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Cover Page Footnote

30-1

FAKING EQUITY: A CRITIQUE OF THE NEW YORK EQUITABLE DISTRIBUTION STATUTE AS APPLIED TO LICENSES AND DEGREES UNDER THE *O'BRIEN* DECISION

*Nicole Giannakis**

I. INTRODUCTION

The landmark decision of *O'Brien v. O'Brien*¹ attempted to reform New York State's interpretation of divorce laws and its underlying policy.² This decision determined that a spouse's professional license could constitute marital property if it is obtained during the marriage and, if so, would be subject to equitable distribution.³ New York enacted equitable distribution in order to remedy some of the inequalities that existed under former divorce laws.⁴ This Comment seeks to address two issues that have resulted from the *O'Brien* decision being decided in the context of the Equitable Distribution Statute, which include (1) the difficulty of placing a value on a license and degree and (2) the resistance of trial courts to granting adequate awards based on the appraised values of licenses and degrees, despite the intent of the statute; both of which have resulted in the statute being inequitable. This Comment proposes that there is a need for the legislature to create more uniform rules of valuing and granting

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¹ 489 N.E.2d 712 (N.Y. 1985).

² Ira Mark Ellman, *O'Brien v. O'Brien: A Failed Reform, Unlikely Reformers*, 27 PACE L. REV. 949, 949 (2007).

³ *O'Brien*, 489 N.E.2d at 713.

⁴ David Kaufman, *The New York Equitable Distribution Statute: An Update*, 53 BROOK. L. REV. 845, 845 (1987).

awards based on attained licenses and degrees.

Prior to the Equitable Distribution Statute, the title theory approach was used to distribute property upon divorce.⁵ The Equitable Distribution Statute views marriage as an economic partnership and distributes property accordingly,⁶ in an attempt to remedy the unfairness.⁷ Although *O'Brien* sought to minimize the inequality of previous divorce methods,⁸ it also created problems in its application due to the inability to place a proper valuation on the future return of an attained license or degree.⁹ Part II of this Comment provides a general history of divorce law and the enactment of the Equitable Distribution Statute in New York; Part III discusses the precedent established by *O'Brien* and its expansion; Part IV discusses the circumstances in which a license or degree may be subject to equitable distribution and the reasons why they fail in practice; Part V discusses the various methods of valuating degrees and licenses, and the imprecise task of obtaining an accurate valuation; Part VI emphasizes the use of judicial discretion in granting these rewards, as well as provides some empirical evidence to prove the effects of such discretion; Part VII discusses the problems of a license or degree that is subject to a distributive award when it is not subject to modification; Part VIII explores how other states classify license and degrees and their approach to distributing awards; Part IX makes a proposal for

⁵ *O'Brien*, 489 N.E.2d at 716; see also Ellman, *supra* note 2, at 950 (explaining the title theory as a method used by most states prior to the 1960's, which focused on the name in which the property's title was held in determining allocation of property in divorce actions).

⁶ *O'Brien*, 489 N.E.2d at 717; see Deborah A. Batts, *Remedy Refocus: In Search of Equity in 'Enhanced Spouse/Other Spouse' Divorces*, 63 N.Y.U. L. REV. 751, 756 (1988) ("In equitable distribution jurisdictions, the question is no longer who owns the property [sic], but rather, what stake or right each spouse has in the property. Marriage is seen as a 'joint enterprise' or 'economic partnership' and courts are free to distribute the parties' accumulated assets as the equities of each case require, not solely according to who holds legal title.").

⁷ *O'Brien*, 489 N.E.2d at 716.

⁸ See Ellman, *supra* note 2, at 950 (stating that title theory awards created a large disparity of property distribution between husband and wife because most title to property was held in the husband's name; alimony awards were discretionary, resulting in unfair awards and failing to provide "a satisfactory substitute for property share"); see also Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621, 624 (1991) (suggesting that alimony was infrequently awarded and often went unpaid and if alimony was awarded it was "in inadequate amounts, and for inadequate periods of time").

⁹ Ellman, *supra* note 2, at 981 ("*O'Brien* has made it impossible for New York to follow the national trend toward divorce law that presumes marital property be divided equally. The division of marital property in New York must instead involve time-consuming and expensive inquiries into the conduct of the parties' marriage.").

change in the current New York treatment of licenses and degrees.

II. HISTORICAL PERSPECTIVE ON PROPERTY DIVISION IN DIVORCE ACTIONS

Before the 1960's, the "most important factor in allocating property" upon divorce was title.¹⁰ Upon the dissolution of marriage, any earnings and property held in a single spouse's name was the named spouse's as a matter of law.¹¹ This usually resulted in disparate awards between men and women because men usually held title in most property.¹²

In an effort to reduce these disparities the English concept of alimony¹³ was introduced, which required the husband to pay installments on a weekly or monthly basis to his former wife.¹⁴ Alimony became subject to criticism because it was infrequently awarded and, if bestowed, was difficult to collect.¹⁵ In addition, some "feminists and women's advocates" sought to reform alimony because it "perpetuated traditional notions of women as dependents and failed to recognize the value of a wife's contributions as a homemaker and parent."¹⁶ They also argued that alimony seemed outdated based on the increasing amount of women in the workforce.¹⁷ Most importantly, alimony did not address the underlying issue of property distribution meaning that although the wife received some type of relief, there was still no resolution to the inequity of property distribution upon divorce.¹⁸

¹⁰ *Id.* at 950.

¹¹ *Id.*

¹² *Id.*

¹³ See Garrison, *supra* note 8, at 626 (explaining that the concept of alimony "derives from the practices of English ecclesiastical courts," and was awarded to the wife based predominantly on unjust enrichment); see also *id.* (stating that it was believed that alimony should only be granted if the husband was at fault for the dissolution as a means of "requiring him to fulfill his marital support obligation").

¹⁴ Ellman, *supra* note 2, at 950.

¹⁵ Garrison, *supra* note 8, at 624.

¹⁶ *Id.* at 630.

¹⁷ *Id.*; see also Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women's Rights and Family Law in the United States During the Twentieth Century*, 88 CALIF. L. REV. 2017, 2023 (2000) (noting that the Civil War perpetuated the movement of women into the workforce as women were needed as teachers and nurses).

¹⁸ Ellman, *supra* note 2, at 950.

A. The Emergence of Equitable Property Distribution and its Rationale

During the mid-1960s there was a sharp increase in divorce rates, which came with a need to reform divorce laws.¹⁹ As a result, some states began to incorporate “equitable remedies to soften the English rules.”²⁰ Furthermore, reforms in allocation of property claims were a more appropriate solution to remedying these, as opposed to reforms to current alimony laws, because they were more reliable based on their finality.²¹ Allocation was also easier to enforce because it permitted the spouse to attach and seize other property to satisfy his or her judgment.²²

Reformers turned to the “ready model” of community property in establishing the concept of equitable distribution.²³ Community property is a concept that treats all property earned during the marriage as joint property, regardless of whom holds title to the property.²⁴ Most states, including New York, did not accept this strict model of “equal property division” because a more flexible approach that allowed for individual treatment of cases was preferred.²⁵ New York instead focused on “equitable property distribution” and began to determine what constitutes marital property and how it should be valued and allocated between parties.²⁶

B. New York’s Enactment of Equitable Distribution Law and the General Laws Regarding Property in Divorce Actions

In July of 1980, the New York legislature enacted the Equita-

¹⁹ *Id.* at 951; see also W. Bradford Wilcox, *The Evolution of Divorce*, 1 NAT’L AFFAIRS 81, 82 (2009) (attributing the rise of the divorce rate to the “introduction of no-fault divorce,” “[t]he sexual revolution,” the feminist movement, “the anti-institutional tenor,” and “the psychological revolution . . . which was itself fueled by a post-war prosperity”).

²⁰ Ellman, *supra* note 2, at 951; see also Garrison, *supra* note 8, at 630 (“Alimony thus was nowhere abolished, although many states enacted new standards that emphasized the use of alimony for transitional, ‘rehabilitative’ purposes to limit its use and duration.”).

²¹ Ellman, *supra* note 2, at 951.

²² *Id.*

²³ *Id.*

²⁴ *Id.*; see also Garrison, *supra* note 8, at 628 (stating that the difference between community property and equitable distribution is that “equitable property distribution applied only at divorce; in an intact marriage, legal title prevailed”).

²⁵ Garrison, *supra* note 8, at 631.

²⁶ *Id.*

ble Distribution Statute in an attempt to ensure a fair distribution of marital property upon dissolution of the marriage, which is premised on an economic partnership theory.²⁷ The statute was meant to consider both parties' "contributions . . . [to the marriage] as . . . spouse[s,] . . . wage earner[s] and homemaker[s]."²⁸ Thus, it takes into account "both direct and indirect contributions" of each spouse.²⁹ The Equitable Distribution Statute shifts from the concept of granting assets due to necessity, to a theory based on equity and fairness because the "assets represent the capital product of what was essentially an economic partnership."³⁰

New York's Domestic Relations Law (DRL) categorizes property into two groups to determine distribution upon divorce: separate property and marital property.³¹ The statute's definition of separate property is an express and infinite listing, which includes property that was acquired before marriage, property that was acquired by descent or gift from a third party, compensation from personal injury claims, "property acquired in exchange for or the increase in value of separate property" unless the appreciation was due to contributions of the spouse, and property that has been established as separate by written agreement.³² In contrast, marital property is defined as "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."³³ Under this statute, marital property is notably broad, while separate property is restrictive to the explicit listing.³⁴ Thus, the broad definition of marital property in the statute comes with the problematic ex-

²⁷ Kaufman, *supra* note 4, at 846; *see also* Kenneth R. Davis, *The Doctrine of O'Brien v. O'Brien: A Critical Analysis*, 13 PACE L. REV. 863, 879 (1994) ("The court based its analysis on the policy of the Equitable Distribution Law, which recognizes that a marriage is an economic partnership and that non-financial contributions are as significant as financial ones.").

²⁸ *O'Brien*, 489 N.E.2d at 715.

²⁹ *Id.* at 718.

³⁰ *Id.* at 717 (internal quotation marks and citations omitted).

³¹ Kaufman, *supra* note 4, at 852.

