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PREVENTING INEQUITIES IN DIVORCE AND EDUCATION: THE EQUITABLE DISTRIBUTION OF A CAREER ABSENT AN ADVANCED DEGREE OR LICENSE

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PART I

I. INTRODUCTION

The “working spouse-student spouse” marriage is the foundational stereotype for the notion that a spouse’s career, valued in terms of its earning capacity, is a marital asset that can be subjected to equitable distribution in a divorce proceeding.¹ Formative cases in this relatively undeveloped area of the law involve a “working spouse” who works to support the family, while the “student spouse” pursues an education to obtain an advanced degree or license.² The student spouse thus becomes the enhanced spouse, as a result of the educational pursuits that have substantially “enhanced” that spouse’s future earning capacity and career prospects.

However, this enhanced earning capacity will have been made possible

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¹ The “working” spouse is also referred to in relevant literature as the “supporting” spouse. See, e.g., Deborah A. Batts, *Remedy Refocus: In Search of Equity in ‘Enhanced Spouse/Other Spouse’ Divorces*, 63 N.Y.U. L. REV. 751, 771, 779, 785 (1988).

² See *O’Brien v. O’Brien*, 66 N.Y.2d 576 (1985) (during the marriage, husband completed medical school in Mexico and clinical and residency training in the United States. In order to support her husband, wife worked and sacrificed opportunity to obtain advanced degree); *In re Marriage of Horstmann*, 263 N.W.2d 885 (Iowa 1978) (husband completed undergraduate education and obtained masters and law degrees during marriage. Wife did not complete her undergraduate education and either worked or cared for the couple’s child); *Maloney v. Maloney*, N.Y.L.J., April 15, 1986 at 16, col. 3 (N.Y. Sup. Ct. Richmond County 1988) (wife made substantial investment in her husband’s career in the form of contributions as spouse, homemaker and mother, by an investment of \$20,000, and by loans from her family members). In the aforementioned cases, the wife is seeking compensation for her contributions to the husband’s career potential. However, in many cases, it is the husband who is seeking compensation for contributions to the wife’s career. See, e.g., *Elkus v. Elkus*, 169 A.D.2d 134 (N.Y. App. Div. 1991); *Sterling v. Sterling*, No. 310833/99, 2001 N.Y. Misc. LEXIS 476, at *11, *8 (N.Y. Sup. Ct. July 31, 2001); *Golub v. Golub*, 139 Misc. 2d 440 (N.Y. Sup. Ct. 1988); *Holihan v. Holihan*, N.Y.L.J., Jan. 15, 1987, at 13 (N.Y. Sup. Ct. 1987); *Cronin v. Cronin*, 131 Misc. 2d 879 (N.Y. Sup. Ct. 1986).

largely as a result of the working spouse's investment of time, energy, money and maybe even a sacrifice of his or her own career opportunities. The working spouse makes these contributions in anticipation of someday sharing in the fruits of the family's enhanced earning capacity, thereby receiving a return on his or her own investment.³

Unfortunately, this return is not fully realized if divorce occurs. In an attempt to prevent inequities at divorce and compensate the supporting spouse, a minority of jurisdictions, most prominently New York,⁴ have been willing to characterize a spouse's enhanced earning capacity as marital property subject to equitable distribution.

As groundbreaking as these cases are in the area of spousal rights, they also leave open a gaping hole. This is because the precedent established by cases involving the "working spouse-student spouse" scenario does not expressly encompass the scenario wherein a working spouse contributes to the development of a career that is not predicated upon an advanced degree or license.

More than fifteen years have passed since the New York Court of Appeals decided the seminal case of *O'Brien v. O'Brien*,⁵ in which a "working wife" was awarded a percentage of the value of her husband's medical license.⁶ Yet the parameters of the ensuing "O'Brien doctrine" remain undefined as courts continue to struggle with its application.⁷

Specifically, New York courts are struggling to determine whether a spouse's career, absent an advanced degree or license that affords its holder a steady stream of income for the duration of a career, can be distributed equitably as a marital asset. In recent years, New York courts have expressed a willingness to consider equitable claims to careers that are not based on an advanced degree or license. This Note argues that New York courts should continue to perpetuate this trend, as it provides courts with an additional tool that can be used to prevent inequities between the parties in a divorce.

Part I of this Note examines judicial and legislative approaches to the equitable distribution of enhanced earning capacity. Part II examines New York case law after *O'Brien*, including recent cases that shed new light on this contentious issue.

³ Because many couples have not had the opportunity to acquire traditional marital assets, a spouse's enhanced earning capacity can be the only real economic asset a couple owns at divorce. Batts, *supra* note 1, at 752.

⁴ See Alicia Brokars Kelly, *The Marital Partnership Pretense and Career Assets: The Ascendancy of Self Over the Marital Community*, 81 B.U. L. REV. 59, 103 (2001).

⁵ 66 N.Y.2d 576 (1985).

⁶ *Id.*

⁷ See generally N.Y. Practice Guide: Domestic Relations (MB) § 27.02[1][a][i] (2002), available at LEXIS, Secondary Legal Library, N.Y.P.G.: Domestic Relations file.

II. EQUITABLE DISTRIBUTION AND NEW YORK DOMESTIC RELATIONS LAW §236

Prior to the passage of equitable distribution laws in the 1970's and 1980's,⁸ property at divorce was distributed on the basis of which party owned legal title, regardless of any contributions made toward the property by the non-titled spouse.⁹ In 1980, New York reformed its Equitable Distribution Law¹⁰ in order to implement a more modern conception of marriage than was recognized by the common law title system. The amended law is premised on the concept of marriage as an economic partnership.¹¹

In reformulating the Equitable Distribution Law, the New York Legislature deliberately went beyond traditional property concepts.¹² Notably, the statute substantially modified the rules governing the division of property upon divorce.¹³ The Law was reformed because of the inequities caused at divorce by the title theory of property.¹⁴ The equitable distribution approach allows the court to take into consideration the individual circumstances of the case and of the parties to the marriage.¹⁵

New York's Equitable Distribution Law distinguishes between separate property and marital property, creating two distinct classes of property.¹⁶ "The term 'marital property' shall mean 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 . . . Marital property shall not include separate property."¹⁷

The Legislature intended the term "marital property" to be defined broadly. The Practice Commentary for New York Domestic Relations Law section 236 states:

Marital property is not just property that happens to be marital. Instead, "marital property" is a totally new concept that sweeps within it all tangible fruit of the economic partnership that exists between married persons, even if those items would not be categorized as property under classical definitions. In short, marital property is anything that has a provable economic worth, which is the product of

⁸ For a comprehensive list of Equitable Distribution Laws, see Batts, *supra* note 1, at 806 n.17. A minority of states require or state a preference for equal, as opposed to equitable, distribution. *Id.*

⁹ *Id.* at 754.

¹⁰ N.Y. DOM. REL. LAW § 236 (McKinney 1999).

¹¹ N.Y. CIV. PRAC L. & R. 236 at C236B:4 (West, Westlaw through 2002 legislation).

¹² *O'Brien*, 66 N.Y.2d at 583.

¹³ N.Y. CIV. PRAC L. & R. 236 at C236B:4.

¹⁴ See *O'Brien*, 66 N.Y.2d at 584-85.

