UNDERSTANDING O'BRIEN & ITS PROGENY

By Peter R. Stambleck

INTRODUCTION

Human capital has been defined as the attributes of a person that are productive in some economic context. In most instances it refers to a formal educational attainment, with the implication that the actual education is an investment whose returns are in the form of wage, salary, or other compensation[1]. Often, during the course of a marriage one or both spouses may attain what is known as human capital

Since a person cannot be separated from his or her human capital (*i.e.* a person's attainment of knowledge and skill, *etc*.) the way one can be separated from financial or other tangible assets, and given that human capital is not readily quantifiable, the courts are left in the unenviable position of adjudicating how to account for the attainment of human capital during a marriage. While many courts have acknowledged the concept of human capital under the guise of an enhanced earning capacity, only New York has developed a body of law addressing the categorization, valuation and distribution of a person's enhanced earning capacity.

CATEGORIZATION

THE BEGINNING – *O'BRIEN*

Domestic Relations Law ("DRL") § 236 B(1)(c) defines marital property as "… all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held… ."

Upon the determination that property is "marital," DRL § 236 B(5)(d) sets forth 13 factors a court "shall" consider in determining how to equitably dispose of such property. Included within these factors are: "…(6) any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party [and] …(9) the impossibility or difficulty of evaluating any

[1] *Traub, James. The New York Times. January 16, 2000. Sunday, Late Edition, final. Article in section 6, starting page 52, column 1, Magazine Desk*

component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest intact and free from any claim or interference by the other party."

Premised upon this language, the New York State Court of Appeals in the landmark case of *O'Brien v. O'Brien*[2], held that a husband's license to practice medicine, earned during the marriage, was a marital asset subject to equitable distribution.

At the time of marriage Mr. and Ms. O'Brien were both employed as teachers. She held a bachelors degree and he had completed three and a half years of college. Shortly after the marriage Mr. O'Brien returned to school to complete his bachelor's degree and to complete his pre-medical school requisites. Upon completion of these courses the parties moved to Guadalajara, Mexico where Mr. O'Brien became a full-time medical student. Nine years after the marriage Mr. O'Brien obtained his medical license; two months after that he commenced divorce proceedings.

In holding that the license was marital property subject to equitable distribution, the Court of Appeals declared that DRL § 236 B.5.d(6),(9) "…mean exactly what [it] says: that an interest in a profession or professional career potential is marital property…." After considering the legislature's intent behind the reform of DRL § 236 the Court went on to state:

> The determination that a professional license is marital property is also consistent with the conceptual base upon which the statute rests. As this case demonstrates, few undertakings during a marriage better qualify as the type of joint effort that the statute's economic partnership theory is intended to address than contributions toward one spouse's acquisition of a professional license. Working spouses are often required to contribute substantial income as wage earners, sacrifice their own educational or career goals and opportunities for child rearing, perform the bulk of household duties and responsibilities and forego the acquisition of marital assets that could have been accumulated if the professional spouse had been employed rather than occupied with the study and training necessary to acquire a professional license. In this case, nearly all of the parties' nine-year marriage was devoted to the acquisition of plaintiff's medical license and defendant played a major role in that project. She worked continuously during the marriage and contributed all of her

[2] *O'Brien v. O'Brien*, 66 N.Y.2d 576 (1985)

> earnings to their joint effort, she sacrificed her own educational and career opportunities, and she traveled with plaintiff to Mexico for three and one-half years while he attended medical school there. The Legislature has decided, by its explicit reference in the statute to the contributions of one spouse to the other's profession or career *(see*, Domestic Relations Law § 236 [B] [5] [d] [6], [9]; [e]), that these contributions represent investments in the economic partnership of the marriage and that the product of the parties' joint efforts, the professional license, should be considered marital property.
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> The majority at the Appellate Division held that the cited statutory provisions do not refer to the license held by a professional who has yet to establish a practice but only to an ongoing professional practice *(see, e.g., Arvantides v Arvantides*, 64 NY2d 1033; *Litman v Litman*, 61 NY2d 918). There is no reason in law or logic to restrict the plain language of the statute to existing practices, however, for it is of little consequence in making an award of marital property, except for the purpose of evaluation, whether the professional spouse has already established a practice or whether he or she has yet to do so. An established practice merely represents the exercise of the privileges conferred upon the professional spouse by the license and the income flowing from that practice represents the receipt of the enhanced earning capacity that licensure allows. That being so, it would be unfair not to consider the license a marital asset.

From the perspective of many matrimonial practitioners, *O'Brien* epitomizes the adage "hard facts made bad law." As discussed in the balance of this chapter, rather than limit the scope of *O'Brien* to its unique facts, a body of law has developed expanding the breadth of that holding and wreaking economic havoc for matrimonial litigants who fall within its purview.

O'BRIEN EXTENDED

The concept of enhanced earning capacity (*i.e.* the additional earnings a party receives as result of holding the license) founded in *O'Brien* has not been limited to the acquisition of a license during the marriage. The New York Courts have extended the concept to the acquisition of degrees, certifications, specialty skills, and even a person's celebrity status.

DEGREES

Three years after *O'Brien* was decided the Supreme Court of New York, Appellate Division, Second Department held, in *McGowan v. McGowan*[3] that a Master 's degree, obtained during the marriage was marital property subject to equitable distribution. In support of its decision, the Court stated:

> We recognize that it is possible to identify certain distinctions between licenses and academic degrees. Generally, an advanced academic degree signifies that its recipient has become proficient in some scientific, artistic, or scholastic discipline, but such an advanced degree does not necessarily confer the legal right to engage in a particular profession. The completion of law school, for example, will be reflected by the granting of an academic degree which, as many recent graduates of law school realize all too well, does not carry with it the right to engage in any profession.
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> It is clear from a review of the *O'Brien* opinion, however, that the status of the professional license as a marital asset in that case did not depend on the fact that it entitled its holder to practice any particular profession. Rather, the critical factor was the existence of proof, in the form of expert testimony, that the license had a discernible monetary value because it enhanced substantially the future earning capacity of the holder. It is evident that in many circumstances an academic degree may also have such value. In the present case, in fact, the plaintiff wife forthrightly admits that her earning capacity increased as the result of her having obtained the Master's degree. It makes little sense to construe the Domestic Relations Law in such a way as to exempt from equitable distribution an MBA from the Harvard School of Business, which in real terms could be worth hundreds of thousands of dollars, and yet to subject to equitable distribution a license to operate a junk yard *(see,* General Business Law § 60), upon the theory that the latter instrument, but not the former, entitles its holder to engage in a particular trade or profession.

Following *McGowan,* courts across New York State have found various degrees (*i.e.* the enhanced earning capacity the degree affords its holder), including but not

[3] *McGowan v. McGowan,* 142 A.D.2d 355 (2nd Dep't 1988)

limited to, college degrees[4], MBA's[5], nursing degrees[6] and other Master's degrees[7] to be assets subject to equitable distribution.

O'BRIEN'S REACH - NOT JUST LICENSES & DEGREES

As expressly stated in both *O'Brien* and *McGowan* it is not the tangible license or degree that has the value. Rather, it is the enhanced earning capacity that such license or degree confers upon the recipient. Relying upon this logic Courts have continued to broaden the concept of enhanced earning capacity irrespective of whether a license or degree has been obtained.

The court in *Madori v. Madori*[8] extended the concept of enhanced earning capacity to the acquisition, during the marriage, of specialty skills in emergency room medicine. The Court did this despite the fact that defendant received no license or degree in association with his acquisition of such specialty skills. The Court's rationale was:

> In the instant case, there is no question that defendant earned his license with the attendant right to practice general medicine months prior to the marriage of the parties in February, 1981. He had not, however, acquired any significant specialty skills up to then. During the marriage, he did acquire such specialty skills and credits in emergency room medicine to enable him well before commencement of this action to sit for the certification examination in this new specialty without the later installed (and present) requirement to undergo a formal residency. That he has not sat to date and speculation over whether he would pass the examination if he did, need not be of direct concern to the Court at present because what plaintiff is claiming to be the marital asset is the already enhanced earning capacity that defendant has come to enjoy without the further benefit of formal certification which would lead to even further but unclaimed enhancement of his earnings. In other words, claim is made to the present difference between the lifetime earning capacity of defendant as a general practitioner (at best) before the marriage and the enhanced lifetime earning capacity of an experienced emergency room practitioner *without certification* that

[4] *Cozza v. Colangelo*, 298 A.D.2d 914 (4th Dep't 2002)
[5] *Judge v. Judge*, 48 A.D.3d 424 (2nd Dep't 2008); *Burns v. Burns*, 193 A.D.2d 1104 (4th Dep't 2008)
[6] *Anderson v. Anderson*, 153 A.D.2d 823 (2nd Dep't 1989)
[7] *Kaufman v. Kaufman*, 207 A.D.2d 528 (2nd Dep't 1994); *Spreistzer v. Spreistzer*, 40 A.D.3d 840 (2nd Dep't 2007)
[8] *Madori v. Madori*, 151 Misc. 2d 737 (Westchester County 1991)

> defendant actually came to enjoy before the commencement of this action and which he continues to enjoy. The Court agrees with this claim. Such an argument is not so far a stretch of *O'Brien* principles as defendant contends. The Court of Appeals there observed as earlier quoted, that it is not only the "career" but the "professional career *potential",* that is marital property.

In *Murtha v. Murtha*[9], while finding that the husband received certification as a Certified Financial Analyst during the marriage, the trial court held that this certification was without value because it was not a requirement for his employment. The Appellate Division reversed the trial court and held:

> While the CFA may not actually be a prerequisite for employment and/or advancement in plaintiff's field of endeavor, he was, after receiving his certification, promoted from being a mere member of the Asian sales desk to the managerial rank, and his compensation more than doubled. Indeed, plaintiff would certainly not have expended the considerable time, money and effort involved in obtaining the CFA if it were not a highly desirable and valuable professional credential.