³² N.Y. DOM. REL. LAW § 236(B)(d)(1)-(4) (McKinney 2010).

³³ N.Y. DOM. REL. LAW § 236(b)(1)(c); *see also O'Brien*, 489 N.E.2d at 715 (defining marital property as "all property acquired by either or both spouses during the marriage and before the . . . commencement of a matrimonial action, regardless of the form in which the title is held").

³⁴ *Price v. Price*, 503 N.E.2d 684, 685 (N.Y. 1986); *see also Raviv v. Raviv*, 545 N.Y.S.2d 739, 740 (App. Div. 1989) (stating that there is a presumption in favor of finding for marital property and the burden is on the defendant to overcome that presumption).

pense of giving “judges too much discretion” under the equitable distribution doctrine, which has created “unpredictable and sometimes arbitrary results.”³⁵

Furthermore, the statute explicitly states its application to distribution, maintenance, spousal agreements, and other matters.³⁶ Maintenance awards are either written agreements or court orders where one spouse must pay sums in fixed intervals to the other, for a definite or indefinite period of time.³⁷ The concept of maintenance was introduced to provide the spouse with an opportunity to achieve economic independence, as opposed to relying on lifetime dependence and support from the former spouse.³⁸ The award terminates upon death of either party or upon the recipient spouse’s remarriage.³⁹ The resulting impact of maintenance awards have been controversial because under this model of distribution, there is an increased risk that the contributing spouse will never receive adequate consideration for his or her contributions.⁴⁰

The statute also describes a distributive award, which is a written agreement between the parties or a court order that provides for payments by one spouse to another “in lieu of or to supplement, facilitate or effectuate the division . . . of property,” to be paid in one lump sum or throughout a period of time.⁴¹ A distributive award is often used in situations where the division of the marital property is impracticable or illegal, and therefore a monetary award is more appropriate than the actual distribution of property.⁴² A distributive award allows for the concept of equity, wherein one spouse is compensated for their contributions, as opposed to a grant of awards to facilitate economic dependence.⁴³ A major distinction between a distributive award and a maintenance decree is that under Domestic Relations Law (DMR) § 236(B)(9)(b) a decree of maintenance may be

³⁵ Garrison, *supra* note 8, at 632; *see also id.* at 730 (emphasizing the troubling fact that “the wife’s average share of net marital property tends to decline as the couple’s net worth increases”).

³⁶ Kaufman, *supra* note 4, at 849.

³⁷ N.Y. DOM. REL. LAW § 236 (B)(1)(a).

³⁸ Kaufman, *supra* note 4, at 853; *see also* Garrison, *supra* note 8, at 640 (stating the objective of the maintenance award “suggests that courts should . . . award maintenance for short-term, ‘rehabilitative’ purposes”).

³⁹ Kaufman, *supra* note 4, at 854.

⁴⁰ Garrison, *supra* note 8, at 640.

⁴¹ N.Y. DOM. REL. LAW § 236 (B)(b).

⁴² Litman v. Litman, 463 N.Y.S.2d 24, 25 (App. Div. 1983).

⁴³ *Id.*

modified, whereas under DMR § 236(B)(5)(e) a distributive award “once made, is not subject to change.”⁴⁴ This has become a particularly important distinction in New York based on current precedent classifying licenses and degrees as marital property, subjecting them to equitable distribution granted by distributive awards.⁴⁵

The Equitable Distribution Statute was passed in an effort to promote fairness and equity, but in the years following its enactment, the courts did not rule in a manner that would effectuate its goals.⁴⁶ There was a period in which New York State Courts blatantly disregarded the statute and did not properly account for all the marital assets.⁴⁷ This is demonstrated in *Conner v. Conner*,⁴⁸ in which the trial court held that “an academic degree was not subject to evaluation as marital property.”⁴⁹ The court acknowledged that both partners made contributions to the marriage with an expectation that they would be entitled to the benefits.⁵⁰ However, the court emphasized that both partners knew of the possibility of dissolution, and therefore ruled that it was not relevant to add the spouse’s future potential earnings in the disbursement of property.⁵¹

III. THE LANDMARK DECISION OF *O’BRIEN V. O’BRIEN*

In 1985, the landmark decision of *O’Brien* established a firm precedent proclaiming that it depicted the true meaning and intent of the statute, with regards to valuation, distribution and classification of marital property.⁵² In *O’Brien*, the parties were married in April of 1971, and at that time, both were employed as teachers.⁵³ The husband returned to school to complete premedical courses in order to apply to medical school.⁵⁴ In 1973, the parties moved to Guadalajara,

⁴⁴ *O’Brien*, 489 N.E.2d at 720.

⁴⁵ *Id.* at 716.

⁴⁶ Kaufman, *supra* note 4, at 863.

⁴⁷ *Id.* at 847.

⁴⁸ 468 N.Y.S.2d 482, 482 (App. Div. 1983).

⁴⁹ Kaufman, *supra* note 4, at 867.

⁵⁰ *Id.* at 865.

⁵¹ *Id.* at 867.

⁵² *Id.* at 846 (stating that the equitable distribution doctrine is based on the premise that marriage is an economic partnership and, therefore, the legislature attempted to ensure that there would be a fair distribution of marital property upon the dissolution of marriage).

⁵³ *O’Brien*, 489 N.E.2d at 713.

⁵⁴ *Id.* at 714.

Mexico and the husband became a full time medical student.⁵⁵ During the course of his studies, both parties contributed to “living and educational expenses.”⁵⁶ However, it is uncontested that the wife “contributed all of her earnings to their living and education expenses and that her financial contributions exceeded those of plaintiff.”⁵⁷ The parties returned to New York, and in October of 1980, the husband, plaintiff, was licensed to practice medicine.⁵⁸ He commenced the divorce action two months later.⁵⁹ At the commencement of divorce, the parties’ only valuable asset was the husband’s newly acquired medical license, and the central issue was whether this asset was marital property, subject to equitable distribution.⁶⁰

Plaintiff argued that professional licenses were not marital property because they do not satisfy the traditional definition of property.⁶¹ The New York Court of Appeals responded to this argument by stating that ultimately, a professional license is property that has value, which can be calculated by the money lost while it was acquired, as well as the enhanced earning capacity granted to the holder.⁶² Furthermore, the court went on to say that marital property is not governed by traditional property concepts because it is a unique statutory creation and should be construed according to the language provided in the statute.⁶³

The court created New York precedent stating that a license is in fact marital property under the meaning of DRL § 236 and is subject to equitable distribution.⁶⁴ Thus, the statute was interpreted to

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *O’Brien*, 489 N.E.2d at 714.

⁵⁹ *Id.*

⁶⁰ *Id.* at 713.

⁶¹ *Id.* at 717; *see also* *Conner v. Conner*, 468 N.Y.S.2d 482, 493 (App. Div. 1983) (Titone, J., concurring) (“As the term is commonly understood, a professional license or degree possesses none of the attributes of ‘property.’ It has no monetary value on the open market and cannot be transferred, assigned, sold, pledged or inherited.”).

⁶² *O’Brien*, 489 N.E.2d at 717.

⁶³ *Davis*, *supra* note 27, at 869; *see also* *Kaufman*, *supra* note 4, at 869 (stating “[m]arital property is simply a way of defining those items of value to which spouses may have an equitable claim on the basis of both the remedial statute and the marital relationship. There is no common law property interest remotely resembling marital property.”).

⁶⁴ *Davis*, *supra* note 27, at 863; *see also* *O’Brien*, 489 N.E.2d at 580-81 (holding that “plaintiff’s medical license constitutes ‘marital property’ within the meaning of Domestic Relations Law § 236(B)(1)(c) and that it is therefore subject to equitable distribution pursuant to subdivision 5 of that part”).

mean that “an interest in a profession or a 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 nonfinancial contributions made by caring for the home and family.”⁶⁵ The court explained that because the license was attained through joint efforts it is marital property.⁶⁶ The court sought to compensate Mrs. O’Brien based on the sympathetic circumstances of the case, but unfortunately “[w]hat started with a poorly reasoned decision in *O’Brien* has spawned a line of cases which have left the lower courts adrift in a sea of illogic.”⁶⁷

A. Expanding *O’Brien*

Following the *O’Brien* decision, a New York State Supreme Court was confronted with the issue of whether the precedent of treating licenses as marital property applied only to licenses or whether it could be extended and applied to other types of educational advances such as Master’s degrees.⁶⁸ In *McGowan v. McGowan*,⁶⁹ the defendant husband argued that his wife’s Master’s degree for teaching should be considered marital property.⁷⁰ The New York Supreme Court, Appellate Division, Second Department recognized a distinction between professional licenses and academic degrees because a degree did not necessarily grant the legal right to participate in a particular profession; it simply allowed the recipient to acquire more knowledge about a specific discipline.⁷¹ However, the court referred to *O’Brien* for guidance and recognized that the significant aspect of that case was not whether the holder was in a particular practice, but rather whether the holder had enhanced his or her future earning capacity.⁷²

The court concluded that there was no reason to form a dis-

⁶⁵ Davis, *supra* note 27, at 872.

⁶⁶ *Id.* at 870.

⁶⁷ Peter Bronstein and David Typermass, *From O’Brien to Keane: Building on a Weak Foundation*, 41 N.Y.S.B.A. FAMILY L. REV. 3, 3 (2009).

⁶⁸ Davis, *supra* note 27, at 874.

⁶⁹ 535 N.Y.S.2d 990 (App. Div. 1988).

⁷⁰ *Id.* at 992.

⁷¹ *Id.* at 993; *see also* Judge v. Judge, 851 N.Y.S.2d 639, 640 (App. Div. 2008) (“An academic degree may constitute a marital asset subject to equitable distribution, even though the degree may not necessarily confer the legal right to engage in a particular profession.”).

