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EQUITABLY DISTRIBUTING LICENSES AND DEGREES IN A DIVORCE

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Eighteen years ago the New York Court of Appeals, in *O'Brien v. O'Brien*, ruled that a professional license acquired during a marriage is a marital asset subject to equitable distribution.¹ Although the majority of states in the country do not agree with the *O'Brien* doctrine, the courts in New York have continued to hold that a professional license attained during a marriage is "a thing of value arising out of the marital relationship," and like other things acquired during marriage, is marital property.² Since *O'Brien*, the state's lower courts have extended the rule to include all licenses, degrees and certifications which enhance the earning capacity of the holder, as well as the enhanced earning potential arising from professional distinction and celebrity status that pre-existed the marriage.³ It also has been established that in order for the license or degree to fit the description given in *O'Brien*, the coursework required for the license or degree must have been carried out during the marriage and the non_titled party seeking the distributive award must show he or she contributed substantially to the attainment of that title. If a substantial contribution is found, the enhanced future earning potential of the holder of the license and/or degree is subject to equitable distribution. The division of this asset is done by the considerations provided by NYDRL§236(B)_ (5)_ (d),⁴ along with the specific case circumstances.

Once it is established that the license or degree was achieved during the marriage and therefore it is marital property, the court determines the value of the license. The value is determined by calculating the present value of the enhanced future earning potential of the holder. The court will determine the value by finding the difference between the average lifetime earnings expected for a person with the particular license or degree and the same average lifetime earnings had the person not received the license or degree. This number is adjusted for taxes and inflation and is discounted to present value.⁵

In the valuation methodology, a distinction is made between the value of the degree or license and the value of the individual's professional life or business practice. In the past, some courts held that the value of the degree or license "merged" into the value of the professional practice and the valuation of that asset was then based on projections of the license holder's future earnings based on past earnings produced by his practice.⁶ In those circumstances, the court was not assessing the independent value of the license because the license was believed to have merged with and been incorporated into the practice.

In 1995 the Court of Appeals, in *McSparron v. McSparron*, addressed the various criticisms of this theory and concluded that, "the letter and spirit of our holding in *O'Brien* is best served by eliminating the concept of 'merger' from the inquiry."⁷ It called for a more "commonsense approach" that would recognize the independent life of a license, even after the licensee had time to reap some of the financial benefits of the license. It also alerted lower courts about the danger of valuing that asset in a manner that would result in duplicative awards, in particular maintenance awards that are based on earnings derived from the license.⁸

In determining what percentage of the enhanced earning capacity the non_titled spouse should be entitled to, the court considers all direct and indirect contributions made by this party to the marital partnership. It rests upon the party looking for the distributive award to demonstrate that he or she made a "substantial contribution to the titled

party's acquisition of that marital asset."⁹

In *Brough*, the court discussed what kinds of activities might fall within the requirement of "substantial contribution." Consequently, a court's review of whether a spouse made a substantial contribution should not be limited to direct financial contributions, but must include all forms of contributions made to the "economic partnership" that is inherent in a marriage.¹⁰ In this case, the wife obtained her undergraduate degree, master's degree and permanent teaching certification during the marriage. For the three years in which she completed her undergraduate degree she did not work and her husband provided for the family. Thereafter she obtained her master's degree while working full_time as a teacher.

During the course of her education, her husband contributed to the household financially and also by assisting the wife with childcare, her studies and buying her a computer for school work. In determining a fair distributive award, the court considered the respective financial condition of the parties, the facts of the case (including the contributions made by the non_titled spouse) and the factors enumerated in D.R.L. §236 (B)(5)(d). The court found the plaintiff was entitled to a distributive award of 10 percent of the enhanced earning capacity of the wife. In addition to considering the factors cited above, the court also took into account the extent to which the license was a direct result of the wife's own ability and hard work.¹¹

