

FAMILY LAW—EQUITABLE DISTRIBUTION—LICENSE TO PRACTICE
MEDICINE MAY BE DEEMED MARITAL PROPERTY SUBJECT TO
EQUITABLE DISTRIBUTION—*O'Brien v. O'Brien*, 66 N.Y.2d 576,
489 N.E.2d 712, 498 N.Y.S.2d 743 (1985).

Historically, property acquired during marriage was distributed upon divorce to the title holding spouse.¹ The inequities inherent in this practice, however, prompted courts and legislatures to explore alternative approaches to the apportionment of marital assets.² As a result of the increasing recognition of marriage as an economic partnership, many states have adopted the theory of "equitable distribution" of property.³ This approach entitles each spouse to a share of "marital property"⁴ in proportion to his or her contributions throughout the marriage.⁵

One of the most controversial issues concerning this area of matrimonial law is whether an educational degree or professional license, acquired during marriage, may be subject to distribution upon dissolution of marriage.⁶ Most states adopting the equitable distribution approach exclude both degrees and licenses from the classification of marital property simply because they lack the traditional attributes of property.⁷ Such courts have re-

¹ Note, *New York's Equitable Distribution Law: A Sweeping Reform*, 47 BROOKLYN L. REV. 67, 70 (1980).

² See *id.* at 74-79.

³ Note, *Equitable Distribution of Degrees and Licenses: Two Theories Toward Compensating Spousal Contributions*, 49 BROOKLYN L. REV. 301, 302 (1983). See also Recent Case, *Divorce After Professional School: Education and Future Earnings Capacity May Be Marital Property*, 44 MO. L. REV. 329, 330-31 (1979).

⁴ Marital property is defined as: "[p]roperty purchased by persons while married to each other and which, in some jurisdictions, on dissolution of the marriage is divided in proportions as the court deems fit." BLACK'S LAW DICTIONARY 873 (5th ed. 1979). For New York's statutory definition of marital property, see *infra* note 28.

⁵ See Note, *supra* note 1, at 72.

⁶ See, e.g., *Hughes v. Hughes*, 438 So.2d 146, 150 (Fla. Dist. Ct. App. 1983) (spouse's bachelor of science degrees not property subject to distribution); *Leveck v. Leveck*, 614 S.W.2d 710, 712 (Ky. Ct. App. 1981) (medical license not marital property); *Mahoney v. Mahoney*, 91 N.J. 488, 492, 453 A.2d 527, 529 (1982) (husband's MBA not property subject to equitable distribution); *Grosskopf v. Grosskopf*, 677 P.2d 814, 822 (Wyo. 1984) (husband's masters degree in accounting not marital property).

⁷ See, e.g., *Wisner v. Wisner*, 129 Ariz. 333, 340, 631 P.2d 115, 122 (Ariz. Ct. App. 1981) (education an intangible property right not subject to division between spouses); *In re Marriage of Goldstein*, 97 Ill. App. 3d 1023, 1027-28, 423 N.E.2d 1201, 1204 (App. Ct. 1981) (speculative earnings potential of medical degree not marital property); *Conner v. Conner*, 97 A.D.2d 88, 93, 468 N.Y.S.2d 482, 486-87 (App. Div. 1983) (academic degree not "res susceptible of actual or constructive

sisted classifying degrees or licenses as property, reasoning that as representatives of intellectual achievement, they merely provide potential for assistance in future acquisition of property.⁸ The New York Court of Appeals' landmark decision in *O'Brien v. O'Brien*⁹ discarded traditional property concepts in holding that a professional degree to practice medicine, acquired during marriage, may be deemed marital property subject to equitable distribution.¹⁰

Loretta and Michael O'Brien were both teachers at the same parochial school when they were married in April 1971.¹¹ At that time, Loretta possessed a bachelor's degree but needed eighteen months of post graduate studies to secure permanent teaching certification in New York.¹² Michael was in the process of acquiring his bachelor's degree and completing certain pre-medical courses in pursuit of his plans to attend medical school.¹³ The couple left for Guadalajara, Mexico in September 1973 where they lived for three years while Michael studied medicine.¹⁴ While in Mexico, Loretta worked continuously, holding as many as three teaching jobs at one time.¹⁵ Loretta contributed the income earned from these positions to pay the couple's joint ex-

possession of transfer."); *Lesman v. Lesman*, 88 A.D.2d 153, 157, 452 N.Y.S.2d 935, 938 (App. Div. 1982) (medical license not within traditional concepts of property).

⁸ *In re Marriage of Graham*, 194 Colo. 429, 432, 574 P.2d 75, 77 (1978). The Supreme Court of Colorado observed that neither a professional education, degree, nor license has:

an exchange value or any objective transferable value on an open market. It is personal to the holder. It terminates on death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed or pledged. An advanced degree is a cumulative product of many years of previous education, combined with diligence and hard work. It may not be acquired by the mere expenditure of money. It is simply an intellectual achievement that may potentially assist in the future acquisition of property. . . it has none of the attributes of property in the usual sense of that term.

Id.

⁹ 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985).

¹⁰ *Id.* at 590, 489 N.E.2d at 720, 498 N.Y.S.2d at 751.

¹¹ *Id.* at 581, 489 N.E.2d at 713, 498 N.Y.S.2d at 744.

¹² *Id.*

¹³ *Id.*, 489 N.E.2d at 714, 498 N.Y.S.2d at 745. Shortly after the marriage, Michael returned to school at night to obtain his undergraduate degree. *Id.* Thereafter, Michael left his teaching position in order to fulfill a year of required premedical courses. *O'Brien v. O'Brien*, 106 A.D.2d 223, 234, 45 N.Y.S.2d 548, 556 (App. Div. 1985) (Thompson, J.P., concurring in part and dissenting in part).

¹⁴ *O'Brien*, 66 N.Y.2d at 581, 489 N.E.2d at 714, 498 N.Y.S.2d at 745.

