset distribution upon divorce. See id. at 4-5. This strict ownership system seemed to foster equality, since each spouse received all that he or she earned or acquired during the marriage. See Comment, Graduate Degree Rejected as Marital Property Subject to Division Upon Divorce: In re Marriage of Graham, 11 Conn. L. Rev. 62, 63 n.3 (1978). However, because husbands generally acquired the familial property in the traditional marriage while the wives remained at home to care for the family, the title approach “promot[ed] unequal treatment under the guise of equality.” Id. Even if the nontitled spouse contributed financially to the marriage, he or she would not share in that property. See L. Golden, supra, § 1.03, at 5. This system also disregards the division of labor within the family unit, leaves the wife with no family assets other than her husband's support obligation, and ignores the intangibles she provides to the husband's career. See Foster & Freed, Marital Property Reform in New York: Partnership of Co-Equals?, 8 Fam. L.Q. 169, 175 (1974).

In common law England, all personal property acquired by the wife before or during the marriage became the husband's legal property. See Johnston, Sex and Property: The Common Law Tradition, The Law School Curriculum, and Developments Toward Equality, 47 N.Y.U. L. Rev. 1033, 1045 (1972). Further, while the wife retained title to any real property she owned prior to marriage, the husband acquired a jure uxoris interest in this property, therefore giving him sole possession and control during the marriage. Id. Thus, marriage transformed the wife into a “legal cipher,” or non-person. Id. at 1046. By the late eighteenth century, the courts of equity had begun to chip away at these injustices, but these advances were mostly achieved by those with a strong bargaining position and the wealth necessary to retain a good legal advocate. See id. at 1057.

While social conditions in the United States differed greatly from those in England, American colonial women carved out only limited exceptions to the prevailing English system. See id. at 1058-59. The Married Women's Property Acts, enacted in many states during the mid to late nineteenth century, finally extended women's marital property rights, albeit slightly and unevenly. See Greene, Comparison of the Property Aspects of the Community Property and Common-Law Marital Property Systems and Their Relative Compatibility with the Current View of the Marriage Relationship and the Rights of Women, 13 Creighton L. Rev. 71, 79-80 (1979). For a discussion of the Married Women's Property Acts and their impact upon the marital relationship, see Johnston, supra, at 1061-70.

2 See K. Gray, Reallocation of Property Upon Divorce 66-67 (1977). Modern prop-
Law, for example, views the marital relationship as an economic partnership, and attempts to fairly and equitably allocate marital property with regard to the individual circumstances of each spouse. Each spouse thus owns a vested one-half interest in the community property, and both financial and non-financial contributions are recognized in the distribution of the marital assets. See Greene, supra note 1, at 72. For a listing of the individual statutes, see id. at 73 n.7.

Approximately thirty-nine states have enacted "equitable distribution" legislation. See Note, Property Distribution in Domestic Relations Law: A Proposal for Excluding Educational Degrees and Professional Licenses from the Marital Estate, 11 Hofstra L. Rev. 1327, 1327 n.2 (1983) [hereinafter Exclusion Proposal]. Generally, an equitable distribution scheme "permits a spouse who has made a material economic contribution toward the acquisition of property which is titled in the other spouse, to claim an equitable interest in such property." Freed & Foster, Family Law in the Fifty States: An Overview, 17 Fam. L.Q. 365, 379 (1984). The economic (but not necessarily financial) contributions made toward the purchase or attainment of a marital asset are weighed against the net assets available at the time of divorce. Id. For a listing of the individual statutes, see Loeb & McCann, Dilemma v. Paradox: Valuation of an Advanced Degree Upon Dissolution of a Marriage, 66 Marq. L. Rev. 495, 496 n.8 (1983).

Today in the United States, three states—Mississippi, South Carolina, and West Virginia—still follow the common law with regard to property distribution upon divorce. See Freed & Foster, supra, at 379-80. In these states, because asset distribution depends solely on title, the courts have no general or equitable power to alter the property distribution, except as to joint property and certain minor exceptions. See id. Due to the harshness of this common law approach, one commentator suggests that in light of recent judicial decisions, South Carolina and West Virginia have retreated from the strict title approach, and have in fact judicially adopted an equitable distribution approach. See id. at 380-81.


4 See Governor's Memorandum on Approval of ch. 281, N.Y. Laws (June 19, 1980), reprinted in [1980] N.Y. Laws 1863 (McKinney). See also Memorandum of Assemblyman Burrows, reprinted in [1980] N.Y. Legis. Ann. 130 ("The basic premise for the marital property . . . reforms of this legislation . . . is that modern marriage should be viewed as a form of partnership."); A PRACTICAL GUIDE TO THE NEW YORK EQUITABLE DISTRIBUTION DIVORCE LAW 51 (H. Foster ed. 1981) (husband and wife should be regarded as partnership, and "family assets produced by partnership effort and expenditure should be equitably divided upon divorce.").

5 N.Y. Dom. Rel. Law § 236(B)(1)(c) (McKinney Supp. 1986). The statute defines "marital property" as: "all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held. . . ." Id.

