

**VALUATION OF DEGREES AND LICENSES
FOR EQUITABLE DISTRIBUTION
(AMERICAN SOCIETY OF PENSION
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VALUATION OF DEGREES AND LICENSES FOR EQUITABLE DISTRIBUTION

Following is a sampling of New York cases related to the valuation of degrees, designations, and licenses for equitable distribution. It is not all inclusive. Summaries are intended only as a convenience, relative to the presentation made by Craig A. Miller, FSPA, MAAA, MIAA, CPC, EA, before the New Rochelle Bar Association, Wednesday, March 7, 1990. They are not intended as a substitute for independent legal research and should not be relied upon as such.

Anderson v. Anderson, AD2d (NYLJ September 18, 1989)

Defendant husband's professional degrees and licenses as a health care administrator constituted marital property subject to equitable distribution. He had the following degrees: Masters degrees in health care administration and labor and industrial relations, and licensed nursing home administrator.

Judicial Hearing Officer erred in finding that degrees and licenses were not subject to equitable distribution, notwithstanding his finding that "the wife's expert could not express any opinion as to the monetary value of the degrees and licenses."

"The court should determine the value of the husband's degrees and licenses in accordance with the procedure outlined in McGowan v. McGowan."

Wife is not disqualified from being awarded expert fees pursuant to Domestic Relations Law §237.

Query: Why wasn't plaintiff wife's expert prepared to testify as to the monetary value of defendant husband's degrees and licenses?

Arvantides v. Arvantides, 64 NY2d 1033 (1985)

Husband's dental practice is considered marital property, subject to equitable distribution.

"The Appellate Division's reliance on the testimony of defendant's expert in determining the value of defendant's dental practice was erroneous, and constituted an abuse of discretion. Witness was admittedly unfamiliar with the

criteria for assessing the value of this type of professional practice, and needed to review certain background materials and case law before expressing an opinion as to the correct valuation factor to use. ... The \$100,000 figure testified to by the witness was wholly speculative..."

Query: Who suffered the finance consequences of the expert's lack of qualifications? The importance of establishing an expert's knowledge and experience before retaining him/her cannot be overemphasized.

Conner v. Conner, 97 AD2d 88, 89 [2d Dept 1983]

The court concluded "that an academic degree is not property susceptible of distribution pursuant to part B of section 236 of the Domestic Relations Law." In Conner, the husband held a Master's degree in business administration. The court noted that "we may not indulge in the fiction that an academic degree can be evaluated as reified marital property." (97 AD2d 102). See, however, for instance, McGowan v. McGowan.

Cronin v. Cronin, 131 Misc.2d 879 (1986)

Plaintiff wife's law degree acquired during the marriage is marital property subject to equitable distribution even though the plaintiff has chosen to pursue a career with the government at a fixed salary and thus "has no private practice to evaluate."

Defendant husband's marketing degree is not subject to equitable distribution since this court held that an academic degree, unlike a professional license is not property susceptible to distribution. See, however, for instance, McGowan v. McGowan.

Court denies branch of plaintiff's cross motion which seeks to compel the defendant to disclose whether he has expended sums for the hiring of experts and the factual information upon which his experts will express opinions, citing Lobatto v. Lobatto, 109 AD2d 697 (1st Dept 1985).

De Stefano v. De Stefano, 119 AD2d 793 (1986)

Medical license constitutes marital property subject to equitable distribution.

"[T]here must be a new trial to determine the exact nature of the parties' agreement and, if it be found that the parties did not intend reimbursement to be the wife's sole recompense, to further determine the value of the husband's medical license and the wife's equitable share thereof."

Freyer v. Freyer, 138 Misc.2d 158, 524 N.Y.S.2d 147, (Sup.Ct., Suffolk Co., 1987)

A party's academic degree acquired during marriage is marital property subject to equitable distribution.

Wife's license to practice medicine which was acquired six months after commencement of divorce action and one month after parties were divorced, was marital property subject to equitable distribution.

Trial court was required to take into account income tax considerations in arriving at valuation of parties' professional licenses and academic degrees.