¹⁵ *Id.* at 585.

¹⁶ § 236 (B)(1).

¹⁷ § 236 (B)(1)(c).

the efforts of either or both spouses during their economic partnership.¹⁸

Marital property has also been accorded a broad definition by the New York Court of Appeals. In *O'Brien v. O'Brien*, the Court of Appeals defined marital property as "things of value arising out of the marital relationship."¹⁹

The language of the statute is open-ended, with key terms left undefined. Notably, the statute does not specify the scenarios in which equitable claims to a career may be permitted. In determining an equitable disposition of property, the statute allows the court to consider:

[a]ny equitable claim to, interest in, or direct or indirect contributions 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.²⁰

In total, the statute authorizes courts to consider a total of thirteen additional factors in determining an equitable disposition of property.²¹

III. CONCEPTS: ENHANCED EARNINGS AND GOODWILL

A career is difficult to quantify, both in terms of its value and in terms of the source of its development. Earning capacity and personal goodwill are two primary concepts used by courts to describe or characterize the value of a person's career are enhanced.²²

A. *Enhanced Earning Capacity*

The equitable distribution of a license or career is predicated upon the increased stream of earnings that will flow from the individual whose career potential has been enhanced.²³ In other words, the value of a career lies in

¹⁸ N.Y. CIV. PRAC L. & R. 236 at C236B:4.

¹⁹ *Id.* (citing *O'Brien*, 66 N.Y.2d at 583); see also *DeJesus v. DeJesus*, 90 N.Y.2d 643, 647 (1997) (characterizing the statutory definition as "sweeping").

²⁰ § 236 (B) (5) (d) (6).

²¹ The statute lists a total of thirteen factors a court may consider in determining an equitable disposition of property. These statutory factors include: the income and property of each party at the time of marriage and at divorce; the length of the marriage and age and health of the parties; any maintenance award; the liquid or non-liquid nature of marital property; the difficulty of evaluating a marital asset and the economic desirability of keeping that asset free and clear of any claims or interference by another party. *Id.*; see also § 236(B) (5) (e).

²² The term "earning capacity" is often used interchangeably with the term "human capital." See Joyce Davis, *Enhanced Earning Capacity/Human Capital: The Reluctance to Call it Property*, 17 WOMEN'S RTS. L. REP. 109, 145. However, some theorists view the terms as distinct. See Allen M. Parkman, *The Recognition of Human Capital as Property in Divorce Settlements*, 40 ARK. L. REV. 439 (1987).

²³ See *O'Brien*, 66 N.Y.2d at 588.

the enhanced earning capacity it produces.²⁴ The process of valuing someone's earning capacity is not a precise science. The valuations set forth by the respective parties in a divorce, based on the testimony of their respective experts, can vary considerably.

The "future income stream" method of valuation measures 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 professional in the enhanced spouse's field.²⁵ The main criticism of this method is that results can vary widely depending on the discount rate used to calculate present value.²⁶ The appropriate discount rate, in turn, is the product of many highly speculative variables, including interest rates, taxes, inflation, and risk of premature death.²⁷

A less speculative alternative to the future income stream approach is the "cost of acquisition" approach.²⁸ Rather than measuring the change in a professional's earning power, the cost of acquisition approach estimates the cost of attaining that enhanced capacity, including the resources expended by a working spouse.²⁹ However, this approach does not compensate a supporting spouse for lost opportunities and other sacrifices.³⁰

Yet another valuation method was demonstrated by the court in *Maloney v. Maloney*.³¹ There, the court valued the projected annual gross earnings of an average doctor and multiplied this figure by his expected work life.³²

B. Goodwill

The second primary concept applied by courts to value a career is goodwill. Generally speaking, for the purposes of divorce, there are two types of goodwill.³³ Professional or business goodwill is the value associated with a business or practice. Personal goodwill, on the other hand, is the value associated with an individual's career and reputation.³⁴ The most

²⁴ *Id.*

²⁵ Leslie F. Burns & Greg A. Grauer, *Human Capital As Marital Property*, 19 HOFSTRA L. REV. 499, 515 (1990).

²⁶ *Id.* at 516.

²⁷ *Id.*

²⁸ *Id.* at 518.

²⁹ *Id.*

³⁰ *Id.*

³¹ See *supra* note 2.

³² Burns, *supra* note 25, at 519.

³³ See generally Thomas B. Egan, *Putting a Value on Professional and Enterprise Goodwill*, 142 CHICAGO DAILY LAW BULLETIN 6 (1996).

³⁴ See generally *id.*; see also Dugan v. Dugan, 92 N.J. 423 (1983) (attorney's reputation can generate goodwill subject to equitable distribution. This is because reputation leads to probable future patronage from existing and potential clients). *Id.* at 433.

prominent cases advocating equitable distribution of personal goodwill involve a celebrity spouse.³⁵ Only three cases - two in New York and one in New Jersey - have deemed a celebrity career to be marital property for equitable distribution purposes.³⁶

IV. ARGUMENTS AGAINST PERMITTING THE EQUITABLE DISTRIBUTION OF A CAREER'S ENHANCED EARNING CAPACITY

Even though a majority of states advocate the equitable distribution of marital property, few states view the future earning power of an individual's career as marital property that can be awarded to his or her spouse.³⁷ Indeed, the difficulty of valuing enhanced earning capacity is a major reason why most jurisdictions do not recognize earning capacity as marital property.³⁸ The primary valuation issue, discussed earlier, is whether enhanced earning capacity should be valued based on its future income stream, "cost of acquisition," or another measure.³⁹ A further complication to the valuation process is the extent to which a person's degree or license has "merged," or been absorbed into, that person's professional career or practice.⁴⁰

In response to the difficulty of valuing enhanced earning capacity, scholars have pointed out that valuation concerns have not prevented courts from routinely valuing professional education in wrongful death and personal injury suits.⁴¹ Another response to valuation concerns is that some value is better for the purpose of achieving equity, and to the person asserting the equitable claim, than no value at all.

As difficult as it is to place a precise value on the career of a degreed, licensed or certified professional, courts face a much greater challenge when

³⁵ A celebrity's personal goodwill is called celebrity goodwill. *See generally* Cerisse Anderson, *Musician's Wife Denied Pay for Goodwill, Celebrity Status Found Decreased Over Marriage*, N.Y.L.J., Jan. 9, 1995, at col. 5.

³⁶ *Sterling*, 2001 N.Y. Misc. LEXIS 476, at *10. The three cases are *Piscopo v. Piscopo*, 232 N.J. Super. 559 (Super. Ct. App. Div. 1989) (Joe Piscopo's celebrity goodwill is no different than the professional goodwill of the attorney in *Dugan*); *Elkus*, 169 A.D.2d 134; *Gohub*, 139 Misc. 2d 440. *See also Sterling*, 2001 N.Y. Misc. LEXIS 476, at *10-20 (plaintiff's acting career has not made her a celebrity and has not resulted in the creation of marital property in the form of an enhanced earning capacity); Anderson, *supra* note 34 (discussing the New York Supreme Court case of *Mann v. Mann*, where the court found that Herbie Mann's celebrity status and earnings declined during his nineteen-year marriage and therefore his career goodwill is separate property not subject to equitable distribution).