The statute also defines a second type of property, "separate property," as either:

(1) property acquired before marriage or property acquired by bequest, devise, or descent, or gift from a party other than the spouse;

(2) compensation for personal injuries;
case. Notwithstanding their progressive statutory reforms, most jurisdictions have refused to declare a spouse’s professional degree or license a marital asset when one spouse has worked to put the other through professional school. Recently, however, in O’Brien v. O’Brien, the New York Court of Appeals held that a medical license acquired during the marriage is marital property, and therefore subject to equitable distribution under the New York

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

(4) property described as separate property by written agreement of the parties.

Id. at § 236(B)(1)(d)(1-4).

N.Y. Dom. Rel. Law § 236(B)(5)(c) (McKinney Supp. 1986). “Marital property shall be distributed equitably between the parties, considering the circumstances of the case and of the respective parties.” Id. The statute then delineates nine factors to be considered in distributing the marital property, Id. at § 236(B)(5)(d)(1-9), and provides a tenth catch-all provision: “[A]ny other factor which the court shall expressly find to be just and proper.” Id. at § 236(B)(5)(d)(10).

The statute also provides that “separate property shall remain such.” Id. at § 236(B)(5)(b). Thus, the court’s initial task is to determine which property is “separate” under § 236(B)(1)(d)(1-4), and which is “marital” under § 236(B)(1)(c).

See Note, The Supporting Spouse’s Rights in the Other’s Professional Degree Upon Divorce, 35 U. Fla. L. Rev. 130, 131 (1983) [hereinafter Supporting Spouse’s Rights]. One recent decision estimated (prior to the subject case of this Comment) that twenty-two of twenty-four jurisdictions that had considered the question of whether a degree or license was marital property, had answered in the negative. See Archer v. Archer, 303 Md. 347, 349, 493 A.2d 1074, 1077 (1985). See, e.g., Lovett v. Lovett, 688 S.W.2d 329, 333 (Ky. 1985) (husband’s medical degree relevant in setting maintenance payments, but is not marital property); Ruben v. Ruben, 123 N.H. 358, 362, 461 A.2d 733, 735 (1983) (Ph.D. earned by husband not asset subject to division); Wehrkamp v. Wehrkamp, 357 N.W.2d 264, 266 (S.D. 1984) (future earning capacity of husband’s dental degree not marital asset); Grosskopf v. Grosskopf, 677 P.2d 814, 822 (Wyo. 1984) (husband’s masters degree in accounting not divisible property). For an extensive listing of these cases, see Archer, 303 Md. at 349 n.1, 493 A.2d at 1077 n.1.

The benchmark case in this area is In re Graham, 194 Colo. 429, 574 P.2d 75 (1978). The Graham court held that while Colorado’s legislature intended the term “property” to be broadly inclusive, “there are necessary limits upon what may be considered “‘property.’” Id. at 430, 574 P.2d at 76. Using traditional definitions of property, the court ruled that because an educational degree or professional license has no exchange value, cannot be assigned, sold or transferred, and is personal to the holder, the husband’s M.B.A. degree was not divisible upon divorce, id. at 431, 574 P.2d at 77, even though the wife had provided 70% of the couple’s income, and contributed heavily to the husband’s education. See id. at 432, 574 P.2d at 78 (Carrigan, J., dissenting). Writing for the majority, Judge Lee held that a degree or license constitutes “an intellectual achievement that may potentially assist in the future acquisition of property.” Id. at 431, 574 P.2d at 77. Further, the court stated that because a license or degree cannot be adequately valued, and a person’s earning capacity is not an item of property, a degree cannot be distributed. See id.

statute. In *O'Brien*, the parties married in 1971, and moved to Mexico in 1973 to enable the husband to attend medical school. The wife, who had earned a bachelor's degree and temporary teaching certificate in New York, held various teaching and tutorial positions while in Mexico. While both spouses contributed to the family's financial expenses, the trial court determined that the wife had provided 76% of the couple's income during the marriage, in addition to managing the family finances and performing household chores. Upon the couple's return to New York in 1976, the wife resumed her former teaching position, and the husband completed his medical internship training. Mr. O'Brien filed for divorce in December, 1980, two months after receiving his license to practice medicine.

The Supreme Court, Westchester County, held that the intent and objectives of the Equitable Distribution Law required a fair and flexible allocation of marital assets, and thus the husband's medical degree and license constituted marital property. A divided Appellate Division reversed the trial court's distribution of the license itself, citing recent New York precedents and persuasive authority, a lack of legislative intent on the issue, and the