"DRL §236(B)(5)(d)(10) provides that in dividing the parties' marital property, the court must consider the tax consequences to each party. Parenthetically, the court notes that DRL §236(B)(5)(d)(8) provides that the court should also consider the probable future financial circumstances of each party."

"With respect to a party's pension, the courts in New York have come to the realization that there may be serious tax consequences to either or both parties when a court divides pension and/or retirement benefits. ... Certainly, if the courts are going to tax impact with something as speculative as future pension and/or retirement benefits, they must also tax impact with academic degrees and licenses. The court also notes that it would be grossly unfair to divide such assets on their gross value, leaving one of the parties to bear the burden of all future tax liability."

Even though wife's income during marriage exceeded that of husband by approximately \$32,500, parties were required to share equally in marital residence, where husband's homemaker services exceeded those of wife by approximately \$33,000.

"A husband's homemaker services are oftentimes not put into evidence in equitable distribution cases, but they should be. They are very important to a court's decision, and they were in this case. The practicing matrimonial bar is alerted accordingly."

Court found Ph.D degree equal in value to \$302,000 and medical licence equal in value to \$500,000.

Golub v. Golub, 139 Misc.2d 440, 527 N.Y.S.2d 946 (Sup.Ct., N.Y.Co., 1988)

A spouses celebrity status (increase in value of wife's acting and modeling career) should be valued as marital property subject to equitable distribution, despite the fact that the spouse's celebrity status is neither "professional" nor a "license." [Extends O'Brien so as not to prejudice a spouse who is married to a non-professional.]

"The same logic used in McGowan to extend marital property to include degrees can be applied to include as marital property a spouse's unique ability to commercially exploit his or her fame."

"The courts should treat all matrimonial litigants equally and should not prejudice nor penalize a spouse who is married to a non-professional who may nevertheless become an exceptional wage earner. ... Clearly, there are certain fields in which the earning capacity exceeds that of other fields which require licensure. When a person's expertise in a field has allowed him or her to be an exceptional wage earner, this generates a value similar to that of the good will of a business."

"There seems to be no rational basis upon which to distinguish between a degree, a license, or any other special skill that generates substantial income. In determining the value of marital property, all such income generating assets should be considered if they accumulated while the marriage endured."

"[T]he skills of an artisan, actor, professional athlete or any person whose expertise in his or her career has enabled him or her to become an exceptional wage earner should be valued as marital property subject to equitable distribution."

Hickland v. Hickland, 39 NY2d 1 (1976)

Appellate Division wrongly "charged the wife with having assumed the risk that [shaky] venture would not pay." Where it is clear that "husband has deliberately stripped himself of income for reasons which went beyond the needs of a reasonable occupational choice [, and] it is clear that he is capable of earning a substantial income", wife should not be deprived of support. "Under such circumstances, a husband is under an obligation to use his assets and earning powers if these are required in order to meet his obligation to maintain the marital standard of living."

Lesman v. Lesman, 110 Misc 2d 815 (1981), 82 AD2d 153 (1982), app dis'd, 57 NY2d 956

Neither a spouse's medical license (which in and of itself does not generate income) nor advanced academic degree (which "is in reality an individual effort") is subject to equitable distribution in a divorce proceeding. See, however, contrary findings of O'Brien and its progeny.

Maloney v. Maloney, NYLJ April 15, 1986, at 15, col. 3, aff'd, 137 AD2d 666 (2nd Dep't 1988

Spouse's increased earning potential acquired by Board Certification in internal medicine is subject to equitable distribution in a divorce proceeding.

The lower court correctly held that defendant wife was entitled to 35% of the value of plaintiff husband's medical license: \$679,828, payable in installments over 10 years.

Since plaintiff failed to produce an expert to testify with respect to the interest rate to be factored into the ten year payout of the distributive award of a portion of the value of plaintiff's medical licence, 8% was selected on the basis of the un rebutted testimony of defendant's expert witness. Likewise, since plaintiff failed to produce an expert to testify with respect to the tax consequences of its distributive award, the court was justified in formulating a distribution plan without consideration of tax laws. "In this regard, we would further note that we are not persuaded by the excuses proffered by the plaintiff on appeal concerning his failure at trial to present any expert testimony whatever on the issue of valuation or tax consequences."