⁷² *McGowan*, 535 N.Y.S.2d at 993.

inction between degrees and professional licenses when categorizing separate and marital property, and therefore a Master's degree should be considered marital property.⁷³ The court in *McGowan* clearly held true to the principal of equitable distribution and concluded that the non-titled spouse would receive a just portion of the assets, regardless of whether the enhanced earnings were a result of a license or a degree.⁷⁴

IV. ESTABLISHING THAT THE LICENSE OR DEGREE SHOULD BE SUBJECT TO EQUITABLE DISTRIBUTION

There are three required elements for a distributive award to be made to a spouse, which include (1) an enhanced earning capacity attributable to the license or degree; (2) the non-titled spouse contributed to the license or degree attainment; and (3) the license or degree has value.⁷⁵ Therefore, even though licenses and degrees are to be classified as marital property because they result in an enhanced earning capacity, it does not automatically subject them to equitable distribution.⁷⁶ The accrual of the marital property⁷⁷ and the non-titled spouse's contributions to its attainment are both relevant factors in determining whether the license or degree will be subject to equitable distribution.⁷⁸

A. Accrual of Marital Property

The court uses timing as a point of reference in order to determine whether a license or degree will be subject to equitable distribution in a divorce proceeding.⁷⁹ There are three scenarios that of-

⁷³ *Id.* at 994; *see also Judge*, 851 N.Y.S.2d at 640 (holding that the wife's MBA degree enhanced her earning capacity and was subject to equitable distribution); *see also Jayaram v. Jayaram*, 880 N.Y.S.2d 305, 307 (holding that the husband's MBA degree although "not an actual prerequisite to his employment at the brokerage firm" it nonetheless increased his earning capacity and constituted marital property).

⁷⁴ *McGowan*, 535 N.Y.S.2d at 995.

⁷⁵ Philip Sherwood Greenhaus, *Equitable Distribution of a Never Used Professional License*, 66 N.Y. ST. B. J. 20, 23 (1994).

⁷⁶ *Id.*

⁷⁷ *McGowan*, 535 N.Y.S.2d at 994-95.

⁷⁸ *Evans v. Evans*, 866 N.Y.S.2d 788, 790 (App. Div. 2008).

⁷⁹ *McGowan*, 535 N.Y.S.2d at 995; *see also Spence v. Spence*, 731 N.Y.S.2d 66, 66 (App. Div. 2001) (holding "[t]he husband's enhanced earning capacity as an investment banker [was] not marital property subject to equitable distribution" because he "earned his MBA, Series 7 license, and Series 63 license four years before the marriage").

ten arise with regards to timing disputes.⁸⁰ First, when the requirements for a degree or license were completed before the marriage, but the physical award or certificate was not obtained until after the marriage.⁸¹ Second, when most courses were completed during the marriage, but not all.⁸² Finally, when a degree is obtained before a marriage, but additional work is required and completed during the marriage to allow one to properly enter the field.⁸³

In *McGowan*, the first circumstance presented itself. The issue in the case was whether a certain teaching certificate, awarded two weeks after the marriage, would be considered marital property.⁸⁴ Plaintiff argued that her education to obtain the certificate was completed before the marriage to the defendant, and therefore should not constitute marital property.⁸⁵ Defendant countered by reiterating the holding in *O'Brien*, which stated that licenses acquired during the marriage, constitute marital property.⁸⁶ The court in *McGowan* made it evident that defendant's argument was a far too simplistic interpretation and that the policy behind *O'Brien's* ruling was to remedy a social injustice by providing compensation for a spouse, who to her detriment, supported the other spouse through an educational program and then was refused the benefits as a result of divorce.⁸⁷ The court held that the "license or degree will constitute marital property only to the extent that it is attributable to the work during the marriage."⁸⁸ Therefore, the court held that plaintiff's teaching certificate was not marital property because her increased skill, knowledge, and increased earning capacity were earned prior to the marriage.⁸⁹

In the case of *Kyle v. Kyle*,⁹⁰ the second timing issue presented itself, which is when all courses have not been completed in order

⁸⁰ *McGowan*, 535 N.Y.S.2d at 995.

⁸¹ *Id.* at 994.

⁸² *Kyle v. Kyle*, 548 N.Y.S.2d 781, 783 (App. Div. 1990).

⁸³ *Shoenfeld v. Shoenfeld*, 563 N.Y.S.2d 500, 502 (App. Div. 1990).

⁸⁴ *McGowan*, 535 N.Y.S.2d at 991.

⁸⁵ *Id.* at 992.

⁸⁶ *Id.* at 994.

⁸⁷ *Id.* at 995.

⁸⁸ *Id.*; see also *Allocco v. Allocco*, 578 N.Y.2d 995, 999 (Sup. Ct. 1991) (holding that "the successful completion of the civil service examinations, which resulted from the knowledge represented by these degrees as well as the direct studies for such examinations, enhanced the Defendant's earning capacity, and should be considered as marital property subject to equitable distribution").

⁸⁹ *McGowan*, 535 N.Y.S.2d at 991.

⁹⁰ *Kyle*, 548 N.Y.S.2d 781.

to obtain a license.⁹¹ In this case, at the time the divorce was commenced, the husband still needed two courses to obtain his principal's license.⁹² The New York Appellate Division, Second Department ruled that the license was not marital property because it was not acquired during the marriage, reasoning that mere anticipation of a license in the future does not qualify for equitable distribution.⁹³

In *Shoenfeld v. Shoenfeld*,⁹⁴ a third timing issue arose in which the parties married after the spouse had obtained his medical degree, but still required a one year program in order to obtain his license in New York.⁹⁵ During this one-year program, his wife was the sole income provider.⁹⁶ The New York Appellate Division, Second Department held that under these circumstances, the non-licensed spouse was entitled to an interest in the medical license.⁹⁷

The issue of timing is one that may conflict with the ultimate purpose of equitable distribution, which is to ensure that there is a fair distribution of marital property upon dissolution of marriage, and therefore it takes into consideration the contributions that both parties have made, whether direct or indirect.⁹⁸ In circumstances where a court considers the timing that the license or degree was received the result can sometimes lead to inequity, as seen in *Kyle*.⁹⁹

The intended purposes of the statute are undermined if a license or degree is automatically exempted from marital assets based on technicalities and despite the substantial contributions put forth by the non-titled spouse.¹⁰⁰ If trial courts were properly carrying out the intentions of the statute the substantial contributions of the non-titled spouse would require an award to promote equity and fairness.¹⁰¹

⁹¹ *Id.* at 783.

⁹² *Id.*

⁹³ *Id.*; see also *Berkman v. Berkman*, 563 N.Y.S.2d 990, 992 (Sup. Ct. 1990) (explaining that mere academic credits accumulated during a marriage did not yield an enhanced earning capacity and therefore were not subject to equitable distribution).

⁹⁴ *Shoenfeld*, 563 N.Y.S.2d 500.

⁹⁵ *Id.* at 502.

⁹⁶ *Id.*

⁹⁷ *Id.* at 503.

⁹⁸ Kaufman, *supra* note 4, at 846.

⁹⁹ *Kyle*, 548 N.Y.S.2d at 783.

¹⁰⁰ See *O'Brien*, 489 N.E.2d at 715 (stating the intention of the Equitable Distribution Statute is to consider both parties contributions to the marriage as spouses, wage earners, and homemakers).

¹⁰¹ Kaufman, *supra* note 4, at 846.

B. Contributions of the Non-Titled Spouse

Although the time of the accrual of the property is relevant in the court's analysis to determine whether the property is marital and subject to equitable distribution, there is a greater focus on the contributions that the non-titled spouse has made in its attainment.¹⁰² Accrual of the license or degree can sometimes be helpful in proving that the non-titled spouse did not make substantial contributions to its attainment.¹⁰³ The non-titled spouse seeking the award has the burden of showing that he or she made a substantial contribution in the attainment of the degree or license in order to obtain a portion of the enhanced earning potential.¹⁰⁴ In one case, the Appellate Division stated:

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.¹⁰⁵

In *Farrell v. Cleary-Farrell*,¹⁰⁶ the husband was entitled to a distributive award of *only* seven and a half percent of his wife's dental hygienist license.¹⁰⁷ The New York Appellate Division reasoned that the wife "exerted extraordinary efforts to complete her degree and obtain her license."¹⁰⁸ The wife worked while at school, took care of the children, was responsible for the household chores and even gave birth mid-semester but still completed her classes.¹⁰⁹ While the wife attended school, the husband remained as the main source of income for the family, assisted with the children, maintained the outside yard work and supported his wife throughout her

¹⁰² *McGowan*, 535 N.Y.S.2d at 995.

¹⁰³ *Id.*

¹⁰⁴ *Esposito-Shea v. Shea*, 941 N.Y.S.2d 793, 796 (App. Div. 2012); *see also O'Brien*, 489 N.E.2d at 715; *see also Brough v. Brough*, 727 N.Y.S.2d 555, 558 (App. Div. 2001).

¹⁰⁵ *Evans*, 866 N.Y.S.2d at 790 (citations omitted).

¹⁰⁶ 761 N.Y.S.2d 357 (App. Div. 2003).

¹⁰⁷ *Id.* at 359.

¹⁰⁸ *Id.* at 360.

¹⁰⁹ *Id.*

schooling.¹¹⁰ Despite this, the husband's contributions were not deemed substantial because during this time it was shown that he advanced his own career because he worked long hours and engaged in business related travel.¹¹¹

Similar to the approach of marital property, the non-titled spouse can obtain the appreciated value of separate property if they can prove that they made substantial contributions, which result in the appreciated value.¹¹² In *Price v. Price*,¹¹³ the husband owned an interest in a family appliance business.¹¹⁴ The husband acquired this interest as a gift prior to the marriage, which DRL § 236(B)(1)(d) classifies as separate property.¹¹⁵ The business thrived and upon divorce the wife sought to obtain a part of the business' appreciated value, she claimed her indirect contributions as a homemaker and mother contributed to the increased value of the business.¹¹⁶ The issue became whether the appreciated value of the business could be constituted as marital property, because the wife's indirect contributions helped facilitate the increased value of the separate property.¹¹⁷ The New York Court of Appeals held that the Equitable Distribution Law allowed for the increased value of one spouse's separate property to be considered marital property, if the increased value was a result "in part to the indirect contributions or efforts" of the other spouse.¹¹⁸ In this decision, the court looked beyond the statutory language and factored in the policy considerations, which:

reflect[] an awareness that the economic success of the partnership depends not only upon the respective fi-

¹¹⁰ *Id.*

¹¹¹ *Farrell*, 761 N.Y.S.2d at 360 (noting that "[w]hile 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.").