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9 Id. at 580-81, 489 N.E.2d at 713, 498 N.Y.S.2d at 744.
10 Id. at 581, 489 N.E.2d at 714, 498 N.Y.S.2d at 745.
12 *O'Brien*, 66 N.Y.2d at 581, 489 N.E.2d at 714, 498 N.Y.S.2d at 745. At times, the defendant held as many as three positions: kindergarten teacher, English teacher, and English tutor. *O'Brien*, 114 Misc. 2d at 234, 452 N.Y.S.2d at 802.
14 Id. At the time of trial, he was a resident in general surgery at a New York hospital. *Id.*
15 Id.
16 See *O'Brien*, 114 Misc. 2d at 238-39, 452 N.Y.S.2d at 805. The defendant's expert witness gave two financial evaluations; first, he determined the present value of the defendant's financial contributions toward the plaintiff's medical education to be $103,390. Id. at 241, 452 N.Y.S.2d at 807. Second, he valued the medical license by considering the plaintiff's age, health, entry into practice, and specialty, and then capitalized the lifetime earning differential between a college graduate and a general surgeon. Id. He thus concluded the present value of the license to be $472,000, of which the court awarded the defendant $188,800, or 40%. *Id.*
availability and suitability of other remedies. The Court of Appeals reversed the Appellate Division on the issue of the license distribution, holding that the New York Equitable Distribution Law intended to reach beyond traditional property concepts, and that the Legislature left it to the courts to decide which specific interests are protected beneath the marital property umbrella.

Writing for the court, Judge Simons stated that the statutory language clearly indicated that an interest in a profession or professional career potential is marital property, and that the legisla-
tive history of the enactment reinforced this interpretation. Addressing the issue of alternative remedies, the court concluded that the statute did not expressly authorize the rehabilitative maintenance award granted by the Appellate Division, and held that limiting the defendant to such an award defeated the equitable results that the legislature sought to achieve. Finally, in valuing the degree, Judge Simons wrote that because the degree was marital property, Mrs. O'Brien was entitled to an equitably distributed portion of it, and not merely a reimbursement of her financial contributions.

(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.

. . . .

(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. . . .

N.Y. DOM. REL. LAW § 236(B)(5)(d)(6), (9) (McKinney Supp. 1986) (emphasis added). In addition, the court noted the following provision:

e. In any action in which the court shall determine that an equitable distribution is appropriate but would be impractical or burdensome or where the distribution of an interest in a business, corporation or profession would be contrary to law, the court in lieu of such equitable distribution shall make a distributive award in order to achieve equity between the parties. The court in its discretion, also may make a distributive award to supplement, facilitate or effectuate a distribution of marital property.

Id. at § 236(B)(5)(e). The court held these provisions to show a clear and unambiguous legislative intent to include an interest in a profession or professional career potential as marital property, see O'Brien, 66 N.Y.2d at 584, 489 N.E.2d at 716, 498 N.Y.S.2d at 747, and thus granted the defendant a distributive award. Id. at 588, 489 N.E.2d at 748-49, 498 N.Y.S.2d at 717-18.

O'Brien, 66 N.Y.2d at 584-85, 489 N.E.2d at 716, 498 N.Y.S.2d at 747. Holding that the legislature intended to create "an entirely new theory" of marital property distribution, Judge Simons emphasized the economic partnership aspects of the legislation. Id. at 585, 489 N.E.2d at 716, 498 N.Y.S.2d at 747. "[F]ew undertakings during a marriage better qualify as the type of joint effort that the statute's economic partnership theory is intended to address than contributions toward one spouse's acquisition of a professional license." Id.

See id. at 587, 489 N.E.2d at 717, 498 N.Y.S.2d at 748. The limitation of a working spouse to a maintenance award runs counter to the economic partnership concept underlying the statute because it "retains the uncertain and inequitable economic ties of dependence that the Legislature sought to extinguish . . . ." Id. Since maintenance terminates upon remarriage, the working spouse may find her decision to remarry unduly hindered by the possibility of never being compensated for contributions toward her ex-spouse's education. See id.

Id. at 588, 489 N.E.2d at 718, 498 N.Y.S.2d at 749. Judge Simons compared the situation at bar to one where a spouse provides the down payment for the purchase of real
Although the *O'Brien* court has sought to bring equity to a historically unjust area of property distribution, it is submitted that the court erred in treating a bare license in the same fashion as traditional forms of marital property. This Comment will discuss the statutory and policy rationale supporting the classification of a bare license as separate property, and propose a statutorily-permissible solution that achieves equity between the parties without promoting unbridled speculation as to future career success and earnings.

**A Bare License Should Not Be Marital Property**

New York’s Equitable Distribution Law requires the court to consider nine factors in determining the equitable distribution of marital property, including direct or indirect contributions, or equitable claims made by the non-license-holding spouse to the “career or career potential of the other party,” and the impossibility or difficulty of valuing “any component asset or any interest in a business, corporation or profession.” Stating that these words “mean exactly what they say,” the *O'Brien* court used these two factors as statutory ammunition for declaring the medical license marital property. It is submitted, however, that by relying on language taken from the factors used to distribute marital property, the *O'Brien* court intermingled the process of classifying marital property with that of distributing it. An equitable distribution trial has three stages: classification of property; valuation of property; and distribution of property. An examination of the language or securities. *Id.* In such a case, the court would not limit the contributing spouse to the recovery of his or her down payment; the distribution would compensate the spouse for “any incremental value in the asset because of price appreciation.” *Id.* Further, the majority held that while valuation problems exist, they are no more difficult than in wrongful death actions or personal injury cases in which one’s ability to work has been diminished. *See id.* at 588-89, 489 N.E.2d at 718, 498 N.Y.S.2d at 749; *see infra* notes 55-59 and accompanying text. The court remanded the case to the appellate division for a determination of the facts. *O'Brien*, 66 N.Y.2d at 590-91, 489 N.E.2d at 720, 498 N.Y.S.2d at 751.