¹⁵ *O'Brien v. O'Brien*, 114 Misc. 2d 233, 234, 452 N.Y.S.2d 801, 802 (Sup. Ct. 1982).

penses.¹⁶ In December 1976, Michael and Loretta returned to New York where Michael completed his final two semesters of medical school and then began his training as an intern.¹⁷ Loretta resumed the teaching position she formerly held and continued to contribute her earnings to the joint support of the couple.¹⁸ In October 1980, Michael became licensed to practice medicine.¹⁹ Two months later he instituted an action for divorce.²⁰

Upon the couple's divorce, the issue concerning distribution of marital assets needed to be decided.²¹ Other than Michael's medical license, the parties acquired no assets of significant value during their nine year marriage.²² Loretta, therefore, sought to have Michael's license to practice medicine declared marital property.²³

The trial court held that Michael's medical license was marital property and, as such, subject to equitable distribution.²⁴ Accordingly, Loretta was awarded \$188,800, representing forty percent of the medical license's present value.²⁵ The trial court's ruling recognized that the laws governing distribution of prop-

¹⁶ *Id.* While the parties were not in agreement as to the amount of their financial contributions to their marital expenses, it was nevertheless undisputed that Loretta, in addition to managing the household and the family finances, was gainfully employed for the duration of the marriage. *O'Brien*, 66 N.Y.2d at 581, 489 N.E.2d at 714, 498 N.Y.S.2d at 745. The trial court held Loretta's financial contributions to be 76% of the couple's expenses; exclusive of a \$10,000 student loan acquired by Michael. *Id.* at 581-82, 489 N.E.2d at 714, 498 N.Y.S.2d at 745.

¹⁷ *Id.* at 581, 489 N.E.2d at 714, 498 N.Y.S.2d at 745.

¹⁸ *Id.* Loretta testified that had she earned additional credits necessary to secure permanent teaching certification, she would have been entitled to double her teaching salary. *O'Brien v. O'Brien*, 106 A.D.2d 223, 234, 435 N.Y.S.2d 548, 556 (App. Div. 1985) (Thompson, J. P., concurring in part and dissenting in part).

¹⁹ *O'Brien*, 66 N.Y.2d at 581, 489 N.E.2d at 714, 498 N.Y.S.2d at 745.

²⁰ *Id.* Originally, Michael sought a divorce from Loretta "on the grounds of cruel and inhuman treatment and constructive abandonment." *O'Brien*, 114 Misc.2d at 235, 452 N.Y.S.2d at 802. In her answer to Michael's complaint, Loretta counterclaimed on grounds of cruelty, seeking, *inter alia*, equitable distribution of their marital property. *Id.* Michael filed a reply to Loretta's counterclaim but eventually withdrew his complaint and Loretta "was granted an uncontested divorce on the grounds of constructive abandonment." *Id.*

²¹ *Id.*

²² *Id.* at 235, 452 N.Y.S.2d at 802-03.

²³ *See id.* at 233, 452 N.Y.S.2d 802.

²⁴ *Id.* at 239, 452 N.Y.S.2d at 805. It should be noted that although the trial court classified *both* the medical degree and license as marital property, the opinion of the Supreme Court, Appellate Division focused solely upon the medical license, *O'Brien*, 106 A.D.2d at 224, 485 N.Y.S.2d at 549, as did the Court of Appeals of New York. *O'Brien*, 66 N.Y.2d at 580, 489 N.E.2d at 713, 498 N.Y.S.2d at 744.

²⁵ *See O'Brien*, 114 Misc.2d at 241, 452 N.Y.S.2d at 806.

erty subsequent to divorce had recently undergone profound change with the passage of New York's equitable distribution law.²⁶ Justice Daronco, writing for the court, noted that the legislature, by introducing the concept of equitable distribution, cast aside traditional concepts of property and "infused flexibility. . . in the measurement of the rights and obligations of family members upon dissolution of the family unit."²⁷ The trial court further noted that the equitable distribution statute equates "marital partners" with "economic partners" and defines marital property to include all property acquired by either partner during the marriage without regard to the source of the asset.²⁸ In its ruling, the trial court weighed the following factors: Loretta's

²⁶ *Id.* at 237, 452 N.Y.S.2d at 804.

²⁷ *Id.* at 238, 452 N.Y.S.2d at 804.

²⁸ *Id.* at 237-38, 452 N.Y.S.2d at 804-05. The relevant sections of the reformed New York Domestic Relations Law are as follows:

1. Definitions. . . .

1-c. The term "marital property" shall mean all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held, except as otherwise provided in agreement pursuant to subdivision three of this part. Marital property shall not include separate property as hereinafter defined.

. . . .

5. Disposition of property in certain matrimonial actions.

a. Except where the parties have provided in an agreement for the disposition of their property pursuant to subdivision three of this part, the court, in an action wherein all or part of the relief granted is divorce, or the dissolution, annulment or declaration of the nullity of a marriage, and in proceedings to obtain a distribution of marital property following a foreign judgment of divorce, shall determine the respective rights of the parties in their separate or marital property, and shall provide for the disposition thereof in the final judgment.

b. Separate property shall remain such.

c. Marital property shall be distributed equitably between the parties, considering the circumstances of the case and of the respective parties.

d. In determining an equitable distribution of property under paragraph c, the court shall consider:

(1) the income and the property of each party at the time of marriage, and at the time of the commencement of the action;

(2) the duration of the marriage and the age and health of both parties;

(3) the need of a custodial parent to occupy or own the marital residence and to use or own its household effects;

(4) the loss of inheritance and pension rights upon dissolution of the marriage as of the date of dissolution;

(5) any award of maintenance under subdivision six of this part;

(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

substantial monetary contributions to Mich  el's education, the breakdown of the marriage shortly after the completion of Michael's schooling, and the fact that the only asset of any significant value acquired during the marriage was the medical license.²⁹

On appeal, the supreme court, appellate division, reversed the lower court's holding that a professional license is marital property.³⁰ The court reasoned that neither the equitable distribution law nor its legislative history relayed any intent "to vest a proprietary right in one spouse to the other spouse's very person."³¹ Additionally, the court observed that the trial court's distinction between a college degree and a professional license was not in accordance with prior case law.³² The court further cautioned that fixing a professional degree as property opens up the possibility of attachment of creditors' liens, a proposition which would yield "indescribable mischief."³³ On cross appeals, the

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

(7) the liquid or non-liquid character of all marital property;

(8) the probable future financial circumstances of each party;

(9) the impossibility or difficulty of evaluating any 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;. . .

