

Human Capital as Property in Celebrity Divorces

by

Allen M. Parkman¹
Regents' Professor of Management
Anderson Schools of Management
University of New Mexico
Albuquerque, NM 87131

Family Law Quarterly, 29(1), Spring 1995, 141-169.

¹ Regents' Professor of Management, Anderson Schools of Management, The University of New Mexico. B. A., 1962, Brown University; Ph.D. (Economics), 1973, UCLA; J.D., 1979, New Mexico.

I. INTRODUCTION

How much is Tom Cruise's celebrity status worth? This no longer will be an academic question if the courts expand the definition of property distributed at divorce to include celebrities' enhanced earning capacity.² No-fault divorce introduced in most states in the 1970's reduced the importance of negotiated divorce settlements and, consequently, increased the courts' role in financial and custodial arrangements at divorce. Recently, this role has expanded to include celebrity status as marital property.³ The increased importance of the courts in divorce settlements has been disappointing, especially their definition and evaluation of property.⁴ Most courts limit their definition of the property distributed at divorce to items for which there is physical evidence such as real and personal property--houses and cars--and financial assets--stocks and bonds. Some jurisdictions recognize some intangible property such as professional licenses, degrees and goodwill.⁵ However, the definition of property generally used by the courts is too narrow and their valuation of intangible property is often inaccurate.⁶

² A celebrity is a celebrated person who is "well-known and widely recognized." THE RANDOM HOUSE DICTIONARY (1980) 146. While that status could be based on a variety of reasons including being a very bad Olympic ski jumper, the cases have dealt exclusively with individuals who have obtained celebrity status by being entertainers.

³ Golub v. Golub, 527 N.Y.S.2d 946 (1988), Piscopo v. Piscopo, 557 A.2d 1040(1989), and Elkus v. Elkus, 572 N.Y.S.2d 901 (1991). Also see Gary S. Stiffelman, Note, *Community Property Interests in the Right of Publicity: Fame and/or Fortune*, 25 UCLA L. R. 1095 (1978); Stuart B. Walzer & Jan C. Gabrielson, *Celebrity Goodwill*, 2 J. AM. ACAD. MATRIMONIAL LAW 35 (1986); Cynthia M. Germano, Note, *Do You Promise to Love Honor and Equitably Divide Your Celebrity Status Upon Divorce,? A Look at eh Development and Application of New York's Equitable Distribution Statute*, 9 LOY. ENT. L. J. 153 (1989); Janine R. Menhennet, *Elkus v. Elkus: A Step in the Wrong Direction*, 12 LOY. ENT. L. J. 561 (1992); and Robin P. Rosen, *A Critical Analysis of Celebrity Careers as Property Upon Dissolution of Marriage*, 61 GEO. WASH. L. R. 522 (1993).

⁴ See Allen M. Parkman, *Human Capital as Property in Divorce Settlements*, 40 ARK. L. R. 439 (1987).

⁵ See Allen M. Parkman, *The Treatment of Professional Goodwill in Divorce Proceedings*, 18 FAM. L. Q. 213 (1984); Severin Borenstein & Paul A. Courant, *How to Carve a Medical Degree: Human Capital Assets in Divorce Settlements*, 79 AM. ECON. REV. 993 (1989); and Daniel D. Polsby & Martin Zelder, *Risk-Adjusted Valuation of Professional Degrees in Divorce*, 23 J. LEG. STUD. 273 (1994).

⁶ While the statutes in the vast majority of jurisdictions define "marital property," the more basic definition of "property" is usually ignored. See Da Silva, *Property Subject to Equitable Distribution*, in John P. McCahey & Barbara E. Adelman, VALUATION &

The wealth of individuals, i.e., their property, is the value of the income stream that they can anticipate from the assets that they own.⁷ The composition of wealth has evolved over recent centuries. In a manufacturing and agricultural society, the primary forms of wealth are physical assets, such as houses and land, and financial assets, such as stocks and bonds. Meanwhile, in an economy such as the United States in which most income is derived from service and knowledge activities, the primary assets are the individuals' income earning capacity--their human capital.⁸ Because the courts have not established a clear understanding of what is property, they have been compelled to treat human capital in an ad hoc manner.⁹ This confusion is most obvious with professionals whose income earning capacity is often reflected by a degree or license that is treated in various ways among the states. Recent cases have expanded the arbitrary analysis of

DISTRIBUTION OF MARITAL PROPERTY 18-4 (Bender ed. 1984).