27 N.Y. Dom. Rel. Law § 236(B)(5)(d)(6); *see supra* note 22 for the text of this provision.

28 N.Y. Dom. Rel. Law § 236(B)(5)(d)(9); *see supra* note 22 for the text of this provision.


30 *Id.*

31 L. Golden, *supra* note 1, § 1.08, at 10.
guage of the nine distribution factors as a whole reveals that they are not definitional, but instead act as weights upon a balance, thereby tipping the property distribution decision toward one party or the other. These factors indicate a legislative intent to reward certain spousal contributions to the marital partnership with a favorable distribution of marital property, not a favorable classification of it. In addition, neither the statute nor its legislative history contain any references to the classification of licenses or degrees. The legislative history does manifest an intention to create a new form of statutorily-created property, dubbed “marital property,” but while the court refused to apply traditional property definitions in classifying marital property, it nonetheless

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33 See O'Brien v. O'Brien, 106 App. Div. 2d 223, 226, 485 N.Y.S.2d 548, 550 (2d Dep't), modified, 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985) (nothing in statute nor legislative history suggests legislative intent to “vest a proprietary right in one spouse to the other spouse’s very person.”); Lesman v. Lesman, 88 App. Div. 2d 153, 160, 452 N.Y.S.2d 935, 940 (4th Dep’t), appeal dismissed, 57 N.Y.2d 956 (1982) (“[The legislature] has not provided for equitable distribution of future earnings and we should not do so, either by distorting the concept of property or by applying our own notions of equity.”); DeStefano v. DeStefano, N.Y.L.J., Jan. 26, 1984, at 14, col. 6, at 15, col. 1 (Sup. Ct. Queens County) (while there is statutory authority to treat professional practices as marital property, no such authority or legislative intent exists for degrees and licenses). But see Kutanovski v. Kutanovski, N.Y.L.J., August 25, 1982, at 12, cols. 1, 5 (Sup. Ct. N.Y. County), (wording of distribution factors indicate legislative intent to include degrees and licenses) rev'd, 109 App. Div. 2d 822, 486 N.Y.S.2d 338 (2d Dep't 1985); Weintraub, A Commentary on O'Brien v. O'Brien, N.Y.L.J., Feb. 13, 1986, at 3, col. 3 (Equitable Distribution Law “calls for equitable remedies, not exact science.”); Foster & Freed, Virtue Is Not the Only Reward For Spousal Contributions, 49 Brooklyn L. Rev. 301, 309-10 (1983) [hereinafter Equitable Distribution of Degrees]. A major element of dominion and control is the power of disposition. Id. at 310. Thus, under the view espoused by In re Graham, 194 Colo. 429, 574 P.2d 75 (1978), discussed supra note 7, and followed by Lesman v. Lesman, 88 App. Div. 2d 153, 452 N.Y.S.2d 935 (4th Dep't 1982), appeal dismissed, 57 N.Y.2d 956 (1982), and Conner v. Conner, 97 App. Div. 2d 88, 468 N.Y.S.2d 482 (2d Dep't 1983), both discussed supra note 17, a degree or license could not be property in the traditional sense because it was inalienable and non-transferable. See Graham, 194 Colo. at 431,
treated a non-traditional asset—Dr. O'Brien's medical license—like a traditional asset for valuation purposes.36

The O'Brien holding also leaves many questions unanswered. First, the court did not explain which licenses or degrees may be included in the court's expansive marital property definition; the majority gave no indication whether only professional degrees may be distributed, or whether undergraduate degrees or technical degrees may also fall under the marital property umbrella.37 Second, the court set no standards as to when a bare degree or license should be marital property. The majority broadly held that the court retains the "flexibility and discretion"38 to either declare the license marital property, or merely use the license as a factor in distributing existing marital property.39 What the O'Brien court termed "flexibility and discretion," however, has been called "doctrinal chaos" by others, who view case by case solutions to this dilemma as inequitable and unfair.40 It is submitted that giving

574 P.2d at 77.

The more modern approach, adopted by the RESTATEMENT OF PROPERTY in 1936, views property as a bundle of legal relations, including sets of rights, privileges, powers and immunities. See Equitable Distribution of Degrees, supra, at 311. This broadened definition afforded protection to certain intangible, but valuable, interests. See id. at 313. A few courts have either advocated or adopted this broad approach with respect to degrees and licenses. See Conner v. Conner, 97 App. Div. 2d 88, 108, 468 N.Y.S.2d 482, 496 (2d Dep't 1983) (Bracken, J. and Brown, J., concurring) (advocates broad definition of property as legal relation between a person and a thing); Daniels v. Daniels, 20 Ohio App. 458, 461, 185 N.E.2d 773, 775 (1961) (right to practice constitutes franchise, and therefore can be property). Compare In re Weinstein, 128 Ill. App. 3d 234, 470 N.E.2d 551 (1984), where the court defined property as "a word of the very broadest import, connoting any tangible or intangible res which might be made the subject of ownership," id. at 240, 470 N.E.2d at 559 (quoting In re Goldstein, 97 Ill. App.3d 1023, 1026, 423 N.E.2d 1201, 1203 (1981)), yet held that since a degree or license is a mere expectancy interest, it cannot be property. Id.