¹¹² *Davis*, *supra* note 27, at 879; *see also Hartog v. Hartog*, 647 N.E.2d 749, 754 (N.Y. 1995) (stating that the non-titled spouse need only show that the titled spouse actively participated to some degree in the appreciation to an asset to classify the appreciation of that asset as a marital asset).

¹¹³ 503 N.E.2d 684, 686 (N.Y. 1986).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 685-86.

¹¹⁶ *Id.* at 689.

¹¹⁷ *Id.* at 685.

¹¹⁸ *Price*, 503 N.E.2d at 685; *see also Majuskas v. Majuskas*, 463 N.E.2d 17, 19 (N.Y. 1984) (holding that increased value in pension rights is marital property because it is the product of continued employment during the marriage).

nancial contributions of the partners, but also on a wide range of nonremunerated services to the joint enterprise, 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.¹¹⁹

Therefore, if the non-titled spouse made substantial contributions to the enhanced earnings or appreciated values, they should be compensated and be granted an award that adequately reflects their contributions.¹²⁰

The New York Court of Appeals held that licenses and degrees are marital property subject to equitable distribution because it sought to remedy a social injustice “that results when one spouse, to the detriment of his or her own fulfillment, labors in order to support the other spouse through an educational program, only to be divorced before the economic rewards of that program are realized.”¹²¹ The rationale behind this approach is that when a spouse agrees to take on an educational venture by the other, he or she makes financial sacrifices with an expectation that they will both eventually enjoy the benefits of that degree or license.¹²² Furthermore, the spouse often chooses to make a financial sacrifice and postpone living a certain lifestyle with the expectation of having an even greater reward due to these sacrifices.¹²³

However, as seen in the above analysis, a license or degree could be considered for equitable distribution only when the non-titled spouse made substantial contributions to its attainment, which reveals that this law is in effect reimbursement to the non-titled spouse.¹²⁴ Contrary to the intent of the statute, trial courts’ decisions are not treating the couple as equals in an economic partnership that accounts for *all* their contributions, including both monetary and household.¹²⁵ “Post-divorce income surveys have uniformly shown

¹¹⁹ *Price*, 503 N.E.2d at 687 (internal quotations omitted).

¹²⁰ *Davis*, *supra* note 27, at 879.

¹²¹ *McGowan*, 535 N.Y.S.2d at 995.

¹²² *Davis*, *supra* note 27, at 890.

¹²³ *Id.*

¹²⁴ Ann Weiss, *Property Distribution in Domestic Relations Law: A Proposal for Excluding Educational Degrees and Professional Licenses from the Marital Estate*, 11 HOFSTRA L. REV. 1327, 1351 (1983).

¹²⁵ *Id.*; see also Garrison, *supra* note 8, at 726 (stating that “divorce law should protect the justifiable expectations of marriage partners that are based on marital commitment and day-

that women's per capita income and standard of living tend to decline substantially following divorce, while those of men tend to increase."¹²⁶ This disparity is mainly attributed to the fact that under the Equitable Distribution Statute "women's contributions as homemakers are typically undervalued."¹²⁷ Five years after the statute was enacted a study revealed that the average marital property award to the wife was thirty percent.¹²⁸ Furthermore, a study done by Legal Awareness for Women, Inc. (LAW) discovered that out of twenty-seven divorced women, seventy-four percent were with husbands who were in a professional practice or entrepreneurial venture and only two received distributive awards.¹²⁹ These results led to the conclusion that there are "apparent inequities resulting from the division of intangible property"¹³⁰ which can be attributed to either "the interpretation of the statute or [to] the language of the statute itself."¹³¹

V. VALUATION OF A LICENSE OR DEGREE

Once it is established that a professional license or degree is in fact marital property that should be subject to equitable distribution based on the case specific circumstances, the court then faces the problem of how to place a value on it.¹³² Although, Equitable Distribution Law does not require an equal division of marital property, it requires a process that promotes fairness.¹³³ In order to properly carry out the intent of the statute, the value of the enhanced earnings resulting from the attainment of the license or degree should not be overestimated or underestimated.¹³⁴ However, it should account for appreciation in value¹³⁵ and should account for the entirety of the length in time that the license or degree will produce enhanced earn-

to-day sharing.").

¹²⁶ Garrison, *supra* note 8, at 633.

¹²⁷ *Id.* at 632.

¹²⁸ Kaufman, *supra* note 4, at 863.

¹²⁹ *Id.* at 864.

¹³⁰ *Id.* at 863-64.

¹³¹ *Id.* at 864.

¹³² Scott Willoughby, *Professional Licenses as Marital Property: Responses to Some of O'Brien's Unanswered Questions*, 73 CORNELL L. REV. 133, 151 (1987).

¹³³ *Arvantides v. Arvantides*, 478 N.E.2d 199, 200 (N.Y. 1985).

¹³⁴ *McGowan*, 535 N.Y.S.2d at 993.

¹³⁵ *Price*, 503 N.E.2d at 685.

ings.¹³⁶

A. Calculating Enhanced Earnings

One of the major criticisms to *O'Brien* is based on the difficulty of placing a value on professional licenses and degrees.¹³⁷ To determine the value, a specific emphasis on the “enhanced earnings” must be made.¹³⁸ In *O'Brien* the court held that:

If the license is marital property, then the working spouse is entitled to an equitable portion of it, not a return of funds advanced. Its value is the enhanced earning capacity it affords the holder and although fixing the present value of that enhanced earning capacity may present problems, the problems are not insurmountable.¹³⁹

In *O'Brien*, the value of the enhanced earning potential that is afforded by the license or degree was established through a simple calculation.¹⁴⁰ The court compared the average income of a college graduate and that of a person holding such degree or license (in this case a general surgeon) between the year the plaintiff’s residency would end and the year that plaintiff reached age sixty-five (signifying age of retirement), while taking into account appropriate adjustments for federal income taxes, inflation rates, interest rates and real interest rates, thus establishing a “true value.”¹⁴¹ However, this calculation approach is an extreme oversimplification and fails to take into consideration the many practical factors that contribute to one’s enhanced earning potential afforded by their degree or license.¹⁴²

¹³⁶ *O'Brien*, 489 N.E.2d at 714; see also Davis, *supra* note 27, at 895 (“Ordinarily, the person’s working life is deemed to continue until age sixty-five.”).

¹³⁷ Willoughby, *supra* note 132, at 152.

¹³⁸ N.Y. DOM. REL. LAW § 236 (McKinney 2010).

¹³⁹ *O'Brien*, 489 N.E.2d at 718.

¹⁴⁰ *Id.* at 714.

¹⁴¹ See *id.*

The court, after considering the life-style that plaintiff would enjoy from the enhanced earning potential his medical license would bring and defendant’s contributions and efforts toward attainment of it, made a distributive award to her of \$188,800, representing 40% of the value of the license, and ordered it paid in 11 annual installments of various amounts beginning November 1, 1982 and ending November 1, 1992.

Id.

¹⁴² Willoughby, *supra* note 132, at 152.

There is a high risk of miscalculations and overestimations when placing a monetary value on degrees and licenses.¹⁴³ The circumstances of one's professional career are often unpredictable due to the many factors that contribute to an individual's professional successes or failures.¹⁴⁴ A degree or license may authorize a person to practice in a certain field, but that has no bearing on whether that person will financially succeed in that field.¹⁴⁵ In effect, "a professional degree or license represents nothing other than a *possibility* of future earnings."¹⁴⁶ Furthermore, despite obtaining the educational credentials, many individuals choose not to practice in that field,¹⁴⁷ or sometimes fall victim to circumstances that do not permit them to work in the field, despite their degree; such as an accident that renders them physically incapable.¹⁴⁸ "There is no guarantee" that the license or degree will actually result in the amount of enhanced earnings that the economists statistically determine.¹⁴⁹ Therefore, placing a value on such an asset is nothing more than speculation.¹⁵⁰

Some argue that placing a value on enhanced earning potential, although speculative, is appropriate because:

the complexity of calculating the present value of a partially exploited professional license is no more difficult than the problem of computing wrongful death damages or the loss of earning potential that is occasioned by a particular injury. Nor does it lead to significantly more speculation than is involved in the now-routine task of valuing a professional practice for the purpose of making a distributive award.¹⁵¹

However, this argument is flawed because it is contradictory to the objectives of the Equitable Distribution Statute.¹⁵² The purpose of this statute is to divide marital property in a fair manner, *not* to com-

¹⁴³ *McGowan*, 535 N.Y.S.2d at 993.

¹⁴⁴ *Lesman v. Lesman*, 452 N.Y.S.2d 935, 938 (App. Div. 1982); *see also* Willoughby, *supra* note 132, at 152 ("[A] surgeon may work longer hours, experience more pressure, or accept more responsibility than the average college graduate does in his job.").

¹⁴⁵ *Lesman*, 452 N.Y.S.2d at 938.

¹⁴⁶ *Greenhaus*, *supra* note 76, at 24 (emphasis added).

¹⁴⁷ *Davis*, *supra* note 27, at 873.

¹⁴⁸ *O'Brien*, 489 N.E.2d at 720 (Meyer, J., concurring).

¹⁴⁹ *Greenhaus*, *supra* note 76, at 22.

¹⁵⁰ *Id.*

¹⁵¹ *McSparron*, 662 N.E.2d at 751.

¹⁵² *Weiss*, *supra* note 124, at 1349.

pensate one spouse for the amount they expected to profit from their partner during the marriage.¹⁵³ The current application of the statute “treats the couple as business partners, with the investing wife anticipating a monetary return.”¹⁵⁴ In addition, when two consenting adults agree to engage themselves in the institution of marriage, they enter knowing the risks of loss that can occur upon dissolution,¹⁵⁵ contrary to a tort action where the victim does not consent to the loss.¹⁵⁶

Another reason why a comparison to a tort case is flawed is because in a wrongful death claim there can be no way to ascertain actual earnings of what the individual will make in the future.¹⁵⁷ However, in the instance of valuing a professional license or degree the courts have the burden of guessing future earnings based on prior and outdated performance.¹⁵⁸ Valuing a license or degree is an imprecise task that can have severe consequences, which interfere with an individual’s personal decisions about their lifestyle.¹⁵⁹ This risk is so severe that the valuation based on enhanced earnings should not be utilized, especially because there are various alternative approaches that may be used.¹⁶⁰

B. The Role of Experts in Valuation

The critical factor is not that the holder can practice a particular profession, but rather that there is proof, in the form of expert testimony, that the license has a monetary value because it substantially enhances “the future earning capacity of the holder.”¹⁶¹ The valuation of a license or degree in court significantly depends on expert

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 1351.