Golub v. Golub[10] was decided approximately two years after *O'Brien*. At the time of marriage in 1982, plaintiff was a renowned and celebrated model and actress and defendant was a successful attorney in private practice. Throughout the marriage defendant used his acumen for business and the law to assist plaintiff in furthering her career as an actress and model. At trial defendant contended that the increase in value of plaintiff's acting and modeling career was marital property subject to equitable distribution. Plaintiff countered that her celebrity status was neither "professional" nor a "license" and thus not an "investment in human capital." The court held:

> …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.

[9] *Murtha v. Murtha,* 264 A.D.2d 552 (1st Dep't 1999)
[10] *Golub v. Golub,* 139 Misc. 2d 440 (New York County 1988)

In reaching this conclusion the court relied heavily on *O'Brien* and on the *McGowan* decision's extension thereof. Specifically the court wrote:

> In *O'Brien*, the fact that the professional license itself had no market value was irrelevant. It is the enhanced earning capacity that the license affords the holder that is of value. In this respect, all sources of enhanced earning capacity become indistinguishable. 'Could it rationally be concluded that, for purposes of equitable distribution upon divorce, the Court of Appeals intended to limit as marital property, licenses enumerated in the Education Law? Hardly, given the definition of a license's value as enunciated in *O'Brien* as being enhanced earning capacity.' *(McGowan v McGowan*, 136 Misc 2d 225, 228, supra.)
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> *McGowan* gives "enhanced earning capacity" an expansive meaning. The same logic used in *McGowan* to extend marital property to include degrees can be applied to include as marital property a spouse's unique ability to commercially exploit his or her fame. In *O'Brien* (66 NY2d 576, *supra)*, it was the privileges conferred by the license that were critical to the court's decision, not the piece of paper itself. In *McGowan*, it was not the spouse's degree that was divisible; it was the income generated by exercising the privileges associated with the degree that the non-degreed spouse was seeking to share.
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> * * * * *
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> The courts should treat all matrimonial litigants equally and should not prejudice nor penalize a spouse who is married to a nonprofessional who may nevertheless become an exceptional wage earner. The *O'Brien* remedy should be applied evenhandedly to all spouses. (Samuelson, *The Valuation of Non-Tangible Assets of Non-Professionals*, 19 [No. 2] Fam L Rev 1 [NY St B Assn, June 1987].) Otherwise, what will result is an economic windfall to some and an unfair deprivation to others. Clearly, there are certain fields in which the earning capacity exceeds that of other fields which require licensure. When a person's expertise in a field has allowed him or her to be an exceptional wage earner, this generates a value similar to that of the goodwill of a business.

In *Elkus v. Elkus*,[11] the Appellate Division, First Department, cited *Golub* in support of its holding that to the extent the husband's contributions and efforts led to an increase in the value of the wife's career as an opera singer and international recording artist, this appreciation – recognizing that the wife had come into the marriage with a certain level of talent and experience – was a product of the marital partnership, and therefore marital property subject to equitable distribution.

In a half page decision that did not provide any substantive guidance or justification, the Appellate Division, First Department in *Hougie v. Hougie*[12] appeared to take the concept of enhanced earning capacity to a new level, finding a person's standard career advancement can constitute an asset under the rubric of enhanced earning capacity subject to equitable distribution:

> On the merits, defendant's enhanced earning capacity as an investment banker is subject to equitable distribution regardless of whether or not such a career requires a license (*see, Elkus v Elkus, supra; but see, West v West, supra*), and the amount of such enhancement was therefore properly determined without regard to the existence of any such license.

The expansion of the enhanced earning capacity concept continued with full force in *Moll v. Moll*[13]. The Husband was a forty year old account executive and financial advisor who had been employed by Morgan Stanley Dean Witter for the past seventeen years. He had no advance degrees, licenses or certifications. The issue presented to the Court was whether his "book of business" constituted an asset subject to equitable distribution. The Court viewed Mr. Moll's "book of business" in conjunction with the legal definition of goodwill and found them to be analogous. As such, the court held that defendant's "book of business" or personal goodwill inherent in his career as a stockbroker or financial advisor was a marital asset subject to equitable distribution.

O'BRIEN'S REACH – THERE ARE LIMITS

Not every court has carried the concept of enhanced earning capacity out as far as the court did in *Hougie* and *Moll*. With facts that were almost identical to those

[11] *Elkus v. Elkus*, 169 A.D.2d 134 (1st Dep't 1991)
[12] *Hougie v. Hougie*, 261 A.D.2d 161 (1st Dep't 1999)
[13] *Moll v. Moll*, 187 Misc. 2d 770 (Monroe County 2001)

presented in *Hougie* the Appellate Division, Second department held in *Spence v. Spence*[14]:

> The husband's enhanced earning capacity as an investment banker is not marital property subject to equitable distribution. The husband earned his MBA, Series 7 license, and Series 63 license four years before the marriage. Accordingly, his increased earning capacity is not attributable to a professional license or degree acquired during the marriage (*see, O'Brien v O'Brien,* 66 NY2d 576; *McSparron v McSparron,* 87 NY2d 275, 285; *West v West,* 213 AD2d 1025, 1026). To the extent that the decision of the Appellate Division, First Department in *Hougie v. Hougie* (261 AD2d 161), holds to the contrary, we decline to follow it.

In *J.C. v. S.C.*[15] the wife argued that the husband's background, skills and experience acquired during the marriage, separate and apart from his attainment of a CPA license before the marriage, enabled him to become an exceptional wage earner resulting in an enhanced earning capacity, subject to distribution as a marital asset. The Court rejected the wife's argument and held the husband's career progression is not itself an asset. In doing so Justice Drager:

> It has been argued that the Appellate Division, First Department, went further by creating a new asset called "enhanced earning capacity." *Hougie v. Hougie*, 261 A.D.2d 161 (1st Dept. 1999). It is contended that instead of a license, degree, celebrity status, or some other thing being valued because it affords the holder enhanced earning capacity, earning capacity itself has been converted into an asset. However, this court concludes that the brief decision in *Hougie* should not be so expansively read. At issue in *Hougie* was whether it mattered in assessing an investment banker's enhanced earning capacity if he required a license. The court decided the presence or absence of a license, in and of itself, was not determinative. In reaching this conclusion, the court cited two opposing decisions that discussed the necessity of a license or degree as a pre-requisite for equitable distribution of an asset derived from a spouse's career (*Elkus v. Elkus*, supra; *West v. West*, 213 A.D.2d 1025 (4th Dept. 1995). Lv dismissed, 86 N.Y.2d 885 (1995)). However, the *Hougie* decision offered no

[14] *Spence v. Spence*, 287 A.D.2d 447 (2nd Dep't 2001)
[15] *J.C. v. S.C.*, 10/31/2003 N.Y.L.J. 20, (col 1)(New York County)

> further guidance as to what components of the investment banker's career made up the "thing of value" that afforded the enhanced earning capacity. * * *
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> This court does not believe that one sentence in a summary judgment motion decision, without further elucidation, should be read as having created a new kind of asset. If so, *Hougie* could ultimately result in every career advancement, no matter what its source, being subject to equitable distribution.

In reliance on *Golub* and *Elkus* the husband, in *Sterling v. Sterling*[16], argued that his wife's role as an actress on a soap opera (her first major paying acting role) made her a celebrity and the enhanced earning capacity that accompanied such a status was marital property subject to equitable distribution. Under these circumstances, the Appellate Division, First Department disagreed. First, they held that plaintiff was not a celebrity:

> In each of the other three celebrity cases, the spouse who was said to have acquired celebrity status during the marriage 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. Thus, as the First Department recognized, Frederica von Stade had become, during her marriage, "one of the most celebrated opera singers in the world," Elkus, 169 AD2d at 135, who had 'risen to the top in a field where success is rarely achieved,' id. at 139, and who was presented with '[M]ore and more [job] opportunities. . .as her fame increased.' Id. In *Golub*, the court characterized Marisa Berenson as a "renowned and celebrated" actress and model who had earned substantial income over the years from films, television and modeling. 139 Misc2d at 441-442.
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> The plaintiff, who used the name Lesli Kaye Sterling as her professional name during her marriage to the defendant and is now known as Lesli Kaye, is just such an average entertainer. * * * The plaintiff is not even the leading actress in the soap opera in which she appears. She is a supporting actress. Indeed, the defendant's expert witness, Steven Kent, characterized the role of Molly as nothing more than "a job." Although soap opera tabloids regularly carry photographs and stories about the plaintiff, there is no evidence that she has obtained any notable recognition

[16] *Sterling v. Sterling,* 303 A.D.2d 290 (1st Dep't 2003)

> outside of the soap opera community. Certainly, she has not achieved that level of enduring celebrity that assures her a high income for an indefinite number of years.
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> Most significantly, the plaintiff's role in As the World Turns is the only high-paying job she has ever held. Moreover, it is a job which she has held for only a few years. Thus, the plaintiff does not have a proven track record for obtaining lucrative acting roles. Rather, the success which plaintiff, to date, has attained in her acting career is based solely on the fact that the producers of a single soap opera program hired her four years ago and have so far decided to renew her services.

In response to the husband's alternative argument, made in his post-trial brief, that even if the wife were not a celebrity, she has acquired an enhanced earning capacity during the marriage, the Court countered:

> This argument has two fatal flaws. First, 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.
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> The defendant's reliance on *Hougie v. Hougie*, 261 AD2d 161 (1st Dept 1999) is misplaced. In that case, the First Department, citing *Elkus*, merely held that a spouse's enhanced earning capacity may be subject to equitable distribution even though his or her career does not require a license. The facts in *Hougie* are not, however, laid out in the court's short decision and there is nothing therein to suggest that the mere increase in the income of a spouse as the result of being hired by a company as an employee must be considered a marital asset.
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> The second 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. See Allen M. Parkman, Human Capital as Property in

> Celebrity Divorces, 29 Fam L Q 141, 159 (1995). 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.