A small number of jurisdictions who have treated the license or degree as a marital asset have tended to avoid the "definition of property" issue. See Woodworth v. Woodworth, 128 Mich. App. 258, 263, 337 N.W.2d 332, 335 (1983); Washburn v. Washburn, 101 Wash. 2d 168, 171, 677 P.2d 152, 157 (1984). See infra notes 48-52 and accompanying text.

See Equitable Distribution of Degrees, supra note 35, at 323. Since the supporting spouse actually seeks a distributed portion of the license holder's enhanced earning power, no analytical distinction can be made between a medical license and a plumbing license, for example. The attorney for the plaintiff at bar suggests that any kind of education that enhances earning capacity—even adult education courses—may soon be a "new breed" of property. See DaSilva, O'Brien v. O'Brien Reviewed by the Doctor's Attorney, N.Y.L.J., Jan. 27, 1986, at 1, col. 3.

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

Id.

L. Golden, supra note 1, § 6.19, at 184. One commentator writes:

A professional education or degree should not be classified as property simply
this much flexibility and discretion to individual trial judges will leave litigants unsure of their legal rights; thus, the legal and practical backlash arising from this decision will induce both professional and non-professional license holders to protect themselves with pre-nuptual agreements, and for good or bad further propel the marital institution into the realm of an arms-length commercial transaction.41

because the equities of the case compel some form of relief. If it would not be property after a long marriage, . . . and where the other spouse may receive maintenance or alimony, then it should not be property in the absence of some or all of these factors. To sanction any other result would be to create "doctrinal chaos." Id. See also Mullenix, The Valuation of an Educational Degree at Divorce, 16 Loy. L.A.L. Rev. 227, 244-245 (1983) (case by case decisions on whether degree is marital property avoid analytical question of whether degree actually is property); Exclusion Proposal, supra note 2, at 1349-50 (limiting distribution of degree to circumstances where no other assets exist can only result in inequity and inconsistency).

A veritable case study in doctrinal chaos has arisen in the Kentucky courts. In Inman v. Inman, 578 S.W.2d 266 (Ky. Ct. App. 1979) (dubbed Inman I), the court held the husband's dental degree to be marital property, but only because there was little or no marital property to distribute, and the supporting spouse had made major contributions to the attainment of the degree. Id. at 268. In Leveck v. Leveck, 614 S.W.2d 710 (Ky. Ct. App. 1981), the majority concluded that an Inman I-type remedy was not warranted because "an equitable result was able to be reached without treatment of the license as marital property." Id. at 712. After remand, Inman I was appealed on other grounds to the Kentucky Supreme Court, and was then dubbed Inman II. Inman v. Inman, 648 S.W.2d 847 (Ky. 1982). In Inman II, the court stated in dicta that if the issue was to come before the court, the degree would not be treated as marital property, but the contributing spouse would be reimbursed with a kind of restitution-compensation. Id. at 852. Discretionary review was then granted to Lovett v. Lovett, 688 S.W.2d 329 (Ky. 1985), in order to resolve uncertainties arising from Inman I, Inman II, and Leveck. Lovett held that degrees and licenses would be considered in awarding maintenance to the supporting spouse, but could not himself be property. Id. at 332-33. One commentator concluded: "At its worst, [an] unpredictable pattern of relief within the same jurisdiction is simply unprincipled." Mullenix, supra, at 250.

41 Cf. Wisner v. Wisner, 129 Ariz. 333, 341, 631 P.2d 115, 123 (1981) ("[I]t is improper for a court to treat a marriage as an arm's length transaction by allowing a spouse to come into court after the fact and make legal arguments regarding unjust enrichment . . ."); Mahoney v. Mahoney, 91 N.J. 488, 500, 453 A.2d 527, 533 (1982) ("Marriage is not a business arrangement in which the parties keep track of debits and credits, their accounts to be settled upon divorce."); Lesman v. Lesman, 88 App. Div. 2d 153, 159, 452 N.Y.S.2d 935, 939 (4th Dep't) (court refuses to treat marriage as purely economic undertaking, and rejects any contractual or quasi-contractual theory of recovery), appeal dismissed, 57 N.Y.2d 956 (1982). One commentator argues that the concept of "marriage as partnership" refers not to a commercial partnership, but a conjugal one. See K. Gray, supra note 2, at 23-4. "[M]arriage is . . . that unique community of life and purpose which characterizes the ideal relation of husband and wife." Id. at 23.

