FAMILY LAW

O'BRIEN V. O'BRIEN: A PROFESSIONAL DEGREE AS MARITAL PROPERTY*

O'Brien v. O'Brien,[1] arose out of a divorce proceeding in the state of New York. The parties' only asset of any consequence at the time of divorce was the husband's newly acquired medical license. New York's highest court held that the medical license was marital property as defined by New York Domestic Relations Law[2] and therefore subject to equitable distribution.[3]

This Comment compares the *O'Brien* court's decision to treat a professional license as marital property with decisions from other jurisdictions in which courts have considered the same issue. By analyzing the theories relied upon by several jurisdictions including New York, this Comment will evaluate the probable outcome should the Arizona Supreme Court consider whether a professional license constitutes community property.[4]

FACTUAL AND PROCEDURAL SETTING

The factual setting in *O'Brien* reflected the contributions and sacrifices

---

* Since the completion of the writing of this Comment, the Arizona Legislature has revised ARIZ. REV. STAT. ANN. § 25-319 to accommodate awards of spousal maintenance to spouses who have contributed to the educational expenses of their former spouses, ARIZ. REV. STAT. ANN. § 25-319A(3), or to the increased earning capacity of their former spouses. ARIZ. REV. STAT. ANN. § 25-319B(6). The language of the statute also takes into account any foregone career opportunities of the contributing spouse. ARIZ. REV. STAT. ANN. § 25-319B(7). Additionally, the statute provides for continuing jurisdiction. ARIZ. REV. STAT. ANN. § 25-319C. This would allow for reconsideration of the award by the court in the event of changed circumstances.

1. 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985).

2. 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. . . . Marital property shall not include separate property as hereinafter defined.

N.Y. DOM. REL. LAW § 236(B)(1)(c) (McKinney 1980). Subsection d of the statute defines separate property as:

(1) property acquired before marriage or property acquired by bequest, devise, or descent, or a gift from a party other than the spouse;
(2) compensation for personal injuries;
(3) property acquired in exchange for or the increase in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse.

N.Y. DOM. REL. LAW § 236(B)(1)(d) (McKinney 1980).

3. N.Y. DOM. REL. LAW § 236(B)(5)(c) (McKinney 1980), provides: "Marital property shall be distributed equitably between the parties considering the circumstances of the case and of the respective parties." This law was adopted by the New York Legislature as part of a 1980 divorce reform act. *See infra* note 21.

4. *See generally* Roadhouse, *The Problems of the Professional Spouse: Should an Educational Degree Earned During Marriage Constitute Property in Arizona?*, 24 ARIZ. L. REV. 963 (1982).

Ms. O'Brien made during her marriage to Dr. O'Brien.[5] Ms. O'Brien had contributed seventy-six percent of the total income received during the marriage, exclusive of $10,000 in student loans obtained by her husband.[6] The trial court accepted Ms. O'Brien's expert's testimony that Dr. O'Brien's medical license was valued at $472,000.[7] The court awarded Ms. O'Brien $188,800, which represented 40 percent of the value of the license, and which was arrived at using the formula developed by Ms. O'Brien's expert. Dr. O'Brien offered no expert testimony relating to the value of the license.[8]

On appeal, the appellate division held that a medical license was not marital property, but rather a non-assignable personal privilege.[9] The New York Court of Appeals reversed, holding that a professional license constitutes marital property within the parameters of New York's Domestic Relations Law.[10] In arriving at that decision, the court reviewed prior decisions which held that similar non-traditional properties, such as pension rights[11] and interests in professional businesses,[12] were marital property subject to equitable distribution upon divorce.[13]

ANALYSIS

The New York Court of Appeals confronted two major issues in *O'Brien*. First, is a professional license a form of marital property subject to distribution? Second, if the license is a form of marital property, should the