The Court in *Halaby v. Halaby*[17] rejected the notion that the post doctorate fellowship was an extension of the doctorate degree to which the wife would be entitled to share. In affirming the lower court's decision, the appellate court held that there was no evidence supporting the wife's contention that the fellowship enhanced the husband's earning capacity above that of the doctorate. They did this, despite their seeming approval of the expansive findings of *Hougie*.

Applying a similar rationale to that used in *Sterling*, the court in *Surasi v. Surasi*[18] found that the evidence presented at trial established that the wife's attainment of her podiatric medical degree did not increase her earnings beyond that which she would have expected if she had continued working as a registered nurse. As a result, the court went on to hold that there was no distinguishable enhancement of the wife's earning capacity.

What is more important and notable however, is the court's discussion of the problems that have arisen as a result of the creation of "a new species of property previously unknown at common law…" born out of *O'Brien*. Specifically, the court in *Surasi* wrote:

> It is not the role of the courts to compel persons who have received advanced degrees, licenses or other attainments which may enhance their earning capacity to maximize their economic potential by taking higher paying positions. However, if it can be demonstrated that a person who has attained a degree, license or other achievement with the assistance of the other spouse who, in the preparation for, or during the pendency of a divorce proceeding intentionally refuses to utilize such achievement with the express purpose of reducing their income during the divorce proceeding, then the court may look at such behavior with askance and apply an average enhanced income for such spouse. The court should pay special attention to the credibility of the witness and the evidence received. Clearly it is against the public policy of this state to compel or prejudice every student who is married prior to attending college or graduate school and who, after graduation and/or licensure gets a divorce, to work for a

[17] *Halaby v. Halaby*, 289 A.D.2d 657 (3rd Dep't 2001)
[18] *Surasi v. Surasi*, 2001 NY Slip Op 40408U (Richmond County)

> high paying practice rather than work in a lesser paying public or not-for-profit organization so that they can maximize their income potential for the benefit of their former spouse.
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> The court should also review the contributions of the spouse to ascertain what if anything he did differently than he would have done had his spouse not achieved that attainment. The lost opportunity costs of marital income spent and earnings not received is closer to the reality of actual loss rather than an annuity payment in the form of a distributive award based upon increased earnings from a successful spouse for the remainder of his or her working career. All persons are not equally capable of being successful or even achieving the average income of persons similarly situated in their field of employment. Those persons should not be prejudiced for not reaching their potential. Courts should look to the reality of the situation as to what actual discussions or other manifestation took place before a divorce that would demonstrate the career goals of the person who achieved a degree, license or other attainment during the marriage. Most people want to receive a positive return on their investment of time, effort and money. However, there are those who seek additional education or attainments purely for the love of learning without an expectation of using that degree or license as a means to enhance their earnings. To assert that any attainment of a degree or license during a marriage results in an automatic enhancement of income is a supposition which should be demonstrated by the reality of the facts of the case.

Notably, in *Pudlewski v. Pudlewski*[19] and *A.Z. v. C.Z*[20], the respective courts both determined that the while the degrees were obtained during the marriage neither enhanced the earning capacity of its holder.

INCOMPLETE COURSES OF STUDY; ABANDONED CAREERS

What happens when a divorcing party has completed, during the marriage, some, but not all, of the work and or studies necessary to obtain a degree or license? Recognizing the theories presented in *O'Brien* and *McGowan* is it not appropriate for the

[19] *Pudlewski v. Pudlewski*, 309 A.D.2d 1296 (4th Dep't 2003)
[20] *A.Z. v. C.Z.*, 07/09/2004 N.Y.L.J. 17, (col 1)(Nassau County)

courts to recognize the inherent value of these yet-to-be-received degrees or licenses? The courts in this state that have addressed this issue have resoundingly answered the question in the negative.

By way of example, in *Kyle v. Kyle*[21] the husband, an assistant principal, at the time of trial was two courses shy of the requirement needed to obtain his principal's license. The court held that the incomplete course of study did not constitute marital property subject to equitable distribution. Similarly, in *Fruchter v. Fruchter*[22] the Court held that any enhanced earning capacity which may result upon the husband's completion of his studies for an MBA degree and a Certified Financial Analyst certificate did not constitute marital property.

A similar issue arises when a license or degree is obtained, in whole or in part, during the marriage but that license or degree is not utilized, for whatever reason, by the recipient in his/her career endeavors.

The parties in *Savasta v. Savasta*[23] were married in November 1978. Prior to their marriage the husband had spent six years at the University of Brussels medical school. Before obtaining his degree from the University of Brussels the husband was required to complete a one year training and/or internship program which he completed between June 1978 and June 1979. Shortly thereafter the Husband received his medical degree. In July 1979 the parties moved to New York and the husband embarked on a three year (1979 through 1982) residency program in internal medicine at Booth Memorial Hospital. The Husband was able to practice medicine at Booth Memorial Hospital as a hospital employee "under supervision" despite the fact that he was not licensed to practice in New York State. In order to become licensed to practice medicine in New York State the husband was required to pass the Federal Licensing exam. While the husband was immediately eligible to sit for this exam, he did not do so until June 1981 at which time he passed. In September 1983, after his three year internship, the husband sat for and passed the examination required for board certification in internal medicine. Despite his board certification the husband did not practice in the area of internal medicine. Instead, he worked as an emergency room physician. In January 1988, subsequent to the commencement of the divorce action, the husband passed certain examinations to become board certified as a specialist in emergency room medicine.

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[21] *Kyle v. Kyle,* 156 A.D.2d 508 (2nd Dep't 1989)
[22] *Fruchter v. Fruchter,* 29 A.D.3d 942 (2nd Dep't 2006)
[23] *Savasta v. Savasta,* 146 Misc. 2d 101 (Nassau County 1989)

First, with respect to the husband's New York State medical license the court found that "for all intents and purposes the husband completed the education and training necessary to become licensed to practice general medicine in the State of New York prior to the marriage."

Further, while acknowledging that emergency room physicians, as a statistical group, earn more than general practitioners, the Court found no asset with which to attribute this earnings differential. They held:

> [N]o degree, license, test or other activity other than that required for general practice is required for emergency room practice. The husband took no test, obtained no degree or license nor participated in any income-enhancing activity to qualify him to become an emergency room doctor beyond those activities attributed by the court to his efforts prior to the marriage.

In what can only be characterized as the court's effort to achieve equity given its inability to attach the enhanced earning capacity created by the husband during his employment as an emergency room physician to a specific asset (*e.g.* degree or license) it valued the husband's *potential* enhanced earning capacity associated with the receipt of his internal medicine board certification. The Court did so despite the husband having never utilized his board certification in this area, opining:

> The husband was not however qualified only as a general practitioner as of the date of the commencement of this action. He obtained board certification as a specialist in internal medicine in 1983. Despite testimony which indicated that it was the husband's dream to open his own medical office to practice internal medicine, this was never accomplished due to numerous financial and personal circumstances which occurred during the marriage. While the court cannot foretell the future, the court cannot ignore the acquisition of this certification. The certification to practice internal medicine enhanced the husband's earning potential and constitutes a marital asset.

As demonstrated above, courts have interpreted the concept of enhanced earning capacity, as enunciated in *O'Brien*, broadly across a wide spectrum of factually diverse cases. What should be clear, however, is the distinction between increased earnings, which usually occurs as a career progresses and the concept of an enhanced earning

capacity which is attributable to the attainment of a proprietary interest during the marriage (*e.g.* license, degrees, and commercially exploitable fame).

VALUATION

Determining whether a spouse, during the marriage has developed some intangible skill or acquired a non-transferable professional attainment by virtue of their professional efforts (human capital) that directly or indirectly creates an enhanced earning capacity is just the first step. The court must next consider how to value this enhanced earning capacity.

O'BRIEN – THE LAW OF AVERAGES; OR MAYBE NOT

The valuation methodology employed in *O'Brien* compared the average income of a college graduate and the average income of a person engaged in the respective profession. This difference was calculated throughout the litigant's working life and adjusted for inflation, taxes, and interest and then reduced to present value.

There are inherent problems with the use of this methodology. One such problem is the conflict that exists between the prospective nature of the valuation methodology with the finality of distributive awards in matrimonial actions. This conflict was addressed by Judge Meyer's concurring opinion in *O'Brien*:

> An equity court normally has power to 'change its decrees where there has been a change of circumstances' *(People v Scanlon*, 11 NY2d 459, 462, *on second appeal* 13 NY2d 982). The implication of Domestic Relations Law § 236 (B) (9) (b), which deals with modification of an order or decree as to maintenance or child support, is, however, that a distributive award pursuant to section 236 (B) (5) (e), once made, is not subject to change. Yet 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 career choice will be leaves him or her no alternative.
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> * * * *
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> The equitable distribution provisions of the Domestic Relations Law were intended to provide flexibility so that equity could be done. But if the assumption as to career choice on which a distributive award payable over a

> number of years is based turns out not to be the fact (as, for example, should a general surgery trainee accidentally lose the use of his hand), it should be possible for the court to revise the distributive award to conform to the fact. And there will be no unfairness in so doing if either spouse can seek reconsideration, for the licensed spouse is more likely to seek reconsideration based on real, rather than imagined, cause if he or she knows that the non-licensed spouse can seek not only reinstatement of the original award, but counsel fees in addition, should the purported circumstance on which a change is made turns out to have been feigned or to be illusory.