In *Vainchenker v. Vainchenker*, the husband was a practicing physician prior to the parties' marriage in their native country, but upon immigrating to the United States he had to embark on a four_year course of study to obtain a license to practice in New York. The court focused on his studies in the United States and determined that his earning potential in this country was enhanced through the medical training he received in this country during the marriage. It found that his New York medical license was a marital asset subject to equitable distribution. The court affirmed the trial court's award to the wife of 50 percent of the husband's medical license because she had contributed to the attainment of the medical license by caring for their children and providing some economic support. As a result of these efforts she neglected her own career as a nurse.¹²

Earlier this year, the Third Department considered the fairness of a distributive award and after balancing the efforts of both spouses towards the attainment of the license; the court found it was appropriate to limit the distributive award.¹³ In *Farrell*, the wife worked while attending school and remained the primary caretaker for the children, regularly performed household chores, and gave birth to a child while she completed her studies. Although the husband remained the primary wage earner, contributed to the wife's education costs and assisted with some chores, he did not considerably alter his schedule; on the contrary, he continued to advance his career, receiving promotions and doubling his salary during the marriage.¹⁴ The court affirmed an award of seven and a half percent of the wife's license to the husband because it found that his contribution to the process of attaining the license was very modest.

In *Allocco* the trial court held that the wife was entitled to one half of the enhanced earning capacity of the former husband based on the substantial direct and indirect contributions she made to his educational and professional achievements. During the marriage, the husband began and developed a career in law enforcement and pursued an associates and bachelor degree in criminal justice. In addition to the completion of the undergraduate degrees, he completed the civil service exams necessary for a promotion to sergeant and later to lieutenant.¹⁵

In the 10_year period of time that Mr. Allocco pursued his education and career goals, his wife indirectly contributed to his efforts by assuming the management of the household, maintenance, meal preparation and childcare. In addition, she made direct contributions by actively participating in his studies and his career. She decided to become politically active in their town in order to support her husband's career in local law enforcement. In the area of the defendant's studies, particularly in the earlier years, she assisted him on a daily basis by reviewing class material with him. She reviewed homework for some courses, typed papers, and helped defendant with some research, and while he prepared for the civil service exams, she assisted him in reviewing the necessary material.¹⁶

The defendant admitted that his wife had assisted him with his education, which in turn helped him with his promotions. Furthermore, the parties had agreed that the defendant would work to further his education and that his wife's mother would pay for tuition and books for these courses. The court found that because the wife not only made indirect contributions but significant direct contributions to the husband's college degrees and completion of the civil service examinations, she should share equally in the value of these marital assets.¹⁷

In *Madori v. Madori*, the court determined that the husband's enhanced earnings were due in part to the wife's efforts and awarded her 40% of the value of the husband's enhanced earning capacity.¹⁸ The defendant had obtained his medical license and had begun practice in an incomplete surgical residency before the marriage. But during the marriage, the husband acquired the work_time and credit_pre_requisites to take the certification exam of the American Board of Emergency Medicine. ¹⁹

In this case there was no question that the defendant earned his license before marriage. However, it was during the marriage that he gained the specialty skills and credits in emergency room medicine that would allow him (if he chose) to take the certification exam without undergoing a formal residency. In determining what portion of the defendant's enhanced earning capacity should be given to the plaintiff, the court considered the fact that a year and a half into the marriage, the plaintiff quit her full_time job to give birth to their first child. From that time on she devoted herself to homemaking and raising their two children.²⁰ It was during that time that the defendant gained the skills and credits that made him eligible to sit for the certification exam.

The Appellate Division, Second Department, evaluated the issue of spousal contribution in *Gold v. Gold*. The Supreme Court, Nassau County, had awarded the wife 25 percent of the plaintiff's future enhanced earnings from the portion of his license earned during the marriage. But on appeal, the Second Department held that her share should have been 27.4 percent of the value of the asset.²¹ The factors considered by the court included the length of the 23_year marriage, the wife's direct and indirect contributions to the marriage which helped to bring into being the husband's medical license, and maintenance.