(10) any other factor which the court shall expressly find to be just and proper.

N.Y. DOM. REL. LAW   236 (B) (McKinney Supp. 1980-81).

²⁹ *O'Brien*, 114 Misc.2d at 236, 452 N.Y.S.2d at 803.

³⁰ *See O'Brien*, 106 A.D.2d at 225, 485 N.Y.S.2d at 550.

³¹ *Id.* at 226, 485 N.Y.S.2d at 550. The appellate division stressed the distinction between basic obligations, such as the transfer of marital property, and the grant to one spouse of a percentage of the other spouse's future labors. *Id.* at 227, 485 N.Y.S.2d at 551. The court reasoned that such an interest in future labors is tantamount to ownership in part by a former spouse, herein accomplished "by the fictional partition of the res of [the husband's medical] license." *Id.*

³² *See id.* Throughout its opinion, the trial court made no distinction in utilizing the terms "degree" and "license." *O'Brien*, 114 Misc.2d at 240, 452 N.Y.S.2d at 805.

³³ *O'Brien*, 106 A.D.2d at 227, 485 N.Y.S.2d at 551. In a lengthy dissent, Justice Thompson expressed approval of the trial court's opinion which treated Michael's medical license as marital property. *Id.* at 233, 485 N.Y.S.2d at 556 (Thompson, J.P., concurring in part and dissenting in part). Justice Thompson, joined by Justice Weinstein, considered the trial court's opinion to be a simple facilitation of "the legislative intent underlying the enactment of Domestic Relations Law   236[B][1][c]. . . ." *Id.* In recognizing that marital property "is a purely statutory creation," the dissent noted that sole reliance upon conventional property concepts "is unnecessary and unrealistic." *Id.* at 237, 485 N.Y.S.2d at 558 (Thompson, J.P., concurring in part and dissenting in part).

The dissenting Justices expressed reservations over the speculative and restric-

Court of Appeals of New York reversed the appellate division, holding that a license to practice medicine, acquired during marriage, may be marital property subject to equitable distribution.³⁴ Thus, the court ruled that the contributing spouse may be entitled to an equitable portion of the license, not merely a return of funds advanced.³⁵

For generations, division of marital property in New York and elsewhere was governed by a common-law title theory.³⁶ Upon dissolution of the marriage, a spouse would retain only that property which was held solely in his or her individual name.³⁷ This practice typically resulted in distribution of most marital property to the husband upon divorce, leaving virtually no substantial assets to the wife.³⁸ In response to the disparity implicit in the common-law approach, the New York Legislature enacted an equitable distribution statute in 1980 that was her-

itive aspects of an award based upon future earnings. *Id.* The Justices noted that monetary restraints imposed on a professional by a distributive award effectively eliminate the option of pursuing less financially rewarding occupations. *Id.* Despite their recognition of the problems inherent in distributive awards of this type, however, the dissent asserted that "the dilemma should be dealt with as a valuation problem and should not serve as a basis for erasing a substantive right." *Id.*

³⁴ *O'Brien*, 66 N.Y.2d at 590, 489 N.E.2d at 719-20, 498 N.Y.S.2d at 750-51. The court of appeals further held that there was no indication of fault on Loretta's part sufficient to "shock the conscience of the court" as required in order for fault to be a consideration in equitable distribution. *Id.* at 589-90, 489 N.E.2d at 719, 498 N.Y.S.2d at 750-51.

The court of appeals also ruled that the appellate division did not abuse its discretion in affirming the trial court's grant of counsel fees to Loretta. *Id.* at 590, 489 N.E.2d at 719, 498 N.Y.S.2d at 750. In addressing the appellate division's decision to delete the expert fee award, the court of appeals remanded the issue in light of its determination that Michael's medical license constituted marital property. *Id.* at 590, 489 N.E.2d at 719-20, 498 N.Y.S.2d at 750-51.

³⁵ *Id.* at 587-88, 489 N.E.2d at 719, 498 N.Y.S.2d at 749.

³⁶ N.Y. DOM. REL. LAW § 234(B) (McKinney Supp. 1986) (Scheinkman, 1982 Practice Commentary at 40) ("Until the enactment of the Equitable Distribution Law New York was a 'title' state in which the court was required to award title to property to the spouse who was entitled to it by ordinary property principles.")

³⁷ See Note, *supra* note 1, at 75. Prior to reform of the New York Domestic Relations Law, the husband, as title-holder, typically retained ownership to most of the parties' assets while the wife "upon divorce acquired no rights in any of the property in recognition of her contributions as homemaker, [and] was forced to rely on alimony as her sole means of support." *Id.* See *Weltz v. Weltz*, 35 A.D.2d 208, 210, 315 N.Y.S.2d 150, 152 (App. Div. 1970) (husband, as title-holder to cooperative apartment, had exclusive right to reside there).

³⁸ DiLeo and Model, *A Survey of the Law of Property Disposition In the Tristate Area*, 56 ST. JOHN'S L. REV. 219, 220 n.2 (1982) ("New York courts were powerless to transfer property to which one spouse held title unless the spouse seeking apportionment satisfied the requirement for the imposition of a constructive trust.") (citing *Fischer v. Wirth*, 38 A.D.2d 611, 611-12, 326 N.Y.S.2d 308, 309-10 (App. Div. 1971)).

alded as a sweeping reform of the state's divorce laws.³⁹ The statute, as revised, provided for the equitable distribution of marital property—which was defined as including “all property acquired by either or both spouses during the marriage. . . regardless of the form in which title is held.”⁴⁰ This law embodied the contemporary notion that the marital relationship is an economic partnership that upon dissolution requires “a winding up of the parties’ economic affairs and a severance of their economic ties by an equitable distribution of the marital assets.”⁴¹

Following the enactment of the 1980 statute, considerable litigation ensued with respect to the precise definition of marital property.⁴² Inevitably, the issue arose as to whether an educational degree or professional license was intended by the legislature to be included as marital property for distribution within the mandates of the reformed matrimonial law.⁴³ In attempting to resolve this exceedingly controversial question, New York courts initially relied on traditional property concepts for interpretive guidance.⁴⁴

Within a year of the 1980 reform, the question of whether the newly acquired medical license of a doctor could be considered marital property was addressed in *Lesman v. Lesman*.⁴⁵ At the

³⁹ Governor's Memorandum on Approval of ch. 281, (June 19, 1980), reprinted in 1980 N.Y. Laws 1863.