Another problem with the valuation methodology utilized in *O'Brien* was the use of statistical averages in determining value despite the existence of an established career path and/or actual earnings history.[24] Ten years after its decision in *O'Brien* the Court of Appeals revisited the concept of enhanced earnings capacity and addressed this issue (among others) in *McSparron v. McSparron.*[25]

In *McSparron,* the Wife, who earned her medical license during the marriage, had, according to the Appellate Division Third Department, established that she "has always planned on joining the staff of a local health and maintenance organization." As such, the Third Department declined to implement the husband's expert's valuation approach that determined the value of the medical license by utilizing the average income of a standard medical doctor. Instead, they agreed with the wife's expert who, in determining the license's value, used the income the wife would receive as an employee of the local health maintenance organization. The Court of Appeals upheld the Third Department's decision stating:

> The value of a newly earned license may be measured by simply comparing the average lifetime income of a college graduate and the average lifetime earnings of a person holding such a license and reducing the difference to its present value (*see, O'Brien v O'Brien, supra,* at 582; 2 McCahey, Valuation & Distribution of Marital Property § 30.03 [3], at 30-19--30-21). In contrast, where the licensee has already embarked on his or her career and has acquired a history of actual earnings, the foregoing theoretical valuation method must be discarded in favor of a more pragmatic and individualized analysis based on the

[24] *See McGowan*; *Finocchio v. Finocchio*, 162 A.D.2d 1044 (4th Dep't 1990); *DiCaprio v. DiCaprio,* 162 A.D.2d 944(4th Dep't 1990)

[25] *McSparron v. McSparron*, 87 N.Y.2d 275 (1995)

> particular licensee's remaining professional earning potential (*see, Finocchio v Finocchio, supra,* at 1045-1046; Scheinkman, *op. cit.,* C236B:6, at 48 [1995 Cum Ann Pocket Part]).

The Court in *Morales v. Morales,*[26] followed *McSparron's* use of an actual earnings methodology. Ms. Morales, a high school graduate with seven years of experience as a receptionist earned her nursing degree during the marriage. The husband's expert determined the value of the license by comparing the average lifetime income of a high-school graduate working in the clerical field and the average lifetime income of a person holding such a license and reducing the difference to its present value. The Wife's expert used as the baseline earnings the average lifetime earnings of a high school graduate working as a nurse's aid (not as a clerical worker). The wife's expert's rationale in using this as a base line was that the wife, prior to gaining her nurses license, could have qualified for this position. The court in validating the methodology of the husband's expert held, "[t]he logic manifest in the analysis of the wife's expert resulted in a speculative valuation which was not founded in economic reality."

In *Fanelli v. Fanelli,*[27] the parties were married in 1973, the same year the husband graduated from college. For the next five years the husband worked under the supervision of a licensed professional engineer and qualified to take the New York State engineer licensing examination. Despite the husband having passed the examination and been awarded a license as a professional engineer he never utilized the license. For the next twenty one years the husband worked for three different employers in generally supervisory positions, none of which required the use of his professional license. The question presented to the court was whether the value of the husband's license should be determined based on his actual earnings or its theoretical value (*e.g.* what the husband could have earned had he worked as a professional engineer). In looking to the Court of Appeals decision in *McSparron* the court held:

> *McSparron* clearly divides the universe of potential enhanced earnings valuation situations into two categories, one of which involves the "newly earned license" and the other of which involves the licensee who "has already embarked upon his or her career and has acquired a history of actual earnings." As between these two categories, the defendant here clearly falls within the latter. Unquestionably, his license is not "newly earned," and he

[26] *Morales v. Morales,* 230 A.D.2d 895 (2nd Dep't 1996)
[27] *Fanelli v. Fanelli,* 191 Misc.2d 123 (New York County 2002*)*

> "has acquired a history of actual earnings." It is equally undeniable that he has "embarked upon his career." That the defendant's career may not have been the most remunerative course available to him as a professional engineer does not, under *McSparron,* require that his actual situation be ignored in determining the value of the license. To do so would be to disregard the "pragmatic and individualized analysis based on the particular licensee's remaining professional earning potential" that *McSparron* commands.

The court further commented:

> … that the valuation must be accomplished in a way that has relevance to the parties' actual situation. This is particularly true where, as here, the licensed spouse has pursued a specific career path in the course of a lengthy marriage. If marriage is an economic partnership, as the Legislature has commanded (*see, O'Brien v O'Brien,* 66 NY2d 576 [1985]), where, as here, that partnership is a lengthy one, its value must be distributed at its dissolution on the basis of the choices the partners have actually made during its course, not on the basis of some hypothetical formulation that bears little, if any, relation to the reality of the marriage. Having participated, to at least some extent, in the choices that resulted in the use made of the license during the marriage, the non licensed spouse should not be permitted to claim a windfall at the time of divorce on the basis of a theoretical valuation.

In perhaps the first published decision of its kind, Justice Ross (Supreme Court of New York, Nassau County) in *Sonnenfeld v. Sonnenfeld*[28] declined to utilize the enhanced earning capacity report of either expert holding:

> The meticulous care that is essential in determining values, is undermined when there is a failure to consider risk in the valuation of enhanced earning capacity. This was not done here, and in rejecting these reports that the parties have stipulated to put into evidence, I may reject one over the other (*Patricia B. V. Steven B.,* 186 A.D.2d 609, 588 N.Y.S.2d 874) and, in this instance, I reject both, given the flawed valuation methodology utilized. *Ferraro v. Ferraro,* 257 A.D.2d 596, 684 N.Y.S.2d 274.

[28] *Sonnenfeld v. Sonnenfeld,* 7 Misc.3d 1005A (2005)

Justice Ross' justification in declining to utilize either expert's report stemmed not from the use of average earnings, but from each expert's failure to "adequately detail facts unique to the license holder, which may impact the inherent risk of his/her career and stability of earnings streams therefrom." Justice Ross wrote:

> … each of the expert's reports here, have adopted a "wooden" forensic accounting methodology - - - their omission of fact-sensitive information in computing the "discount factor" is contrary to the Court of Appeals maxim that "theoretical methods for determining the value of a professional license must be discarded in favor of more pragmatic and individual analysis based on the particular licensee's remaining professional earning potential." *See, McSparron v. McSparron*, 87 N.Y.2d 275, 662 N.E.2d 745, 639 N.Y.S.2d 265. In valuing licenses, 'because the valuation method is driven by work-life expectancy, it produces its highest values precisely when the licensed spouse's earnings are at their lowest level and few tangible assets exist. Thus, trial judges and lawyers confront the challenge of making something out of nothing . . . .' *See*, Tippins, "*O'Brien Revisited, a Contribution Solution to Classification*," New York Law Journal, June 10, 2002.

Specifically, he took issue with the "arbitrary use of such 3% "risk-free" discount rates as "inherently flawed."

Justice Ross continued his discussion of enhanced earnings capacity in his opinion in *F.M.C. v. F.A.C*[29]. The Husband, at the time of marriage, had already obtained a Doctor of Medicine and Surgery Degree from the University of Yucatan, Mexico. For a few years thereafter and prior to moving to the United States, the husband was a practicing physician in Mexico. Between 1987 and 1990, the first three years in the United States, the husband worked without compensation as a research associate at Stony Brook University. During this time, in addition to being the primary caretaker of the parties two children, the wife worked at various jobs to financially support the family. Beginning in 1990 and 1993 the husband worked as an assistant professor of anatomy and pathology at the New York College of Osteopathic Medicine at annual salary of $17,000. During this three year period the husband took and failed the medical examinations necessary to become a licensed physician in the United States – this despite the parties having spent their savings on a review course.

[29] *F.M.C. v. F.A.C.*, 06/19/2006 N.Y.L.J. 17, (col 3)(Nassau County)

In 1993 the defendant was admitted as an advanced placement student at the New York College of Osteopathic Medicine Immigrant Physician Program. He graduated from this in May 1996 and was awarded a Doctor of Osteopathic Medicine Degree. In July 1996, the husband began a residency at Nassau Medical Center in ophthalmology. In November of 1999, approximately six months prior to the husband's completion of his residency, the wife commenced this divorce action.

During the trial the Court found that the husband did not provide the court's neutral expert with accurate information and further found that the husband's testimony and evidentiary submissions during trial with respect to his financial situation to be "replete with inconsistencies." Justice Ross, despite finding that the husband was deceitful and impeded the valuation process, adhered to the guidelines laid down in *McSparron* which required a "pragmatic and individualized" enhanced earning capacity analysis and held:

> The expert here was left to utilize figures that purportedly represent "actual" earnings - - - but defendant's accounting of these earnings was wholly misstated, grossly misleading, and artfully inaccurate. Many of those assertions were proven false, and at odds with his tax returns and testimony. And, therein, lies the problem - - - irrespective of fault, should the defendant be penalized to the extent of being subjected to a grossly incorrect enhanced earnings valuation? Equally repugnant, should the plaintiff be placed in an enforcement purgatory for a staggering award of equitable distribution the Court knows to be inaccurate? As trier of fact, I cannot accept that for this expert's opinion to be valid, it is capable of being based upon false/erroneous information. While the credibility of the expert witness here is beyond reproach, the valuation technique was based on assumption of facts and inaccurate figures improperly relied upon by the expert. I reject same.

The quandary presented as a result of the rejection of the experts' valuation of the husband's enhanced earning capacity required Justice Ross, in his opinion, to consider "all approaches to facilitate appropriate findings 'considering the circumstances of the case and of the respective parties.'" *See*, Domestic Relations Law § 236 [B][5][c]. In this regard Justice Ross turned to the provisions of the Equitable Distribution Law. Because of the uniqueness of this decision, it is quoted at length:

> The trial court retains the flexibility and discretion to structure a distributive award equitably, but only after it has

received evidence of the present "*value*" of the license and the working spouse's contributions toward its acquisition and considering the remaining factors mandated by the statute (*see,* Domestic Relations Law § 236[B][5][d][1]-[10]. Then, and only then, it may make an appropriate distribution of the marital property including a distributive award for the professional license if such an award is warranted. *See, also, O'Brien v. O'Brien*, 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743. But here, no value was established and a distribution is impractical. *See, McDicken v. McDicken*, 109 A.D.2d 734, 486 N.Y.S.2d 52.

