

## DRL § 236(B): A Professional Degree or License Is Not Marital Property Subject to Apportionment During Divorce Proceedings

Hilary Gingold

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afforded the fullest extent of their due process rights.<sup>142</sup>

Steven F. Siegel

#### DOMESTIC RELATIONS LAW

*DRL § 236(B): A professional degree or license is not marital property subject to apportionment during divorce proceedings*

The Equitable Distribution Law<sup>143</sup> mandates that courts equitably distribute marital property between the parties during the dissolution of a marriage.<sup>144</sup> "Marital property" has been broadly

<sup>142</sup> California cases have placed the burden of proving the constitutionality of a predicate conviction upon the People beyond a reasonable doubt. *See, e.g.,* *People v. Coffey*, 67 Cal. 2d 204, 213 n.15, 430 P.2d 15, 24 n.15, 60 Cal. Rptr. 457, 466 n.15 (1967) (en banc); *People v. Sumstine*, 147 Cal. App. 3d 866, 871, 195 Cal. Rptr. 535, 540 (1983); *People v. Zavala*, 147 Cal. App. 3d 429, 432, 195 Cal. Rptr. 527, 531 (1983). In *Coffey*, the Supreme Court of California held that the defendant had sufficiently alleged infringement of his right to counsel to entitle him to a predicate hearing. 67 Cal. 2d at 213, 430 P.2d at 24, 60 Cal. Rptr. at 466. The procedure set out in *Coffey* was later adopted by statute. *See Zavala*, 147 Cal. App. 3d at 432, 195 Cal. Rptr. at 531.

<sup>143</sup> DRL § 236 (McKinney Supp. 1983-1984). Section 236 is divided into two subsections: Part A, governing all actions commenced prior to July 19, 1980, the effective date of the new equitable distribution law, *id.* § 236(A), and Part B, controlling all proceedings introduced on or after that date, *id.* § 236(B). Part A of § 236 retained the alimony provisions of the former law, with modifications in language to guarantee gender-neutral application. *Compare id.* § 236(B) with *id.* § 236 (1977). Part B of § 236 replaced the term "alimony" with "maintenance" to eliminate sexist stereotypes and misconceptions associated with the former. *Id.* § 236, commentary at 38-39 (McKinney Supp. 1983-1984).

<sup>144</sup> *Id.* § 236(B) (McKinney Supp. 1983-1984). The philosophy behind the Equitable Distribution Law recognizes marriage as an "economic partnership" of co-equal parties. Governor's Memorandum on Approval of ch. 281, N.Y. Laws (June 19, 1980), *reprinted in* [1980] N.Y. Laws 1863 (McKinney). "Under the new provision marital property is to be distributed equitably between the parties taking into consideration the circumstances of the parties, included among the other factors is a spouse's contribution as a homemaker, the age and health of the parties and the duration of the marriage." Memorandum of Assemblyman Burrows, *reprinted in* [1980] N.Y. Legis. Ann. 129. Where equitable distribution would be impractical or unduly burdensome, or where the distribution of an "interest in a business, corporation or profession would be contrary to law," the court is authorized to grant a distributive award "in order to achieve equity between the parties." DRL § 236(B)(5)(e) (McKinney Supp. 1983-1984). A distributive award is often employed where it is not physically feasible to divide the marital property, *see id.* commentary at 140, for example, where the primary asset is a pension plan or business interest, *see, e.g.,* *Reed v. Reed*, 93 App. Div. 2d 105, 111, 462 N.Y.S.2d 73, 77 (3d Dep't 1983) (non-vested pension plan acquired during marriage deemed marital property); *Roussos v. Roussos*, 106 Misc. 2d 583, 585, 434 N.Y.S.2d

defined to include all property acquired during the marriage, regardless of individual claims of possession or ownership.<sup>145</sup> This liberal conception of property<sup>146</sup> has led to controversy over

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600, 602 (Sup. Ct. Queens County 1980) (distributive award in lieu of transfer or liquidation of spouse's interest in business entity). The court also has the discretion to order a distributive award as a supplement to alimony or maintenance. DRL § 236(B)(5)(e) (McKinney Supp. 1983-1984). In determining a maintenance award, courts must take into account factors such as duration of the marriage, present and future earning capacity of the spouse in need, and the "time and training necessary to enable the person having need to become self-supporting." *Id.* § 236(B)(6)(a)(2)-(4).