¹⁵⁵ Kaufman, *supra* note 4, at 867.

¹⁵⁶ Weiss, *supra* 124, at 1349.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ See Sophia Hollander, *After Divorce, a Degree is Costly*, WALL ST. J., Dec. 24, 2012, at A15, available at <http://online.wsj.com/article/SB10001424127887324481204578180132637628330.html> (statement of Willard DaSilva, Dr. O’Brien’s attorney, comparing the decision to indentured servitude) (“Dr. O’Brien would have to pursue a career in surgery in order to earn the money to pay for the debt assigned to him by the court, and to force him to do something he really didn’t want to do . . .”).

¹⁶⁰ Bronstein & Typermass, *supra* note 67, at 3 (“In *O’Brien v. O’Brien*, the New York State Court of Appeals deviated from the vast experience of every other state in the country when it decided that professional licenses constituted marital property and that such licenses should be valued and divided between spouses.”).

¹⁶¹ *McGowan*, 535 N.Y.S.2d at 993.

testimony.¹⁶² It is clear that judges are given substantial discretion in regard to expert testimony when establishing the value of a license or degree.¹⁶³ Experts generally establish that the value of marital property is based on “the date of the commencement of the matrimonial action;” however, the trial court has the discretion to change the valuation date to something more appropriate and distribute an award accordingly.¹⁶⁴ Furthermore, the trial court is responsible for evaluating the testimony and giving it the proper weight from the evidence introduced.¹⁶⁵

In *Esposito-Shea v. Shea*,¹⁶⁶ the potential earning capacity of the wife’s law license was ultimately determined by a “battle of the experts.”¹⁶⁷ In this case, both experts sought to determine the wife’s earning potential with a law degree, as compared to her earning potential without it.¹⁶⁸ To this end, they each factored in her work-life expectancy and reached two separate figures, which were compared and used to determine her enhanced earning capacity due to her law degree.¹⁶⁹ In order to compute the wife’s earnings without a law degree, her expert used her actual employment history and statistical data of how much individuals with a Bachelor’s degree earned in her geographical location during the pertinent time period.¹⁷⁰ The husband’s expert used the wife’s “employment history in the period prior to obtaining her law degree,” which significantly lowered her earning

¹⁶² *Esposito-Shea*, 941 N.Y.S.2d at 795-96; *see also* *Chew v. Chew*, 596 N.Y.S.2d 950, 953 (Sup. Ct. 1992):

The husband failed to adduce any expert proof at trial despite a full opportunity to do so and therefore, has waived any claim to a distributive award based upon the value of the Master’s Degree. The failure to adduce expert testimony at trial is fatal to a claim for equitable distribution which was first made in the defendant’s attorney’s post trial brief and which set forth, for the first time, calculations as to value.

Id.

¹⁶³ *Esposito-Shea*, 941 N.Y.S.2d at 796.

¹⁶⁴ *Cleary-Farrell*, 761 N.Y.S.2d at 359.

¹⁶⁵ *Esposito-Shea*, 941 N.Y.S.2d at 796; *see also* *Evans*, 866 N.Y.S.2d at 790 (“While plaintiff presented expert testimony that reached a different conclusion, it was for [sic] Supreme Court to evaluate this testimony, assign to it whatever weight the court believed it deserved and arrive at determinations that were supported by the credible evidence introduced at trial.”).

¹⁶⁶ 941 N.Y.S.2d 793 (App. Div. 2012).

¹⁶⁷ *Id.* at 795.

¹⁶⁸ *Id.* at 796.

¹⁶⁹ *Id.* at 795.

¹⁷⁰ *Id.* at 796.

capacity.¹⁷¹ Ultimately, the court rejected the husband's expert and reasoned that had the wife not attended law school she would have pursued employment that required her Bachelor's degree.¹⁷²

Most notably, after the court accepted the wife's expert valuation of her degree, the husband was awarded *only* ten percent of its value.¹⁷³ This "battle of the experts" approach does not seem to promote the goals of divorce law and specifically the Equitable Distribution Statute, which are to produce reasonably consistent results, promote negotiation and settlement to avoid litigation, and to foster efficiency to lower legal costs.¹⁷⁴ In terms of cost effectiveness, the financial burden of hiring an expert to value a license or degree¹⁷⁵ results in a minimal monetary return due to the inadequate awards granted by judges.¹⁷⁶ The lack of guidelines in the statute leads to inequity because more money is often spent trying to place a value on the license or degree than the actual return awarded for it.¹⁷⁷ In addition, "[v]ague rules also tend to favor the litigant with greater resources . . . [who] can afford to 'wait it out.'"¹⁷⁸

VI. EQUITABLE DISTRIBUTION AND JUDGE DISCRETION

Judges have the most discretion in divorce cases, in comparison to "any other field of private law,"¹⁷⁹ and this has only expanded

¹⁷¹ *Esposito-Shea*, 941 N.Y.S.2d at 796.

¹⁷² *Id.*

¹⁷³ *Id.* at 797 (noting that although "[t]he husband maintains that he is entitled to a greater degree of the value of the wife's law degree because he was the family's primary wage earner during the parties' marriage and arranged his work schedule so that he could care for their children while the wife attended law school. However, these sacrifices represented 'overall contributions to the marriage rather than an additional effort to support [the wife] in obtaining [her] license.'").

¹⁷⁴ Garrison, *supra* note 8, at 727.

¹⁷⁵ 19 Carmody-Wait 2d § 118:163.

¹⁷⁶ See *Cleary-Farrell*, 761 N.Y.S.2d at 359 (holding that the husband was entitled to a distributive award of only seven and a half percent of his wife's dental hygienist license); see also *Esposito-Shea*, 941 N.Y.S.2d at 795 (granting the husband ten percent of the wife's law degree); *Brough v. Brough*, 727 N.Y.S.2d 555, 559 (App. Div. 2001) (granting plaintiff "ten percent of [] enhanced earnings" from her teaching certificate); *Kriftcher v. Kriftcher*, 874 N.Y.S.2d 153, 154-55 (App. Div. 2009) (granting the wife ten percent of the enhanced earnings of her husband's law degree).

¹⁷⁷ 19 Carmody-Wait 2d, *supra* note 175.

¹⁷⁸ See Garrison, *supra* note 8, at 727; see also *Litman*, 463 N.Y.S.2d at 25 (explaining there is no set formula, but rather valuation is based on the expert testimony and the trial court will develop an award based on the facts before it).

¹⁷⁹ Marsha Garrison, *How Do Judges Decide Divorce Cases? An Empirical Analysis of*

within the past two decades.¹⁸⁰ The trial court is “granted substantial discretion [to] determin[e]” what is equitable under any circumstance in this area.¹⁸¹ In New York, judges are given thirteen factors¹⁸² to consider and a “catch-all clause”¹⁸³ which are to be used to distribute property equitably amongst the parties.¹⁸⁴

An empirical analysis by Professor Marsha Garrison,¹⁸⁵ at-

Discretionary Decision Making, 74 N.C. L. REV. 401, 411 (1996).

¹⁸⁰ *Id.* at 404 (explaining that in the past two decades there has been a shift to discretionary distribution in titled based property, the adoption of gender-neutral divorce laws, and the removal of fault based awards in alimony).

¹⁸¹ *Farrell*, 761 N.Y.S.2d at 359.

¹⁸² See N.Y. DOM. REL. LAW § 236(B)(5)(d) (McKinney 2010) listing the factors the court shall consider when equitably distributing property as:

- (1) the income and 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) the loss of health insurance benefits upon dissolution of the marriage;
- (6) any award of maintenance under subdivision six of this part;
- (7) 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;
- (8) the liquid or non-liquid character of all marital property;
- (9) the probable future financial circumstances of each party;
- (10) 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;
- (11) the tax consequences to each party;
- (12) the wasteful dissipation of assets by either spouse;
- (13) any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration.

¹⁸³ *Id.* (listing the last factor to be considered as “any other factor which the court shall expressly find to be just and proper.”).

¹⁸⁴ Garrison, *supra* note 179, at 410.

¹⁸⁵ See *id.* at 430.

[a]nalysis of judicial decision making under the Equitable Distribution Law is part of a larger research project aimed at determining the impact of the change in legal standards upon divorce outcomes. For analysis of the statute's overall impact, data were drawn from the court files of approximately 900 divorces filed in 1978, two years before enactment of the Equitable Distribution Law, and from the files of approximately 900

tempted to reveal how judges in New York utilize these factors in their decisions.¹⁸⁶ The study concluded that in the first few years following the enactment of the Equitable Distribution Statute, cases determined by a judge, as opposed to settlement agreements, had a strong tendency to result in distributing most marital assets relatively equally.¹⁸⁷ Nevertheless, when evaluating the particular distribution of couples who owned a professional degree, husbands were found to receive “a disproportionate share of the net marital assets” resulting from the degree.¹⁸⁸ It was found that:

[t]o the extent that disproportionate distribution to one spouse was predictable, it thus tended to reflect monetary contribution to the marriage instead of need. The husband’s ownership of a large percentage of marital assets, of a business or professional license, and a higher value for net marital assets were all associated with an increased likelihood that the husband would receive a disproportionate percentage of marital net worth.¹⁸⁹

Thus, the data reflects that despite the Equitable Distribution Statute, judges often do not award proportional shares to the non-titled spouse, and when they do, it is usually based on monetary contributions as opposed to the intended factors of the statute, such as one’s contributions as a parent and homemaker.¹⁹⁰ Garrison’s study further concluded that what was most notable about property division in divorce is that there was no data that reflected a consensus or trend as

divorces filed in 1984, four years after the law's passage. In order to examine regional variation in case outcomes, cases were selected in equal numbers from three diverse counties: one from New York City, one from the suburban belt surrounding it, and one representative of the mixed urban/rural upstate region. Analysis of the case data revealed that the average property distribution varied little over the research period but that the frequency and duration of alimony awards declined markedly. Case outcomes for both time periods were also highly variable; the passage of the law thus appeared to have little effect in improving the consistency of results.