In view of the distinct purposes of equitable distribution and maintenance, our Appellate Division has previously indicated *that the treatment of a distributive award as maintenance is improper* (*see, Buzzeo v. Buzzeo*, 141 A.D.2d 490, 491, 529 N.Y.S.2d 120; *Perri v. Perri*, 97 A.D.2d 399, 400, 467 N.Y.S.2d 226; *see, also, Kennedy v. Kennedy*, 256 A.D.2d 1048, 1049-1050, 683 N.Y.S.2d 608; *Mullin v. Mullin*, 187 A.D.2d 913, 914-915, 590 N.Y.S.2d 921; *Cohen v. Cohen*, 184 A.D.2d 347, 348, 585 N.Y.S.2d 348). Courts are duty bound by a bedrock principle of stare decisis, to adhere to determinations of the Appellate Division and our Court of Appeals. *Ross Bicycles v. Citibank*, 149 A.D.2d 330, 539 N.Y.S.2d 906.

A cross referencing of equitable distribution provisions and maintenance provisions (*see,* Domestic Relations Law § 236, Part B, subd. 5, par. d, cl [5]; subd. 6, para, a, cl [1]) confers on the Court the authority to be flexible in establishing the *form* of recognition of the dependent spouse's claim. This gives me the statutory guidance and discretion to consider the contribution of the plaintiff to the defendant's career here. If the important precepts of our Court of Appeals in *McSparron v. McSparron*, 87 N.Y.2d 275, 662 N.E.2d 745, 639 N.Y.S.2d 265 and *Grunfeld v. Grunfeld*, 94 N.Y.2d 696, 731 N.E.2d 142, 709 N.Y.S.2d 486, in being "meticulous" in establishing values of enhanced earnings is to be followed, then a failure to establish these values, as is the case here, can be appropriately redressed by the statutory language contained in the maintenance statute, which recognizes a spouse's contribution to the other's career. The flexibility to distribute the value of the license as marital property, or, to take the license income into consideration in determining the licensed spouse's capacity to pay maintenance,

> emanates from our Court of Appeals. *See*, *Grunfeld, supra*, and from Domestic Relations Law § 236[B][6][a][1].
>
> This is not, at all, a re-allocation of a distributive award as maintenance, - - rather, it is an appropriate, permissible and necessary application of statutory considerations. If the Court is to have 'broad discretion in fixing the amount and duration of maintenance,' (*see*, *Hartog v. Hartog*, 85 N.Y.2d 36, 647 N.E.2d 749, 623 N.Y.S.2d 537; *Wilner v. Wilner*, 192 A.D.2d 524, 595 N.Y.S.2d 978) then a circumspect exercise of discretion under the circumstances of this case, will permit the plaintiff to take her education, work skills and perseverance to a higher level in becoming self supporting, while continuing to realize the benefits of the enhanced earnings she contributed to. Those factors stressed by *Hartog*, the spouse's needs, the payor-spouse's ability to provide for those needs and the parties' pre-divorce standard of living, are especially underscored by the hybrid award of maintenance made here. That pre-marital standard of living, in this instance, was entirely based and predicated upon the plaintiff's exaltation of herself - - physically, emotionally and financially - - to the defendant's career path. Almost simultaneously with his arrival to that path, he chose to depart, leaving the plaintiff behind, with alarming disconnection to her and the children.
>
> In this unique case, there are really two distinguishable species of maintenance that comprise one hybrid award - - one durational, to enable the plaintiff to become self-supporting; and the other non-durational, to recognize that factor which provides "for her contribution to the career or career potential of the other party." *See*, Domestic Relations Law § 236(B)[6](a)(8).

THE ELIMINATION OF MERGER - - BUT NO DOUBLE DIPPING

The Court of Appeals' focus in *McSparron* was not limited to the actual earnings analysis discussed above. The decision also eliminated the concept of merger which had been an evolving concept within the lower courts - - specifically that a person's license, at some point, would "merge" into (and sometimes reemerge[30] from) either (a) his or her

[30] *Aborn v. Aborn*, 196 A.d.2d 561 (2nd Dep't 1993); *Martin v. Martin*, 200 A.D.2d 304 (3rd Dep't 1994); *Behrens v. Behrens*, 143 A.D.2d 617 (2nd Dep't 1988) : *Maroano v. Marano*, 200 A.D.2d 718 (2nd Dep't 1993)

practice[31] or (b) his or her career[32]. This time discussing the husband's law license as it related to his sixteen years of practice as a Deputy First Assistant Attorney-General the Court noted three "objections" to the merger theory and in doing so rejected the concept:

> One objection to the concept of "merger" is that it rests on the notion that an unrevoked professional license can somehow lose its character as a component of marital property solely because of its use in advancing its holder's career. If, as we held in *O'Brien*, a currently valid professional license is a distributable item of economic value, it should logically retain that quality throughout its existence. It would be anomalous to suggest that a marital asset may "merge" or disappear and perhaps even "reemerge" or reappear depending on the vicissitudes of the licensee's professional career…
>
> A second objection to the "merger" theory is that it is difficult to apply. Even the doctrine's simplest application is problematic, since there can be no clear yardstick for measuring when the licensee's practice or career has matured to the point where it has "subsumed" the license … The doctrine's proper use becomes even more confusing when it is applied to the many situations in which the licensee has experienced career reversals, has opted to change professional direction or has simply selected a career that does not "square up exactly" with the scope of the license.
>
> Finally and most fundamentally, the merger doctrine is flawed because its practical effect is to limit the *O'Brien* rule's application to recently acquired licenses … . Such a narrow approach is inconsistent with the equitable goal of assuring both spouses a fair share of all of the assets that were produced by the marital partnership. Application of the merger doctrine is particularly inimical to the statutory purposes because it generally favors the nonlicensed spouse in a shorter marriage over the nonlicensed spouse who is faced with rebuilding his or her economic life after the breakup of a long-term marriage … .

DOUBLE DIPPING - MAINTENANCE

[31] *Phelps v. Phelps*, 199 A.D.2d 608 (3rd Dep't 1993); *Marcus v. Marcus*, 135 A.D.2d 216 (2nd Dep't 1988); *Vanasco v. Vanasco*, 132 Misc.2d 227 (1986); *Finocchio v. Finocchio*, 162 A.D.2d 1044 (4th Dep't 1990)
[32] *Parlow v. Parlow*, 145 Misc.2d 850 (1989); *Maher v. Maher*, 196 A.D.2d 530 (2nd Dep't 1993); *Nolan v. Nolan*, 215 A.D.2d 795 (3rd Dep't 1995); *DiCaprio v. DiCaprio*, 162 A.D.2d 944(4th Dep't 1990)

The Court of Appeals in eliminating the concept that a license can merge into its holder's practice or career also provided valuation guidance in warning against using the same income stream for determining the value of a license; the value of a professional practice; or in determining a maintenance award. Since *McSparron* was decided, the following two sentences have undoubtedly been the decision's most referred to/cited[33]:

> [C]are must be taken to ensure that the monetary value assigned to the license does not overlap with the value assigned to other marital assets that are derived from the license such as the licensed spouse's professional practice. The courts must also be meticulous in guarding against duplication in the form of maintenance awards that are premised on earnings derived from professional licenses.

Following this guidance the trial court in *Grunfeld v. Grunfeld*[34] declined to distribute the enhanced earning capacity associated with the husband's law license. In doing so they stated, "The court concludes that *McSparron's* antiduplication rule requires that the value of the maintenance award be compared with the earning differential used in the license calculation. *(See, Wadsworth v Wadsworth,* 219 AD2d 410). Since the wife is to receive 50% of the license value, an award to the extent of one half of the earnings differential would clearly be duplicative. The maintenance award here, including the reduced amount after the sale of the house, clearly exceeds that figure. Alternatively the court could reduce the maintenance award to present value, as wife's expert suggests, and compare that figure to 50% of the "license" value."

On appeal, the Appellate Division, First Department reversed and awarded the wife a half share of the value of the husband's license. After comparing the differences between a "property distribution" and "maintenance" they held, " '[R]educ[ing] the value of the enhanced earnings by the amount awarded in maintenance' " (*Wadsworth v Wadsworth, supra,* 219 AD2d, at 415), is not the only way to avoid double dipping. Another viable option is for the court to grant a distributive award based upon the enhanced earnings, and then adjust the payor's other obligations accordingly (*see, Seeman v Seeman*, 251 AD2d 487, 488).

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[33] *Wadsworth v. Wadsworth*, 219 A.D.2d 410 4th Dep't 1996); *Grunfeld v. Grunfeld*, 94 N.Y.2d 696 (2000); *Holterman v. Holterman*, 3 N.Y.3d 1 (2004); *Reczek v. Reczek*, 239 A.D.2d 867 (4th Dep't 1997); *NK v. MK*, 2007 NY Slip Op 52126U; *Tanzman v. Tanzman*, 191 Misc.2d 215 (2002); *Jafri v. Jafri*, 176 Misc.2d 246 (1997); *Miklos v. Miklos*, 39 A.D.3d 826 (2nd Dep't 2007); *Fruchter v. Fruchter*, 288 A.D.2d 942 (4th Dep't 2001); *Murphy v. Murphy*, 6 A.D.3d 678 (2nd Dep't 2004); *Hlinka v. Hlinka*, 22 A.D.3d 524 (2nd Dep't 2005)

[34] *Grunfeld v. Grunfeld*, 94 N.Y.2d 696 (2000)

The Court Appeals found the alternative methodologies employed by the First Department to avoid double dipping did not comport with the law as set forth in *McSparron*. Specifically, they wrote:

> Where license income is considered in setting maintenance, a court can avoid double counting by reducing the distributive award based on that same income (*see,* Domestic Relations Law § 236 [B] [5] [d] [5]). The necessity of this reduction was recognized in *Wadsworth v Wadsworth* (219 AD2d 410). 'Not to do so would involve a double counting of the same income' (*id.,* at 415; *see also, Reczek v Reczek,* 239 AD2d 867; *Jafri v Jafri,* 176 Misc 2d 246, 252; *Procario v Procario,* 164 Misc 2d 79, 87-88). One advantage of this method is that the maintenance award may be adjusted in the future if the licensed spouse's actual earnings turn out to be less than expected at the time of the divorce (*see,* Domestic Relations Law § 236 [B] [9] [b]; *O'Brien v O'Brien, supra,* at 591 [Meyer, J., concurring]; Scheinkman, *op. cit.,* at 303; Oldham, Divorce, Separation and the Distribution of Property § 9.02 [1], at 9-11). This method is also consistent with our observation that in particular cases the value of the license "may be nominal" (*McSparron v McSparron, supra,* at 286).
>
> On the other hand, there may be cases where it is more equitable to avoid double counting by reducing the maintenance award (*see,* Domestic Relations Law § 236 [B] [6] [a] [1]). Where the license is likely to retain its value in the future but the nonlicensed spouse may only be entitled to receive maintenance for a short period of time, it may be fairer actually to distribute the value of the license as marital property rather than to take the license income into consideration in determining the licensed spouse's capacity to pay maintenance … .
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> * * * *
>
> Therefore, on the face of the Appellate Division's decision, in ordering full distribution of plaintiff's share of defendant's license without any adjustment of maintenance, the Court engaged in double counting of income. This is inconsistent with *McSparron.* Thus, that portion of its order cannot be affirmed.

