The Demise of O'Brien
By Joel R. Brandes

The classic example of the "student-spouse/working-spouse" syndrome is where the newlywed spouse gives delays starting a career, works in low paying administrative positions, maintains the household and puts the medical student spouse through school, only to be handed a summons for divorce when he or she is handed a doctor's or other professional license.

In O'Brien v. O'Brien (66 N.Y.2d 576, 498 N.Y.S.2d 743, 489 N.E.2d 712 (1985)) the Court of Appeals held that a doctor's wife was entitled to 40 percent ($188,800) of the present value of her husband's medical license because of the substantial contributions she made to its acquisition. His professional license was classified as "marital property" because after nine years of marriage, he was a resident in general surgery and had no medical practice to distribute, and his wife made substantial contributions to the acquisition of his license. The trial court determined that the current value of that license was $472,000. That value was arrived at by comparing the average net income of a college graduate and a general surgeon between the time when Dr. O'Brien was to complete his residency, and the year when he would reach age 65. After considering federal income taxes, an inflation rate and a real interest rate the expert capitalized the difference in average earnings and reduced the amount to a current value of $472,000

The O'Brien decisions charted the future course of the 1980 Equitable Distribution Law when it held that a diploma or professional license is **"**property**"** subject to equitable distribution and that the Equitable Distribution Law permits recognition of the value of a degree, diploma, license and the enhanced earning capacity it affords the holder when marital property is equitably distributed. In doing so it mandated that the statute be given a liberal interpretation to achieve its objective of an equitable division of family assets upon divorce.

Judge Simon's opinion in O'Brien noted that **"**marital property**"** as the term is used in the Equitable Distribution Law is a term of art and that the Equitable Distribution Law created a new species of **"**property**"** that was not anchored in common-law property concepts nor affected by decisions in other states having a different statutory definition. The Court said that an interest in a profession or professional career potential is marital property which may be represented by direct or indirect contributions of the non-title-holding spouse, including financial contributions and non-financial contributions made by caring for the home and family. It noted that Legislature replaced the former system with equitable distribution of marital property, an entirely new theory that considered all the circumstances of the case and of the respective parties. The fact that the license was not assignable, could not be transferred, could not be sold, and had no market value did not preclude the license from being a **"**valuable property right**"** that enhanced the husband's earning capacity, which the Equitable Distribution Law had recognized by providing for distributive awards. The Court also endorsed the concept that indirect spousal contributions as a spouse, parent, and homemaker **"**should

ordinarily be regarded as equal" to those of a breadwinner and cited with approval prior decisions so holding.

The Appellate Division, Second Department extended O'Brien's holding to academic degrees, in McGowan v McGowan (142 A.D.2d 355, 535 N.Y.S.2d 990 (2d Dep't 1988)) holding that the wife's master's degree, which reflected the successful completion of a course of study undertaken during the marriage, was marital property. The court premised its determination upon the recurring theme of O'Brien that a professional license is a "thing of value," mainly, if not solely, because of the enhanced earning capacity if affords its holder, which is "obtained by one spouse as a result of years of education completed only with the assistance and support of the other spouse." The court stated that the monetary value of the license is to be determined by calculating the present value of the enhancement of the future earning potential of the holder of the license.

The doctrine of O'Brien was subsequently extended beyond professional licenses and academic degrees to include virtually anything earned during the marriage that enhances a spouse's earning capacity, including a career. In McSparron v McSparron, (87 N.Y.2d 275, 639 N.Y.S.2d 265, 662 N.E.2d 745 (1995)), the Court of Appeals concluded that even after a license has been exploited by the licensee to establish and maintain a career, it does not "merge" with the career or ever lose its character as a separate, distributable asset. In Grunfeld v. Grunfeld (94 N.Y.2d 696, 709 N.Y.S.2d 486, 731 N.E.2d 142 (2000)), the Court of Appeals held that to comply with McSparron Supreme Court had to reduce either the income available to make maintenance payments or the marital assets available for distribution or some combination of the two. Once a court converts a specific stream of income into an asset, that income may no longer be calculated into the maintenance formula and payout. It stated that where license income is considered in setting maintenance, a court can avoid double counting by reducing the distributive award based on that same income.