⁷ In financial and economic analysis, an asset, which is another word for property, exists and has value if it produces a future stream of returns, notwithstanding whether it is exchangeable. While these returns are normally income, they can also be psychic. See David W. Pearce, ed., *THE MIT DICTIONARY OF MODERN ECONOMICS* (3rd ed. 1986). A standard formula for the value of an asset (V) with a permanent annual payment ($\$N$) when the relevant interest rate is i is $V = \$N/i$. See P. Samuelson & W. Nordhaus, *MICROECONOMICS* (14th ed. 1992). An asset that will generate annual payments of \$100 forever is worth \$1,000 if the relevant rate of interest is 10%.

Because the courts and the legal profession have not accepted this definition of an asset and, therefore, property, substantial confusion has developed. For example, it has been argued that celebrities' enhanced earning power and goodwill are not property, while their right to publicity is property. The rationale given is that the Supreme Court in *Zacchini v. Scripps-Howard Broadcasting*, 433 U.S. 562, 573 (1977) described the right of publicity as a "proprietary interest." Therefore, a right of publicity is property because it is a proprietary interest that can be assigned and valued. Since enhanced earning power and goodwill do not have those characteristics, they are not property. Rosen *supra* note 3 at 549. From a financial perspective, which is the only relevant one because property is a financial concept, this analysis is incorrect.

⁸ In 1929, goods were 54% of gross national product with services being 35%. *HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970* (1975). Reflecting the change in the composition of output, by 1992 goods had fallen to 38% of gross domestic product, while services had grown to 54%. *STATISTICAL ABSTRACT OF THE UNITED STATES 1993* (1993).

⁹ This is illustrated by the courts development of the concept of "professional goodwill." See Parkman, *supra* note 5.

human capital to celebrities providing an opportunity to clarify how human capital should be treated at divorce.¹⁰

The courts' role in divorce settlements expanded after the introduction of no-fault divorce because most divorces with significant assets had been negotiated under the prior fault divorce grounds.¹¹ For most of the history of the United States, divorce--when allowed--was based on fault with one spouse required to prove that the other spouse was responsible for the failure of the marriage based on grounds such as adultery, cruelty, or desertion.¹² The legal grounds for divorce and the legal standards for the accompanying property division, alimony, and child support and custody were based on penalizing the party at fault. As divorce became more common, the likelihood increased that the parties had fabricated the evidence to establish those grounds.¹³ Under those circumstances, the divorce was often based on mutual consent with the parties agreeing to their own financial and custodial arrangements along with the evidence necessary to establish the grounds. Then, one party accepted the responsibility for the failure of the marriage. Usually, the courts accepted these negotiated settlements.

Although the fabrication process was straight forward when both parties wanted a divorce, it became more complicated when only one party initially wanted a divorce. Because the plaintiff in a divorce action had to be the "innocent party," spouses wanting a divorce either had to have evidence of fault by their spouse or had to persuade their spouse to become the plaintiff in the divorce case. In the more common situation in which there was no evidence of fault, the divorcing spouses usually had to make concessions to the divorced spouses to obtain their cooperation. The concessions at divorce could be an increase in the property settlement, alimony and child support and custody of any children. In reaching these agreements, the parties could essentially ignore the applicable laws. In a community property state, for example, each spouse was entitled by law to half the property acquired by the couple during the marriage. If a

¹⁰ Golub v. Golub, 527 N.Y.S.2d 946(1988); Piscopo v. Piscopo, 557 A.2d 1040(1989); and Elkus v. Elkus, 572 N.Y.S.2d 901(1991).