DOUBLE DIPPING DOES NOT APPLY

After *McSparron and Grunfeld*, most practitioners, while still uncomfortable with the concept that a person's enhanced earning capacity could be an asset, felt as though the Court of Appeals had at least taken a step in the right direction when they cautioned against using the same income stream twice. Unfortunately, the old adage, "one step forward, two steps back" applies to the Court of Appeals subsequent two decisions relating to double dipping.

Prior to the Court of Appeals decision in *Holterman v. Holterman*[35], the trial court in *Grunfeld*, in response to the Husband's expert's report noted:

> The court rejects Husband's expert's implied analysis that this language in *McSparron* should also apply to child support. This court believes that the Court of Appeals was carefully using terms of art in its decision and the omission of reference to child support was intentional and not, as suggested, a mere oversight.

This issue was never raised on Appeal.

Justice Ross, in *Goodman v. Goodman*[36], disagreed with the trial court's findings in *Grunfeld* on this subject. In *Goodman*, the husband filed an application asking the court to consider that when calculating child support the income used in determining the husband's enhanced earning capacity (as awarded to wife) be deducted from his income and allocated to her. The court, "mindful of the precedential, and consequential future, effects" granted the husband's application holding, "For the purposes of this court's proper computation and determination of each of the parties' respective child support obligations, as mandated by Domestic Relations Law § 240 (1-b) (Child Support Standards Act), this court determines that it *must* redistribute the income accordingly."

In support of his findings Justice Ross opined:

> The duplication of awards, and the reutilization of the already converted income stream, clearly resurfaces when "enhanced earnings" presents itself as another award of equitable distribution without appropriate adjustment of income for computation of the child support obligations between the parties. Succinctly stated, 'Once income has been 'converted' into an asset and distributed, it is no longer

[35] *Holterman v. Holterman*, 3 N.Y.3d 1 (2004)
[36] *Goodman v. Goodman*, 195 Misc.2d 204 (Nassau County 2003)

> fully available to the titled spouse as a source from which to pay the maintenance award. Logic dictates that neither is it fully available to the titled spouse as a source of child support payments either' (*see,* Tippins, Matrimonial Practice, *Part 1: Child Support as a Duplicative Award,* NYLJ, Jan. 15, 2003, at 3, col 1). Enhanced earnings, as a distributive award, reflect a redistribution of income from the titled parent to the nontitled parent. 'Though no longer fully available to the titled spouse due to the redistribution, it remains *fully present* for a child support award.' (*See,* Tippins, *supra* at 6, col 1.

With no "tacit or express" guidance to support or contradict this position, Justice Ross proceeded to uniquely dissect and analyze DRL §240 (1-b), the Child Support Standards Act, in order to provide justification for his position.

Shortly after *Goodman* was decided the Court of Appeals, in what many consider their first step backwards from *McSparron* and *Grunfeld*, proceeded to provide the "express guidance" that Justice Ross found missing in its widely criticized decision in *Holterman*.

The facts in *Holterman* were as follows: Mr. and Ms. Holterman were married in 1981. At the time of marriage, Mr. Holterman was a third year medical student in Philadelphia, Pennsylvania. In 1983, Mr. Holterman graduated from medical school and one year later he obtained his license to practice medicine. Mr. Holterman in the following years continued to advance his professional credentials and in 1987 he became board certified in emergency room medicine. In 2000, after 19 years of marriage, Ms. Holterman commenced an action for divorce. Following a bench trial, the Supreme Court, among other things, determined that Ms. Holterman was entitled to $214,200 as her equitable share of Mr. Holterman's enhanced earnings capacity premised on the attainment of his medical license. After accounting for a credit for which Mr. Holterman was entitled the Court directed that he pay Ms. Holterman $21,288 over a 15 year period. Further, the court directed that Mr. Holterman pay $34,875.65 in support of his two children. One issue presented to the Court of Appeals was whether the Supreme Court erred by declining to deduct the $21,288 – the annual installment payment of Ms. Holterman's distributive award of her share of enhanced earnings from Mr. Holterman's medical license – from the computation of Mr. Holterman's income in determining his child support obligation under the Child Support Standards Act, and concomitantly, including that amount as income attributable to Ms. Holterman.

The Court held:

> [T]hat husband's proposed reallocation formula--or any formula that requires a deduction of a distributive award paid over a period of years from the licensed spouse's income for purposes of calculating child support--is impermissible under the CSSA.

The Court looked at the Child Support Standards Act as provided for in DRL §240 (1-b) and noted that the statute does not provide for "the receipt of distributive award payments" as a category of income, nor does it provide that "payments of distributive awards" are recognizable deductions.

More specifically they provided:

> Had the Legislature intended to make distributive awards deductible from one parent's income and includable in the other's, it could easily have so provided. Simply put, it appears that the Legislature did not wish to have a child's lifestyle and support altered based on a distributive award. In sum, husband's proposed methodology conflicts with the plain language of the CSSA.

As far as addressing the theoretical conflict this holding had with that of *McSparron* and *Grunfeld,* the Court found:

> *McSparron* and *Grunfeld* do not dictate a contrary result. In *McSparron*, this Court warned that 'care must be taken to ensure that the monetary value assigned to the license does not overlap with the value assigned to other marital assets that are derived from the license such as the licensed spouse's professional practice,' and cautioned the lower courts to 'be meticulous in guarding against duplication in the form of *maintenance* awards that are premised on earnings derived from professional licenses' (87 N.Y.2d at 286, 639 N.Y.S.2d 265, 662 N.E.2d 745.
>
> In *Grunfeld*, this Court reaffirmed the *McSparron* prohibition against duplicative awards and noted that to avoid "double counting," courts must reduce either the income available to make maintenance payments or the marital assets available for distribution, or some combination of the two. Specifically, we held that '[o]nce a court converts a specific stream of income into an asset, that income may no longer be calculated into the *maintenance* formula and payout' (*Grunfeld*, 94 N.Y.2d at

> 705, 731 N.E.2d 142, 709 N.Y.S.2d 486 [emphasis added]).
>
> Notably, neither *McSparron* nor *Grunfeld* discussed double counting vis-a-vis child support. Rather, in each case we held that a court may not award maintenance and the distribution of enhanced earnings attributable to a professional license from the same income stream. Unlike maintenance, child support is governed by a precise formula in the CSSA, which simply does not authorize a court to deduct a distributive award from the titled spouse's income.

Judge Smith, the lone dissenter, was highly critical of the majority's rigid position and their failure to fully explore DRL §240 (1-b), specifically, the "escape clause" provided for in sub-paragraph (f).

> The only justification offered by the majority for this rule is that the statute requires it--and, if the statute had no escape clause, the majority would be right. The authors of the CSSA apparently failed to anticipate the need to reallocate income where income-producing assets are transferred. The authors were wise enough, however, to realize that they could not anticipate everything--and therefore the statute does have an escape clause that seems to have been written precisely to avoid results like the one the majority reaches today.
>
> Under Domestic Relations Law § 240 (1-b), the non-custodial parent must pay his or her 'pro-rata share of the basic child support obligation,' based on "income" as defined in the statute, '*[u]nless the court finds that the non-custodial parent's pro-rata share of the basic child support obligation is unjust or inappropriate*.' (*id.* P [f] [emphasis added]). Thus, the statute expressly authorizes departure from the statutorily calculated "pro-rata share" where a failure to depart would produce an "unjust or inappropriate" result. The statute lists 10 "factors" to be considered in making a departure, of which the first is: "[t]he financial resources of the custodial and non-custodial parent, and those of the child" (*id.* cl [1]). Where an income-producing asset changes hands as part of the divorce, the 'financial resources' of one party are greater, and those of the other are less, than the statutory formula assumes. If this is not an instance where the parties' "financial resources" render the "pro-rata share" as calculated by statute "unjust or

> inappropriate" I find it hard to imagine what such a case would be.
>
> * * * *
>
> The injustice of a wooden application of the statutory formula where an income-producing asset has been distributed is so blatant that it was recognized in this case by plaintiff's own expert witness. John R. Johnson, a valuation expert, testified that while he knew that 'duplication within the context of child support' was, legally, an open question, 'I feel intellectual honesty would suggest we still have only one income stream.' He testified that 'the only way to really equitably determine the relative child support obligation' would be to make an adjustment taking account of the equitable distribution. In his child support calculation, he reallocated to plaintiff--the party who employed him--the portion of defendant's income that would in effect be distributed to plaintiff upon the divorce. Today, the majority concludes that such a reallocation, however clearly "intellectual honesty" compels it, is forbidden by the CSSA.
>
> The majority completely fails to explain, however, why the CSSA's "unjust or inappropriate" escape clause should not be invoked here.