<sup>145</sup> DRL § 236(B)(1)(c) (McKinney Supp. 1983-1984). Marital property is defined as "all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action." *Id.* Separate property is distinguished from marital property as:

- (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;
- (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.* § 236(B)(1)(d). Professional practices and non-vested interests have been held marital property under the statute. *See, e.g.,* Damiano v. Damiano, 94 App. Div. 2d 132, 137, 463 N.Y.S.2d 477, 480 (2d Dep't 1983) (non-vested pension plan held marital asset as form of deferred compensation "contemplated to be enjoyed by both spouses at a future date"); Litman v. Litman, 93 App. Div. 2d 695, 696, 463 N.Y.S.2d 24, 25 (2d Dep't 1983) (*per curiam*) (attorney's law practice held proper subject for distributive award despite difficulty in valuation); Forcucci v. Forcucci, 83 App. Div. 2d 169, 171-72, 443 N.Y.S.2d 1013, 1015 (4th Dep't 1981) (interest in non-professional business subject to equitable distribution). *But cf. Jolis v. Jolis*, 111 Misc. 2d 965, 980, 446 N.Y.S.2d 138, 147 (Sup. Ct. N.Y. County 1981) (gift of stock to husband separate property; wife not entitled to distribution of its increased value absent proof that her actions led to its appreciation).

<sup>146</sup> Prior to the enactment of the Equitable Distribution Law, New York courts were not authorized to transfer property from titled spouses to non-titled spouses. DRL § 234, commentary at 29 (McKinney Supp. 1983-1984). Property was divided between spouses only if it was jointly held prior to the marriage. *See, e.g.,* Tsavaris v. Tsavaris, 40 N.Y.2d 970, 971-72, 359 N.E.2d 331, 332, 390 N.Y.S.2d 820, 821 (1976) (personal injury award in joint bank account "uncluttered by unconnected causes of action" not warranting transfer of such assets or establishing title in wife); McGuigan v. McGuigan, 46 App. Div. 2d 665, 665, 359 N.Y.S.2d 842, 843 (2d Dep't 1974) (DRL § 234 directs occupancy and use but does not authorize transfer of title); Dolphus v. Dolphus, 39 App. Div. 2d 829, 830, 332 N.Y.S.2d 974, 975 (4th Dep't 1972) (transfer of title from one party to another not authorized by statute where real property owned by parties as tenants by the entirety). The purpose of § 234 was to permit courts to resolve any questions concerning title to property so as to allow determination of "all issues existing between the parties . . . in one action." DRL § 234, commentary at 28 (McKinney Supp. 1983-1984). Thus, § 234 provided the judiciary with broad discretion in awarding possession of real property such as the marital residence, and personalty acquired during the marriage, such as furniture. *See, e.g.,* Sharer v. Sharer, 60 App. Div. 2d 780, 781, 400 N.Y.S.2d 423, 423-24 (4th Dep't 1977) (sale of marital home and division of proceeds appropriate where exclusive possession by one spouse not justified); Silbert v. Sil-

whether the enhanced earning capacity of one spouse, who attained a graduate or professional degree with the aid of the other, should be considered "property" for purposes of equitable distribution.<sup>147</sup> Recently, in *Conner v. Conner*,<sup>148</sup> the Appellate Division, Second Department, held that a professional degree or license is not marital property, and, therefore, is not subject to apportionment during divorce proceedings.<sup>149</sup>