5. The trial court found that Ms. O'Brien, who was employed as a teacher with a temporary certificate in New York at the time of the marriage, had relinquished the opportunity to obtain permanant teacher certification in New York because of the marriage and subsequent change of residence. *O'Brien*, 66 N.Y.2d at 581, 489 N.E.2d at 713, 498 N.Y.S.2d at 745. Ms. O'Brien worked continuously during the nine-year marriage and spent three and one-half years in Guadalajara, Mexico while her former husband attended medical school there. They returned to New York where Dr. O'Brien received his medical license in October, 1980. He filed for divorce two months later. *Id.* at 581, 489 N.E.2d at 714, 498 N.Y.S.2d at 745.

6. *O'Brien*, 66 N.Y.2d at 582, 489 N.E.2d at 714, 498 N.Y.S.2d at 745.

7. Ms. O'Brien's expert testified that he arrived at the figure of $472,000 by comparing the expected average income of a college graduate and a general surgeon (Dr. O'Brien's residency was in the field of surgery) between 1985, the year Dr. O'Brien's residency was scheduled to end, and 2012, when Dr. O'Brien would reach age 65. The expert computed amounts for federal income taxes, inflation at a rate of ten percent, and real interest at a rate of three percent. He capitalized the difference in average earnings and reduced the amount to present value. The trial court ordered the $188,800 to be paid in eleven annual installments beginning November 1, 1982, and ending November 1, 1992. *Id.* at 584, 489 N.E.2d at 714, 498 N.Y.S.2d at 745.

8. *Id.* Although the New York Court of Appeals affirmed the trial court determination that the medical license was marital property, the court remanded *O'Brien* because it found the trial court decision did not indicate the factors considered, nor the weight attributed to them, in awarding Ms. O'Brien a portion of the value of the license. *Id.* at 589, 489 N.E.2d at 719, 498 N.Y.S.2d at 750.

9. O'Brien v. O'Brien, 106 A.D.2d 223, 485 N.Y.S.2d 548 (1985).

10. *O'Brien*, 66 N.Y.2d at 584, 489 N.E.2d at 716, 498 N.Y.S.2d at 747.

11. Majauskas v. Majauskas, 61 N.Y.2d 481, 463 N.E.2d 15, 474 N.Y.S.2d 699 (1984) (vested rights in a non-contributory pension plan were held to be marital property).

12. The New York Court of Appeals had previously held that a dental practice could be valued at a dollar amount if supported by expert testimony. Arvantides v. Arvantides, 64 N.Y.2d 1033, 478 N.E.2d 199, 489 N.Y.S.2d 58 (1985). In that case, the plaintiff's dental practice was valued and divided equitably between the dentist and homemaker spouse.

13. The *O'Brien* decision overruled a finding by the appellate divison eight months before in Kutanovski v. Kutanovski, 109 A.D.2d 822, 486 N.Y.S.2d 338 (1985). The appellate divison, in *Kutanovski*, relied upon the earlier appellate ruling in *O'Brien* to reach the decision that a professional license was not marital property.

non-licensed spouse be entitled to an equitable portion of the value of the license?[14]

The court ruled that a professional license is marital property subject to equitable distribution under New York's Domestic Relations Law.[15] In reaching its decision, the *O'Brien* court looked to New York's Domestic Relations Law and prior case law dealing with the definition and distribution of intangible properties.[16] The *O'Brien* court decided that whether a professional license fits within traditional property concepts is irrelevant.[17] Instead, the court emphasized that a professional license is a valuable, though perhaps intangible, property right which cannot be revoked without due process.[18] The court concluded that, although a professional license has no actual fair market value, the license can still be determined to have some identifiable value.[19]

Once the court determined that Dr. O'Brien's professional license was property, it relied heavily upon the statutory language of New York's Domestic Relations Law to establish that marital property included all property acquired during marriage.[20] Therefore, according to the court, intangible properties, such as Dr. O'Brien's medical license, fit within that definition of marital property.