¹¹ Under fault divorce, approximately 90 percent of divorces were uncontested. These figures tend to understate the actual number that were uncontested because if the defendant answered or offered any evidence the case was often treated as contested. See Max Rheinstein, MARRIAGE, STABILITY, DIVORCE AND THE LAW (1972) 248. In California, 94 percent of divorce hearings were uncontested and divorces were granted with pro forma testimony as to fault. See REPORT OF THE [CALIFORNIA] GOVERNOR'S COMMISSION ON THE FAMILY (1966) 30.

¹² For a history of divorce in the United States, see Roderick Phillips, PUTTING ASUNDER: A HISTORY OF DIVORCE IN WESTERN SOCIETY (1988).

¹³ In Cook County, Illinois, in 1967, 97 percent of the divorces granted were apparently uncontested. See Rheinstein, *supra* note 11 and Donald Schiller, Note, *A Survey of Mental Cruelty as a Ground for Divorce*, 15 DE PAUL L. R. 159, 163 (1965) (citing Neu v. Neu, 298 N.W. 318 (Mich. 1941), in which parents fabricated evidence in divorce proceeding).

high income celebrity asked for a divorce, the other spouse could respond by demanding more than half the community property. For fabricated divorces under the fault standards, the mutual consent of the spouses was far more important than the fault grounds and the legal standards for the arrangements at divorce.

This situation changed dramatically with the introduction of no-fault divorce.¹⁴ California adopted the first unequivocal no-fault divorce statute in 1969 when it established irreconcilable differences and incurable insanity as the only grounds for divorce. During the following 16 years, the other 49 states, Puerto Rico and the District of Columbia passed statutes that either made incompatibility or irretrievable breakdown the only grounds for divorce or added them to the existing fault grounds.¹⁵ In most states, no-fault divorce meant that a divorce could be obtained by just one spouse reducing the incentives for spouses to negotiate.¹⁶ Without the negotiations, the courts' role in divorce settlements increased based on outdated legal standards, especially for property settlements. These laws usually provide for a return of any separate property and an equal division of marital property.¹⁷ The items accepted as property was too narrow, but it had not been challenged during the fault divorce era because most divorces with substantial assets or high incomes had been negotiated.¹⁸

This article discusses the recently expanded definition of property, especially marital property subject to division at divorce, to include a celebrity's career. I argue that being a celebrity is just another example of an individual who possesses human capital and the systematic incorporation of human capital into divorce settlements would produce more equitable results at divorce. This is illustrated by applying the human capital framework to some recent cases in which celebrity status has been held to be marital property.

II. WHAT IS PROPERTY?

¹⁴ For data on the current status of the divorce laws, see Linda D. Elrod and Timothy B. Walker, *Family Law in the Fifty States*, 27 FAM. L. Q. 515 (1994).

¹⁵ *Id.*

¹⁶ Mutual consent is required for a no-fault divorce in a few states. See Daniel Sitarz, *DIVORCE AND DISSOLUTION OF MARRIAGE LAWS OF THE UNITED STATES* (1990). In New York, for example, the no-fault grounds for divorce consist of (1) living separate and apart for one year under the terms of a separation agreement which is in writing and signed and notarized or (2) living separate and apart for one year under the terms of a judicial separation decree.

¹⁷ While both community property and equitable distribution states give courts some discretion in the allocation of property at divorce, the common pattern is for the courts to return separate property and divide marital property equally. See Allen M. Parkman, *NO-FAULT DIVORCE* (1992) 20.

¹⁸ Rheinstein, *supra* note 11.

The definition of property at divorce has been treated very casually. For example, the equitable distribution statutes in the vast majority of jurisdictions define "marital property," but usually ignore the more basic definition of "property."¹⁹ As a result, the definition of property has relied on court decisions. The courts' interpretation of the items that are property has been too narrow for two reasons. First, as discussed above, the sources of individuals' wealth have expanded from being primarily things that are tangible such as stocks, bonds, cars and houses to include less tangible items such as the individuals' increased earnings, pensions, and stock options. The courts have only slowly adapted to this change. Second, many divorces with substantial property under fault divorce were negotiated with the parties reaching their own financial arrangements. These arrangements often ignored any statutes, so they seldom were the basis of litigation that could have clarified the definition of property.