In *Conner*, the defendant-wife moved for an award to have an expert evaluate the marital assets of the parties: the plaintiff-husband's graduate degree earned during the marriage, the defendant's economic loss incurred by foregoing a career as a school teacher to become a housewife and mother, and the present and

bert, 22 App. Div. 2d 893, 894, 255 N.Y.S.2d 272, 275 (2d Dep't 1964) (exclusive possession of home owned by parties as tenants by the entirety, as well as jointly owned household furniture, awarded to wife), *aff'd*, 16 N.Y.2d 564, 565, 208 N.E.2d 783, 784, 260 N.Y.S.2d 838, 839 (1965). However, New York courts were hesitant to award exclusive occupancy of a residence where title vested solely in one spouse. *See, e.g.*, *Dubno v. Dubno*, 51 App. Div. 2d 693, 693, 379 N.Y.S.2d 106, 108 (1st Dep't 1976) (wife failed to provide reason why she should have greater property rights than owner of marital house); *see also Note, Recent Developments: Equitable Distribution in New York*, 45 ALB. L. REV. 483, 484 n.8 (1981) (prior to the adoption of DRL § 236(B), New York was one of six states following common-law title theory).

<sup>147</sup> Compare *Lesman v. Lesman*, 88 App. Div. 2d 153, 157, 452 N.Y.S.2d 935, 938 (4th Dep't 1982) (professional degree or license not property in themselves since neither had value nor could generate income) with *O'Brien v. O'Brien*, 114 Misc. 2d 233, 239, 452 N.Y.S.2d 801, 805 (Sup. Ct. Westchester County 1982) (where one spouse played significant financial role in medical education of other, court held degree was property within spirit and intent of statute). Despite differing opinions in the courts as to whether a professional degree can be classified as property, a license has been clearly recognized to be a valuable interest. *See, e.g.*, *Olsson v. Board of Higher Educ.*, 49 N.Y.2d 408, 413, 402 N.E.2d 1150, 1153, 426 N.Y.S.2d 248, 251 (1980) (value of diploma would be diminished if courts ordered academic institutions to grant such diplomas to unqualified students). It is an accepted principle of law in New York that a license cannot be revoked without due process. *See, e.g.*, *Mitchell v. Association of the Bar*, 40 N.Y.2d 153, 156, 351 N.E.2d 743, 745, 386 N.Y.S.2d 95, 97 (1976) (attorney has personal privilege to practice and may not be excluded absent due process).

Some commentators posit that the legislature intended that DRL § 236(B) be given a liberal construction; accordingly, the distributive award was designed as a flexible method of dividing marital assets. *See Foster & Freed, Virtue is Not the Only Reward for Spousal Contributions*, N.Y.L.J., Jan. 17, 1983, at 2, col. 1 [hereinafter cited as *Spousal Contributions*]. However, other commentators argue that the statute should not be construed to include a professional degree as property subject to distribution, because a degree "will depend entirely upon factors within that person's control . . . and . . . factors entirely beyond that person's control." Riebesehl, *An Argument Against Degrees, Licenses as Marital Property*, N.Y.L.J., Dec. 8, 1982, at 36, col. 1.

<sup>148</sup> 97 App. Div. 2d 88, 468 N.Y.S.2d 482 (2d Dep't 1983).

<sup>149</sup> *Id.* at 89, 468 N.Y.S.2d at 484.

future financial prospects of the parties.<sup>150</sup> Concluding that a business degree is not a marital asset, the supreme court granted the defendant's motion to the extent of awarding fees to evaluate "all other marital property" acquired by the parties during the marriage<sup>151</sup> and the value of the wife's homemaker services.<sup>152</sup>

On appeal, the Appellate Division, Second Department, modified the award of expert's fees, but upheld the supreme court's ruling that the plaintiff's degree was not a marital asset.<sup>153</sup> Writing for the court, Justice O'Connor agreed with the Fourth Department's holding in *Lesman v. Lesman*<sup>154</sup> that a graduate degree is not marital property subject to equitable distribution.<sup>155</sup> A distributive award for a percentage of expected earnings, the court observed, is essentially a maintenance award for support.<sup>156</sup> Since the

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<sup>150</sup> N.Y.L.J., Aug. 31, 1982, at 11, col. 5 (Sup. Ct. Suffolk County, Aug. 20, 1982). The parties had been married for 11 years. *Id.* During that time, the plaintiff husband earned a bachelor's degree as well as masters' degrees in public administration and business administration. *Id.* The defendant wife worked full time as a teacher when the couple was first married, but only taught intermittently thereafter. *Id.* After their second child was born in 1975, the defendant became a full-time homemaker. *Id.* Although the plaintiff worked only sporadically during this period, he remained the primary provider for the family. *Id.* At the commencement of the divorce action, the parties owned no real property and very little personalty. *Id.*