A more realistic approach views the marriage, or at least the dissolution of it, in economic terms. See Woodworth v. Woodworth, 126 Mich. App. 258, 261, 337 N.W.2d 323, 335-36 (1983) (while marriage is not intrinsically commercial, dissolution has residedly economic overtones). Some commentators feel that changes in the traditional perceptions of marriage make contractual theories of dissolution a mere extension of the "marriage as part-
Many courts have observed that the contributing spouse in fact has no desire to obtain a piece of the license itself; the claimant actually seeks a portion of the holder's increased future earning capacity. This presents a conflict between the oft-stated rule that future earnings cannot be a marital asset, and the O'Brien court's holding that because the student spouse's license or degree was made possible by contributions received during the marriage, the enhanced future earning capacity that licensure provides is marital property. Judge Simons blurred the line between present and future assets by rejecting any distinction between an ongoing professional practice, which has been declared marital property,

nership” idea. See Compensation For Financing A Spouse’s Education: The Means of Economic Justice in Maine, 35 Mr. L. Rev. 340, 344-45 (1983); Equitable Distribution of Degrees, supra note 35, at 316. One commentator rather coldly views the supporting spouse as an economically feasible source of funding for the student spouse's investment in his own human capital. See Krauskopf, Recompense For Financing Spouse’s Education: Legal Protection For the Marital Investor in Human Capital, 28 U. Kan. L. Rev. 379, 385 (1980). It is suggested, however, that while the dissolution of marriage must inevitably dredge up economic contribution and distribution issues, it is socially harmful to the marital institution to force future spouses to contractually prepare debit-credit/investment-return analyses even before the wedding vows are taken.


See O’Brien, 66 N.Y.2d at 588, 489 N.E.2d at 716, 496 N.Y.S.2d at 747. O’Brien and other courts have justified the distribution of enhanced future earning capacity by adhering to a “fruits of the license” theory. See Inman v. Inman, 578 S.W.2d 266, 268 (Ky. Ct. App. 1979); Woodworth v. Woodworth, 126 Mich. App. 258, 266, 337 N.W.2d 332, 335 (1983); Kutanovski v. Kutanovski, N.Y.L.J., Aug. 25, 1982, at 12, col. 5 (Sup. Ct. N.Y. County), rev’d, 109 App. Div. 2d 822, 486 N.Y.S.2d 338 (2d Dep’t 1985). This theory proposes that when the advanced degree earned by one spouse is the “product of . . . concerted family investment,” Woodworth, 126 Mich. App. at 261, 337 N.W.2d at 334, the contributing spouse should also share in the fruits of the degree, which are the enhanced earnings the licensed spouse will earn. Id. at 264, 337 N.W.2d at 336. In economic terms, the degree or license constitutes “marriage specific capital” which is only valuable to the “family firm” as long as the marriage continues. See Krauskopf, supra note 41, at 386-87. If the marriage dissolves, however, the contributing spouse's claim to her investment in the license-holder's earning capacity is at risk. Id. at 388. Rewarding the contributing spouse is socially important to encourage investment in spousal education, and legally important to honor traditional expectations of return for investment. See id. at 416.

and a bare license to practice. It is submitted, however, that this distinction must stand in order to preserve the crucial differentiation between property acquired during the marriage, and post-divorce property acquisitions or appreciation.

The court compared the situation at bar to one where a spouse provides the downpayment for a real estate or stock purchase. Judge Simons correctly stated that upon divorce, this spouse would be entitled to an equitably distributed portion of the incremental value of the asset, and not merely a return of the downpayment. Application of this hypothetical in the case of a bare license or degree is not appropriate, however. A real estate or stock purchase may increase in value solely due to random market fluctuations, without any effort from either spouse. An appreciation in the value of separate property without any affirmative contribution by the non-titled spouse will not subject the value of that appreciation to equitable distribution. A bare license or degree,

See O'Brien, 66 N.Y.2d at 586, 489 N.E.2d at 717, 498 N.Y.S.2d at 748.
See infra notes 48-52 and accompanying text.
See O'Brien, 66 N.Y.2d at 588, 489 N.E.2d at 718, 498 N.Y.S.2d at 749.
Id.
This section provides that upon dissolution, all separate property shall remain as such, except that any appreciation in the value of the separate property due in part to the contributions or efforts of the other spouse, shall be marital property. See id.
See Conner v. Conner, 97 App. Div. 2d 88, 94 n.4, 468 N.Y.S.2d 482, 490 n.4 (2d Dep't 1983). Judge O'Connor set out an "active-passive management distinction," in which he states that any appreciation in passive investments, such as securities or bank accounts, would remain separate property since the non-titled spouse would have made no active contribution to that appreciation. Id. For an appreciation in separate property to be subject to equitable distribution, the non-titled spouse would have to make direct or indirect contributions or efforts toward the appreciation of the separate property. See Price v. Price, 113 App. Div. 2d 299, 306, 496 N.Y.S.2d 455, 461 (2d Dep't 1985). The non-titled spouse must show a "[causal relation] to the enhancement of the separate property asset so as to warrant an award of a percentage of the appreciation in value of the separate property asset."
Id.