Many divorce courts maintain a narrow definition of property by resisting the expansion of property to include intangible rights.²⁰ Often these courts require that something have value in exchange before it can be considered property. Some courts hold that the owner must be able to sell it or pledge it for it to be property.²¹ In addition, some courts have concluded that items that are property cannot be contingent in any way limiting spouses' rights in their spouse's future earnings or pension. Some states have expanded the concept of property to include some intangible items such as increased earning capacity and pensions.²² In these states, the contingency of a right may not eliminate it from being property, but just limit its value. Because the courts have been uncomfortable radically changing the definition of property, the change has been made by statute.²³ In West Virginia, "marital property" includes "every valuable right and interest, corporeal or incorporeal, tangible and intangible."²⁴

The definition of property used in most jurisdictions differs substantially from the one used by economists and financial analysts. In economic analysis, an asset, which is another word for property, exists and has value if it produces a future stream of returns, no matter whether it is exchangeable or not. Exchangeability has become a less common characteristic of assets because of the increase in the wealth consisting of their human capital. Human capital is a term used to describe the capitalized value of the increased stream of earnings that will flow to an individual

¹⁹ See Da Silva, *supra* note 6.

²⁰ J. Thomas Oldham, *DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY* (1994) 5-4.

²¹ *Id.*

²² *Id.* at 5-6.

²³ *Id.*

²⁴ W. Va. Code Ann. § 48-2-1.

who has been the recipient of an investment in skills or knowledge.²⁵ In other words, human capital is an asset owned by an individual. An asset has value not because it can be exchanged for money, but because it will provide a stream of future returns. This difference can be illustrated by considering a share of common stock that has traditionally been recognized as property and a medical education that seldom has been treated similarly. Although a share of common stock can be exchanged, no rational investor would pay a positive price for the common stock of a corporation that was never expected to produce any profits or pay any dividends. Meanwhile, medical school can be an attractive investment resulting in a valuable asset--human capital--although the doctor cannot sell herself or the degree.²⁶ An asset has value because of its future returns--both financial and psychic--not because of its exchangeability.

Our wealth or property at any moment consists of the assets that provide us with future returns. That property can consist of a house providing services that could be converted into a rental value, stocks and bonds that will provide dividends and interest, and the income stream that we can expect from the compensation for our services in the future. In contrast to a house, a share of common stock or a bond, the stream of future income from human capital cannot be sold. Conceptually, however, they are all assets or property.

When is Property Acquired?

When property is acquired can be an important question at divorce because separate property is usually returned to its owner, but marital property is divided between the spouses. While property's value is based on its future returns, its acquisition is based on investments.²⁷ Investments in physical and financial assets and, therefore, their acquisition can usually be traced to particular transactions. A car purchased before marriage is usually separate property, while a house purchased during marriage will usually be marital property.²⁸ This process is much less straight forward with human capital. The investments that create human capital occur over a long period and take many different forms making the partition between separate and marital property more difficult. We all have the innate ability to earn an income based on our natural intelligence and strength. While the income from these skills is partially a return to earlier investments in food, shelter, and clothing, the focus here will be on investments that allow an individual to generate an income greater than the income that he would derive from his innate strength and intelligence. In other words, the investments create human capital. Sometimes the skills that

²⁵ The primary source for the development of human capital is Gary Becker, HUMAN CAPITAL (3d ed. 1993).

²⁶ The doctor can sell his or her services.

²⁷ Investment is the flow of expenditures devoted to projects producing goods which are not intended for immediate consumption. These investment projects may take the form of adding to both physical and human capital as well as inventories. See Pearce, *supra* note 7 at 216.

²⁸ Property acquired during marriage with separate property funds will generally continue to be separate property.

produce the enhanced income will be evidenced by a license or degree, but that is not necessary. Some celebrities such as athletes and entertainers have enhanced incomes that have nothing to do with licenses and degrees.