Domestic Relations Law §236(B)(6) was overhauled in 2015. The definition of maintenance in Domestic Relations Law §236(B)(6)(a) was amended to direct that the court make its award for post-divorce maintenance pursuant to mandatory guidelines, with formulas for the calculation of maintenance awards. The definition of income was expanded to include income from income-producing property that is being equitably distributed. Additional factors for determining if the formula amount of post-divorce maintenance is unjust or improper were added to Domestic Relations Law §236(B)(6)(a)(7), and an "advisory" formula for determining the duration of post-divorce maintenance awards was included.

The 2015 Legislature also amended Domestic Relations Law §236 [B] [5] [d] [7] to eliminate "enhanced earning capacity" as marital property. Domestic Relations Law §236 [B] [5] [d] [7] was amended to specify that: "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, it added the provision that "… in arriving at an equitable division of marital property, the

court shall consider the direct or indirect contributions to the development during the marriage of the enhanced earning capacity of the other spouse. (See Laws of 2015, Ch.269).

The 2015 legislation had the effect of overruling the holding in O'Brien and its progeny that the value of a spouse's enhanced earning capacity arising from a license, degree, celebrity goodwill, or career enhancement was marital property.

However, vestiges of O'Brien remain. The enhanced earning capacity of a spouse attributable to a license, degree, celebrity goodwill, or career enhancement acquired during the marriage is no longer property and its value may not be equitably distributed. However, in arriving at an equitable disposition, the court “shall” consider, a spouse's direct or indirect contributions to the development during the marriage of the enhanced earning capacity of the other spouse.

To be clear, the Legislature decreed that “enhanced earning capacity” is not a marital property and may not be distributed. At the same time the Legislature decreed that a spouse’s direct and indirect contributions to the development of a spouse's “enhanced earning capacity” -- which is not property -- is a factor for the courts consideration in arriving at an equitable division of the marital property.

What was the legislature thinking when they passed this amendment? Unfortunately, we will never know. The Sponsors Memorandum in support of the legislation merely states that highlights of this measure include…“ Elimination of enhanced earning capacity as a marital asset,” but it contains no public policy explanation as to why it was eliminated as a marital asset, other than as part of a compromise among competing interest groups. (See New York Bill Jacket, 2015 A.B. 7645, Ch. 269)

It would appear that the 2015 addition of the last sentence to Domestic Relations Law §236 [B] [5] [d] factor (7) was intended to enable a spouse to obtain a greater share of the marital “pot” by proving that he or contributed, directly or indirectly, to the development of the enhanced earning capacity of the other spouse, even though it is no longer marital property to be distributed. In that case the legislature imposed a financial burden of proof on a spouse who wants to avail himself or herself of this provision as he or she would have to prove (1) that the other spouse has an enhanced earning capacity attributable to a license, degree, celebrity goodwill, or career enhancement obtained during the marriage; (2) the value of that enhanced earning capacity; and (3) his or her direct or indirect contributions to the development of that enhanced earning capacity.

Conclusion

The keystone for the 1980 equitable distribution law was the premise that marriage is an economic as well as a social and private relationship that should be regarded as a joint undertaking or partnership with its own internal assignments of labor. It was the *product* of individual and partnership efforts that would serve as the

"pot" for property distribution purposes upon divorce. The 2015 amendment to factor (7) and the 2015 amendments to the maintenance statute reflects a major change in this basic policy.

In a given case, it may be equitable to recognize the contributions of the working-spouse to the student-spouse in the equitable distribution of the family assets or the granting of a distributive award. The time of divorce is significant. There is unjust enrichment where the degree and divorce summons are handed out simultaneously, and usually, there is no marital property to distribute, so that a distributive award or an enhancement of maintenance are the only practical alternatives. As a practical matter, neither the 2015 maintenance amendments nor the new factor (7) accomplishes this result.

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