³⁷ *Batts*, *supra* note 1, at 751.

³⁸ *Id.* In many states there is no consistent legal precedent for divorce valuation. Nancy Fannon, *Tackling Valuation Issues in the Context of Divorce*, CPA ACCOUNTANT, Jan. 1, 2000, available at 2000 WL 23249218.

³⁹ *See Batts*, *supra* note 1, at 781-85.

⁴⁰ *See McSparron v. McSparron*, 87 N.Y.2d 275 (1995) (for purposes of dividing marital property, the husband's law license has not merged with his professional career, but rather has residual economic value independent of his career).

⁴¹ *See Davis*, *supra* note 22, at 117.

asked to assess the value of a career that is not predicated upon a degree or license. Indeed, as will be seen in Part II of this Note, in the majority of the cases, courts fail to place a value on the career in question, even as they advocate the equitable distribution of such a career.

Valuation issues notwithstanding, arguably the most cogent argument underlying the exclusion from the marital estate of earning capacity stemming from an advanced education is premised upon the traditional definition of property. This view is articulated by the court in *In re Marriage of Graham*.⁴²

An educational degree, such as an M. B. A., is simply not encompassed even by the broad views of the concept of "property." It does not have an exchange value or an 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.⁴³

A third argument against characterizing enhanced earning capacity as property is that "[l]ong-term financial entanglement between the parties . . . thwart[] the goal of a clean break."⁴⁴ Other arguments include the common law preference for the free alienability of property⁴⁵ and the Thirteenth Amendment of the United States Constitution.⁴⁶ In *Severs v. Severs*, for example, the court argued that awarding the wife an interest in her husband's education and profession would result in involuntary servitude that violates the Thirteenth Amendment.⁴⁷ Indeed, Judge Meyer's concurrence in *O'Brien* specifically addresses the degree-bearing spouse's freedom:

[A] professional in training who is not finally committed to a career choice when the distributive award is made may be locked into a particular kind of practice simply because the monetary obligations imposed by the distributive award made on the basis of the trial judge's conclusion (prophecy may be a better word) as to what the

⁴² 574 P.2d 75 (Colo. 1978).

⁴³ *Id.* at 77; see also *O'Brien*, 66 N.Y.2d at 583 (quoting Leonard G. Florescue, "Market Value," *Professional Licenses and Marital Property: A Dilemma in Search of a Horn*, 1982 N.Y. ST. B.A. FAM. L. REV. 13 (1982)).

⁴⁴ Davis, *supra* note 22, at 112.

⁴⁵ Stewart E. Sterk, *Restraints on Alienation of Human Capital*, 79 VA. L. REV. 383, 384 (1993).

⁴⁶ *Id.* at 443.

⁴⁷ 426 So.2d 992 (Fla. Dist. Ct. App. 1983).

career choice will be leaves him or her no alternative.⁴⁸

Finally, scholars have also proposed a concept called "solitary individualism" to explain courts' reluctance to permit the equitable distribution of human capital.⁴⁹ According to the solitary individualism model, both parties to a divorce enter and leave marriage as separate individuals whose sovereign identity has not been reduced by the marriage.⁵⁰

V. ALTERNATIVE REMEDIES OR NO REMEDY AT ALL?

In jurisdictions that do not recognize earning capacity as marital property, a supporting spouse may be left without a remedy.⁵¹ Many courts take earning capacity into account when formulating maintenance and alimony awards.⁵² Two types of alimony are used as alternative remedies to a property award: reimbursement alimony and rehabilitative alimony.⁵³ The purpose of rehabilitative alimony is to provide funding to enable the supporting spouse to become self-sufficient.⁵⁴ Reimbursement alimony, meanwhile, is designed to compensate the supporting spouse for his or her financial contributions to the enhanced spouse's education. This approach treats the supporting spouse as a lender, not as an investor in the marital asset.⁵⁵

However, compared to receiving an equitable percentage of enhanced earning capacity, there are several major drawbacks to an alimony or maintenance award. First, alimony and maintenance payments terminate upon the recipient's remarriage. That is, a spouse may never receive adequate consideration for his or her contribution.⁵⁶ Another major drawback is that alimony and maintenance payments are taxed as income to the recipient,⁵⁷ while equitable distribution awards are not. On the other hand, unlike a property award, an alimony award can be adjusted after divorce to account for changes in the parties' circumstances.⁵⁸

Indeed, the relationship between marital property and maintenance is the source of one of the difficulties inherent in the valuation process. Courts must address the effect that distributing enhanced earnings as a marital asset has on maintenance and alimony payments. Care must be taken to avoid

⁴⁸ *O'Brien*, 66 N.Y.2d at 591 (Meyer, J. concurring).

⁴⁹ See generally Kelly, *supra* note 4.

⁵⁰ *Id.* at 61.

⁵¹ Batts, *supra* note 1, at 767; see also Kelly, *supra* note 4, at n.244.

⁵² See generally Batts, *supra* note 1, at 764-67.

⁵³ Burns, *supra* note 25 at 509.

⁵⁴ See Kelly, *supra* note 4, at 105-06.

⁵⁵ *Id.* at 106.

⁵⁶ *O'Brien*, 66 N.Y.2d at 587.

⁵⁷ I.R.C. § 61(a)(8).

⁵⁸ See Kelly, *supra* note 4, at 115-16.

“double counting,” which occurs when the same income stream is incorporated into more than one award.⁵⁹ If a court distributes enhanced earnings as an asset, it must be careful not to incorporate those same earnings into maintenance or alimony.⁶⁰

PART II.

I. LAYING THE GROUNDWORK: *O'BRIEN V. O'BRIEN*

The *O'Brien* decision marked the first time that a state high court valued a professional achievement as marital property for equitable distribution purposes.⁶¹ Seventeen years later, it remains the authoritative case. In many ways, Loretta and Michael O'Brien's marriage exemplifies the working spouse-student spouse conundrum. The plaintiff husband and defendant wife were married in 1971.⁶² At the time of marriage, the wife needed eighteen months of postgraduate classes (which would cost \$3,000 plus living expenses) to obtain permanent certification as a teacher in New York.⁶³ The trial court agreed with the wife's claim that she had sacrificed the opportunity to obtain permanent certification while the husband pursued his education.⁶⁴

In 1973, the couple moved to Mexico so that the husband could attend medical school.⁶⁵ During this time, the wife worked and contributed her earnings towards their expenses.⁶⁶ The trial court found that she contributed seventy-six percent of the couple's income.⁶⁷ The couple returned to the U.S., and the husband was licensed to practice medicine in the U.S. in 1980.⁶⁸ He brought an action for divorce two months later.⁶⁹ The husband's medical license was the parties' only valuable asset.⁷⁰ At trial, the wife's expert testified that the present value of the medical license was \$472,000.⁷¹

The husband did not claim that the license was separate property and therefore excluded from distribution.⁷² Rather, he claimed the license is not

⁵⁹ See *Sodaro v. Sodaro*, 729 N.Y.S.2d 731, 732 (App. Div. 2d Dep't 2001).

⁶⁰ *Id.*

⁶¹ N.Y. Practice Guide: Domestic Relations (MB), § 27.02[1][a], *supra* note 7.