The court also drew from prior marital property assessment cases in determining that Dr. O'Brien's medical license was marital property. In one such case, *Majauskas v. Majauskas*,[21] the New York Court of Appeals held that vested but unmatured rights in a pension plan are marital property subject to equitable distribution.[22] Since pension benefits were not specifically addressed by the Domestic Relations Law, the court, in *Majauskas*, based its decision in part on the legislative intent behind the Law's enactment, which the court found supported a final and equitable severance of the marriage.[23]

---

14. While there may be instances in which the non-licensed spouse does not contribute to the acquisition of the license, the court found this was not the situtation in *O'Brien*. O'Brien v. O'Brien, 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985). Counsel for Dr. O'Brien suggested alternative remedies such as an award of rehabilitative maintenance or reimbursement for direct financial contributions. *Id.* at 576, 489 N.E.2d at 712, 498 N.Y.S.2d at 743. The *O'Brien* court rejected these alternatives on the grounds that selection of such a remedy would frustrate the goal of the Equitable Distribution Law, because the licensed spouse would have been unjustly enriched. *Id.*

15. *Id.* at 580-81, 489 N.E.2d at 713, 498 N.Y.S.2d at 744.

16. *See supra* notes 11-12. Property can be either tangible or intangible. Property has been defined as:

> that which is peculiar or proper to any person; which belongs exclusively to one .... The term is said to extend to every species of valuable right and interest. More specifically, ownership; the unrestricted and exclusive right to a thing; the right to dispose of a thing in every legal way, to possess it, to use it, and to exclude everyone else from interfering with it ....

BLACK'S LAW DICTIONARY 1095 (5th ed. 1979).

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

18. *Id.* Similarly, the right to practice dentistry has been held to constitute a valuable property right. *In re* Bender v. Board of Regents, 262 A.D. 627, 30 N.Y.S.2d 779 (1941) (A license to practice dentistry, while not strictly a personal or property right, partakes in the measure of both and cannot be revoked without a hearing.).

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

20. N.Y. DOM. REL. LAW § 236(B)(1)(c) (McKinney 1980).

21. 61 N.Y.2d 481, 463 N.E.2d 15, 474 N.Y.S.2d 699 (1984).

22. *Id.* at 486, 463 N.E.2d at 15, 474 N.Y.S.2d at 699.

23. *Id.* at 490, 463 N.E.2d at 19, 474 N.Y.S.2d at 703.

In arriving at its decision, the *O'Brien* court, like the *Majauskas* court, relied on legislative intent.[24] In addition, the court looked to the legal and legislative history preceding the enactment of New York's Domestic Relations Law.[25] Finally, the *O'Brien* court relied on cases holding that interests in professional practices are marital property[26] amenable to valuation.[27]

On the issue of whether Ms. O'Brien was entitled to an equitable portion of the license, the New York Court of Appeals rejected Dr. O'Brien's contention, with which the appellate division had agreed, that alternative remedies are applicable and more equitable.[28] Instead, the court interpreted the Domestic Relations Law statute as applicable and, in doing so, rejected the contention that any authorization for rehabilitative or maintenance awards could be implied from the language of the statute.[29] Furthermore, the court concluded that limiting the non-licensed spouse to a maintenance award frustrates the goal of equitable distribution under New York law.[30] Therefore, the court found that equity compelled a distribution of the professional license.

ALTERNATIVE APPROACHES

An overview of rulings in Arizona and other jurisdictions regarding what constitutes marital property may provide some insights into the possible outcome of a ruling by the Arizona Supreme Court on this issue.[31]

Unlike New York, Arizona is a community property state. Arizona statutes expressly dictate that all property acquired during marriage is presumed to be community property, except that which is obtained by gift, devise or descent.[32] Traditionally, states have operated on either the doctrine

24. *O'Brien*, 66 N.Y.2d at 583, 489 N.E.2d at 715, 498 N.Y.S.2d at 746.