<sup>151</sup> *Id.* at 11, col. 6. Although the court noted supreme court opinions to the contrary, *see id.* at 11, col. 5 (citing *O'Brien v. O'Brien*, 114 Misc. 2d 233, 452 N.Y.S.2d 801 (Sup. Ct. Westchester County 1982)), Justice Geiler declared that he was "bound" by the *Lesman* decision of the Fourth Department, *see* N.Y.L.J., Aug. 31, 1982 at 11, col. 5-6 (citing *Lesman v. Lesman*, 88 App. Div. 2d 153, 452 N.Y.S.2d 935 (4th Dep't 1982)), until "another New York appellate court or the New York Court of Appeals passes on the question," *see* N.Y.L.J., Aug. 31, 1982 at 11, col. 6.

<sup>152</sup> N.Y.L.J., Aug. 31, 1982, at 11, col. 6. The court found that the wife did not contribute financially to her husband's attainment of his professional degree. *Id.* However, Justice Geiler determined that the wife "may have made contributions in the role of a homemaker and of mother which enabled her husband to attain his degree and employment." *Id.* If these services could be valued, the court stated, they would be included in the distributive award. *Id.*

<sup>153</sup> 97 App. Div. 2d at 89, 103-04, 468 N.Y.S.2d at 484, 493. The court modified the award to include expert's fees to determine the wife's contributions as a homemaker. *Id.* at 95-96, 468 N.Y.S.2d at 488. Justice O'Connor took exception to the trial court's assumption that the wife's contributions as a homemaker were less valuable than potential financial contributions she would have made as a teacher. *Id.* Under the Equitable Distribution Law, the Appellate Division noted, there is a presumption that contributions of a homemaker are equal to the financial contributions of the other spouse. *Id.*

<sup>154</sup> 88 App. Div. 2d 153, 452 N.Y.S.2d 935 (4th Dep't 1982).

<sup>155</sup> 97 App. Div. 2d at 89, 91, 468 N.Y.S.2d at 484, 486 (quoting *Lesman v. Lesman*, 88 App. Div. 2d 153, 157, 452 N.Y.S.2d 935, 938 (4th Dep't 1982)).

<sup>156</sup> 97 App. Div. 2d at 93-94, 468 N.Y.S.2d at 488. The court recognized that its characterizations of the degree had important tax consequences. *Id.* at 92-93, 468 N.Y.S.2d at 486. In order for the defendant to avoid having a distributive award taxed as alimony under § 71

degree had none of the attributes of property, the court concluded that the degree could be evaluated only to determine the husband's present and future earnings as they related to his capacity to provide maintenance for his wife.<sup>157</sup>

In a joint concurring opinion,<sup>158</sup> Justices Bracken and Brown took issue with Justice O'Connor's rationale, maintaining that section 236(B) of the DRL required the court to recognize the "student-spouse working-spouse syndrome" in determining the type of equitable distribution award.<sup>159</sup> According to Justices Bracken and Brown, the legislature intended a transition from the more traditional view of property to a broader concept of marriage as an "economic partnership."<sup>160</sup> Thus, the concurring justices concluded that the value of a professional degree could be ascertained by apportioning both the indirect and direct contributions of each party toward the total cost of the degree.<sup>161</sup>

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of the Internal Revenue Code, 26 U.S.C. § 71(1)-(3) (1982), she would have to show that it was her portion of the liquidation of the marital property and not merely a support payment. 97 App. Div. 2d at 94, 468 N.Y.S.2d at 488. The plurality noted that it is a generally accepted view that a "person's future earnings capacity is not characterized as property under the code." *Id.*

<sup>157</sup> 97 App. Div. 2d at 103, 468 N.Y.S.2d at 493. The court analogized the Equitable Distribution Law to the Partnership Law in that marital assets, like partnership assets, are to be divided equally upon termination of the partnership." *Id.* at 96-97, 468 N.Y.S.2d at 489. The Equitable Distribution Law, however, goes one step further by providing maintenance to compensate the non-student contributing spouse. *Id.* at 100, 468 N.Y.S.2d at 491.