⁶² *O'Brien*, 66 N.Y.2d at 580.

⁶³ *Id.* at 581.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *O'Brien*, 66 N.Y.2d at 581-82.

⁶⁸ *Id.* at 581.

⁶⁹ *Id.*

⁷⁰ *Id.* at 580.

⁷¹ *Id.* at 582.

⁷² *O'Brien*, 66 N.Y.2d at 583.

marital property at all.⁷³ Following *In re Graham*,⁷⁴ he argued that a professional license is not marital property because it does not fit within the traditional view of property.⁷⁵ The trial court disagreed, holding that the husband's license was marital property subject to equitable distribution under Domestic Relations Law section 236(B)(5).⁷⁶ Taking into account the enhanced earning potential and enhanced lifestyle that the medical license would generate and the wife's contributions towards the attainment of the license, the trial court made a distributive award of \$188,000, representing forty percent of the value of the license.⁷⁷ The award was to be paid in eleven annual installments.⁷⁸

On appeal, a majority of the Appellate Division reversed the trial court's decision, holding that the plaintiff's medical license is not marital property. The Court of Appeals reversed the Appellate Division and reinstated the trial court's judgment, holding that the husband's medical license constitutes marital property within the meaning of Domestic Relations Law section 236(B)(1)(c) and is subject to equitable distribution.⁷⁹

The court stated that "a professional license is a valuable property right, reflected in the money, effort and lost opportunity for employment expended in its acquisition, and also in the enhanced earning capacity it affords its holder."⁸⁰ In concurrence, Judge Meyer questioned the speculative nature of the award.⁸¹

Since *O'Brien*, courts have extended the doctrine to permit the equitable distribution of the enhanced earning capacity from a law degree,⁸² and a variety of other degrees, licenses, and certifications.⁸³ However, these

⁷³ *Id.*

⁷⁴ 574 P.2d 75 (Colo. 1978).

⁷⁵ *O'Brien*, 66 N.Y.2d at 586.

⁷⁶ *Id.* at 576.

⁷⁷ *Id.* at 582.

⁷⁸ *Id.*

⁷⁹ *Id.* at 579-80.

⁸⁰ *Id.* at 586.

⁸¹ *O'Brien*, 66 N.Y.2d at 591 (Meyer, J., concurring).

⁸² *Holihan v. Holihan*, 159 A.D.2d 823 (N.Y. 2d Dep't 1990); *see also Woodworth v. Woodworth*, 337 N.W.2d 332 (Mich. Ct. App. 1983).

⁸³ *Murtha v. Murtha*, 264 A.D.2d 552, 694 N.Y.S.2d 382 (N.Y. App. Div. 1st Dep't 1999) (certified financial analyst certification); *Duspiva v. Duspiva*, 181 A.D.2d 810 (N.Y. App. Div. 2d Dep't 1992) (certified public accountant license); *DiCaprio v. DiCaprio*, 162 A.D.2d 944 (N.Y. App. Div. 2d Dep't 1990) (master's degree and permanent certificate in school administration); *Anderson v. Anderson*, 153 A.D.2d 823 (N.Y. App. Div. 2d Dep't 1989) (teaching certificate); *McGowan v. McGowan*, 535 N.Y.S.2d 990 (App. Div. 2d Dep't 1988) (master's degree in teaching); *Morimando v. Morimando*, 145 A.D.2d 609, 536 N.Y.S.2d 701 (App. Div. 2d Dep't 1988) (licensing and certification of a physician's assistant); *McAlpine v. McAlpine*, 143 Misc. 2d 30 (Sup. Ct. Suffolk Co. 1989) (husband's membership in professional association called *The Society of Actuaries*); *Savasta v. Savasta*, 146 Misc. 2d 101, 549 N.Y.S.2d 544 (Sup. Ct. Nassau Co. 1989) (medical board certification); *Hart v. Hart*, 13 Fam. L. Rep. 1251 (N.Y. Sup. Ct. Erie County 1987) (certified registered nurse-anesthetist); *Vanasco v. Vanasco*, 132 Misc. 2d 227, 503

cases do not address situations in which a spouse asserts an equitable claim to a career that is not based on some form of a degree or license.

II. THE SWEET SMELL OF CELEBRITY GOODWILL: *GOLUB v. GOLUB* AND *ELKUS v. ELKUS*

Marisa Berenson, a film and television actress and model, plays the role of the plaintiff in *Golub v. Golub*.⁸⁴ The defendant, Richard Golub, is a successful entertainment attorney who represented his wife and other celebrity clients, including Brooks Shields.⁸⁵ The court found both the increase in value of plaintiff's career as well as the increase in value of defendant's practice to be marital property.⁸⁶ The court focused on Richard Golub's equitable claim to his wife's career based on his contributions to her career.⁸⁷

Marisa Berenson argued that her celebrity status was not subject to equitable distribution because it was neither a professional degree nor a license.⁸⁸ She also argued that careers in show business are too volatile to be considered for equitable distribution.⁸⁹ These arguments did little to sway the court, which agreed with the defendant. The court stated that the *O'Brien* rule should be uniformly applied to a degree, license, or any other special skill that generates substantial income.⁹⁰

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. Thus, although plaintiff's celebrity status is neither "professional" nor a "license" its increase in value is marital property; despite the difficulties presented in valuing such property.⁹¹

Frederica Von Stade Elkus, a renowned opera singer, was the defendant in *Elkus v. Elkus*.⁹² Over the course of her seventeen-year marriage, her earnings grew from just over \$2,000 to more than \$600,000, a 275 fold increase.⁹³ Her plaintiff husband argued that he sacrificed his own career as a singer and teacher to devote himself to his wife's career and to

N.Y.S.2d 480 (Sup. Ct. Nassau Co. 1986) (accounting degree); *Kalnins v. Kalnins*, N.Y.L.J., Nov. 16, 1989, at 23, col.3 (N.Y. Sup. Ct.) (masters degree in business administration).

⁸⁴ *Golub*, 139 Misc. 2d at 441.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 444.

⁸⁸ *Id.*

⁸⁹ *Golub*, 139 Misc. 2d at 444.

⁹⁰ *Id.* at 446.

⁹¹ *Id.* at 447.

⁹² *Elkus*, 169 A.D.2d 134.

⁹³ *Id.* at 135.

the lives of their young children, and that his efforts enabled her to become one of the most celebrated opera singers in the world.⁹⁴ He traveled with her, attended her performances and rehearsals, photographed her for album covers, and was her voice coach.⁹⁵ His wife's argument was based on the absence of a license. She argued that because her career and celebrity status are not licensed, they are not property.