On the heals of their decision in *Holterman* the Court Appeals decided *Keane v. Keane*[37]. In *Keane,* the Husband owned a rental property which was valued (very much like a professional practice) by capitalizing the income earned from that business. The intermediate appellate court, citing *Grunfeld*, held that the portion of the income received by the husband from his business and that had been utilized in calculating the value of the business – which value was divided with the wife – could *not* be considered again as a source of income for the purposes of paying maintenance. Once again, the notion was that if the value of the business was based upon the income it produced to the husband, and that income was capitalized as an asset, and then the capitalized asset divided, the portion of that cash flow that had been distributed to the wife was no longer available to pay maintenance[38].

[37] *Keane v. Keane*, 8 N.Y.3d 115 (2006)

[38] This court did not go as far as Justice Ross did in *Goodman* in that the Court did not "redistribute" this income to the wife.

This decision was reversed. According to the Court of Appeals, there exists a fundamental difference between intangible assets, such as a professional license and degree and "tangible" asset like a body shop. Essentially what *Keane* stands for is the proposition that the previous direction to the courts that they should be diligent in avoiding double-counting only apples when the asset at issue is a license or degree. When a more traditional form of income producing property is involved, even though the value of the property is based upon the income it generates and that value has been split between the parties for equitable distribution purposes, all of the income received by the owner spouse from such property must still be considered in determining maintenance.

The erosion of the circumstances under which the concept of double-dipping continued in late 2007 in a case entitled *Griggs v. Griggs*, decided by the Appellate Division, Second Department. In *Griggs*, the husband was a doctor whose medical practice was valued and the value of which practice was equitably divided between the parties. The husband contended that the court had double-counted the cash flow used to value his practice, when it utilized the same cash flow in calculating his ability to pay maintenance. In a two sentence paragraph citing to *Keane*, the Appellate Division rejected the argument holding:

> The plaintiff's contention that the Court "double-counted" his practice is without merit. The Court of Appeals recently held the prohibition against double-counting does not apply where, as here, the asset to be distributed is a "tangible income-producing asset," rather than an "intangible asset," such as a professional license, the value of which can only be determined based on projected earnings.

The *Griggs* court seems to have simply ignored that in *Grunfeld*, the inequity in duplicative awards based upon the same stream of income clearly related to professional practices as well as licenses and degrees.

DISTRIBUTION

The Equitable Distribution Laws were enacted based on the idea that marriage is an "economic partnership." The economic partnership that results from a marriage is dependant upon not just the respective financial contributions of the partners, but also on a wide range of non-remunerated services such as "homemaking, raising children, and

providing the emotional and moral support necessary to sustain the other spouse in coping with the vicissitudes of life outside the home."[39]

Specifically, DRL §236 B(5)(c) provides: Marital property shall be distributed equitably[40] betweens the parties, considering the circumstances of the case and of the respective parties. The thirteen factors that a court is mandated to consider in determining an equitable distribution of property are set forth in DRL § 236B(5)(d). Because a person's enhanced earning capacity is so personal in nature, the courts, in determining how such enhanced earning capacity should be allocated between the parties, have focused on sub-paragraph (6) of DRL § 236B(5)(d) which mandates that the courts consider: "…direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker… ."

It is within this realm that the lower courts have looked to remedy the inequities caused by the strict application, regardless of the particular facts of the case, of the enhanced earning capacity doctrine, as initially set forth in *O'Brien*. A review of the cases that address the allocation of a person's enhanced earning capacity evidences that the lower courts have instituted strict standards when looking at the non-titled spouses "contributions" in relation to the titled spouses attainment of the degree, license, certificate, skill, *etc*. that resulted in the enhanced earning capacity. The following survey of cases demonstrates the lower courts' focus on "contribution" and the trend toward an unequal allocation of the enhanced earning capacity as between the parties.

In *Morrongiello v. Paulsen*[41], the Appellate Division reduced the wife's allocation of the value of the husband's law license from 50% to 30%. In doing so the Court noted:

> Although the wife forfeited her career network in the Boston area by relocating to New Orleans, the interruption to the wife's career was not significant. The wife was unemployed when the parties set their wedding date and she was able to find a full-time position in her field within months of moving to New Orleans. Moreover, the parties' move to New York enhanced the wife's opportunities for career advancement. Additionally, the wife provided only minimal assistance to the husband in his studies.

[39] Governor's Memorandum of Approval, 1980 McKinney's Session Laws of NY at 1863
[40] Of course it is well settled that "Equitable distribution does not mean equal distribution and there is no requirement that each asset be divided equally between the parties." *See Arvantides v. Arvantides*, 64 NY2d 1033 (1985); *Naimollah v. DeUgarte*, 18 AD3d 268 (1st Dep't 2005).
[41] *Morrongiello v. Paulsen*, 195 A.D.2d 594 (2nd Dep't 1993)

The court in *Matisof v. Dobi*[42] found no reason to disturb the trial court's determination that the wife was entitled to a distribution amounting to 40% of the total enhancement attributable to the husband's attainment of his MBA. In doing so they cited to the wife's "facilitation of defendant's decision in mid-marriage to embark upon the full-time, demanding course of study …" and to her support "of defendant's studies and new career emotionally and financially, both as a homemaker and as a lender of substantial funds upon extremely favorable terms for the payment of business school tuition."

Though it was conceded that the wife's attainment of her bachelor's degree during the marriage was marital, the Third Department in *Mallet v. Mallet*[43] refused to award any portion of the value to the husband. Their rationale:

> The undisputed trial evidence established, and Supreme Court correctly found, that defendant made essentially no positive noneconomic contribution to plaintiff's acquisition of her college degree. As noted in Supreme Court's detailed decision, defendant did not interrupt the development of a career (he had a 10th grade education and worked as a seasonal laborer), assume a disproportionate share of the household work (he did none) or assist plaintiff in her studies. To the contrary, the record establishes that during nearly all of plaintiff's college years, she took a full course load, maintained full-time employment and was solely responsible for all household chores, including cooking, cleaning and paying the bills, despite the fact that defendant was frequently unemployed and had substantial opportunity for hobbies such as boat building and salmon fishing. In plaintiff's final year of college, when she had a 21-credit-hour course load, she reduced her employment somewhat, but still worked 25 hours per week.
>
> * * * *
>
> We therefore conclude that defendant 'failed to show that [he] had made a substantial contribution' (*Duspiva v Duspiva*, 181 AD2d 810, 811, *lv denied* 80 NY2d 752) to plaintiff's attainment of her degree, which was earned solely through her own ability and herculean effort… .

In *Brough v. Brough*[44], the Court was presented with a 20 year marriage during which the wife obtained her undergraduate degree in education and, while working full

[42] *Matisof v. Dobi*, 242 A.D.2d 495 (1st Dep't 1997)
[43] *Mallet v. Mallet*, 246 A.D.2d 904 (3rd Dep't 1998)
[44] *Brough v. Brough*, 285 A.D.2d 913 (3rd Dep't 2001)

time, obtained her Master's degree. First, the Court noted "it is also incumbent upon the nontitled party seeking a distributive share of such assets to demonstrate that they made a substantial contribution to the titled party's acquisition of that marital asset." While the Court found that the husband had indeed contributed towards the attainment of the wife's degrees, that contribution, in their view, was "modest":

> In determining the amount of plaintiff's distributive award, we first note that while plaintiff's modest contributions to defendant's realization of her teaching license entitle him, under our law (*see, e.g., O'Brien v O'Brien,* 66 NY2d 576, *supra*), to share in the benefits of same, defendant's accomplishments cannot be minimized and the record amply demonstrates that her degrees and license were obtained 'through her own ability and Herculean effort' (*Mallet v Mallet,* 246 AD2d 904, 905, *supra*), 'as well as [her] own capacity for hard work' (*Gandhi v Gandhi,* 283 AD2d 782, 785). Accordingly, under the circumstances presented, we find that plaintiff is entitled to a distributive award of 10% of the enhanced earnings attributable to defendant as a result of her advanced degree and permanent teaching certification.

The court in *Halaby v. Halaby*[45] was presented with a two year marriage wherein the parties during the first year of marriage were separated while the husband completed his doctorate in biology and lived together during the second year while the husband participated in a one-year postdoctoral fellowship. While the lower court acknowledged that the portion of the husband's doctorate earned during the marriage was marital within the meaning of DRL §236 B(1)(c), they affirmed the lower court's determination that the wife was not entitled to any portion of its value because she did not make any contribution to the husband's obtainment of the degree.

In *Corasanti v. Corasanti*[46], the Appellate Division Fourth Department, after acknowledging that the wife's efforts as a homemaker "certainly contributed to the ability of defendant to obtain his medical license and advanced degrees," upheld the lower court's award to the wife of 30% of the value of the husband's enhanced earnings attributable to his medical degree. In doing so they noted that "while in medical school defendant tutored other students and worked at night in an area hospital" and concluded that the husband's achievements "were accomplished through his own Herculean effort…as well as [his] own capacity for hard work."