⁴⁰ N.Y. DOM. REL. LAW § 236(B)(1)(b) (McKinney Supp. 1980-81). See also Foster, *Commentary On Equitable Distribution*, 26 NEW YORK L. SCH. L. REV. 1, 8 (1981) (“The definition of marital property which makes title ownership irrelevant is perhaps the major reform of the new law for, prior to its enactment, New York was one of the six ‘title’ states. . .”).

⁴¹ *O'Brien*, 66 N.Y.2d at 585, 489 N.E.2d at 716, 498 N.Y.S.2d at 747.

⁴² See, e.g., *Majauskas v. Majauskas*, 61 N.Y.2d 481, 463 N.E.2d 15, 474 N.Y.S.2d 699 (1984) (present value of vested rights in noncontributory pension plan found to be marital property subject to equitable distribution); *Wood v. Wood*, 119 Misc.2d 1076, 465 N.Y.S.2d 475 (Sup. Ct. 1983) (appreciation of separate assets during marriage is marital property); *Nehorayoff v. Nehorayoff*, 108 Misc.2d 311, 437 N.Y.S.2d 584 (N.Y. Sup. Ct. 1981) (husband's interest in closely-held corporation found to be distributable marital property).

⁴³ *Lesman v. Lesman*, 110 Misc. 2d 815, 442 N.Y.S.2d 955 (Sup. Ct. 1981), modified and aff'd, 88 A.D.2d 153, 452 N.Y.S.2d 935 (App. Div.), appeal dismissed, 57 N.Y.2d 956 (1982) (license to practice medicine).

⁴⁴ See *infra* notes 45-54 and accompanying text.

⁴⁵ 110 Misc.2d 815, 442 N.Y.S.2d 955 (N.Y. Sup. Ct. 1981). The facts of *Lesman* are substantially similar to those in *O'Brien* in that the parties were married in New York in 1971 and left for Guadalajara, Mexico shortly thereafter, where the husband studied medicine for three and a half years. *Lesman v. Lesman*, 88 A.D.2d at 154, 452 N.Y.S.2d at 936 (App. Div. 1982), appeal dismissed, 57 N.Y.2d 956 (1982). Significantly, however, Mrs. Lesman was not employed throughout this time pe-

trial level, the *Lesman* court concluded that a doctor's license to practice medicine has "no monetary value per se," is not a salable commodity, and is completely valueless to anyone other than its holder.⁴⁶ The court noted, instead, that the increased earnings the license afforded its holder translated, upon divorce, into larger maintenance and support payments to the non-licensed spouse.⁴⁷ Accordingly, the license was held not to be property subject to equitable distribution.⁴⁸

The trial court's ruling was affirmed by the appellate division, where once again, traditional property concepts provided the basis for excluding professional degrees from the classification of marital property.⁴⁹ The appellate division in *Lesman* found it significant that neither professional licenses nor educational degrees carry an exchange or transfer value on the open market, are not inheritable and terminate upon the holder's death.⁵⁰ Moreover, the court noted that both are incapable of assignment, sale, transferral, or conveyance and may not be acquired simply in exchange for money.⁵¹ The court further noted that because these intellectual achievements merely contribute to the potential for future property acquisitions, they do not carry familiar attributes of property.⁵² The *Lesman* court observed that the classification of an education or a degree as property also has the effect of treating future earning capacity, an unvested right, as property.⁵³ In a final note of caution, the *Lesman* court focused on the potential for flagrant inequities which would result from a distribution awarded on the basis of "speculative expectation of enhanced future earnings" which, unlike maintenance awards, are not modifiable "to meet future realities."⁵⁴

riod. *Lesman*, 88 A.D.2d at 154, 452 N.Y.S.2d at 936-37. Upon returning to New York, Mrs. Lesman earned a small weekly salary which was not applied toward her husband's expenses. *Id.*

⁴⁶ *Lesman*, 110 Misc. 2d at 816, 442 N.Y.S.2d at 957.

⁴⁷ *Id.* at 817, 442 N.Y.S.2d at 957.

⁴⁸ *Id.*

⁴⁹ *Lesman*, 88 A.D.2d at 157, 452 N.Y.S.2d at 938. In affirming *Lesman*, the appellate court acknowledged the Supreme Court of Westchester County's recent decision in *O'Brien* which held that "a medical education is property subject to equitable distribution." *Id.* at 155 n.1, 452 N.Y.S.2d at 937 n.1.

⁵⁰ *Id.* at 157, 452 N.Y.S.2d at 938 (quoting *In re Marriage of Graham*, 194 Colo. 429, 432, 574 P.2d, 75, 77 (1978)).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *See id.*

⁵⁴ *Id.*

In *Litman v. Litman*,⁵⁵ however, the New York Supreme Court Appellate Division, in deciding whether a law practice was marital property, gave little effect to traditional property concepts.⁵⁶ Rather, the *Litman* court focused on the New York Domestic Relations Law's language relevant to marital property and its distribution.⁵⁷ The *Litman* court acknowledged that the legislature's enactment of the equitable distribution law was in recognition of marriage as an economic partnership.⁵⁸ The court noted that the amended statute mandated distribution of property accumulated during marriage in accordance with the parties' individual needs and circumstances.⁵⁹ In conformance with this goal, the legislature fashioned the "distributive award"⁶⁰ to accommodate circumstances where an actual division of marital assets between spouses is "impracticable, impossible or illegal."⁶¹ Relying on the statutory language, the *Litman* court asserted that the distributive award is intended to be invoked where marital assets are so intertwined with a spouse's very livelihood that they are incapable of undergoing veritable distribution.⁶² Thus, despite the inherent difficulty of valuing a law practice, the *Litman* court, in "the face of the clear intent of the Legislature," held that a law practice was an appropriate target for a distributive award.⁶³

In contrast, the New York Appellate Division in *Conner v. Conner*⁶⁴ refused to treat an academic degree as property subject to equitable distribution.⁶⁵ The *Conner* court discussed exten-

⁵⁵ 93 A.D.2d 695, 463 N.Y.S.2d 24 (App. Div. 1983), *aff'd*, 61 N.Y.2d 918, 463 N.E.2d 34, 474 N.Y.S.2d 718 (1984).