The court found that neither Domestic Relations Law section 236 nor the *O'Brien* decision supported the wife's argument:⁹⁶ With regard to *O'Brien*, the *Elkus* court noted that the *O'Brien* court did not restrict its holding to professions requiring a license or degree.⁹⁷ As for section 236, the *Elkus* court reasoned that "the purpose behind the enactment of the legislation was to prevent inequities which previously occurred upon the dissolution of a marriage. Any attempt to limit marital property to professions which are licensed would only serve to discriminate against the spouses of those engaged in other areas of employment."⁹⁸

More importantly, the court added that the status of marital property should be determined by the "nature and extent of the contribution by the spouse seeking equitable distribution, rather than the nature of the career, whether licensed or otherwise."⁹⁹

III. POLITICS AND THE LAW: *MARTIN V. MARTIN*

In *Martin v. Martin*,¹⁰⁰ the Appellate Division, Third Department, held that a husband's former Congressional career constituted "marital property" subject to equitable distribution within the meaning of Domestic Relations Law section 236(B)(1)(c).¹⁰¹ The defendant husband practiced law until 1980, when he was elected to the United States Congress and served as a Representative through 1992.¹⁰² The trial court found that during the parties' lengthy marriage, the plaintiff wife had worked as a homemaker, caretaker and as an aide to defendant husband in building his career in Congress.¹⁰³ The court also found that defendant's law license had reemerged as a separate and valuable asset upon the termination of his congressional career.¹⁰⁴

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 138.

⁹⁷ *Elkus*, 169 A.D.2d at 137.

⁹⁸ *Id.* at 138 (emphasis added).

⁹⁹ *Id.* at 140.

¹⁰⁰ 200 A.D.2d 304 (N.Y. App. Div. 3d Dep't 1994).

¹⁰¹ *Id.*

¹⁰² *Id.* at 306.

¹⁰³ *Id.* at 307.

¹⁰⁴ *Id.* at 308.

Martin illustrates the difficulties faced by courts attempting to determine the value of a career and its future earning capacity, particularly when there have been career changes. Despite agreeing with the Supreme Court's determination that the husband's congressional career from 1980 to 1992 constituted "marital property" subject to equitable distribution (Domestic Relations Law § 236 [B][1][c]), the Appellate Division strongly objected to the Supreme Court's valuation of his increased earning capacity:

The starting point for [the] Supreme Court's valuation was the \$125,000 salary that plaintiff's expert posited defendant would be earning, as a partner, if he had engaged in the private practice of law on a continuing basis since securing his license. [The] Supreme Court's modification of that figure was based solely on geographical location and population factors. No adjustment was made for the fact that defendant did not have an established law practice. [The] Supreme Court's decision further failed to address the impact that defendant's status as a former Representative might have on his future compensation as an attorney. Consequently, use of the \$125,000 figure, whether derived from defendant's former Congressional income or from the average salary of law firm partners, cannot be said to have been grounded in the "economic reality" that defendant actually faced.¹⁰⁵

The court in *Martin* struggled to determine whether the husband's congressional career could have value apart from his law license, or whether the two merged.¹⁰⁶ Citing an insufficient basis upon which to formulate a conclusion, the court did not assign a value to the career, and failed to determine the extent to which plaintiff's contributions enhanced the career, thus providing little guidance for future cases dealing with similar issues.¹⁰⁷ Instead, the case was remitted for further testimony.¹⁰⁸

In dissent, Justice Mercure stated that although courts have expanded the *O'Brien* doctrine, he advocates limiting its application to degrees and licenses.¹⁰⁹ Mercure stated:

[I]t is my view that a determination to value defendant's law license, as enhanced by his Congressional experience, expands *O'Brien* well beyond its intended reach. *O'Brien* was a special case designed to deal with a special problem, the "working spouse/student spouse syndrome," where the license was newly earned and the husband's

¹⁰⁵ *Martin*, 200 A.D.2d at 308.

¹⁰⁶ *Id.* at 309 (Mercure, J., dissenting). Mercure states that "[t]he majority opinion offers little guidance as to whether Supreme Court is to value defendant's Law license, his Congressional career or his law license as enhanced by his Congressional career." *Id.*

¹⁰⁷ *Id.* at 309.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

career had nothing but potential. To apply the *O'Brien* doctrine here and attempt to place a value upon the product of a defunct political career and a license that had not been utilized for at least 12 years is nothing less than folly.¹¹⁰

IV. TERSE PRECEDENT: *HOUGIE V. HOUGIE*

In the factually bare case of *Hougie v. Hougie*,¹¹¹ the Appellate Division, First Department, seemingly launched an unprecedented extension of the *O'Brien* doctrine. *Hougie* appears to be the first example of a court's willingness to distribute a career as marital property absent an advanced degree or celebrity goodwill.

The court in *Hougie* was asked to consider whether the enhanced earnings from the husband's banking career was a marital asset subject to equitable distribution. Relying on *Elkus*, *Hougie* held that the enhanced earning capacity generated from a husband's investment banking career may be subject to equitable distribution even though his career does not require a license.¹¹² However, the dearth of facts makes *Hougie* a difficult case from which to establish precedent.¹¹³

Indeed, in *Spence v. Spence*,¹¹⁴ the Supreme Court, Second Department held that the husband's earning capacity as an investment banker is not marital property subject to equitable distribution. The court stated that because the husband earned his MBA, Series Seven license and Series Sixty-three license four years before the marriage, his increased earning capacity is not attributable to a professional license or degree acquired during the marriage:¹¹⁵ "To the extent that the decision of the Appellate Division, First Department in *Hougie v. Hougie* holds to the contrary, we decline to follow it."¹¹⁶

¹¹⁰ Martin, 200 A.D.2d at 309 (italics supplied). A recent divorce involving another lawyer turned politician – former New York City mayor Rudy Giuliani – recently presented the New York Supreme Court with issues similar to those in *Martin*. Supreme Court Justice Judith J. Gische ruled that Mr. Giuliani's celebrity status arising from his political career was a marital asset subject to equitable distribution. The court also ruled that Mr. Giuliani's multi-million dollar book contract was not a marital asset even though the books are to be based on experiences that occurred during his marriage because the contract was negotiated after divorce proceedings had begun. However, the court was never given the opportunity to rule on the equitable distribution issue as Giuliani and wife Donna Hanover ultimately agreed to a \$6.8 million settlement. See Tom Perrotta, *Book Contract for Giuliani Not Seen as Marital Property*, N.Y. L.J., Jan. 8, 2002.

¹¹¹ 261 A.D.2d 161 (Sup. Ct. N.Y. County 1999).

¹¹² *Id.* at 162.

¹¹³ In addition, the *Hougie* court did not make an affirmative property distribution. The court merely affirmed the lower court's denial of the husband's motion for summary judgment. *Id.*

¹¹⁴ 731 N.Y.S.2d 66 (App. Div. 2d Dep't 2001).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

V. IMPORTANT CLIENTS: *MOLL v. MOLL*

In deciding *Moll v. Moll*¹¹⁷ in March 2001, the Supreme Court, Monroe County was not swayed by *Hougie's* lack of facts. Instead, the *Moll* court found *Hougie* to be similar "on its facts" to the case over which it was presiding.¹¹⁸ In so doing, the *Moll* court held that the personal goodwill inherent in a non-celebrity career could be subject to equitable distribution.¹¹⁹

The defendant husband in *Moll* was a highly paid, forty-year-old financial advisor.¹²⁰ His wife brought a divorce action, and the husband moved for partial summary judgment.¹²¹ He sought a determination that his stock brokerage clients, or "book of business," did not constitute a marital asset subject to equitable distribution.¹²²

Mr. Moll argued that he had no ownership interest in the book of business because the clients belonged to his employer.¹²³ The book of business therefore could not be property acquired during marriage subject to equitable distribution.¹²⁴ The husband produced as evidence his employment contract, which stipulated that all customer lists and accounts were property of the company.¹²⁵ He argued that these client accounts were the "thing of value acquired during marriage" that the plaintiff was seeking.¹²⁶

His wife characterized differently the "thing of value" acquired during marriage.¹²⁷ She viewed the book of business as "client relationships of trust and confidence. . . which create for the Defendant the ability to realize substantial monies either now or at a future date."¹²⁸

The wife further argued that the thing of value created during the marriage was the probability that clients would follow defendant should he change firms.¹²⁹ In support of this argument, she produced expert written

¹¹⁷ 187 Misc. 2d 770 (N.Y. Sup. Ct. 2001).