Id.

¹⁸⁶ *Id.* at 406-08.

¹⁸⁷ *Id.* at 452.

¹⁸⁸ Garrison, *supra* note 179, at 458.

¹⁸⁹ *Id.* at 460.

¹⁹⁰ *Id.* at 465.

to how judges deviated from the new trend of equal division.¹⁹¹

The critics of judicial discretion assume that uniform rules will suffice in divorce law and that individualized decisions are not necessary.¹⁹² The current shift in divorce law, which is no longer a fault based system, and the “enhanced role of dependency prevention as a theme of divorce law” has eliminated the need for individualized judgments.¹⁹³ However, equitable distribution of property has somehow increased discretionary decision-making.¹⁹⁴ This has been attributed to the emotionally charged competing views of the nation on marital roles, gender, and individual obligations in a marriage.¹⁹⁵ Thus, the legislature has decided not to create a rule-based system.¹⁹⁶

VII. THE INABILITY TO MODIFY A DISTRIBUTIVE AWARD OF A LICENSE OR DEGREE

New York takes the approach of classifying licenses and degrees as marital property, subject to equitable distribution set by the standard in *O'Brien*.¹⁹⁷ This approach has various implications on divorced parties, one of which includes the inability to modify or amend such awards after the decree is final.¹⁹⁸ DRL § 236(B)(9)(b) states in part that:

[w]here, after the effective date of this part, a separation agreement remains in force no modification of a prior order or judgment incorporating the terms of said agreement or order as modified shall supersede the terms of the prior agreement and judgment for such period of time and under such circumstances as the court determines.¹⁹⁹

The effect of this section is that unlike a decree of maintenance or child support, once a distributive award is finalized it “is not subject

¹⁹¹ *Id.* at 466.

¹⁹² *Id.* at 417.

¹⁹³ Garrison, *supra* note 179, at 421.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 422.

¹⁹⁶ *Id.* at 422-23.

¹⁹⁷ *O'Brien*, 489 N.E.2d at 720 (Meyer, J., concurring).

¹⁹⁸ *Id.*

¹⁹⁹ N.Y. DOM. REL. LAW § 236(B)(9)(b) (McKinney 2010).

to change.”²⁰⁰ This is best represented in the case of *Siegel v. Siegel*.²⁰¹

In *Siegel*, during the marriage, the parties acquired “valuable furniture and artwork.”²⁰² Upon divorce, the furniture and artwork were appropriately classified as marital property and were distributed accordingly within the trial court’s judgment.²⁰³ A month later, Diego Giacommetti, the artist who designed most of the pieces, died.²⁰⁴ The husband requested a new trial and alleged that based on the changed circumstances of the artist’s death, the artwork and crafted furniture had increased in value and therefore, resulted in inequity in the divorce decree.²⁰⁵ The court denied the motion.²⁰⁶ The Court of Appeals affirmed and stated that the denial of a new trial was proper because “even if we assume that certain assets, such as the Giacommetti artwork, substantially increased in value since the time of the trial, this would have no effect on the validity of the equitable distribution of property ordered by the court.”²⁰⁷ The court explained that if they allowed the husband’s modification of asset judgments, due to an unforeseen change in value that took place after trial, it would “undermine the finality of judgment in matrimonial actions.”²⁰⁸ Thus, if a degree or license were subject to such a rule, it too would not be subject to an equitable modification.²⁰⁹

A professional license or degree is distinct from other property, such as artwork and should not be classified as “marital property subject to distribution upon divorce.”²¹⁰ A professional license or degree far exceeds the traditional aspects of property, including “transferable value, assignability or inheritability.”²¹¹ A degree or license, does not solely represent an enhanced earning capacity, but rather reflects the individual’s hard work, efforts, and personal sacrifices, which the monetary value of the license or degree does not

²⁰⁰ *O’Brien*, 489 N.E.2d at 720 (Meyer, J., concurring).

²⁰¹ 523 N.Y.S.2d 517 (App. Div. 1987).

²⁰² *Id.* at 521.

²⁰³ *Id.* at 522.

²⁰⁴ *Id.* at 521.

²⁰⁵ *Id.* at 522.

²⁰⁶ *Siegel*, 523 N.Y.S.2d at 522.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ Weiss, *supra* note 124, at 1346.

²¹¹ *Id.*

account for.²¹² Although the Equitable Distribution Statute attempts to disregard these inherent disparities by stating this is a unique statutory creation,²¹³ it avoids the problems that accompany creating a new form of property, such as the uncertainty of placing a value on such property.²¹⁴

Some supporters of the statute argue “that an education[] degree is [similar] [to] other intangible items of property”, such as pension benefits that have not vested.²¹⁵ However, this comparison is not persuasive because pension benefits have a quantifiable dollar amount, which is certain to vest, unlike professional licenses and degrees in which the monetary value is based on “highly uncertain future events.”²¹⁶ The court seeks to achieve finality in divorce judgments but this is extremely unjust when one is to place a value on property that is entirely speculative and cannot be modified despite changed circumstances.²¹⁷ The projected future earnings may create hardships to the licensed spouse if the spouse fails to attain the average earnings of the profession.²¹⁸ This may be attributable to various factors such as an economically depressed profession, the inability to find employment, a physical impairment as a result of an accident or unforeseen illness, and choosing a certain sub-section within that profession that pays below average salary.²¹⁹ If the licensed spouse is simply not making the projected earnings, it will result in unjust inequities and place a severe hardship on them with no available remedy.²²⁰

Moreover, the courts do not address the contradictory results of licenses and degrees being classified as marital property.²²¹ Marital property is to include any property acquired during the marriage

²¹² *In Re Marriage of Graham*, 574 P.2d at 77.

²¹³ Davis, *supra* note 27, at 869.

²¹⁴ Weiss, *supra* note 124, at 1347.

²¹⁵ *Id.* at 1346.

²¹⁶ *Id.* at 1347.

²¹⁷ *Id.*; *see, e.g., O'Brien*, 489 N.E.2d at 720 (Meyer, J., concurring) (suggesting that “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”).

²¹⁸ Weiss, *supra* note 124, at 1347.

²¹⁹ Willoughby, *supra* note 132, at 153.

²²⁰ *Id.*

²²¹ Weiss, *supra* note 124, at 1348.

and therefore subject to equitable distribution.²²² However, the assets resulting from a professional license or degree would be acquired after the marriage, yet these future earnings are still being subject to equitable distribution.²²³

The most troubling factor of classifying licenses and degrees as marital property subject to distributive awards is placing a highly speculative value on one's career choice, especially because they cannot be modified.²²⁴ An individual may decide that he or she no longer wants to practice in a particular field, regardless of his or her attained degree.²²⁵ However, "[b]y not allowing modification, the legislature prevents some licensed spouses from altering their career paths before they have even settled in their chosen field of practice."²²⁶ This is an extremely unjust consequence, which imposes a life choice on the licensed spouse.²²⁷

VIII. REJECTING LICENSES AND DEGREES AS MARITAL PROPERTY AND THE VARIOUS APPROACHES ADOPTED BY OTHER STATES

Many courts realize that inequity occurs when one spouse has completed an educational license or degree, while the other spouse has held back their individual professional goals in an effort to support their spouse.²²⁸ Despite this fact, those courts have refused to classify the degree or license as marital property.²²⁹ These courts do not allow for such classification of degrees and licenses mainly based on the practical difficulties of placing a monetary value on licenses and degrees,²³⁰ as well as the underlying concern that the award would be not be subject to modification.²³¹ Due to these concerns, most states do not classify licenses and degrees as marital property,

²²² *O'Brien*, 489 N.E.2d at 713.

²²³ *Weiss*, *supra* note 124, at 1348.

²²⁴ *Willoughby*, *supra* note 132, at 153.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.* at 149.

²²⁹ *See, e.g.*, *Drapek v. Drapek*, 503 N.E.2d 946, 950 (N.Y. 1987).

²³⁰ *McGowan*, 535 N.Y.S.2d at 993.

²³¹ *O'Brien*, 489 N.E.2d at 720; *see also* *Mahoney v. Mahoney*, 453 A.2d 527 (N.J. 1982) (holding that finality of such a judgment is a major concern based on the fact that placing a value on a degree or license is speculative, unpredictable, and if a severe inequity arises, the court will not be able to remedy the situation).

and instead have found other ways to achieve equitable distribution that allows for modification of judgment orders.²³² Two alternative approaches include: (1) increased alimony or maintenance awards; and (2) reimbursement alimony.

A. Increased Alimony or Maintenance Awards

Those states that allow for increased alimony or maintenance awards provide that when determining the asset amount to grant, “earning capacity of the degree holder and the contributions of the nondegree holder may be considered.”²³³ Most of these states rely on General Law c. 208 § 34, which:

is clearly broad enough to allow courts to consider the increased earning potential engendered by a professional degree in determining an award of alimony and assignment of the estates of the parties. Neither the degree or license itself, however, nor the increased earning capacity of the degree holder is an asset subject to assignment.²³⁴

The case of *Drapek v. Drapek*²³⁵ conveys the approach and rationale of increased alimony. In *Drapek*, the husband appealed from a judgment of divorce that ordered him to pay his wife “annual installments and [a portion] of his gross earnings.”²³⁶ The husband contended that it was an error to classify his medical degree and increased earnings based on that degree as “part of his estate subject to equitable assignment under G.L. c. 208, § 34.”²³⁷ He further argued that the “alimony awarded was an abuse of discretion.”²³⁸ In order to properly assess whether the trial court erred, this court referred to General Law c. 208, § 34, which provides for the specifications of al-

²³² Harvey G. Landau, *Is the Glass Half-Empty or Half Full?* 78 N.Y. ST. B.J. 46, 46 (2006) (noting that “New York is the only state to adhere to the view that a non-transferable advanced degree, license, or certification constitutes marital assets subject to distribution.”).