In contrast to other forms of property acquired with discrete transactions, human capital is acquired through many investments. These investments normally take place in a formal educational environment or on-the-job financed either by the recipient or by others. In addition, they are often interconnected, so that a group of investments has to be viewed as a package. The income of a successful actor should be attributed to both his training as an actor and the preceding investments in formal education that provided a foundation for that training. Investments that result in a successful actor or singer having an above average income are interconnected and extend over his life.

The funding of human capital investments can be made by the individual who is the beneficiary of the investments or by others while incurring at the present or being shifted to the future. These investments consist of the direct expenditures on tuition and books during formal education and the indirect costs of the individual's sacrificing income from alternate employment. While the individual will usually incur the cost of the sacrificed income, the direct costs are often incurred by others. It is difficult to borrow to invest in one's human capital because of the lack of collateral. This is especially true for investments in elementary and secondary education. Therefore, the funds for these investments are usually provided by others. Parents usually cover their children's living expenses. Taxpayers--including the parents--pay for most of the direct costs of educational institutions. After the individual reaches an age when jobs are available, the proportion of the investment made by the recipient due to sacrificed employment increases. A major cost of a medical education is the income that the student could be earning somewhere else.

At some point, the individual may have to incur both the direct and indirect costs of these investments in human capital. This is especially true for graduate education, but is also true for athletes and entertainers who have to sacrifice other alternatives in pursuit of their career. The question then becomes whether to incur the costs now or later. Given the higher future income that the investment can generate, some borrowing is logical to fund these investments while shifting the cost to the future.

Investments in On-The-Job Training

While celebrity status can be based on a variety of backgrounds, the focus here is on the entertainment industry. Therefore, this article analyzes an individual's celebrity status based on being an actor. This analysis is equally appropriate for other types of celebrities such as athletes and musicians. Investments in human capital typically occur in the two environments noted above: educational institutions and on-the-job.²⁹ The skills acquired can be general with broad applications or specific so that they are only used by a particular company or organization. Formal education is an important source of general skills such as English and mathematics, while on-the-job training can result in the acquisition of either specific or general skills. On-the-job training or experience can be particularly important for celebrities. The skills possessed by actors

²⁹ See Jacob Mincer, *SCHOOLING, EXPERIENCE, AND EARNINGS*, (1974).

reflect a combination of innate skills combined with formal education and experience or on-the-job training.

Economists have investigated the funding sources for on-the-job training.³⁰ They have concluded that businesses, including theaters, will incur the cost of specific on-the-job training since the skills only have value to the funding company. For example, established actors expect to be paid to memorize an obscure play that a theater is performing since their committing this play to memory has little value elsewhere. Alternatively, theaters are reluctant to pay actors for obtaining general skills. If a theater pays an actor for the time necessary to master basic skills that have broad applications, it has no assurance that the actor will continue to work for it. Therefore, the aspiring actor often has to pay to acquire experience in a university setting or to accept limited compensation in summer stock. Having acquired these essential general skills, the actor can expect to be paid more by his current or another employer.

Therefore, particularly important for celebrities such as actors is on-the-job training--learning by doing. Initially, the aspiring actor probably has a poor grasp of the skills necessary for success and, therefore, cannot expect a high income. Sometimes, the actor's skills are so limited that he is not offered a salary or has to pay for the privilege of performing. To improve his skills, an investment has to be made. A major cost of this investment is sacrificed income that is the difference between his best alternate income and the one earned during training. If an actor accepts a job in summer stock for living expenses worth \$500 a month, while sacrificing a job that pays \$2,000 a month, he is investing \$1,500 a month in his skills.

Equity and Debt Claims

Since an actor's skills are usually general, he must fund their acquisition by either paying for formal training or sacrificing income from other types of employment to pursue acting opportunities.³¹ These investments--like other ventures--can be funded from two sources: equity and debt. While the funds are the same, the claims are very different. An equity claim, such as a share of common stock, provides the investor with a share of the profits, if any, from a venture. Meanwhile, debt provides a lender, such as a commercial bank, with a claim for a certain return on their investment no matter whether it is profitable or not. This return consists of interest plus the return of the principle amount of the loan.