¹¹⁸ *Id.* at 778.

¹¹⁹ *Id.*; see also *Alloco v. Alloco*, 578 N.Y.S.2d 995 (Sup. Ct. 1991) (college degrees obtained by husband during marriage enhanced his earning capacity by enabling him to pass civil service examinations and attain rank of police sergeant and lieutenant). *Contra* *Bystricky v. Bystricky*, 677 N.Y.S.2d 443 (Sup. Ct. 1998) (husband's enhanced earning capacity as result of his attainment of rank of police sergeant during marriage is not a marital asset subject to equitable distribution).

¹²⁰ *Moll*, 187 Misc. 2d at 770. Mr. Moll was employed by Morgan Stanley Dean Witter and earned \$392,000 during the final year of the marriage. *Id.*

¹²¹ *Id.* at 771.

¹²² *Id.* at 777.

¹²³ *Id.* at 771-72.

¹²⁴ *Id.*

¹²⁵ *Moll*, 187 Misc.2d at 772.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

testimony indicating that financial services firms that try to lure a broker from another firm typically pay the broker a lump sum based on his or her book of business.¹³⁰

The court agreed with the wife, finding her characterization of a book of business similar to the legal definition of goodwill: "Defendant's book of business is not the customer accounts maintained by the brokerage house. It is the personal or professional goodwill acquired by defendant which is the 'thing of value' plaintiff seeks to have equitably distributed."¹³¹ The court compared the job of a stockbroker to that of an attorney or accountant.¹³² The court explained that these professionals must develop a relationship of trust and confidence with their clients in order to ensure their future business.¹³³

The *Moll* court relied heavily on Justice Silberman's opinion in *Golub*. In so doing, the court expanded the *Golub* holding beyond cases involving a spouse who is a celebrity:

the rationale of [*Golub*'s] holding was clearly not limited to the unique careers of celebrities. Rather, it was predicated on a logical, uniform extension of the rule established in *O'Brien*. Again quoting Justice Silberman: "There seems to be no rational basis upon which to distinguish between a degree, license, or any other special skill that generates substantial income. In determining the value of marital property, all such income generating assets should be considered if they accumulated while the marriage endured. If one spouse has sacrificed and assisted the other in an effort to increase that other spouse's earning capacity, it should make no difference what shape or form that asset takes so long as it in fact results in an increased earning capacity."¹³⁴

Unfortunately, the *Moll* court did not delve into the substantiality of the spouse's contribution to the development of the husband's book of business. The court simply denied the husband's application for partial summary judgment¹³⁵ stating that "[i]t would be inequitable and contrary to the expansive definition of marital property as construed by the Court of Appeals to not consider defendant's 'book of business' or personal goodwill as marital property."¹³⁶

The *Moll* court was careful to distinguish the Fourth Department case

¹³⁰ *Moll*, 187 Misc.2d at 772.

¹³¹ *Id.* at 773.

¹³² *Id.* at 772.

¹³³ *Id.*

¹³⁴ *Id.* at 775 (quoting *Golub*, 139 Misc.2d at 446 (italics supplied)).

¹³⁵ *Moll*, 187 Misc. 2d at 778.

¹³⁶ *Id.* at 777.

of *West v. West*,¹³⁷ in which the wife asserted an equitable claim to the enhanced earning capacity resulting from her husband's banking career. At the time of divorce, Mr. West was a fifty-four-year-old executive who could choose to begin receiving the benefits of his retirement pension, which exceeded one million dollars.¹³⁸ The Supreme Court affirmed the lower court's dismissal of the wife's claim, noting that her claim was not premised on the enhanced earning capacity created by an advanced degree.¹³⁹ The court in *West* emphasized the lower court's findings that Mr. West's earnings were decreasing and that his future earnings and employment were uncertain.¹⁴⁰ The *Moll* court stated that under these circumstances, "a 'thing of value' had not been created causing an enhanced earning capacity. That point in Mr. West's career, if it had ever existed, had long passed . . . Mr. Moll, unlike Mr. West, is just entering the peak years of his earning capability."¹⁴¹

VI. TEETERING ON THE EDGE OF A SLIPPERY SLOPE: *STERLING V. STERLING*

Ultimately, the case of *Sterling v. Sterling*¹⁴² could prove to be a major setback in the ability of a supporting spouse to assert an equitable claim to the personal goodwill and/or enhanced earning capacity of an enhanced spouse.

During the course of the Sterlings' seven-year marriage, the plaintiff, known professionally as Lesli Kay, achieved success as an actress.¹⁴³ At the time of divorce, she played the role of Molly on the soap opera *As the World Turns*,¹⁴⁴ earning close to \$200,000.¹⁴⁵ The defendant claimed that his wife's celebrity status, as well as the success she achieved as an actress, was a marital asset reflecting an enhanced earning capacity and that he was entitled to half the value of this asset.¹⁴⁶

In formulating its judgment, the court considered the equitable distribution of the wife's career from both the goodwill and enhanced earning capacity perspectives.¹⁴⁷ The court also considered the scope of Mr. Sterling's contributions to his wife's career.¹⁴⁸

¹³⁷ 213 A.D.2d 1025, 625 N.Y.S.2d 116 (4th Dep't 1995).

¹³⁸ *Moll*, 187 Misc.2d at 777.

¹³⁹ *West*, 213 A.D.2d at 1026.

¹⁴⁰ *Moll*, 187 Misc.2d at 778.

¹⁴¹ *Id.*

¹⁴² 2001 N.Y. Misc. LEXIS 476 (unpublished opinion).

¹⁴³ *Id.*

¹⁴⁴ *Id.* at *6-8.

¹⁴⁵ *Id.* at *6.

¹⁴⁶ *Id.* at *1.

¹⁴⁷ *Sterling*, 2001 N.Y. Misc. LEXIS 476, at *11-19.

¹⁴⁸ *Id.* at *19-25.