Trial court was found to have acted within its authority in directing plaintiff to purchase and maintain a term life insurance policy for the benefit of the defendant in the amount of the unpaid balance due on the distributive award.

Query: Why didn't plaintiff submit expert testimony:

- a. valuing his wife's teaching licence, as an offset to the value of his medical licence;
- b. addressing the suitability of an 8% interest assumption applied to the distribution of the value of his medical licence; and
- c. addressing the question of his prospective tax liabilities?

Marcus v. Marcus, 137 AD2d 131 (1988)

Plaintiff wife is entitled to an equitable share of husband's medical practice in divorce proceeding. However, inasmuch as defendant obtained his license over 30 years ago, during the early years of the marriage, and subsequently built up his psychiatric practice, which was an ongoing and viable enterprise when the action was commenced, "under the circumstances of this case, the plaintiff is not entitled to two separate awards for the defendant's license and psychiatric practice." Since separate awards might lead to a double recovery, "the medical license should be deemed to have merged with and been subsumed by the practice itself."

"[W]hile defendant husband was responsible for the major share of the economic contributions to the marriage, plaintiff's comparatively small financial contributions were significant because they were made early in the marriage and helped enable defendant to pursue a medical education and career; moreover, plaintiff's noneconomic contributions as a full-time parent, spouse and homemaker were also substantial throughout the parties' lengthy marriage."

Matsuo v. Matsuo, 124 AD2d 864 (1986)

"Trial Term improperly calculated the value of the defendant [husband's] medical practice for purposes of equitable distribution," by using the book value of husband's medical professional corporation, "which reflects only the depreciated

value of the tangible assets of the corporation minus the liabilities." "As established in O'Brien v. O'Brien (66 NY2d 576,585), a professional license acquired during the marriage is marital property,...[whose] value is the enhanced earning capacity it affords the holder...."

The court determined that even though the plaintiff wife provided expert proof as to the value of the defendant's medical practice, and based this value on the capitalization of earnings, rather than book value, no effort was made by Trial Term to use this information to "analyze the relationship of assets, professional income, liabilities or capital of defendant's medical practice in order to arrive at its value for equitable distribution purposes. Accordingly, the matter must be remitted for that purpose."

Query: Why didn't defendant seek to value plaintiff's nursing degree?

McAlpine v. McAlpine, 539 N.Y.S.2d 680 (1989)

Professional distinction of being awarded fellowship in the Society of Actuaries to husband during marriage and any resultant enhanced earning capacity was marital asset subject to equitable distribution.

"[A] trend has developed wherein the courts will consider as a marital asset, the enhanced earning capacity that a party has achieved during marriage by virtue of attaining a professional license, academic degree or other accomplishment. Of course, the value of the enhanced earning capacity is something that must be proven at trial. Here, defendant-husband was awarded a fellowship in the Society of Actuaries during his marriage to plaintiff. Certainly, such distinction may enhance the earning capacity of the recipient thereof. Accordingly, the court holds that such a professional distinction and its resultant enhanced earning capacity is a marital asset." (Emphasis added.)

McGowan v. McGowan, 142 A.D.2d 355, 535 N.Y.S.2d 990 (2nd Dep't 1988); mot. lv. app. den., N.Y.L.J. March 10, 1989 p. 25 col. 1 (2nd Dep't)

Extension of O'Brien. Wife's master degree which was attained during the course of the marriage was marital property subject to equitable distribution. Wife's teaching certificate,

conferred during the parties' marriage but as result of education program which had been completed prior to marriage, was not marital property.

"Since an academic degree may, under various circumstances, similarly enhance the earning potential of its holder, we see no valid basis upon which to distinguish such degrees from the professional licenses which pursuant to O'Brien are subject to equitable distribution. Also, considering that the enhancement of one spouse's earning capacity is the thing of value subject to equitable distribution pursuant to the O'Brien case, we conclude that such enhancement of earning capacity is acquired when it is actually achieved, that is, when the work that gave rise to it is finally completed, not at some later point when the completion of that work is formally recognized by the conferral of a degree or license."