[45] *Halaby v. Halaby* 289 A.D.2d 657 (3rd Dep't 2001)
[46] *Corasanti v. Corasanti,* 296 A.D.2d 831 (4th Dep't 2002)

Affirming the lower courts 7.5% award to the wife of the husband's enhanced earning capacity, the Court in *Farrell v. Cleary-Farrell*[47] held:

> Where only modest contributions are made by the nontitled spouse toward the other spouse's attainment of a degree or professional license, and the attainment is more directly the result of the titled spouse's own ability, tenacity, perseverance and hard work, it is appropriate for courts to limit the distributed amount of that enhanced earning capacity.
>
> Here, defendant certainly exerted extraordinary efforts to complete her degree and obtain her license. While attending school, she worked part time during most semesters and full time one summer, was primary caretaker for the children, regularly performed most of the household chores, and gave birth to a child mid-semester but still completed her course work. On the other hand, while his wife was in school, plaintiff remained the primary wage earner for the family, contributed meaningfully to household bills and the costs of defendant's education, performed some household chores and most of the outdoor maintenance, assisted with child care when he was available, built the family home by acting as general contractor and personally constructing significant portions of the home, and emotionally supported defendant in her endeavor to better herself, including acting as her clinical patient for her clinical board examinations. Both parties worked very hard during this period. However, the evidence indicated that plaintiff did not substantially alter his schedule due to defendant's schooling; plaintiff admitted that his duties around the house did not really change when defendant was in school, and plaintiff worked out of town for the duration of defendant's education, requiring him to leave for work at 5:00 A.M. and occasionally remain away overnight or return late at night, leaving defendant to maintain the household and care for their young child while going to school. While defendant attended school and received her license as a dental hygienist, plaintiff was busy advancing his own career, gaining promotions and doubling his salary during the marriage. Under all of these circumstances, Supreme Court did not abuse its discretion in awarding plaintiff a modest portion of defendant's enhanced earning capacity… .

In *Cabeche v. Cabeche*[48] the Husband was denied any share of the wife's enhanced earning capacity attributable to her acquisition, during the marriage, of her

[47] *Farrell v. Cleary-Farrel* 306 A.D.2d 597 (3rd Dep't 2003)
[48] *Cabeche v. Cabeche,* 10 A.D.3d 441 (2nd Dep't 2004)

registered nurse license because his contributions toward in assisting plaintiff acquire the license were "de minimis."

The Appellate Division, Fourth Department, in *Schiffmacher v. Schiffmacher*[49], reversed the lower court's 50% award to the wife of the husband's enhanced earning capacity arising from his degree because the plaintiff's contributions were "modest."

The court in *Carman v. Carman*[50] commented:

> Plaintiff, as the nontitled spouse seeking a share of enhanced earning capacity, bore the burden of demonstrating that she made a substantial contribution to defendant's acquisition of the license. 'Where only modest contributions are made by the nontitled spouse toward the other spouse's attainment of a degree or professional license, and the attainment is more directly the result of the titled spouse's own ability, tenacity, perseverance and hard work, it is appropriate for courts to limit the distributed amount of that enhanced earning capacity' (*Farrell v Cleary-Farrell*, *supra* at 599 [citations omitted]; *see Corasanti v Corasanti*, 296 AD2d 831, 832, 744 NYS2d 614 [2002]; *Brough v Brough*, *supra* at 916). Here, defendant obtained his college degree and completed almost half of his two-year practice requirement before the marriage. He completed the second year of practice during the marriage, but that experience was earned through a job where he was gainfully employed, earning money to support the parties as a couple. The exam preparatory course lasted less than two months and was a review of his college work. During this time, plaintiff was also employed full time. While plaintiff performed household chores and provided an environment for defendant to study, this can be seen more as overall contributions to the marriage rather than an additional effort to support defendant in obtaining his license (*see Gandhi v Gandhi*, 283 AD2d 782, 785, 724 NYS2d 541 [2001]). As plaintiff's own testimony indicated that she did not substantially alter her schedule due to defendant's studying for his CPA exam and licensure, it would be inequitable to award plaintiff half of defendant's enhanced earning capacity related to his CPA license (*see Farrell v Cleary-Farrell*, *supra* at 599; *Gandhi v Gandhi*, *supra*). Based on plaintiff's limited contribution to defendant's acquisition of this asset, her equitable share of the marital portion of defendant's CPA license is 20%.

[49] *Schiffmacher v. Schiffmacher*, 21 A.D.3d 1386 (4th Dep't 2005)
[50] *Carman v. Carman*, 22 A.D.23d 1004 (2nd Dep't 2005)

In *Higgins v. Higgins*[51], the husband's award of 30% of the wife's enhanced earnings resulting from her attainment of a Bachelor's and Master's degree was reduced to 0% because the husband did not demonstrate that his contributions were substantial. There was no evidence of a career sacrifice or that he did a disproportionate share of the household work. Further, the wife worked full-time while attending school, funded some of her own education and was the primary caregiver for the parties' children.

In *Mairs v. Mairs*[52], the parties were married for over 20 years at the time the action was commenced. During that time the parties had seven children; the husband successfully completed his undergraduate studies; he graduated from medical school, and completed his medical internship and residency. The wife, in addition to giving birth to the seven children, cared for them, managed the household and worked – including at her husband's medical practice. Facing these facts the trial court awarded the wife only 15% of the value of the husband's medical license. The Appellate Division, Third Department in finding that the wife's contributions were "both meaningful and significant" increased that award to 25%.

Quoting from their decision in *Farrell* and *Higgins*, the Appellate Division, Second Department in *Guha v. Guha*[53], affirmed the lower court's award to the husband of 5% of the value of the wife's enhanced earning capacity. The evidence at trial they said, "established that the defendant made minimal financial contributions to the marriage (*see Evans v Evans*, 57 AD3d at 719; *Arrigo v Arrigo*, 38 AD3d 807; *Sade v Sade*, 251 AD2d 646, 647). The defendant, moreover, failed to satisfy his burden of demonstrating that he made substantial contributions to the plaintiff's attainment of her license to practice medicine in the United States (*see Higgins v Higgins*, 50 AD3d at 853; *Brough v Brough*, 285 AD2d 913, 914; *Sade v Sade*, 251 AD2d at 647).

LEGISLATIVE CHANGE

In January 2004 former Chief Judge Judith S. Kaye established the Matrimonial Commission (the "Commission"), chaired by Hon. Sondra Miller, to examine various problems ever-present in the divorce process. One such problem examined by the Commission was the concept, unique only to New York which says something in and of itself, that a person's enhanced earning capacity is an asset that could be subject to

[51] *Higgins v. Higgins*, 50 A.D.3d 852 (2nd Dep't 2008)
[52] Mairs v. Mairs, 2009 WL 1011101 (N.Y.A.D. 3rd Dep't)
[53] *Guha v. Guha*, 2009 NY Slip Op 2748, 1-2 (N.Y. App. Div. 2d Dep't Apr. 7, 2009)

equitable distribution. Their findings, which set forth the many problems delineated above, were addressed on page 65 through 66 and Appendix L of their report:

> *Enhanced Earnings.* An issue tangentially related to the valuing of marital assets both of the payment of fees as discussed above and in making equitable distribution is the concept of enhanced earnings. The Commission received a great deal of comment and expressions of concern over the treatment by New York courts of a spouse's "enhanced earnings capacity" as an asset subject to equitable distribution in a divorce proceeding. Notably, New York is the only state in the nation which has recognized such an "asset." Among the concerns expressed on this issue are the intangible nature of the "asset," the speculative nature of its "value" including the unfairness of creating a non-modifiable award based on a projection of earnings, the cost of the valuation process, the problems of double counting when coupled with maintenance and child support awards and the multitude of litigation spawned by this concept that has increased the cost and the length of matrimonial proceedings. The Commission also recognizes the need to address one spouse's contributions to another's career and increased earning capacity in any ultimate award on divorce. Consistent with the Commission's mandate to reduce the cost and length of matrimonial proceedings and to increase the public's confidence in the fairness and rationality of the awards rendered by the courts, the Commission recommends that legislation be adopted that eliminates a party's "enhanced earning capacity" as a marital asset. The legislation would also require that the trial court must consider a spouse's contributions to the development of a spouse's enhanced earning capacity in arriving at the equitable distribution of the remaining marital property and, in cases where it is appropriate, shall order maintenance that does not cease upon remarriage."

The Commission's proposed statutory amendments were as follows:

> *DRL §236(B)(5)(d):*
> (6) any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party. <u>The court shall not consider as marital property subject to distribution the value of a spouse's enhanced earning capacity arising from a license, degree, celebrity goodwill, or career enhancement. However, in arriving at an equitable division of marital property, the court shall consider the direct or indirect</u>

> contributions to the development during the marriage of the enhanced earning capacity of the other spouse.;
>
> *DRL 236(B)(6):* Maintenance.
> a. Except where the parties have entered into an agreement pursuant to subdivision three of this part providing for maintenance, in any matrimonial action the court may order temporary maintenance or maintenance in such an amount as justice requires, having regard for the standard of living of the parties established during the marriage, whether the party in whose favor maintenance is granted lack sufficient property and income to provide for his or her reasonable needs and whether the other party has sufficient property or income to provide for the reasonable needs of the other and the circumstances of the case and of the respective parties. Such order shall be effective as of the date of the application therefore, and any retroactive amount of maintenance due shall be paid in one sum or periodic sums, as the court shall direct, taking into account any amount of temporary maintenance which has been paid. In determining the amount and duration of maintenance the court shall consider:
>
> (8) contributions and services of the party seeking maintenance as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party, and in considering the contributions to the career or career potential of the other party, the court shall, where appropriate, award maintenance which is payable for a period of time subsequent to the remarriage of the party receiving the maintenance;
>
> c. The court may award permanent maintenance, but an award of maintenance shall terminate upon the death of either party or upon the recipient's valid or invalid marriage, unless specifically provided by the court in an order rendered pursuant to paragraph (b)(8) of subdivision 6 of section two hundred thirty-six of this part that the maintenance shall continue beyond such remarriage, or upon modification pursuant to paragraph (b) of subdivision nine of section two hundred thirty-six of this part or section two hundred forty-eight of this chapter.

CONCLUSION

It is now over three years since the Commission issued their report and to date no changes have been implemented. Instead, the courts (and the litigants) continue, as best

they can, to navigate through the difficulties created by application of the enhanced earnings concept.

Perhaps the next revision of this chapter will require a complete overhaul in order to address legislation "that eliminates a party's enhanced earning capacity as a marital asset."[54]

[54] Matrimonial Commission's Report to the Chief Judge of the State of New York, page 66 (2006)