⁵⁶ *Id.* at 696, 463 N.Y.S.2d at 25.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ "Distributive award" is defined as:

payments provided for in a valid agreement between the parties or awarded by the court, in lieu of or to supplement, facilitate or effectuate the division or distribution of property where authorized in a matrimonial action, and payable either in a lump sum or over a period of time in fixed amounts. Distributive awards shall not include payments which are treated as ordinary income to the recipient under the provisions of the United States Internal Revenue Code.

N.Y. DOM. REL. LAW § 236(B)(1)(b) (McKinney Supp. 1980-81).

⁶¹ *Litman*, 93 A.D.2d at 696, 463 N.Y.S.2d at 25 (citation omitted).

⁶² *See id.*

⁶³ *Id.*

⁶⁴ 97 A.D.2d 88, 468 N.Y.S.2d 482 (App. Div. 1983).

⁶⁵ *Id.* at 89, 468 N.Y.S.2d at 484. In 1971, Robert and Elaine Conner married in West Germany. *Id.* Robert was a recently discharged captain in the United States Army and Elaine was a teacher, holding a master's degree in education. *Id.* Elaine worked full time for four years of the six year marriage while her husband attended

sively the reformed matrimonial law's virtues, and lauded its framers' foresight in conferring flexibility on the courts to establish a form of appropriate compensation to the dependent spouse in a matrimonial action.⁶⁶ Nevertheless, the court did not agree that the statute justified the imposition of a "judgment debt" upon a percentage of the husband's future earnings, regardless of the extent of his wife's efforts toward attainment of his degree.⁶⁷ The *Conner* court further observed that granting the wife "a share in her husband's future earnings. . . on the assumption that he will maximize his potential" would frustrate "the basic assumptions and operation of the Equitable Distribution Law."⁶⁸

A year after *Conner*, the New York Appellate Division decided in *Cohen v. Cohen*⁶⁹ that a partnership interest in an accounting firm was marital property and was a proper subject for a distributive award.⁷⁰ Unlike previous cases concerning whether professional interests constitute marital property, Richard Cohen had been established professionally at the time of his marriage in 1970.⁷¹ Five years later, however, Richard became a partner in a prestigious accounting firm in which he had accumulated a considerable number of shares of ownership by the time the couple divorced in 1981.⁷² The *Cohen* court relied upon the *Litman* decision in holding that Janet Cohen was entitled to fifty percent of

school. *Id.* During the marriage, Robert earned a bachelor's degree at the University of California at Santa Barbara and two master's degrees, in public administration and business administration, from Harvard University. *See id.* at 89-90, 468 N.Y.S.2d at 485. In the divorce action, Elaine Conner sought to have Robert's masters degrees declared marital property, since the parties owned no real property or other assets of substantial value. *Id.* at 90, 468 N.Y.S.2d at 485.

⁶⁶ *Id.* at 100-01, 468 N.Y.S.2d at 491-92.

⁶⁷ *Id.* at 102, 468 N.Y.S.2d at 492.

⁶⁸ *Id.* In concluding that Robert Conner's academic degree was not marital property subject to distribution, the *Conner* court emphasized:

there is no authority in the Equitable Distribution Law to impose upon her husband a judgment debt—not merely a support obligation—of half or some other percentage of the present value of his future services under the degree, no matter how much his skills have been enhanced by her efforts during their marriage.

Id.

⁶⁹ 104 A.D.2d 841, 480 N.Y.S.2d 358 (App. Div. 1984), *appeal dismissed*, 64 N.Y.2d 773, 475 N.E.2d 457 (1985).

⁷⁰ *Id.* at 842, 480 N.Y.S.2d at 361.

⁷¹ *Id.* at 843, 480 N.Y.S.2d at 361. It should be noted that Richard's interest in the accounting firm was not the Conner's sole distributable asset. At the time of divorce, the Cohen's home in Scardale, New York was among their accumulated marital assets. *Id.* at 842, 480 N.Y.S.2d at 360.

⁷² *Id.* at 843, 480 N.Y.S.2d at 361.

her husband's partnership interest acquired during the marriage.⁷³ This award was deemed particularly appropriate in light of the considerable contributions she made to the marriage in her dual capacities as wage earner and homemaker for their family.⁷⁴

Notwithstanding the language set forth in the equitable distribution law, New York's lower courts continued to be embroiled in disputes as to whether intangibles such as professional licenses, educational degrees, and business interests constituted marital property.⁷⁵ The apparent contradiction between the *Lesman* and *Litman* rulings encouraged confusion and a wealth of ambivalence in instances concerning distribution of intangible assets.⁷⁶ With no consistent case law to serve as guidance in resolving this exceedingly controversial question, the *O'Brien* case was appealed to New York's highest court.⁷⁷

The *O'Brien* majority began its analysis by noting that the Domestic Relations Law is predicated upon the notion that spouses acquire an equitable interest in "things of value" accumulated during the marriage.⁷⁸ The court further recognized that the New York Legislature deliberately overstepped traditional property notions by broadly defining marital property to include "all property acquired by either or both spouses during the marriage. . . regardless of the form in which title is held."⁷⁹ In deferring to the statute's language, the court of appeals rejected

⁷³ *Id.* at 842-43, 480 N.Y.S.2d at 361.

⁷⁴ *Id.* at 843, 480 N.Y.S.2d at 361.

⁷⁵ See generally Note, *Property Distribution in Domestic Relations Law: A Proposal for Excluding Educational Degrees and Professional Licenses from the Marital Estate*, 11 HOFSTRA L. REV. 1327, 1330, 1341 (1983) (noting lack of uniformity among courts deciding whether intangibles are marital property).