A. Celebrity: A Very High Standard.

Lesli Kay's four-year tenure on *As the World Turns*,¹⁴⁹ the amount of fan mail she received¹⁵⁰ and her appearance in tabloid magazines¹⁵¹ indicate that she attained a considerable level of celebrity status. In addition, the defendant's expert witness¹⁵² testified that the plaintiff's future as an actress was secure due to her popularity and that she could obtain lucrative roles elsewhere.¹⁵³ Yet the court held that the plaintiff's acting career did not make her a celebrity and did not result in the creation of marital property in the form of an enhanced earning capacity.¹⁵⁴

In determining that Lesli Kay was not a celebrity, the court distinguished her career from those of the three aforementioned principal celebrity goodwill cases. The court made three primary distinctions: "In each of the other three celebrity cases, the spouse who was said to have acquired celebrity status had (1) risen to an exceptionally high echelon in his or her field; (2) attained a significant level of fame and (3) established an ability to consistently obtain lucrative work over an extended period of time."¹⁵⁵

In *Piscopo v. Piscopo*, the court emphasized that Joe Piscopo's level of success distinguished him from an "average" entertainer.¹⁵⁶ In contrast, the Sterling court did not meet any of the three criteria common to the celebrities in the previous three celebrity goodwill cases, and was therefore an "average" entertainer as contemplated in *Piscopo*.¹⁵⁷

Although the three distinctions are sustainable on the facts of the four cases, the court in *Sterling* went out of its way, perhaps unnecessarily, to provide additional reasons to debunk any notion that Mrs. Sterling's career generated celebrity goodwill. Unlike the court in *Moll*, which was not swayed by the husband's employment contract, the court in *Sterling* noted that Lesli Kay's employment contract could be terminated without cause at the end of a twenty-six -week cycle. The court also noted that the plaintiff's witness¹⁵⁸ testified that the producers of *As the World Turns* could decide to write the plaintiff's character out of the show at any time.¹⁵⁹ Therefore, her job lacked

¹⁴⁹ *Id.* at *17.

¹⁵⁰ *Id.* at *16.

¹⁵¹ *Id.*

¹⁵² *Id.* Steven Kent, the supervising producer of *As the World Turns*.

¹⁵³ *Sterling*, 2001 N.Y. Misc. LEXIS 476, 968262 at *16.

¹⁵⁴ *Id.* at *13.

¹⁵⁵ *Id.* at *11.

¹⁵⁶ *Id.* at *12 (citing *Piscopo*, 232 N.J. Super. Ct. 559).

¹⁵⁷ *Sterling*, 2001 N.Y. Misc. LEXIS 476, at *13.

¹⁵⁸ *Id.* at *18. Susan Savage, the director of business affairs for Proctor & Gamble, the owner and producer of *As the World Turns*.

¹⁵⁹ *Id.*

meaningful security.¹⁶⁰ The court added that even though soap opera tabloids regularly print photographs and stories about the plaintiff, there was no evidence that she obtained notable recognition outside of the soap opera community.¹⁶¹ Finally, the court stated that “certainly, she has not achieved that level of enduring celebrity that assures her a high income for an indefinite number of years.”¹⁶² The court even went so far as to suggest that Lesli Kay’s accomplishments as an actress were attributable to “a measure of good fortune.”¹⁶³

The obvious counterarguments to the court’s reasoning are as follows: first, in concluding that Lesli Kay did not attain the level of success as the other celebrities, the court overlooked the fact that Lesli Kay earned more in the final year of her marriage than did *Golub* plaintiff Marisa Berenson; secondly, no celebrity is ever assured a high income for an indefinite number of years. All celebrity careers are, to a certain degree, volatile and insecure.¹⁶⁴ Thirdly, it is well settled that employment is terminable at will. Conceivably, any actor’s employment is at risk of being terminated within a relatively short period of time. Finally, the extent to which a celebrity has gained recognition outside of his or her respective “community”¹⁶⁵ is highly subjective.

B. Enhanced Earnings and the Slippery Slope

The *Sterling* court clearly elucidated its concern for a potential slippery slope problem:¹⁶⁶

The defendant has not cited any cases, and the court has found none, where marital property has been found to arise out of the mere fact that, during the marriage, a spouse found a better job than he or she had ever previously held. This court has seen no indication in the ensuing case law that the rationale enunciated by the Court of Appeals in *O’Brien* was intended to cover such a commonplace turn of events in the lives of a married couple. If otherwise, it would lead to an enhanced earning capacity analysis and a division of lifetime earnings in nearly every case since most working spouses increase their earnings over the years either through advancement, seniority or inflation.¹⁶⁷

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at *13.

¹⁶² *Sterling*, 2001 N.Y. Misc. LEXIS 476, at *13.

¹⁶³ *Id.* at *19.

¹⁶⁴ *Id.* at *17.

¹⁶⁵ Also unclear is the meaning of the word “community” as used by the court in this context.

¹⁶⁶ *Sterling*, 2001 N.Y. Misc. LEXIS 476, at *14-15.

¹⁶⁷ *Id.*; see also *DiCaprio v. DiCaprio* 162 A.D.2d 944, 948 (4th Dep’t 1990) (Lawton, J., dissenting) (“Enhanced earning skills which naturally occur during most individuals’ working

The *Sterling* court was unconvinced by the husband's reliance on *Hougie*. In dismissing the defendant's reliance on *Hougie*, the court seemingly attempted to eliminate *Hougie* as precedent. Emphasizing the lack of facts in *Hougie*, the court asserted that it did not support the proposition that the mere increase in a spouse's income as the result of being hired by a company as an employee must be considered a marital asset. The *Sterling* court supported its view by making a distinction between increase in income during a marriage and an increase in income-earning capacity.¹⁶⁸ The *Sterling* court stated:

[another] flaw in the defendant's argument is that it confuses the plaintiff's increase in income during the marriage with an increase in her income earning capacity. In this respect, the defendant has failed to prove that the plaintiff will be able to translate her present role into a long-term, lucrative acting career.¹⁶⁹

C. Husband's Contribution to Wife's Career

Even if the court had found that Lesli Kay had acquired an enhanced earning capacity and/or celebrity goodwill, it would not have awarded a share of these assets to the husband.¹⁷⁰ This is because the court found that the husband's contributions to her career were not sufficiently direct and concrete.¹⁷¹

Lesli Kay's husband generated more than ninety percent of the couple's income for several years at the outset of the marriage.¹⁷² He argued that his financial support enabled the plaintiff to devote the majority of her time to her acting career.¹⁷³ Yet the court found that he did not deserve a share of her career because his contributions to his wife's career paled in comparison to the contributions made by the spouses in the *Golub*, *Elkus* and *Piscopo* cases:

In the three celebrity cases which the court has already discussed, the courts stressed the fact that the non[-]celebrity spouse had contributed meaningfully to the other spouse's success and was, indeed, an integral part of that success.

lifetimes would under the majority's holding be required to be valued and distributed. With both spouses enjoying careers these days, the majority's holding will needlessly complicate and unduly protract the disposition of the growing number of divorce actions.")

¹⁶⁸ *Sterling*, 2001 N.Y. Misc. LEXIS 476, at *15-16.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at *19.

¹⁷¹ *Id.* at *25.

¹⁷² *Id.* at *4-9.

¹⁷³ *Sterling*, 2001 N.Y. Misc. LEXIS 476 at *22.