25. The reform of part B of § 236 of the New York Domestic Relations Law was enacted in 1980 as a response to the overwhelming sense of inequity in the then existing common-law title practice of property division. This common-law title rule provided that, upon divorce, each party would retain property to which he or she was the sole named owner. Generally, (and particulary in marriages in which the woman had been a homemaker) the effect of the title theory was that the husband received nearly all of the property accumulated during the marriage, because title was usually vested in the husband's name. *O'Brien*, 106 A.D.2d at 228, 485 N.Y.S.2d at 552.

26. Arvantides v. Arvantides, 64 N.Y.2d 1033, 478 N.E.2d 199, 489 N.Y.S.2d 58 (1985)(dental practice held to be marital property and distributable based upon the contributions of each party). Litman v. Litman, 61 N.Y.2d 918, 463 N.E.2d 34, 474 N.Y.S.2d 718 (1984)(law practice was a proper subject for a distributive award in a divorce action).

27. Recognizing the legislative intent and history behind the Domestic Relations Law, the court stated that the value of an established practice represented the use of a professional license. Because the court viewed the value of the practice as evolving from the possession of the license, it found no difficulty in placing a value on the license itself. *O'Brien*, 66 N.Y.2d at 586, 489 N.E.2d at 717, 498 N.Y.S.2d at 747.

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

29. *Id.*

30. *Id.*

31. Several jurisdictions have held that a professional license is not marital property. The Colorado Supreme Court held that a Masters of Business Administration degree does not constitute marital property. *In re* Marriage of Graham, 194 Colo. 429, 574 P.2d 75 (1978). The Court of Appeals of Maryland held that a medical license or degree did not fit the definition of marital property under Maryland's Property Disposition in Divorce and Annulment Law. Archer v. Archer, 303 Md. 347, 493 A.2d 1074 (1985). The Superior Court of Pennsylvania relied on Colorado's ruling in *Graham* to determine that a doctor's medical license was not marital property. Lehmicke v. Lehmicke, 339 Pa.Super. 559, 489 A.2d 782 (1985).

32. ARIZ. REV. STAT. ANN. § 25-211 (1976 & Supp. 1986).

of common-law title theory or the doctrine of community property.[33] Under community property doctrines, assets acquired by the parties during marriage are considered part of the community and subject to distribution upon divorce.[34] But, requirements regarding community property division vary among the states. For example, the statutory language regarding divison of community property in Arizona differs significantly from that of California. While California requires that the community property be divided "equally,"[35] Arizona's "equitable"[36] requirement is more open to interpretation. In this respect, the language in Arizona's community property statute is similar to the language in the New York Domestic Relations Law relied upon by the court in *O'Brien*.[37]

Statutory language regarding distribution of marital property upon divorce has been a major issue in decisions involving professional licenses as marital property. What the New York Court of Appeals perceived as the underlying purpose of New York's Domestic Relations Law[38] contradicts the move by other states toward no-fault divorce[39] and away from awards of spousal maintenance contingent upon the ex-spouse's future income.[40] California's statutory law, however, seems to be keeping with the national trend. A California case, *In re the Marriage of Sullivan*,[41] involved essentially the same facts as *O'Brien*.[42] The California court in *Sullivan* reached a different result, however, holding that a doctor's medical license was not marital property and that the doctor's spouse was entitled only to the return of the funds she contributed.[43] California, a community property state,[44] has a specific statute requiring that reimbursement be granted in divorce proceed-

33. *See supra* note 25.