The Fourth Department, in *Corasanti*, affirmed the lower court's award to the wife of 30 percent of the value of the enhanced earnings attributed to the husband's medical license. It found that although the wife had substantially contributed to the ability of her husband to attain his medical license and PhD, by discontinuing her employment to raise their children and by managing the finances and the household, those accomplishments were mainly due to the defendant's "own ability and Herculean effort."²²

A few months later, the Fourth Department again analyzed a similar fact pattern in *Cozza v. Colangelo*. In this case, the determination was made with respect to the value of the wife's college and medial degrees. As for the college degree, it was established that she had earned one_fifth of the credits towards her degree prior to marriage and therefore, only 80 percent of the enhanced earning capacity attributed to that degree was subject to equitable distribution. It was found that the defendant made no financial contributions to her college education but he did work for the majority of the time she was in college and paid some of the family expenses. He also cooked meals, cared for their three children and performed housework. The plaintiff, while in college, contributed to a portion of the family expenses through her student loans. Under these circumstances the court found it fair to apportion 30 percent of the value of the plaintiff's enhanced earning potential attributed to this degree to the husband.²³

In relation to the medical degree, the defendant admitted that during the first two years of medial school he made minimal contributions to the family expenses because he was unemployed due to disability and was only receiving income through workers' compensation. He did not make any contributions to the medical school costs. But because he was at home, he had more responsibilities with respect to the children and maintenance of the household.²⁴ Plaintiff moved out of their shared residence in 1995 and from that time and until she obtained her medical degree, the defendant made no substantial economic or non_economic contributions towards the attainment of her degree. In consideration of these facts, the court granted the husband 10 percent of the value of the wife's enhanced earning capacity attributable to the medical degree, specifically for his contributions during her first two years in medical school.²⁵

In conclusion, it should be increasingly apparent that the issues of valuation and distribution of licenses and degrees are a complex and difficult matter. Once it is established that all or part of the degree and license is marital property, it is incumbent upon the non-titled spouse to establish that they made a substantial contribution to the acquisition of the degree or license. It is critical in seeking to establish a substantial contribution, that all direct and indirect contributions are placed in evidence for the Court's consideration.

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1. O'Brien v. O'Brien, 66 N.Y.2d 576, 498 N.Y.S.2d

743 (1985).

2. O'Brien at 746

3. The Doctrine of O'Brien v. O'Brien: A Critical

Analysis. 13 Pace L.Rev. 863

4. N.Y.Domestic Relations Law

5. McGowan v. McGowan, 142 A.D.2d 355, 535

N.Y.S.2d 990, 992 (2d Dept. 1988).

6. Finocchio v. Finocchio, 162 A.D.2d 1044, 556

N.Y.S.2d 1007, 1010 (4th Dept. 1990).

7. McSparron v. McSparron, 87 N.Y.2d 275, 285,

639 N.Y.S.2d 265 (1995).

8. Id. at 286.

9. Brough v. Brough, 285 A.D.2d 913, 727 N.Y.S.2d

555, 558 (3d Dept. 2001).

10. Id. at 558.

11. Id. at 559.

12. Vainchenker v. Vainchenker, 242 A.D.2d 620,

662 N.Y.S.2d 545, 547 (2d Dept. 1997).

13. Farrell v. Farrell, 306 A.D.2d 597, 761 N.Y.S.2d

357, 360 (3d Dept. 2003).

14. Id. at 360.

15. *Allocco v. Allocco*, 152 Misc.2d 529, 578 N.Y.S.2d 995, 996 (Sup. Ct. Monroe Co. 1991).

16. Id. at 997.

17. Id. at 1000.

18. *Madori v. Madori*, 151 Misc.2d 727, 573 N.Y.S. 2d 553, 556 (Sup. Ct. Westchester Co. 1991).

19. Id. at 554.

20. Id. at 556.

21. *Gold v. Gold*, 276 A.D.2d 587, 714 N.Y.S.2d 323, 325 (2d Dept. 2000).

22. *Corasanti v. Corasanti*, 296 A.D.2d 831, 744 N.Y.S.2d 614, 616 (4th Dept. 2002).

23. *Cozza v. Colangelo*, 298 A.D.2d 914, 747 N.Y.S.2d 641, 644 (4th Dept. 2002).

24. Id. at 644. 25. Id. at 645.