Here, in contrast, the defendant's direct contributions to the plaintiff's career were minimal. Although there is evidence that he rehearsed a few scripts with her at night, tried to introduce her to a few industry executives who were members of Braemar, posted signs at his workplace informing Braemar employees and members of her upcoming appearances on television and was generally encouraging after she would be rejected for roles for which she auditioned, he was nevertheless a full-time tennis instructor with a T-shirt business on the side. In all, he provided the plaintiff with what can be characterized as nothing more than the normal emotional support which one would expect from a spouse. His efforts did not involve the sort of "direct and concrete" support of a substantial nature which the First Department found to be critical in its decision in *Elkus*.¹⁷⁴

There are also hints that the husband was not particularly supportive of Lesli Kay's decision to move to New York in furtherance of her acting career. Nor was he eager to join her there. Indeed, he stayed in California during her first eighteen months on *As the World Turns*. In addition, it took him an additional five months to join the plaintiff in New York after he finally quit his tennis job in California.¹⁷⁵

VII. CONCLUSION

The conflicting views expressed by the foregoing cases illustrate the legal uncertainty and confusion surrounding the equitable distribution of a career absent an advanced degree or license.

In the future, forward thinking courts should follow *Golub*, *Elkus*, *Hougie* and *Moll*. It is possible that the *Sterling* court intended to send a strong message about its willingness to consider equitable claims to a career that is not predicated, at least in part, upon some form of an advanced degree or license. This author believes that the *Sterling* court went too far in its attempt to disprove that Lesli Kay's career has generated marital property in the form of celebrity goodwill or enhanced earning capacity. The court could have reached the same conclusion without drawing unnecessary and unfounded conclusions about the degree of Lesli Kay's celebrity goodwill and enhanced earning capacity, or lack thereof. For example, the court is in no position to judge whether Lesli Kay's success is the result of skill or "good fortune."¹⁷⁶ Nor is such a determination relevant to the court's discussion of whether her success has generated an enhanced earning capacity and/or celebrity goodwill.

¹⁷⁴ *Id.* at *19-21 (italics supplied).

¹⁷⁵ *Id.* at 21.

¹⁷⁶ *Id.* at *19. For example, it would be easy to argue that Joe Piscopo's success was due to his "good fortune" in landing a job as a *Saturday Night Live* cast member.

As advocated by *Elkus*, the *Sterling* court should have focused primarily on the scope of the husband's contributions to Lesli Kay's career, as this was clearly the determinative factor in the case. The purpose of allowing equitable claims to a spouse's career is to prevent inequities at divorce by providing compensation for such contributions. The purpose is not to provide courts with an opportunity to assess the subjective value of a career.¹⁷⁷

The *O'Brien* doctrine should be applied to careers that are not based on an advanced degree or license. While the slippery slope concerns expressed in *Sterling* are viable, courts need not undergo an enhanced earning capacity analysis in every case. Consideration of equitable claims to an enhanced spouse's career can be restricted to cases where the supporting spouse has shown a contribution or sacrifice in furtherance of the enhanced spouse's career.¹⁷⁸ If this burden is not met, then there is no need to apply an enhanced earning capacity analysis. In other words, equitable claims to a person's career should be considered only when equity demands it. Again, as stated by the court in *Elkus*, the determinative factor should be the scope of the spouse's contribution to the career, and not the nature of the career itself.¹⁷⁹

Had the New York legislature intended to limit equitable claims only to situations where a spouse's enhanced earning capacity results from an advanced degree or license, it would have expressly provided so. New York Domestic Relations Law section 236 expressly permits equitable claims to a spouse's "career or career potential."¹⁸⁰ There is no language purporting to limit equitable claims to a spouse's career or career potential to careers predicated upon an advanced degree or license.¹⁸¹ Nor does *O'Brien* contain such restrictive language.¹⁸²

The theorist Allen Parkman argues that focusing exclusively on the value of a degree or license in divorce proceedings obscures the concept of "human capital."¹⁸³ "A degree or license is not human capital. Although a degree or license may be required to receive the future income stream, the value of the human capital was created by prior investments, not by the degree or license itself."¹⁸⁴

¹⁷⁷ See *Elkus*, 169 A.D.2d at 138; *Moll*, 187 Misc. 2d at 777.

¹⁷⁸ Equitable Distribution (MB), § 18.03[2][e], 18-28, available at LEXIS, Secondary Legal Library,

¹⁷⁹ *Elkus*, 169 A.D.2d at 140.

¹⁸⁰ § 236 (B)(5)(d)(6) (emphasis supplied).

¹⁸¹ *Id.*; see also NYPG, *supra* note 7.

¹⁸² *Elkus*, 169 A.D.2d at 137.

¹⁸³ The term "human capital" is another conceptualization of the value of an individual's capitalized earnings flow. Under this view, the increase in income flows from investments that are made by the individual. See Parkman, *supra* note 22, at 441.

¹⁸⁴ See *id.* at 448.

This author posits that reimbursement alimony does not adequately compensate a supporting spouse for contributions to the development of an enhanced spouse's career. Furthermore, reimbursement alimony does not compensate a supporting spouse for the risks incurred with such contributions. As explained earlier, reimbursement alimony treats the supporting spouse as a lender, not as an investor in the marital asset.¹⁸⁵ However, the reimbursement alimony approach does not recognize that the risk assumed by a supporting spouse is much greater than the risk assumed by a commercial lender. Unlike a lender in the commercial marketplace, a supporting spouse does not have any contractual protection or security for her investment. If extraneous circumstances such as divorce intervene, the supporting spouse is left holding the bag. As a result, a supporting spouse is in a position to demand a much higher rate of return than would a commercial lender. This higher rate of return can be achieved by awarding the supporting spouse a share of the enhanced spouse's enhanced earning capacity.

The purpose of New York's equitable distribution law is to compensate a spouse who has made contributions or sacrifices in furtherance of a spouse's "*career or career potential*."¹⁸⁶ There is no indication that the law intended to create rigid categories which would compensate some spouses but not others based on whether or not the enhanced spouse has a degree or license.

Permitting equitable claims to a "naked" career, bare of any advanced degree, does not dramatically alter the equitable distribution landscape. It simply provides courts with additional flexibility, another tool they can use in fashioning distributive awards that are fair and just. Enhancing this flexibility is consistent with the purpose of the New York Equitable Distribution Law, which allows judges broad discretion by permitting them to consider a variety of factors add (in reaching their decision?).¹⁸⁷

Just as *O'Brien* applied a plain reading of New York's Equitable Distribution Law to conclude that a license constitutes marital property, courts in the future should be able to rely on a literal reading of the Equitable Distribution Law to compensate an individual who has made sacrifices or contributions in furtherance of a spouse's career, even though that spouse does not have an advanced degree or license.¹⁸⁸ To not apply the *O'Brien* rule uniformly would result in the unfair treatment of certain

¹⁸⁵ See Kelly, *supra* note 4, at 106.

¹⁸⁶ See § 236 (B) (5) (c) (6) (emphasis supplied).

¹⁸⁷ See *supra* note 21.

¹⁸⁸ *O'Brien*, 66 N.Y.2d at 587 ("whether a professional license constitutes marital property is to be judged by the language of the statute which created the new species of property previously unknown at common law or under prior statutes").

spouses.¹⁸⁹ *Golub* echoes this notion clearly: "The courts should treat all matrimonial litigants equally and should not prejudice nor penalize a spouse who is married to a non-professional who may nevertheless become an exceptional wage earner. The *O'Brien* remedy should be applied evenhandedly to all spouses."¹⁹⁰

¹⁸⁹ See *Elkus*, 169 A.D.2d at 138; *Golub*, 139 Misc. 2d at 446.

¹⁹⁰ *Golub*, 139 Misc. 2d at 445.