<sup>158</sup> *Id.* at 106, 468 N.Y.S.2d at 495. Justices Titone and Gulotta filed separate concurring opinions. *Id.* at 104, 105, 468 N.Y.S.2d at 493, 494. These justices agreed that a professional degree itself is not property subject to equitable distribution, but that it should be considered a factor in earnings capacity relative to a maintenance award. *Id.* at 104-05, 468 N.Y.S.2d at 493-94 (Titone, J., concurring); *id.* at 105-06, 468 N.Y.S.2d at 494-95 (Gulotta, J., concurring). In addition, Justice Titone advocated that the contributing spouse should be reimbursed on a cost basis for amounts expended to aid the student spouse's education. *Id.* at 105, 468 N.Y.S.2d at 494 (Titone, J., concurring). Justice Gulotta argued that the contributing spouse's efforts should be evaluated only to the extent of determining a proper distribution of the marital property and an award of maintenance. *Id.* at 106, 468 N.Y.S.2d at 494 (Gulotta, J., concurring).

<sup>159</sup> *Id.* at 106-07, 468 N.Y.S.2d at 495 (Bracken & Brown, J.J., concurring). The "student-spouse working-spouse syndrome" occurs when the student spouse, shortly after completing his or her degree, divorces the working spouse who supported the couple prior to the student's graduation. Foster & Freed, *Spousal Interests in Professional Degrees, Licenses*, N.Y.L.J., June 30, 1982, at 1, col. 1.

<sup>160</sup> 97 App. Div. 2d at 107, 468 N.Y.S.2d at 495 (Bracken & Brown, J.J., concurring). The joint concurrence argued that although a professional degree "is personal to the holder and inalienable," it is clear that the very concept of marital property is a statutory fiction created without regard to common-law ownership theory. *Id.* (Bracken & Brown, J.J., concurring); see *supra* note 147.

<sup>161</sup> 97 App. Div. 2d at 109-10, 468 N.Y.S.2d at 496 (Bracken & Brown, J.J., concurring).

The holding of the *Conner* court is in line with the majority view in this country.<sup>162</sup> Nevertheless, it is suggested that the focus on whether a professional degree has a transferable value deviates from the primary issue; namely, how will the courts compensate the respective parties for their marital contributions?<sup>163</sup> The Equitable Distribution Law clearly mandates that a value be given to each particular contribution, either by awarding maintenance or by ordering a supplementary distributive award.<sup>164</sup> Indeed, the dis-

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Direct contributions are financial; indirect contributions take the form of homemaking and parenting. *Id.* at 109, 468 N.Y.S.2d at 496 (Bracken & Brown, J.J., concurring). Justices Bracken and Brown contended that it is illogical to determine the value of a professional practice or pension fund as marital property without treating a professional degree likewise. *Id.* (Bracken & Brown, J.J., concurring).

<sup>162</sup> See, e.g., *In re Marriage of Graham*, 194 Colo. 429, 431, 574 P.2d 75, 77 (1978) (en banc) (graduate degree not marital property since it has none of the characteristics of ordinary property); *Wilcox v. Wilcox*, 173 Ind. App. 661, 664, 365 N.E.2d 792, 795 (1977) (absent vested present interest in prospective salary, future earnings not subject to distribution); *DeWitt v. DeWitt*, 98 Wis. 2d 44, 53, 296 N.W.2d 761, 765-66 (Ct. App. 1980) (law degree not marital asset). *But see In re Marriage of Horstmann*, 263 N.W.2d 885, 891 (Iowa 1978) (potential for increased earnings due to law degree considered marital asset); *Inman v. Inman*, 578 S.W.2d 266, 269 (Ky. Ct. App. 1979) (dental degree marital property, but nonstudent spouse's interest limited to her financial contribution).