34. ARIZ. REV. STAT. ANN. § 25-318 (1976 & Supp. 1986).

35. CAL. CIV. CODE § 4800(a) (West 1984).

36. ARIZ. REV. STAT. ANN. § 25-318(A) (1984).

37. *See O'Brien*, 106 A.D.2d at 228, 485 N.Y.S.2d at 552. Arizona case law is consistent in holding that while the trial court has discretion concerning the nature of the property awards in divorce proceedings, such awards should be "substantially equal." *In re* Marriage of Berger, 140 Ariz. 156, 680 P.2d 1217 (1983); Wineinger v. Wineinger, 137 Ariz. 194, 669 P.2d 971 (1983); Tester v. Tester, 123 Ariz. 41, 597 P.2d 194 (1979).

38. *O'Brien*, 66 N.Y.2d at 584-85, 489 N.E.2d 715, 498 N.Y.S.2d at 746.

39. South Dakota, in 1985, became the last of the 50 states to enact no-fault divorce provisions. *1985 Summary of American Family Law*, 11 FAM. L. REP. 3015 (BNA 1985).

40. No-fault divorce legislation has shifted emphasis toward property division and away from forms of continued spousal maintenance. Courts are now focusing on the fairness of the division of property rather than on the punishment of the "wrongdoer." In keeping with the concept of no-fault divorce, marital obligations are ending at the time of divorce, and spouses are no longer automatically entitled to a share of the other's future income. Clarke & Gottsfield, *Valuation Problems in Divorce From a Professional Spouse: The Right to Your Ex-Mate's Future Pay?*, 10 ARIZ. B.J., June/July 1986, at 10.

41. 37 Cal.3d 762, 691 P.2d 1020, 209 Cal. Rptr. 354 (1984).

42. In *Sullivan*, the parties were married in 1967. The following year, Mr. Sullivan entered medical school and Ms. Sullivan began her final year of undergraduate work. She worked part-time while completing her education, and then obtained full-time employment after her graduation. Dr. Sullivan completed medical school in 1971 and accepted a residency internship in Oregon. Ms. Sullivan left her full-time position to accompany him to Oregon. She began working there part-time, and later worked full-time as Dr. Sullivan completed his residency. The parties returned to California in 1977 and separated shortly thereafter. *O'Brien*, 66 N.Y.S. at 581, 489 N.E.2d at 713-14, 498 N.Y.S.2d at 745.

43. *Sullivan*, 37 Cal. 3d at 767, 691 P.2d at 1023, 209 Cal. Rptr. at 356.

44. The holding is probably due more to California's statutory language, however, than to the fact that California is a community property state. *See* CAL. CIV. CODE § 4600 (West 1984).

ings to individuals who have supported their professional spouses through the professional education.[45]

While Arizona has no such statute requiring reimbursement, the decisions in *Wisner v. Wisner*,[46] and *Pyeatte v. Pyeatte*,[47] indicate that Arizona courts may be more inclined to accept a reimbursement argument.

In *Wisner*, the Arizona Court of Appeals rejected an argument that a medical license is community property. As a result, the court refused to find that failure to distribute the future earnings of the licensed spouse would result in unjust enrichment.[48] The court did, however, determine that the education acquired by one spouse constituted an intangible right which could be considered in reaching an equitable property distribution.[49] Therefore, according to the *Wisner* court, an unjust enrichment claim by the non-licensed spouse is unenforcable, absent a specific agreement between the spouses providing for a distribution.[50]

In *Pyeatte*, the Arizona Court of Appeals examined a situation in which the former husband had attended law school and obtained his professional license during the marriage.[51] While attending law school, he relied upon his spouse for support.[52] The parties had an oral agreement that after finishing law school the husband would support his spouse while she attended graduate school.[53] The court found that no express contract existed[54] and that statutory reimbursement under A.R.S. § 25-318 was not appropriate.[55] The court ruled, however, that an implied contract did exist between the spouses[56] and that the former wife was entitled to restitution for the amount she contributed to her former spouse's legal education.[57]

Thus, the court in *Pyeatte* was anxious to imply the very agreement it declined to recognize in *Wisner*. The *Pyeatte* court explained this shift by ruling that *Wisner* was limited to its facts, and therefore found restitution to be the appropriate remedy.[58]

The Arizona legislature has failed to address precisely these types of situations involving professional licenses. Given this fact, along with present

45. Chapter 1661 of the California Civil Code provides, in part, "[t]he community shall be reimbursed for community contributions to education or training of a party that substantially enhances the earning capacity of the party." CAL. CIV. CODE § 4800.3(b)(1) (West 1984).