"It makes little sense to construe the Domestic Relations Law in such a way as to exempt from equitable distribution an MBA from the Harvard School of Business, which in real terms could be worth hundreds of thousands of dollars, and yet to subject to equitable distribution a license to operate a junk yard (see, General Business Law §60), upon the theory that the latter instrument, but not the former, entitles its holder to engage in a particular trade or profession."

Court focuses on "the extremely unjust consequences which may result from an overestimation [or underestimation] of the present monetary value of the enhancement of a matrimonial litigant's potential future earnings attributable to the knowledge, skill and ability signified by a professional licence, particularly since such an overestimation of value will result in a substantial monetary judgment, which will be enforceable by all of the coercive procedures authorized by law and which, unlike an order directing maintenance or child support, will not be subject to change (see, Domestic Relations Law §236[B](9)[b]; cf., Domestic Relations Law §236[B](5)[e]; O'Brien v. O'Brien, ... Siegel v. Siegel ...)"

"The license or degree will constitute marital property only to the extent that it is attributable to the work done during the marriage."

Morimando v. Morimando, 536 N.Y.S.2d 701 (2nd Dep't 1988)

The enhanced earning capacity of the husband as a result of his registration as a physician's assistant, with the Division

of Professional Licensing Service of the New York State Department of Education, after successful completion of a full time two year course of study, and his certification as a physician's assistant by the National Commission on Certification of Physician's Assistants, is marital property subject to equitable distribution.

Morton v. Morton, 130 AD2d 558 (1987)

Plaintiff wife was entitled to 30% of defendant husband's podiatry practice under equitable distribution in a divorce proceeding.

O'Brien v. O'Brien, 114 Misc 2d 233, 106 AD2d 223, 66 NY2d 576 (1985)

Precedent setting case holding the future enhanced earning capacity of a professional license (medical license) is marital property subject to equitable distribution.

"[P]rivilege (to practice the profession of medicine), being in the nature of a franchise, was properly considered by the trial court as marital property for the purpose of equitable distribution." (106 AD2d, at p 240.)

Professional license is a thing of value because of the "enhanced earning capacity it affords the holder."

Furthermore, "[t]here is no reason in law or logic to restrict the plain language of the statute to existing practices, however, for it is of little consequence in making an award of marital property, except for the purpose of evaluation, whether the professional spouse has already established a practice or whether he or she has yet to do so. An established practice merely represents the exercise of the privileges conferred upon the professional spouse by the license and the income flowing from that practice represents the receipt of the enhanced earning capacity that licensure allows. That being so, it would be unfair not to consider the license a marital asset." (p. 586)

Parlow v. Parlow, NYLJ September 25, 1989

Husband's teaching license had "merged" into his career and had no value for purposes of equitable distribution because

its potential worth had already been achieved.

Plaintiff wife's expert was discredited by inconsistent testimony. "Although he agreed that the teaching license had 'merged' in the course of the 15 years the defendant had been employed as a teacher, he valued the defendant's career as though it were a newly acquired license giving no effect to the fact of merger. He failed to reconcile the apparent contradiction of this position with a strikingly different one he had advanced in a publication ... In addition to ignoring the fact of merger, [the expert's] actual method of evaluation in this case is flawed and unacceptable."

The Court accepted as valid plaintiff husband's conclusion that defendant's teaching career has no value whatsoever, based upon the expert's comparison of Mr. Parlow's compensation to that of other teachers with the same training and tenure, covered by the same union contract.

Query: Why didn't the experts value the "enhanced earning capacity" of Mr. Parlow's teaching licence/career, by comparing Mr. Parlow's prospective income with his teaching licence to what it would be if he didn't have his teaching licence?

Raff v. Raff, 120 AD2d 507 (1986)

Plaintiff husband's medical license was subject to equitable distribution in divorce proceeding.