⁷⁶ See *Kutanovski v. Kutanovski*, 109 A.D.2d 822, 486 N.Y.S.2d 338 (Sup. Ct. 1985), *rev'd*, 120 A.D.2d 571, 502 N.Y.S.2d 218 (App. Div. 1986). In *Kutanovski*, the appellate division held that the lower court erred in ruling that a license to practice medicine was marital property. *Id.* at 824, 486 N.Y.S.2d at 339. The *Kutanovski* court, relying upon the *O'Brien* appellate decision as well as both *Conner* and *Lesman*, determined that a distributive award to Mrs. Kutanovski for ten percent of the projected value of her husband's medical license over ten years was improper. *Id.* at 823-24, 486 N.Y.S.2d at 339. The original distributive award, however, was later reinstated in 1986 "[i]n light of the Court of Appeals' recent determination [in the *O'Brien* case] that a license to practice medicine obtained by one partner during marriage is marital property." *Kutanovski v. Kutanovski*, 120 A.D.2d 571, 572, 502 N.Y.S.2d 218, 219 (App. Div. 1986).

⁷⁷ *O'Brien*, 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743.

⁷⁸ *Id.* at 583, 489 N.E.2d at 715, 498 N.Y.S.2d at 746.

⁷⁹ *Id.* (quoting N.Y. DOM. REL. LAW § 236(B)(1)(c),(d) (McKinney Supp. 1980-81)).

Michael O'Brien's argument that his license was merely representative of his potential for future earnings.⁸⁰ Judge Simons, writing for the majority, noted that marital property is a unique " 'statutory creature [having] no meaning whatsoever during the normal course of the marriage and arises full-grown, like Athena, upon the signing of a separation agreement or the commencement of a matrimonial action.' " ⁸¹ Consequently, the court concluded that it was completely irrelevant that traditional common law property notions are not consonant with the innovative concept known as marital property.⁸²

Focusing on the language of the Domestic Relations Law, the *O'Brien* court held that a spouse's "interest in a profession or professional career potential is marital property."⁸³ The court observed that such an interest exists whether it is manifested by direct or indirect contributions from the non title-holding spouse and may include intangible contributions made incident to the role of a homemaker.⁸⁴ Judge Simons commented that few endeavors occur during a marriage which better exemplify the kind of united effort for which the statute's economic partnership theory was intended to apply than the joint contributions made in pursuit of one spouse's attainment of a professional license.⁸⁵ The court of appeals interpreted the legislature's express reference to contributions by one spouse to the other spouse's profession or career potential as an acknowledgment that such contributions represent investments in the marital partnership.⁸⁶

⁸⁰ See *id.* Michael O'Brien relied primarily upon cases from other jurisdictions in support of the theory that his medical license should not be considered marital property, and he further asserted that a license is not consistent with common law property concepts. *Id.* These arguments were refuted as the court of appeals noted that the language of each state's particular statute, along with its legislative history, controls for purposes of interpreting the boundaries of "marital property." *Id.*

⁸¹ *Id.* (quoting Florescue, "Market Value", *Professional Licenses and Marital Property: A Dilemma in Search of a Horn*, 1982 N.Y. ST. B.A. FAM. L. REV. 13).

⁸² *Id.* (citation omitted).

⁸³ *Id.* at 584, 489 N.E.2d at 716, 498 N.Y.S.2d at 747.

⁸⁴ *Id.* The *O'Brien* court noted that:

[w]orking 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.

Id. at 585, 489 N.E.2d at 716, 498 N.Y.S.2d at 747.

⁸⁵ *Id.*

⁸⁶ *Id.* at 585-86, 489 N.E.2d at 716, 498 N.Y.S.2d at 747.

Accordingly, the court reasoned that a professional license, as a product of the parties' joint efforts, is rightfully classified as marital property.⁸⁷

The majority asserted that the appellate division's holding erroneously limited the statute's application solely to established professional practices, and rendered unaffected a license held by a novice professional.⁸⁸ Judge Simons could fathom no reason to confine the statute's language exclusively to existing practices since such a limitation would affect a distributive award for valuation purposes only.⁸⁹

The court of appeals further rejected the appellate court's reasoning that Michael's license was not marital property because the license had no exchange value, and was incapable of sale, assignment, or transfer.⁹⁰ The *O'Brien* court faulted the appellate court's reasoning on two bases.⁹¹ First, it disregarded the fact that, regardless of traditional property notions, the question of whether a professional license constitutes marital property is governed by the statute's language.⁹² Second, the court of appeals posited that a professional license could warrant consideration as property even outside the statute's context.⁹³ Judge Simons noted that a professional license, by its very nature, is clearly a valuable property right that may only be revoked when subjected to the mandates of due process.⁹⁴ Therefore, the Judge concluded that the absence of traditional attributes of property is irrelevant to the classification of a professional license as marital property pursuant to the statutory definition.⁹⁵

The majority dismissed Michael's suggestion that alternative remedies, such as a rehabilitative maintenance award or reim-

⁸⁷ *Id.* at 586, 489 N.E.2d at 717, 498 N.Y.S.2d at 748.

⁸⁸ *Id.* at 586, 489 N.E.2d at 716-17, 498 N.Y.S.2d at 747-48. The court noted that the appellate division held the relevant provisions of the Domestic Relations Law were not applicable to the "license held by a professional who has yet to establish a practice but only to a going professional practice." *Id.*, 489 N.E.2d at 716, 498 N.Y.S.2d at 747.

⁸⁹ *Id.*, 489 N.E.2d at 717, 498 N.Y.S.2d at 748.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* The *O'Brien* court accordingly held that it is of no consequence that the license's basic characteristics depart from traditional property concepts. *Id.*

⁹³ *Id.*

⁹⁴ *Id.* See also *Bender v. Board of Regents*, 262 A.D. 627, 631, 30 N.Y.S.2d 779, 784 (App. Div. 1941) ("The right to practice dentistry is, like the right to practice any other profession, a valuable property right, in which, under the Constitution and laws of the State, one is entitled to be protected and secured.").