<sup>163</sup> See *Foster & Freed*, *supra* note 159, at 2, col. 1. Courts employ varying approaches to determine how to compensate spousal contributions, for example, "out-of-pocket loss" approach for reimbursement for past contributions, and . . . 'loss-of-bargain' approach . . . somewhat modified." *Id.* (footnotes omitted); see, e.g., *In re Marriage of Horstmann*, 263 N.W.2d 885, 891 (Iowa 1978) (cost of spouse's legal education used to determine award); *Moss v. Moss*, 80 Mich. App. 693, 694, 264 N.W.2d 97, 98 (1978) (per curiam) (wife's contributions toward husband's medical degree reimbursed); *Daniels v. Daniels*, 20 Ohio App. 2d 458, 461, 185 N.E.2d 773, 775-76 (1961) (spouse's only financial asset is medical degree, carrying with it "high potential earning power").

Former § 236 required courts to consider several factors before awarding alimony, such as duration of the marriage, ability of the wife to support herself, as well as particular circumstances affecting the case and the parties involved. Note, *New York's Equitable Distribution Law: A Sweeping Reform*, 47 BROOKLYN L. REV. 67, 86-87 (1980). The primary purpose of alimony was to protect women without property or marketable skills. See *Sleicher v. Sleicher*, 251 N.Y. 366, 371, 167 N.E. 501, 503 (1929). Alimony, however, was not considered a property right, but merely a personal obligation arising, for public policy reasons, out of the marital relationship. *Surut v. Surut*, 191 App. Div. 570, 571, 181 N.Y.S. 631, 632 (1st Dep't 1920); *Averett v. Averett*, 110 Misc. 584, 585-86, 181 N.Y.S. 645, 646 (Sup. Ct. N.Y. County), *aff'd*, 191 App. Div. 948, 181 N.Y.S. 927 (1st Dep't 1920). Similarly, a maintenance award does not expand a personal obligation into a vested property right. See *Conner*, 97 App. Div. 2d at 93-94, 468 N.Y.S.2d at 486-88.

<sup>164</sup> DRL § 236(B)(5)(d)(6) (McKinney Supp. 1983-1984); see *Spousal Contributions*, *supra* note 147, at 1, col. 1, at 2, col. 1. Section 236(B) specifies that:

[i]n determining an equitable disposition of [marital] property, . . . the court shall consider: . . . (6) any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services

tributive award mechanism was designed to guarantee flexibility and fairness in dividing marital assets.<sup>165</sup> It is submitted, therefore, that, in order to effect a more just distribution of marital contributions, a professional degree or license should be treated as the separate property of one spouse that has appreciated in value "due in part to the contributions or efforts of the other spouse."<sup>166</sup> Under this characterization, the nonstudent spouse would be compensated for his or her contribution to the partnership.

The attainment of an education by the student spouse through the contributions of the entire family unit results in the acquisition of an intangible value by the degree holder.<sup>167</sup> As a result of this family effort, and based upon the principles of equity underlying

as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party. . . .

DRL § 236(B)(5)(d)(6) (McKinney Supp. 1983-1984); see also *infra* note 168.

<sup>165</sup> See DRL § 236(B), commentary at 151 (McKinney Supp. 1983-1984). Governor Carey stated in his Memorandum of Approval, that under the new Equitable Distribution Law, "property accumulated during the marriage should be distributed in a manner which reflects the individual needs and circumstances of the parties." Governor's Memorandum on Approval of ch. 281, N.Y. Laws (June 19, 1980), reprinted in [1980] N.Y. Laws 1863 (McKinney); see Note, *Equitable Distribution of Degrees and Licenses: Two Theories Toward Compensating Spousal Contributions*, 49 BROOKLYN L. REV. 301, 302-03 (1983) [hereinafter cited as Note, *Two Theories*].