²³³ *Drapek*, 503 N.E.2d at 950. For other examples of states that use this approach, see, e.g., *Nelson v. Nelson*, 736 P.2d 1145 (Alaska 1987); *Wisner v. Wisner*, 631 P.2d 75 (Ariz. Ct. App. 1981); *Peterson v. Peterson*, 737 P.2d 237 (Utah Ct. App. 1987); *In re Marriage of Hortsmann*, 263 N.W.2d 885 (Iowa 1978); *Stevens v. Stevens*, 492 N.E.2d 131 (Ohio 1986).

²³⁴ *Drapek*, 503 N.E.2d at 950.

²³⁵ 503 N.E.2d 946 (N.Y. 1987).

²³⁶ *Id.* at 947.

²³⁷ *Id.* at 947-48.

²³⁸ *Id.* at 948.

imony for either of the parties.²³⁹ This statute provides what the trial judges must²⁴⁰ and may consider when awarding alimony.²⁴¹ Under the statute, the court may consider “the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates and the contribution of each of the parties as a homemaker to the family unit.”²⁴² The Supreme Court of Massachusetts held that the husband’s medical degree and resulting enhanced earning capacity could not be considered part of his estate; however, on remand, the judge may amend the alimony in order to reflect the value of his degree and enhanced earnings.²⁴³ The court rejected the classification of a professional degree or license as a marital asset subject to division by emphasizing the speculative nature of assigning such values and the court’s inability to modify such a judgment; it therefore reasoned that a judgment of alimony was more appropriate.²⁴⁴

As previously stated, both alimony and maintenance awards can be paid to a party “for a definite or indefinite period of time, to meet the reasonable needs of [the] party.”²⁴⁵ The judiciary regards increased alimony or maintenance awards as “rehabilitative measure[s], available only until the spouse is able to enter the labor force.”²⁴⁶ This can be quite problematic when applied in circumstances when a spouse has been out of the work force for a long period of time, because it is often difficult and highly unlikely that the spouse will be able to obtain a career and automatically become self-supporting.²⁴⁷

B. Reimbursement Alimony

Some states take another approach and provide for reim-

²³⁹ *Id.* at 948.

²⁴⁰ *Drapek*, 503 N.E.2d at 948; *see also* G.L. c. 208 § 34 (stating that the trial court is required to consider “the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income.”).

²⁴¹ *Drapek*, 503 N.E.2d at 948.

²⁴² *Id.* at 948; *see also* G.L. c. 208 § 34.

²⁴³ *Drapek*, 503 N.E.2d at 950.

²⁴⁴ *Id.* at 949.

²⁴⁵ Kaufman, *supra* note 4, at 871.

²⁴⁶ *Id.* at 872.

²⁴⁷ *Id.* at 873.

bursement alimony. Reimbursement alimony is a:

circumstance[] where a supporting spouse should be reimbursed for the financial contributions he or she made to the spouse's successful professional training. Such reimbursement alimony should cover *all* financial contributions towards the former spouse's education, including household expenses, educational costs, school travel expenses and any other contributions used by the supported spouse in obtaining his or her degree or license.²⁴⁸

The theory behind reimbursement alimony is that one spouse sacrificed or postponed his or her own educational goals in order to support the household, and therefore he or she should be compensated through either a "lump sum or a short-term award to achieve economic self-sufficiency."²⁴⁹ In *Mahoney v. Mahoney*,²⁵⁰ the Supreme Court of New Jersey had to decide whether an M.B.A. degree obtained by a spouse during the course of a marriage should be categorized as property and subject to equitable distribution upon a divorce proceeding.²⁵¹ The court rejected the classification of an M.B.A. degree as marital property and did not subject such a degree to equitable distribution.²⁵² The court reasoned that future earnings are extremely speculative and the finality of such a distribution was too risky because there was no remedy if a property distribution were to result in unfairness.²⁵³ The court decided, in order to avoid this inherent unfairness related to the classification of a degree as property, to take a cost approach.²⁵⁴ The cost approach reimburses a spouse by awarding him or her a certain amount, which is calculated by the cost of supporting the other spouse who obtained the degree.²⁵⁵ New York law rejects this approach on the basis that it refuses to view a mar-

²⁴⁸ *Mahoney*, 453 A.2d at 534. For more examples of states that use this approach *see, e.g.*, *Hughes v. Hughes*, 438 So. 2d 146 (Fla. Dist. Ct. App. 1983); *Hoak v. Hoak*, 370 S.E.2d 473 (W. Va. 1988).

²⁴⁹ *Mahoney*, 453 A.2d at 535; *see also* Landau, *supra* note 232, at 46 (stating that "New York is the only state to adhere to the view that a non-transferable advanced degree, license, or certification constitutes marital assets subject to distribution.").

²⁵⁰ 453 A.2d 527 (N.J. 1982).

²⁵¹ *Id.* at 530.

²⁵² *Id.* at 536.

²⁵³ *Id.* at 532.

²⁵⁴ *Id.* at 533.

²⁵⁵ *Mahoney*, 453 A.2d at 533.

riage as a “business arrangement in which the parties keep track of debits[,] credits, [and] their accounts to be settled upon divorce.”²⁵⁶

IX. PROPOSALS FOR CHANGE

The purpose of the Equitable Distribution Statute is to promote a sense of fairness between spouses upon dissolution of marriage.²⁵⁷ The statute is premised on the belief that marriage is an economic partnership and both parties must be accounted for with regards to their contributions, whether it is via the workforce or as a homemaker.²⁵⁸ Despite attempts to achieve equity through the landmark decision of *O’Brien*, establishing professional licenses as marital property and its later expansion to include educational degrees in *McGowan*, the struggle to attain equity still continues, as these cases have resulted in their own injustices.²⁵⁹ The difficulty of applying the provisions of the Equitable Distribution Law to property such as licenses and degrees has resulted in inequity, which is inconsistent with the legislative intent of the statute.²⁶⁰

There has been a consistent trend within the trial courts in the state of New York granting exceedingly modest awards, which exemplifies the hesitation of granting awards based on the enhanced earnings of licenses or degrees.²⁶¹ Some argue that the “statutory framework for the distribution of marital assets is being intentionally disregarded by the courts.”²⁶² However, another explanation for such modest awards may be the lack of guidance with respect to valuating licenses and degrees provided for in the statutory language.²⁶³

Consequently judges remain extremely conservative when granting these awards to avoid inequity.²⁶⁴ Some may argue that valuing a degree or license is not unlike valuing other indeterminable as-

²⁵⁶ *Id.*

²⁵⁷ Davis, *supra* note 27, at 870.

²⁵⁸ *Id.*

²⁵⁹ Ellman, *supra* note 2, at 981.

²⁶⁰ Kaufman, *supra* note 4, at 864.

²⁶¹ See *Cleary-Farrell*, 761 N.Y.S.2d at 359 (holding that the husband was entitled to a distributive award of only seven and a half percent of his wife’s dental hygienist license); see also *Esposito-Shea*, 941 N.Y.S.2d at 795 (granting the husband ten percent of the wife’s law degree); *Brough v. Brough*, 727 N.Y.S.2d 555, 559 (App. Div. 2001) (granting the plaintiff only ten percent of the enhanced earnings of the teaching certificate obtained by spouse).

²⁶² Kaufman, *supra* note 4, at 847.

²⁶³ *Id.* at 864.

²⁶⁴ Ellman, *supra* note 2, at 981.

sets, including unvested pension benefits²⁶⁵ or loss of earning potential in wrongful death or personal injury claims, because they all require a degree of speculation.²⁶⁶ However, it should at least be recognized by the legislature that licenses and degrees are in fact a unique type of property.²⁶⁷ Licenses and degrees do not follow the traditional notions of property because they are highly personal to the owner in that it reflects their own efforts and abilities and, furthermore, their value is only attributable to these personal efforts.²⁶⁸ If a new form of property asset is to be created, the legislature must respect and recognize the need for guidelines in how to value such property.²⁶⁹

The *O'Brien* decision must be overturned in that it calls for valuating licenses and degrees based on a party's enhanced earning capacity. The Equitable Distribution Statute must be amended²⁷⁰ to provide better guidance for courts to use in how to place a value on licenses and degrees and thereafter how to determine a proper award based on the value of the license or degree.²⁷¹ The legislature should implement a formula to use when valuating licenses and degrees, which will allow for more "simplicity and predictability."²⁷² Some may argue that rigid rules and guidelines are unworkable in divorce law because the sensitive nature of the cases requires individualized decisions to reflect the unique family circumstances of each case.²⁷³ However, the best solution is to provide a formula that can be applied consistently,²⁷⁴ yet allows for flexibility to ensure that the individualized needs of the spouse's are met in this sensitive area of law.²⁷⁵

²⁶⁵ Weiss, *supra* note 124, at 1346.

²⁶⁶ *McSparron*, 662 N.E.2d at 751.

²⁶⁷ Davis, *supra* note 27, at 869.

²⁶⁸ James Mastracchio & Nicholas Mastracchio, *Professional License Value in a Divorce*, 66 CPA JOURNAL ONLINE 1, 1 (1996), available at <http://www.nysscpa.org/cpajournal/1996/1296/features/professional.htm>.

²⁶⁹ Davis, *supra* note 27, at 869.

²⁷⁰ See Tim Grant, *The High Cost of Divorce Breaking Up can be Really Hard to do in a Tough Economy*, PITTSBURGH POST-GAZETTE (Nov. 27, 2012), available at www.post-gazette.com/stories/.../the-high-cost-of-divorce-663830/ (showing that the intended goals of the Equitable Distribution Statute are still relevant as "[d]ivorce [] can be a rude financial awakening for women whose main job was running the household and caring for the children" because although many of these women have college degrees "they have been out of work for so long that technology has swept by them. Their skills have become obsolete.").

²⁷¹ Garrison, *supra* note 179, at 521.

²⁷² Garrison, *supra* note 8, at 731.

²⁷³ Garrison, *supra* note 179, at 405.

²⁷⁴ *Id.* at 412.