For example, in Nolan v. Nolan, 107 App. Div. 2d 190, 193, 486 N.Y.S.2d 415, 418 (3d Dep't 1985), the court held that the increase in value of the husband's securities was not simply due to random market fluctuations, since he actively managed his portfolio full-time. Id. The wife's contributions as mother and homemaker enabled the husband to pursue this goal, and therefore the appreciation of the husband's securities was marital property. Id. See also Borg v. Borg, 107 App. Div. 2d 777, 778, 491 N.Y.S.2d 659, 660 (2d Dep't 1985) (wife not entitled to portion of appreciation in husband's business since she made no substantial contribution to it during couple's short six-month marriage); Rubin v. Rubin, 105 App. Div. 2d 736, 741, 481 N.Y.S.2d 172, 176 (2d Dep't 1984) (wife made no substantial
upon attainment, is not nearly as valuable as it will become in the future when the licensee achieves certain personal intangibles, such as field expertise, business acumen, and professional reputation. Any incremental increase in the value of the license after divorce would be without any affirmative act by the contributing spouse, and therefore the contributing ex-spouse should not share in these personal intangibles, which do not accrue until years after the marriage dissolves.

Perhaps more disturbing than the equitable distribution of intangible "assets" acquired after the divorce is the attempt to value a bare license based on future unknowns. In his concurrence, Judge Meyer asserted that this kind of speculation is little more than a judge's "prophecy." While expert valuation of projected future earnings is commonplace in our judicial system, especially in tort cases, these awards are predicated upon an assumption of wrongdoer fault, while fault is not a consideration in property dis-

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contributions to husband's interest in closely-held corporation, and therefore received no portion of appreciation).

52 Cf. Conner v. Conner, 97 App. Div. 2d 88, 98, 468 N.Y.S.2d 482, 489-90 (2d Dep't 1983), which compares this situation to the dissolution of an economic partnership. If one partner sacrifices some of his own skills to advance the interests of the partnership, and as a result another partner's marketable skills are enhanced, the contributing partner does not "have a claim to another partner's future labors on the theory that such constitutes good will in which all partners must share upon dissolution." Id. at 98, 468 N.Y.S.2d at 490. It is suggested that after divorce, the supporting spouse will make no contributions to the license-holder's skill, experience, business acquaintances, clientele, or good will, all of which accrue after the marital dissolution. While it is true that assets such as vested but unmatured pension rights and professional practices have been declared marital property, see O'Brien, 66 N.Y.2d at 584, 586, 489 N.E.2d at 715, 716-17, 498 N.Y.S.2d at 746, 747-48, a substantial portion of the financial value of those assets have accumulated during the marriage. In the case of the bare license, the O'Brien court has in effect predicted that certain attributes, qualifications and values—such as business judgment and good will—will inure to the license-holder sometime in the future. The court then equitably distributed these potentials as if they had already accrued.

53 See O'Brien, 66 N.Y.2d at 591-92, 489 N.E.2d at 720, 498 N.Y.S.2d at 751 (Meyer, J., concurring). When asked by counsel if his calculations were speculative, the defendant's valuation expert responded:

Yes. They're speculative to the extent of, will Dr. O'Brien practice medicine? Will Dr. O'Brien earn more or less than the average surgeon earns? Will Dr. O'Brien live to age sixty-five? Will Dr. O'Brien have a heart attack or will he be injured in an automobile accident? . . . I mean, there is a degree of speculation.

Id. (Meyer, J., concurring).

54 Id. (Meyer, J., concurring).

55 See Supporting Spouse's Rights, supra note 7, at 139. In both personal injury and wrongful death actions, the remedies depend largely on expert evaluation of future earning capacity. See Krauskopf, supra note 41, at 388-89.
A large judgment based on what a license-holder could conceivably earn may force the judgment debtor into a career he does not wish to pursue, or perhaps prevent him from entering a lower-paying specialization or position.\textsuperscript{57} By fashioning a non-adjustable award based on projected earnings, the \textit{O'Brien} solution may have the effect of forcing a bare license-holder to live up to financial standards determined years before by a "prophetic" court.

\textbf{WHAT IS THE VALUE OF A BARE LICENSE?}

The distributive award provision relied upon by the court reads that "where the distribution of an interest in a . . . profession would be contrary to law, the court \textit{in lieu of such equitable distribution} shall make a distributive award. . . ."\textsuperscript{58} This same section further provides that "[t]he court in its discretion, also may make a distributive award to supplement, facilitate or effectuate a distribution of marital property."\textsuperscript{59} Neither the wording of the distributive award provision nor its legislative history indicates that the exclusive remedy left to the courts is the equivalent of an equitable distribution of the bare license.\textsuperscript{60} Nonetheless, the court held

\textsuperscript{56} See \textit{Mullenix}, supra note 40, at 270 n.183. "Except in egregious cases that shock the conscience of the court. . . .[f]ault is not a 'just and proper' factor for consideration in the equitable distribution of marital property." \textit{O'Brien}, 66 N.Y.2d at 589-90, 489 N.E.2d at 719, 498 N.Y.S.2d at 750.