⁹⁵ *O'Brien*, 66 N.Y.2d at 586, 489 N.E.2d at 717, 498 N.Y.S.2d at 748.

bursement for direct monetary contributions, was inconsistent with the notion of an economic partnership implicit in the statute.⁹⁶ The court reasoned that such measures would retain the undesirable ties of dependence and defeat the underlying purposes of equity and independence the legislature had sought to achieve through the introduction of equitable distribution.⁹⁷ In recognizing that maintenance may be subject to termination upon the recipient's remarriage, the majority observed that a non title-holding spouse may never receive adequate compensation for the contributions he or she made and would effectively be penalized for choosing to remarry.⁹⁸ While acknowledging the obstacles inherent in valuation, the court nevertheless commented that valuing a professional license would be no more difficult than computing tort damages.⁹⁹

In his concurrence, Judge Meyer expressed concern over the potential inequity implicit in the distributive award of a professional license made while its holder is still in the formative stages of his profession.¹⁰⁰ The Judge noted that while an equity court normally is empowered with the right to alter a child support or maintenance award where circumstances warrant modification, the Domestic Relations Law, however, implies that a distributive award may not undergo subsequent alteration.¹⁰¹ Of particular

⁹⁶ *Id.* at 587, 489 N.E.2d at 717, 498 N.Y.S.2d at 748.

⁹⁷ *Id.*

⁹⁸ *Id.* The *O'Brien* court borrowed from language used by the court in *Wood v. Wood*, 119 Misc.2d 1076, 465 N.Y.S.2d 475 (Sup. Ct. 1983), which observed that the goal of equitable distribution focuses on the recognition that upon termination of marriage, both spouses are entitled to share in the marital assets accumulated throughout its duration because they represent " 'the capital product of what was essentially a partnership entity.' " *O'Brien*, 66 N.Y.2d at 587, 489 N.E.2d at 717, 498 N.Y.S.2d at 748 (quoting *Wood*, 119 Misc.2d at 1079, 465 N.Y.S.2d at 477).

⁹⁹ *O'Brien*, 66 N.Y.2d at 588, 489 N.E.2d at 718, 498 N.Y.S.2d at 749. The *O'Brien* court explained that while valuation is difficult, computation of such awards does not differ from fashioning tort damages in wrongful death cases or calculating diminished earning capacity resulting from injury. *Id.* Valuing a license, the *O'Brien* court asserted, poses problems different only in degree from those presented in valuing professional practices for distributive awards. *Id.* See, e.g., *Arvantides v. Arvantides*, 64 N.Y.2d 1033, 478 N.E.2d 199, 489 N.Y.S.2d 58 (1985) (husband's dental practice valued for purposes of distributive award); *Billington v. Billington*, 111 A.D.2d 203, 489 N.Y.S.2d 89 (App. Div. 1985) (wife permitted expert's fees for purposes of calculating value of husband's medical practice). See also *Nehorayoff v. Nehorayoff*, 108 Misc.2d 311, 437 N.Y.S.2d 584 (Sup. Ct. 1981) (husband's interest in closely-held corporation valued by capitalizing net earnings).

¹⁰⁰ *O'Brien*, 66 N.Y.2d at 591, 489 N.E.2d at 720, 498 N.Y.S.2d at 751 (Meyer, J., concurring).

¹⁰¹ *Id.* (citing *People v. Scanlon*, 11 N.Y.2d 459, 462, 184 N.E.2d 302, 303, 230 N.Y.S.2d 708, 709 (1962)).

concern to Judge Meyer was the manner in which to avoid the situation where a professional still in training, yet not committed to a career choice, "may be locked into a particular kind of practice simply because the monetary obligations imposed by the distributive award. . .leaves him or her no alternative."¹⁰²

Judge Meyer commented that since the expert's valuation is admittedly based upon a considerable degree of speculation, projections range from whether Dr. O'Brien will earn what the average surgeon earns to whether he will live to the age of sixty-five.¹⁰³ Judge Meyer averred that the equitable distribution provision of the reformed divorce law was intended to infuse flexibility.¹⁰⁴ Accordingly, the Judge urged that where assumptions as to one's professional success prove incorrect, it should be possible for courts to revise distributive awards consistent with the pliance afforded child support and maintenance decrees.¹⁰⁵

The *O'Brien* decision displays a radical departure from traditional reasoning and demonstrates a strong commitment by New York's highest court to construe the State's Domestic Relations Law in accordance with its original purpose.¹⁰⁶ The major thrust of the *O'Brien* holding centers on the notion that "marital property" is a recent statutory creation which completely departs from established common law property concepts.¹⁰⁷ The statutory definition of marital property, therefore, was properly granted deference by the Court of Appeals in its conclusion that the legislature intended professional licenses to be included as distributable marital property.¹⁰⁸

One problem with apportioning a professional license pursuant to a monetary distributive award, as mentioned in the concurrence, stems from the concept of irrevocable finality implicit in such awards. This characteristic presents a serious question as to whether the distribution is in fact "equitable" at all. The at-

¹⁰² *Id.*

¹⁰³ *Id.* at 591-92, 489 N.E.2d at 720, 498 N.Y.S.2d at 751 (Meyer, J., concurring). When questioned as to whether his valuation of the medical license was speculative in nature, Loretta's expert candidly admitted that his assumptions and calculations necessarily included a degree of conjecture. *Id.*

¹⁰⁴ *Id.* at 592, 489 N.E.2d at 720, 498 N.Y.S.2d at 751 (Meyer, J., concurring).

¹⁰⁵ *Id.* Judge Meyer asserted that the right to reconsideration of an award would not be abused due to fabricated cases since a nonlicensed spouse would be able to seek reinstatement of the original award plus counsel fees should the alleged circumstances upon which an award is based turn out to have been "illusory or feigned." *Id.*, 489 N.E.2d at 721, 498 N.Y.S.2d at 752 (Meyer, J., concurring).