<sup>166</sup> DRL § 236(B)(1)(d)(3) (McKinney Supp. 1983-1984); see *Eisenstadt v. Eisenstadt*, N.Y.L.J., Oct. 14, 1983, at 7, cols. 3-4 (Sup. Ct. N.Y. County, Oct. 13, 1983) (wife denied any interest in husband's dental practice based upon her contributions to his education). A professional degree or license "is a cumulative product of many years of previous education," *id.* at col. 3, and is primarily a result of individual intellectual achievement, *id.*; see Riebesehl, *supra* note 147, at 36, col. 5. Moreover, "[a]n educational degree does not have any exchange value or any objective transferable value on an open market." *Eisenstadt*, N.Y.L.J., Oct. 14, 1983, at 7, col. 3. Due to the inability to transfer or convert a degree it must be considered separate property. Riebesehl, *supra* note 147, at 36, col. 5; see also *In re Marriage of Aufmuth*, 89 Cal. App. 3d 446, 461, 152 Cal. Rptr. 668, 678 (1979). In *Aufmuth*, the court stated:

The value of a legal education lies in the potential for increase in the future earning capacity of the acquiring spouse made possible by the law degree and innumerable other factors and conditions which contribute to the development of a successful law practice. A determination that such an "asset" is community property would require a division of post-dissolution earnings to the extent that they are attributable to the law degree, even though such earnings are by definition the separate property of the acquiring spouse.

*Id.* Although a degree is property viewed as separate property, it is submitted that, in cases like *Conner*, the court is confronted with separate property that has been, in a very real sense, enhanced by the efforts of the non-student spouse.

<sup>167</sup> See *Wood v. Wood*, 119 Misc. 2d 1076, 1077-78, 465 N.Y.S.2d 475, 476 (Sup. Ct. Suffolk County 1983). Assuming that a degree is not marital property, the court should recognize that the degree, as separate property, represents "the capital product of what was essentially a partnership entity." *Id.* at 1079, 465 N.Y.S.2d at 477.

section 236 of the DRL, both spouses, it is submitted, should share the "fruit" of their joint efforts.<sup>168</sup> From a policy perspective, however, it would be unreasonable to grant a valuation of the student spouse's enhanced earning capacity on the assumption that the spouse will maximize his or her potential.<sup>169</sup> Such an approach would, it is suggested, approximate a punitive damages award by placing the equivalent of a permanent garnishment upon a percentage of all future income of the spouse who received the degree.

On the other hand, a maintenance award is subject to many other considerations, such as remarriage, that are not relevant to a spouse's earlier contributions to the other's degree.<sup>170</sup> Thus, a maintenance award alone would not provide adequate compensation to a working spouse when there are few other marital assets to distribute.<sup>171</sup> A strict rule prohibiting distributive awards to con-

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<sup>168</sup> See DRL § 236(B)(5)(d)(6) (McKinney Supp. 1983-1984). Section 236 of the Domestic Relations Law was designed to provide equity for both the homemaker spouse, whose indirect contributions enabled the other spouse to pursue economic advantages, as well as the spouse whose efforts enable the other "to improve his or her career potential through the pursuit of advanced education or training." *Id.*, commentary at 159 (McKinney); see *Conteh v. Conteh*, 117 Misc. 2d 42, 44, 457 N.Y.S.2d 363, 364 (Sup. Ct. Monroe County 1982) (discretionary distributive award as return of contributions "to further what were thought to be common future goals . . . appears fully consistent with the . . . distributive award provisions"); *O'Brien v. O'Brien*, 114 Misc. 2d 233, 239-40, 452 N.Y.S.2d 801, 805 (Sup. Ct. Westchester County 1982) (denial of compensation to wife who bore burden of supporting spouse through medical school would be contrary to legislative desire that marriage be "viewed as an economic partnership").

<sup>169</sup> See *Lesman v. Lesman*, 88 App. Div. 2d 153, 157, 452 N.Y.S.2d 935, 938-39 (4th Dep't 1982). The enhanced earning capacity of the degree holder is dependent on the holder's future success and efforts, *id.*, and there is no guarantee that his or her potential will be met, *Riebesehl*, *supra* note 147, at 36, col. 1. See *supra* note 147.