With most ventures, equity and debt funds are not perfect substitutes. Loans usually require some collateral from the borrower. Until some initial investments have been made, the borrower will find it very difficult to acquire additional funds. The initial investments in human capital such as support from the family, foregone earnings by the beneficiary and educational funding by taxpayers are similar to equity. They are essential. On the other hand, later investments in human capital, especially in formal education, often are similar to debt since they are financed with loans. With loans, the usual criterion is the source with the lowest cost. While

³⁰ See Becker, *supra* note 25 at 30.

³¹ For a discussion of the efficiency considerations in spousal support of education, see Borenstein & Courant, *supra* note 2 and Polsby & Zelder, *supra* note 2.

someone with an equity interest has a claim on a share of the returns to an investment, those with a debt interest only have a claim on the contracted rate of return.

A loan--if available--allows an actor to make an investment without a current sacrifice. On the other hand, because of loan payments, the loan reduces the income that will be available later. If an alternate source of funding is available, it would be preferred. Funding by the family or spouse will increase the actor's current standard of living without a corresponding need for repayments later. Often, this funding does not make success possible; it simply reduces the burdens incurred during the investment process.

Current Income vs. Human Capital

At any time, individuals have an expected future net income stream based on past and anticipated future investments the present value of which is their human capital.³² Although we cannot calculate human capital with certainty, it exists. The human capital that individuals possess at marriage is separate property just as much as if they had owned a portfolio of stocks and bonds. If they had not acquired training as an actor but instead they had taken the direct and indirect costs of the training and invested those funds in stocks and bonds, the courts would have no difficulty treating those assets as separate property. However, when the investments result in professional or celebrity status, the courts have not developed a clear and consistent policy.

An actor who marries has an anticipated income stream independent of his marital status based on prior investments in human capital. This income stream is net of any additional investments, such as continuing to sacrifice income that could be earned elsewhere, that might be required to continue his training or to remain flexible for acting opportunities. Usually, these additional investments are small compared with prior investments, especially in education.

Under normal circumstances, the investment in human capital before marriage will be so large and essential compared with the investments after marriage that an individual's human capital should be treated as separate property. In exceptional cases, when the investment after the marriage is substantial, it is appropriate to treat part of the human capital as marital property. Even when human capital is treated as separate property, reimbursement is appropriate if it was funded in part by funds provided by the other spouse.

To determine the share of human capital that can be attributed to the marriage, the analysis should address the investments made after the marriage. A common mistake in cases involving human capital as professional or celebrity careers is to associate human capital with current income. An individual's income at marriage is often a poor gauge of his human capital then, since incomes increase over time. The rate at which earnings increases is particularly pronounced for people with substantial human capital.³³ A fourth year medical student probably

³² All economic decisions are forward looking. Past events provide information for those decisions, but they are "sunk" for purposes of making rational decisions about the future. See Samuelson & Nordhaus, *supra* note 7 at 271.

³³ Becker, *supra* note 25 at 230, shows the people with more education and, therefore, more human capital tend to have a higher rate of earnings increases over their lives. This is most noticeable in the professions as individuals often need on-the-job training that complements their

has no income and more than likely is incurring substantial expenses, yet possesses substantial human capital. Even after graduation, her income as a resident is far below what she can expect later so it again is a poor gauge of her human capital. Her human capital is the value of her future income stream that often has little to do with her current income.

In summary, it is important to recognize that an individual's human capital was created by investments that occurred over an extensive period. Its value is based on the future income that it will produce. Investments that are essential create an equity interest and, therefore, a claim on a share of the human capital, while other investments generally replace loans and, therefore, result in a fixed debt claim against the human capital.