Plaintiff husband's expert valued license at \$80,500 as compared with Defendant wife's expert's testimony that the value was \$422,161. The trial court determined that the plaintiff's enhanced lifetime earning capacity was \$600,000, but failed to set forth the facts in support of its conclusions as required by CPLR 4213. Accordingly, the Appellate Division held that a new trial was warranted with respect to the issues of the valuation of the plaintiff's enhanced earning capacity as a result of his medical license.

Award of expert fees to the defendant wife were found to be appropriate.

Savasta v. Savasta, NYLJ September 13, 1989

The certification to practice internal medicine enhanced the husband's earning potential and constitutes a marital asset subject to equitable distribution.

The wife's expert valued the husband's enhanced earning potential at \$891,442.00 - \$1,858,751.00. The husband's expert calculated a value of \$495,117.00. The court found that it was "unable to adopt the analysis of either expert; both conclusions are flawed." By independent methodology, the court determined the value to be \$571,878.00.

Expert fees were awarded to the wife.

Schoenfeld v. Schoenfeld, NYLJ, July 6, 1988 (Supreme Court, Nassau Co.)

There was a partial merger of the doctor's license into his "fledgling practice." Value of the practice was subtracted from the value of the license.

Siegel v. Siegel, 132 AD2d 247, 254, 523 NYS2d 517, appeal dismissed, 71 NY2d 1021, 530 NYS2d 108, 525 NE2d 753

Fluctuation of value of marital asset (i.e. value of professional licence or academic degree) after divorce decree is entered, does not warrant granting of postjudgment motion to modify property distribution.

Tessler v. Tessler, Family Law Review, 1986, Wrigler, J.

"[E]ven were the license to be merged into a practice or as here [where defendant husband doctor was a salaried hospital employee] in the absence of a practice into the husband's 'career,' the question arises as to the method of evaluation of the husband's career choice or indeed whether that career is a marital asset."

Motion of plaintiff wife for expert fees pendente lite to evaluate the husband's license was granted by the court.

Vanasco v. Vanasco, 132 Misc 2d 227 (1986)

A C.P.A. license acquired during the marriage "merges" into the business conducted through said license so that an evaluation of the husband's business, rather than his license, is the correct manner in which to measure the value of said license.

ADDITIONAL CONSEQUENCES OF EXPERT TESTIMONY FOR EQUITABLE DISTRIBUTION

Following is a sampling of cases related to the additional consequences of expert testimony for equitable distribution. It is not all inclusive. Summaries are intended only as a convenience, relative to the presentation made by Craig A. Miller, FSPA, MAAA, MIAA, CPC, EA, before the New Rochelle Bar Association, Wednesday March 7, 1990. They are not intended as a substitute for independent legal research, and should not be relied upon as such.

Siegel v. Siegel 523 N.Y.S.2d 517 (A.D. 2 Dept. 1987)

Court ruled that the "[o]pinion of the wife's expert ...was overly speculative, and therefore unworthy of belief, for purposes of distribution of marital assets, where expert deliberately inflated value...so as to correspond to values assigned...in connection with insurance claim."

Likewise, court ruled that the "[o]pinion of husband's expert as to value of...corporations under husband's control was unpersuasive, for purposes of distribution of marital assets, in that...true earnings of corporation amounted to figure much higher than that which appeared on corporation's financial statements."

Liddle v. Liddle 410 N.W.2d 196 (Wis.App. 1987)

The court ruled that inasmuch as the petitioner-appellant chose neither to provide the court with expert testimony to contradict the respondent's expert testimony on the valuation of assets at the time of trial, nor to cross-examine the testimony, and as the trial court found the expert assumptions and predictions to be "probably correct", no cross-examination of the expert witness will be allowed at this time.

Povosky v. Povosky 508 N.Y.S.2d 722 (A.D. 4 Dept. 1986)

Although the husband did produce expert testimony of a tax accountant regarding tax consequences on other matters, the tax consequence of lump sum distribution of his pension plan was not addressed. As such, the court ruled that the lower court's computation of the award was correct.