<sup>170</sup> See DRL § 236(B)(1), (6)(a)(3)-(4) (McKinney Supp. 1983-1984). "[A]n award of maintenance shall terminate upon the death of either party or upon the recipient's valid or invalid marriage." *Id.* § 236(B)(1)(a). "In determining reasonable needs the court shall decide whether the party in whose favor maintenance is granted lacks sufficient property and income to provide for his or her reasonable needs." *Id.* § 236(B)(6)(a). It has been argued that, since a self-supporting spouse "is not made whole" until he or she receives restitution, § 236(B)(6)(a) should not bar an award of "compensatory maintenance." Note, *Two Theories*, *supra* note 165, at 329. New York law, however, contains no direct authority in support of this proposition.

In *Conner*, the wife had been a school teacher with a graduate degree. 97 App. Div. 2d at 89, 468 N.Y.S.2d at 484-85. Although she had stopped teaching some years before the divorce, her education and ability to support herself would be factors in the determination of any maintenance award. It is suggested, therefore, that a maintenance award, with a supplementary distributive award of the couple's limited assets would not provide adequate compensation for the wife's contributions to her husband's degree. See *Foster & Freed, Distributive Awards—Fruits of Professionalism*, N.Y.L.J., Sept. 13, 1982, at 2, col. 4; Note, *Two Theories*, *supra* note 165, at 328-31.

<sup>171</sup> See *supra* note 170; see also *Conteh v. Conteh*, 117 Misc. 2d 42, 44, 457 N.Y.S.2d

tributing spouses solely on the ground that a professional degree should not be considered marital property represents, it is argued, an unduly narrow adherence to traditional concepts of property. Indeed, this approach contradicts the primary objective of the Equitable Distribution Law, which is to provide the courts with the necessary flexibility to effect a just distribution of marital assets in light of the spouses' respective contributions. Therefore, a distributive award to reimburse the working spouse, not only for his or her contributions to the education, but also in restitution for any personal loss suffered, is the most equitable solution.<sup>172</sup>

Hilary Gingold

#### WORKERS' COMPENSATION LAW

*Work. Comp. Law § 29(1): Balancing the equities in the apportionment of workers' compensation litigation costs—New York adopts the total benefit doctrine*

Section 29(1) of the Workers' Compensation Law<sup>173</sup> grants in-

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363, 365 (Sup. Ct. Monroe County 1982) (when there are few marital assets and wife is self-supporting, distributive award guarantees return of investment).

<sup>172</sup> See Note, *Family Law: Ought a Professional Degree Be Divisible as Property Upon Divorce?*, 22 WM. & MARY L. REV. 517, 554-58 (1981). As one commentator notes, the working spouse's contributions "are an immediate investment in the non-working spouse's degree and a future investment in a better way of life for both"; deprivation of the "yield on investment does that spouse a grave injustice." *Id.* at 544. It is generally accepted that supporting spouses are entitled to some restitution with respect to their contributions. See *Moss v. Moss*, 80 Mich. App. 693, 694-95, 264 N.W.2d 97, 98 (1978) (per curiam); *Conner*, 97 App. Div. 2d at 102-03, 468 N.Y.S.2d at 492-93; cf. *Farash v. Sykes Datatronics Inc.*, 59 N.Y.2d 500, 505, 452 N.E.2d 1245, 1246-47, 465 N.Y.S.2d 917, 918-19 (1983) (plaintiff permitted reliance damages despite unenforceability of oral contract).

<sup>173</sup> N.Y. WORK. COMP. LAW § 29(1) (McKinney Supp. 1983-1984). Because litigation delays threatened to transform injured workers into wards of the state, workers' compensation laws were passed to allow immediate compensation for injury. Gegan, *The Compensation Carrier's Right to Restitution for Medical Expenses Through a Lien on the Employee's Tort Recovery*, 52 ST. JOHN'S L. REV. 395, 396 & nn.4-5 (1978). These laws provide employees injured on the job with benefits equal to a percentage of their lost earnings. 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 2.50, at 11 (1982). Workers' compensation guarantees employees benefits based upon a precalculated table and releases employers from uncertain tort liability. See Note, *New Policies Bearing on the Negligent Employer's Immunity From Loss-Sharing*, 29 ME. L. REV. 243, 246-47 (1978). The statutory benefits are granted regardless of fault, and the costs are ultimately borne by the consumer. See Wolfe