¹⁰⁶ *See id.* at 583, 489 N.E.2d at 715, 498 N.Y.S.2d at 746.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

tendant problems with valuation pose a veritable obstacle course in the path of achieving genuine equity in distributions of marital assets.¹⁰⁹ The future of a professional on the threshold of his career is at best nebulous, and in the worst scenario, wrought with uncharted woes which may seriously impede satisfaction pursuant to a distributive award. Since the distribution of a newly acquired license is "predicated upon the unknown",¹¹⁰ any estimation as to its present value is purely speculative and, as such, susceptible to a tremendous margin of error. The award assumes that the professional license or degree holding spouse will either maximize his potential or achieve a level of financial success commensurate with the "average" person in his field.¹¹¹ Although "average" as the basic measurement purports to be both a conservative and equitable point of reference, such a standard becomes manifestly unfair to roughly half of the professionals who are neither at the median nor "above average." Basing a distributive award on such an imprecise standard fosters inequity and places an overwhelming burden on the novice professional whose career future remains essentially hazy.¹¹²

Further, the statute as written invites creative maneuvering on the part of a professional for whom the conclusion of both his

¹⁰⁹ See DaSilva, *O'Brien v. O'Brien Reviewed By the Doctor's Attorney*, New York L.J., Jan. 27, 1986, at 1, col. 3. Willard DaSilva, attorney for Michael O'Brien, took exception with the *O'Brien* court's opinion that analogized projecting future potential earnings of a professional to computations made in personal injury, wrongful death, and medical malpractice actions. *Id.* at 4, col. 3. There is, cautioned DaSilva, a major hazard overshadowing a "guesstimate" made of an individual's future earnings that does not burden defendants in cases where tort damages are based on estimated calculations. *Id.* DaSilva stated that the issue of who must absorb the loss becomes critical when considering the following:

In tort actions, there is usually an insurance fund which is available to pay claims based upon the anticipated lost earnings of the injured party. If a mistake is made by overestimating lost earnings, the fund is depleted a little more rapidly. As the fund becomes depleted, the insurance company is in a position to, and does, increase its premiums to spread the risk over many thousands of policyholders who replenish the fund. The insurance company loses no money because it has a means to recoup its losses based upon the higher claims being paid. On the other hand, Dr. O'Brien, or anyone similarly situated, would have no recourse if there has been an overestimation of his future earnings. He has no fund of money which can be replenished by others. He either earns what the trial judge anticipates he would earn, or he is in trouble, with no way to alter the determination or to pass the losses onto anyone else.

Id.

¹¹⁰ *Id.*

¹¹¹ See *id.* at 4, col. 2-4.

¹¹² *O'Brien*, 66 N.Y.2d at 591, 489 N.E.2d at 702, 498 N.Y.S.2d at 751 (Meyer, J., concurring).

education and marriage coincide. The Domestic Relations Law classifies marital property as "all property acquired. . .before the execution of a separation agreement or the commencement of a matrimonial action."¹¹³ Therefore, a shrewd professional facing graduation and divorce concurrently may avoid having his license included as marital property simply by orchestrating the commencement of the divorce action so that the license is obtained after the date of filing.¹¹⁴

Another area of potential inequity involves the situation where a professional practice has developed over time to some degree of profitability. A problem arises in determining when the non title-holding spouse is entitled to a share of both the professional practice as well as the license itself. The facts of *O'Brien* do not lend themselves to an examination of this issue. Consequently, it remains unclear at what point the courts should render a professional license irrelevant for distribution purposes where a profitable professional practice, utilizing the potential of the professional license itself, has been developed.

The *O'Brien* decision unquestionably has stirred a host of unexplored problems relative to valuation of marital assets, actual spouse contribution, award modification and countless other delicate marital issues. The New York Court of Appeals, however, has resolved the critical issue that a professional license to practice medicine acquired during marriage may be considered marital property subject to equitable distribution in accordance with New York's revised Domestic Relations Law.¹¹⁵ Though future litigation will resolve the many crucial ancillary issues necessary to create a truly equitable approach to such apportionment of assets, the momentous issue has clearly been determined.

Despite its seemingly radical overtones, the *O'Brien* decision represents a distinctly conventional view of the marital institution. This is demonstrated by the New York Court of Appeals' genuine respect for both parties' interests and its commitment toward facilitating the partnership aspects of the couple's marriage.¹¹⁶ The *O'Brien* decision balances both tangible and intangible contributions of either spouse toward the realization of that which was launched as a common goal: the acquisition of a pro-

¹¹³ See *supra* note 28 (definition of marital property).

¹¹⁴ DaSilva, *supra* note 109, at 4, col. 2.

¹¹⁵ *O'Brien*, 66 N.Y.2d at 580-81, 489 N.E.2d at 713, 498 N.Y.S.2d at 744.

¹¹⁶ See *id.* at 585, 489 N.E.2d at 716, 498 N.Y.S.2d at 747.

fessional license.¹¹⁷ Loretta O'Brien was not merely reimbursed for her monetary contributions to Michael's medical education. Rather, she was awarded an equitable portion of the asset generated as a direct result of her varied efforts and sacrifices towards its attainment.¹¹⁸ Michael and Loretta O'Brien were deemed "business partners," an arrangement which dictates that upon dissolution of their partnership, each shall retain an equitable share of the assets acquired—not simply collect the value of services rendered. Thus, the *O'Brien* decision obviates the loss of esteem that the working spouse faces as a result of being relegated "to the role of an alternative to a student loan"¹¹⁹ and counteracts calamitous regrets due to forfeited opportunities.

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¹¹⁷ See Skoloff, *A Second Look At Professional Degrees: Are They Now Marital Property?*, Nat'l L. J., April 7, 1986, at 28, col. 3. Gary Skoloff commented that the *O'Brien* court's treatment of a professional license as marital property

appears to be the correct approach where it is limited to the career threshold spouse. Where there are no assets available for equitable distribution, treatment of the professional degree as property seems the only remedy that adequately compensates the supporting spouse and allows the wage-earner spouse to reap the fruits of their investment. The result comports with the original expectations of both parties, since the usual testimony results around a collective decision that one of them should pursue a particular career goal so both will benefit in the future.

Id. at 29, col.1.

¹¹⁸ *O'Brien*, 66 N.Y.2d at 585-86, 489 N.E.2d at 716, 485 N.Y.S.2d at 747.

¹¹⁹ *O'Brien*, 106 A.D.2d at 239, 485 N.Y.S.2d at 559 (Thompson, J.P., concurring in part and dissenting in part).