46. 129 Ariz. 333, 631 P.2d 115 (1981).

47. 135 Ariz. 346, 661 P.2d 196 (1982).

48. Wisner v. Wisner, 129 Ariz. 335, 340, 631 P.2d 115, 122 (1981). The court stated, "Unquestionably, if we were to hold that these items [medical license, board certification, and education] are property, by statutory definition they would be community property, ARIZ. REV. STAT. ANN. § 25-211, and the wife would be entitled to an equitable division of their value." *Id.* at 341, 621 P.2d at 122.

49. *Id.*

50. *Id.*

51. *Pyeatte*, 135 Ariz. at 349, 661 P.2d at 199.

52. *Id.*

53. *Id.*

54. *Id.* at 350, 661 P.2d at 200.

55. *Id.* at 351, 661 P.2d at 201.

56. *Id.* at 353, 661 P.2d at 203.

57. The court determined, on the basis of the existence of an implied contract, that the husband had been unjustly enriched because he received his legal education at the expense of the exhaustion of community assets. *Pyeatte*, 135 Ariz. at 357, 661 P.2d at 207.

58. *Id.* at 352, 661 P.2d at 202.

case law, it seems likely that Arizona courts will continue to seek equity under a theory of either implied contract reimbursement or unjust enrichment restitution.

CONCLUSION

In *O'Brien v. O'Brien*, the New York Court of Appeals held that a professional license is marital property and that the non-licensed spouse is entitled to an equitable portion of it under New York's Domestic Relations Law.[59]

Although the *O'Brien* decision seems a just result, it does not properly balance the costs and benefits of a rule which regards a professional license as being marital property. As Justice Meyer points out in his concurring opinion, under New York law, court awards of spousal maintenance or child support are subject to modification, yet distributive awards of property are not.[60] In his concurrence, Justice Meyer estimated that, under a distributive award of his license, Dr. O'Brien was locked into a lifetime career by the trial judge.[61] Furthermore, the award in *O'Brien* was based upon an expert's assessment of a particular field of medicine.[62]

Responding to the harshness of the result, Justice Meyer advocated a policy of reconsideration for professional license property settlements when such situations inevitably arise.[63] While such a reconsideration does seem fair, it would appear to violate the provisions of the equitable distribution law which provide for the finality of property settlements. Additionally, the party wishing a reconsideration would undoubtedly bear the burden of providing the court with adequate reasons for granting the reconsideration.

Whether other states will impose such strict and permanent limitations on an individual's free choice, as New York has done, remains to be seen. The ruling in *O'Brien* definitely reflects a national judicial trend to seek some form of equity in these situations. Considering prior rulings, it is likely Arizona courts will continue to award reimbursement or restitution to non-licensed spouses who have contributed, financially or otherwise, to their licensed spouse's education. The ruling in *O'Brien*, and in other cases involving professional licenses as marital property, should force professional students to consider that the vow, "'til death do us part," may refer not to their spouses, but to their future professions.

Frances Lynch

59. *O'Brien*, 66 N.Y.2d at 592, 489 N.E.2d at 721, 498 N.Y.S.2d at 746.
60. *Id.* at 591, 489 N.E.2d at 720, 498 N.Y.S.2d at 751.
61. *Id.*
62. Id. *See supra* note 7. Dr. O'Brien's residency was in general surgery, yet despite Dr. O'Brien's testimony concerning his dissatifaction with the field of general surgery, the court based his future earnings on that of a surgeon.
63. *Id.*