\textsuperscript{57} See \textit{O'Brien}, 66 N.Y.2d at 591, 489 N.E.2d at 720, 498 N.Y.S.2d at 751 (Meyer, J., concurring). Mr. O'Brien had in fact completed one year of an internal medicine residency, and at the time of trial was a resident in general surgery. \textit{Id}. (Meyer, J., concurring). Despite the plaintiff's testimony that he was dissatisfied with the surgery program and planned on returning to internal medicine, the trial judge utilized the expert's evaluation based on a general surgeon's future earnings. \textit{Id}. (Meyer, J., concurring). While the trial judge certainly had the discretion to discredit testimony, "equitable distribution was not intended to make a career decision for a licensed spouse still in training." \textit{Id}. (Meyer, J., concurring). See also \textit{DaSilva}, supra note 37, at 4, col. 1, who points out that Dr. O'Brien is in fact pursuing a career as a "primary care physician," which is a salaried position that pays considerably less than a surgeon would earn. \textit{But see} Weintraub, supra note 33, at 3, col. 2 (whether Dr. O'Brien becomes surgeon or internist, expert's evaluation was still very conservative).

\textsuperscript{58} N.Y. DOM. REL. LAW § 236(B)(5)(e) (McKinney Supp. 1986).

\textsuperscript{59} Id. See supra note 22 for the full text of the distributive award provision.

\textsuperscript{60} See N.Y. DOM. REL. LAW § 236(B)(5)(e) (McKinney Supp. 1986). It is suggested that the words "supplement, facilitate or effectuate" evidence legislative intent for extreme flexibility in fashioning distributive awards. \textit{Cf.} \textit{Conteh v. Conteh}, 117 Misc. 2d 42, 43-44, 457 N.Y.S.2d 365, 365 (Sup. Ct. Monroe County 1982), which stated in dicta that the word "supplement" in the distributive award provision appeared to provide a remedy where a spouse has made financial contributions to the other spouse's education, and there was little or no marital property. \textit{Id}. "To allow a discretionary distributive award under such circumstances,
that because the license was marital property, the defendant was entitled to an equitably distributed portion of the license in the form of a distributive award. Reading the above provisions together with the O'Brien court's stated equitable goals, an award equivalent to the speculative present value of the holder's future earnings is not mandated by statute, and the distributive award provision in fact provides for judicial leeway in forming equitable awards.

A more equitable remedy can be fashioned using a financial and non-financial reimbursement approach. In Mahoney v. Mahoney, the New Jersey Supreme Court awarded the contributing spouse the value of "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." While this is an appropriate starting point, it is suggested that the contributing spouse also be reimbursed for the value of his or her contributions and services as a spouse, parent and homemaker during the time period the licensee attended school. In addition, the supporting spouse should receive interest from the date of commencement of the action.

CONCLUSION

The working-spouse/student-spouse syndrome has too long gone unrecognized, due in part to an antiquated divorce law that failed to heed the contributions of the non-titled spouse, and judi-

as a return of advances or contributions made by a spouse to further what were thought to be common future goals, appears fully consistent with the [statute's] distributive award provisions." Id. at 44, 457 N.Y.S.2d at 364; Weintraub, supra note 33, at p. 3, col. 2. ("[The law] was designed with sufficient flexibility to provide equitable remedies in cases involving difficult facts.").

61 See O'Brien, 66 N.Y.2d at 588, 489 N.E.2d at 718, 498 N.Y.S.2d at 749.
63 Id. at 501, 453 A.2d at 534.
64 Cf. N.Y. Dom. Rel. Law § 236(B)(1)(d)(6) (McKinney Supp. 1986), which provides statutory authority to consider these non-financial contributions in the distribution of marital property. One of the statute's strongest aims was to credit a spouse for performance of traditional family services that often went unrecognized under prior New York law. See Debates Relating to ch. 281 of the N.Y. Laws of 1980—Equitable Distribution Law (June 3, 1980) (statement of Ass. Sullivan). Implicit in the "partnership of co-equals" language that frequently appears in the statute's legislative history, see supra note 4, is the notion that non-financial contributions are as important as financial ones. See O'Brien, 66 N.Y.2d at 585, 489 N.E.2d at 716, 498 N.Y.S.2d at 747.
cial reservations about contractualizing the marital institution. However, in its sincere efforts to implement the equitable goals of New York's Equitable Distribution Law, the O'Brien court has transformed the license-holding ex-spouse into a guaranteed investment that has been judicially ordered to "pay off."\(^6\) Marital dissolution, under this statute or any other, does not mandate a fulfillment of a spouse's financial expectations as if the marriage had remained intact. Nor does the New York statute allow a court to credit certain business skills and good will to a bare license-holder who may or may not ever achieve those attributes. Even if these predictions do become reality, they will have done so after the dissolution of the marriage, without any contribution from the ex-spouse. Thus, the working spouse should be equitably compensated for her contributions during the marriage, in the form of a supplementary "financial and non-financial reimbursement award," while the future earning capacity that licensure may provide remains separate property.

Michael R. Herman

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\(^6\) While the media has hailed O'Brien as a great victory for women, it is submitted that many women may have their licenses distributed, even though their ex-husbands, who put them through school, do not need the money. "To impose upon those women the burden of making financial contributions to their husbands based upon their future life earnings is manifestly unfair. . ." DaSilva, supra note 37, at 4, col. 2. These women, who leave the marriage "seeking to improve their economic role in society," id., may instead face a large judgment debt, thus hindering their attempts at financial independence.