²⁷⁵ *Id.* at 405 (stating "fairness to the many families affected by divorce law demands

The best formula to be used under the Equitable Distribution Statute for placing a value on a license or degree and thereafter granting an equitable award based on its value would provide that if a spouse has significantly contributed to the student spouse's attainment of the degree or license, then there should be a ten year payout based on actual earnings. The percentage awarded during this ten year payout should be based on a sliding scale beginning at ten percent and increasing in ten percent increments based on the amount of contributions put forth, and leveling off at fifty percent of the titled spouse's income as the maximum award. A spouse's contributions should only be considered "significant" as to apply to the statute when the contributing spouse has been with the student spouse for at least half of the class credits or hours required for the attainment of the license or degree. If the contributing spouse meets such requirements then there should be a presumption that they be awarded at least ten percent, with the possibility of increased benefits based on the specifics of their contributions. The court should utilize the present factors listed in the Equitable Distribution Statue assuming that the more factors satisfied, the greater the payout percentage. Furthermore, the court should classify "significant contributions" as both financial contributions and one's role in being a homemaker or parent.²⁷⁶ The formula would continue to apply if the spouse is remarried because its main purpose is to promote a sense of fairness because even though one spouse may remarry and move forward, the past sacrifices still remain relevant. The application of this formula will remedy the two most problematic issues of the statute, which have resulted in inequity.²⁷⁷

The ten-year timeframe provided in the formula quells three major concerns that may accompany this formula. These include the issue of the titled spouse postponing their career, the issue of establishing a career long enough to obtain the average earnings in the profession and the issue of promoting finality in divorce. The ten-year period is long enough that it is unlikely that most titled spouses will postpone their careers to avoid payment and allows the titled-spouse

standards that achieve predictable and consistent outcomes").

²⁷⁶ See Weiss, *supra* note 124, at 1351 (reflecting that N.Y. DOM. REL. LAW § 236 accounts for contributions of both monetary and household).

²⁷⁷ Two most problematic issues of the statute, as suggested by this Comment are: (1) the difficulty of placing a value on a license and degree and (2) the resistance of the trial courts to grant adequate awards based on the appraised value of the licenses and degrees, both of which have resulted in the statute being inequitable.

attain the average earnings of someone in the profession, yet it is short enough to promote a sense of finality in divorce.

Moreover, the ten-percent increment adjustment is a good starting point for distributions because it is small enough that it will have a modest impact for those who did not significantly contribute to the attainment, yet the increase is large enough to provide those who made greater contribution to attain a larger award. A ten-percent increment is more desirable than a smaller increment because it will be harder for the court to use arbitrary discretion to award judgments. For example, if the sliding scale of distributions were only based on two percent increments it would be difficult to distinguish why a judge awarded two percent to one litigant, as opposed to an award of four percent to another litigant.

The idea of equitable distribution was intended to promote a sense of fairness in the treatment of women upon divorce.²⁷⁸ This above formula still accounts for spousal contributions as well as financial contributions and it recognizes the efforts of being a parent or a homemaker, which satisfy the historical intent of the enactment of this law.²⁷⁹ As seen throughout this Comment, the current methods of valuation resulted in a bias towards women, rather than benefiting them.²⁸⁰ The provided method will force a more consistent approach, which will ultimately result in achieving greater awards for women.

This formula also will remedy the current issues of timing and contributions involved in distributing an award²⁸¹ because of its clear rules. If the contributing spouse was married to the titled spouse for at least half of the credits or hours required for the license or degree attainment then it is deemed that their contributions are substantial. This portion of the formula ultimately merges the accrual of marital property and the substantial contribution factors to give more direct guidance to the courts. If the *Kyle* decision²⁸² were to be analyzed under this approach, the court would find that because the contributing spouse was married to the student spouse for more than half of the attainment of the credits required for the principal's license then it

²⁷⁸ Ellman, *supra* note 2, at 981 (replacing the previous title theory approach, which granted property to the person who held title in their name, usually men).

²⁷⁹ *O'Brien*, 489 N.E.2d at 715.

²⁸⁰ Garrison, *supra* note 179, at 414-15.

²⁸¹ Greenhaus, *supra* note 76, at 23.

²⁸² *See Kyle*, 548 N.Y.S.2d at 783 (exemplifying the circumstances when a court deemed that a principal's license was not deemed marital property subject to equitable distribution because the titled spouse still required two courses to complete it).

would be said that she has substantially contributed to its attainment. Thereafter the contributing spouse would have obtained at least ten-percent of actual earnings from the titled spouse for ten years, unless the titled spouse²⁸³ can overcome this presumption.

The next issue that this formula will remedy is the inability to accurately calculate the enhanced earning potential that is afforded to the titled spouse based on the attainment of the degree or license.²⁸⁴ Placing a value on enhanced earnings is entirely too speculative,²⁸⁵ especially because the earning potential can drastically vary based on the individual's career goals and economic job market of the field, which the titled spouse has no control over.²⁸⁶ The formula presented allows for a reasonable solution that will provide for greater equity amongst both spouses. The formula suggests that there should be a ten-year payout based on actual earnings. This allows for the non-titled spouse to regain some of the fruits of its attainment and to compensate them for his or her efforts, without placing a heavy burden on the titled spouse to provide earnings that he or she may not actually be obtaining, or forcing them to stay in a field that they may not want to remain in. This distinct rule takes away the uncertainty and speculation that is irrationally applied to property as unique as licenses and degrees, which ultimately will lead to greater equity.

The suggested formula also alleviates the problem of the high emphasis placed on experts.²⁸⁷ The use of experts will not be necessary to predict enhanced earnings, but rather earnings are determined from actual payment records during the ten-year period. However, experts might be used to demonstrate the percentage of actual earnings that the non-titled spouse should be entitled to. This will not be as significant of an issue because of the presumed ten percent that will be given to the contributing spouse. The less reliance on experts will likely lead to a fairer playing field and result in more equitable results.²⁸⁸

The issue of avoiding duplicative awards²⁸⁹ will also be re-

²⁸³ See *Esposito-Shea*, 941 N.Y.S.2d at 796 (stating that the current approach requires the burden to be on the non-titled spouse to demonstrate that they made a substantial contribution to its attainment).

²⁸⁴ Willoughby, *supra* note 132, at 152.

²⁸⁵ Greenhaus, *supra* note 76, at 22.

²⁸⁶ Willoughby, *supra* note 132, at 153.

²⁸⁷ *Esposito-Shea*, 941 N.Y.S.2d at 795-97.

²⁸⁸ Garrison, *supra* note 8, at 727.

²⁸⁹ *Grunfeld v. Grunfeld*, 688 N.Y.S.2d 77, 80 (App. Div. 1999).

solved based on this formula. The non-titled spouse will receive a portion of the actual earnings, meaning that if the license or degree develops into a practice then the non-titled spouse is entitled to a portion of it. There will be no need to distinguish between the amounts received for future earning potential and the amount received from an established practice. If a practice is in existence then the actual earnings will be determined based on the income it produces.

Judicial discretion has long accompanied the matrimonial field and it is not likely to be completely eliminated.²⁹⁰ However, the particular data involving awards of licenses and degrees reflects that non-titled spouses are frequently awarded disparate monetary awards, contrary to the intent of the statute.²⁹¹ One possible explanation why judges have so sparingly and modestly applied this statute may be attributable to the lack of guidelines. A heavy burden is placed on the judge to attain equity without firm guidelines. Furthermore, the reminder that the award will be final and not subject to modification further exacerbates this burden. Amending the statute to provide a proper valuation formula for licenses and degrees will result in judges more consistently applying the law in a way that promotes equity.²⁹²

The inability to modify the award, which is a paramount issue in placing a value on licenses and degrees and subjecting them to distributive awards,²⁹³ will not be as problematic because the guidelines set forth in the formula allow for the award to balance itself to create equity. For example, the concurring opinion by Justice Meyer in *O'Brien* expresses the concern over inequity that may result if a surgeon lost their hand after an award was granted based on his enhanced earnings as a working surgeon.²⁹⁴ If the situation arose that a surgeon lost his hand and no longer worked as a surgeon or could obtain a comparable salary, the proposed formula would afford an equitable solution because the payout would reflect his actual earnings therefore relieving him of the obligation to pay an amount that he can not afford.

As seen, other states have chosen to reject licenses and degrees as marital property and compensate non-titled spouses by other

²⁹⁰ Garrison, *supra* note 179, at 404.

²⁹¹ Kaufman, *supra* note 4, at 864.

²⁹² Garrison, *supra* note 8, at 727.

²⁹³ *O'Brien*, 489 N.E.2d at 720 (Meyer, J., concurring).

²⁹⁴ *Id.*

means;²⁹⁵ however, New York has held true to its precedent as set forth in *O'Brien*.²⁹⁶ If New York wants to continue to abide by this precedent there must be a change in the statute that will recognize the problems of classifying licenses and degrees as marital property and it must make proper changes to provide for equity.

X. CONCLUSION

The Equitable Distribution Statute should be seen as a great accomplishment in terms of attempting to promote a progressive legislation, which seeks to level the playing field by treating both spouses as equals in marriage. The statute had hopeful intentions to provide protection to those underrepresented in the past and attempted to balance the inequalities that have once plagued our legal system. The *O'Brien* decision further attempted to validate the intentions of the statute by classifying licenses and degrees as marital property subject to equitable distribution. However, the facts of the *O'Brien* case were clearly sympathetic and there was an obvious need to remedy the wife in these unjust circumstances. Therefore the court held that the degree should be marital property subject to equitable distribution. However, the continued precedent of this case, of classifying licenses and degrees as marital property, has proven inequitable.

The difficulty of placing a value on the degree or license and the trial courts moderate awards based on its valuation, does not in fact result in just outcomes. If New York wants to continue the precedent of the *O'Brien* decision a change to the Equitable Distribution Statute is essential. The Statute must be amended to create more specified guidelines of how to value licenses and degrees and what percentages they should be awarded because overbroad legislation often results in inequity due to the inability to create consistent and predictable results. Some legal fields such as divorce law are far too individualized to provide for standard uniform rules that would be appropriately applied to all. However it is important to provide some uniform guidelines to ensure that the statute will properly be applied and result in its anticipated purposes, an equitable remedy.

²⁹⁵ See, e.g., *Drapek*, 503 N.E.2d at 950.

²⁹⁶ See *Landau*, *supra* note 248, at 46.