Conceptually, human capital is similar to the assets that the courts traditionally have recognized as property in divorce settlements. At dissolution, an evolving issue has been whether a spouse's human capital is marital property. While the courts have not used those words, they have addressed whether evidence of human capital such as degrees and licenses is marital property. Recently, they have expanded the evidence of human capital to include celebrity status. Normally, all property acquired by either spouse before marriage continues to be his or her separate property after marriage and does not become marital property. In contrast, in most states the property obtained by either spouse during the marriage belongs to the husband and wife equally. A clearer understanding of how human capital is acquired reduces the confusion over how the courts should deal with marital property at divorce when there is celebrity status.

III. HUMAN CAPITAL IN A CELEBRITY DIVORCE

Since celebrity status is a form of human capital, it should result in an adjustment in the divorce settlements in two situations: when significant investments were made in human capital during the marriage to acquire celebrity status (celebrity investments) or when the non-celebrity spouse sacrificed human capital for the benefit of the celebrity spouse (sacrificed career). Celebrity investments can either produce marital property that can be divided or require reimbursement for funds provided from the supporting spouse's separate property human capital. With a sacrificed career, the supporting spouse is contributing separate property human capital to the marriage under circumstances warranting compensation at divorce.

Celebrity Investments

Becoming a celebrity requires innate ability combined with investments. While it might go unnoticed, a significant share of these investments consists of formal education funded by parents and taxpayers. Later, aspiring entertainers benefit from formal training programs or on-the-job training during which much of the investment consists of sacrificed income by the entertainer. The entertainer's life style can be improved during the period of sacrificed income if he is provided funds from other sources such as family or a spouse.

The family or spouse are making an investment. A central question is whether the investment results in an equity or debt claim. As noted above, equity investments are essential and result is a claim on a share of the profits from the venture, while debt investments come later and result in a fixed return. Most support for graduate education, for example, is best treated as creating a debt interest because it replaces loans that the student could receive from other sources.

formal education.

If spousal support of an aspiring entertainer replaces credit card and automobile loans, for example, treating the support as a loan is often the best approach.

Since it is more difficult for young people who are not students to obtain loans, funds provided by a spouse may be more similar to an equity investment. For example, an actor who is the only source of support for his mother is working as an automobile mechanic so that it is virtually impossible for him to pursue an acting career. He does not qualify for any loans that would help the process. Eventually, support from his wife permits him to quit his job, move to California and pursue a successful acting career. His wife's investment is similar to an equity investment and, therefore, creates a claim against the actor's future income if there is a divorce.

Having identified the investment as creating an equity claim still leaves many issues to be addressed. Within a commercial setting, the share of the business acquired by an equity investor is based on a contract. If a business that has 90 shares of common stock issues 10 more shares, the new shareholders will own 10% of the business. Since most equity investments in human capital are not accompanied by an explicit contract, we have no direct guidance as to the share acquired by the investment. Does support for the last year of medical school warrant a 5% interest in the enhanced earnings of a doctor or 25%?

There are additional problems involved in determining the value of an equity interest in enhanced earning capacity. The seminal New York case of *O'Brien v. O'Brien*³⁴ held that a medical degree can be marital property. The court valued the degree not on the funds provided but on the enhanced earnings that it produced with the wife being awarded a share. Since the investment by Mrs. O'Brien resulted in her husband obtaining his medical degree, the court based the enhanced earnings on the difference between a college graduate's income with a bachelor's degree and one with a medical degree. This type of analysis has to be used with care, since it overstates the value of the investment. People accepted by medical schools are better qualified than the average college graduate, so they would be expected to become more successful than the average college graduate even if they did not go to medical school.

In addition, the future enhanced earnings have to be converted to a present value to determine the value of the marital property. In *O'Brien*, Mrs. O'Brien's expert used an inflation adjusted interest rate of 3%. One significant factor influencing the return on an investment is risk, which is an unattractive characteristic.³⁵ The more variable the income stream from an investment, i.e., the risk, the higher is the expected return. Because of the higher variability of celebrities' incomes, the discount rate used for them should be higher than the rate used for a medical doctor. In contrast to stocks listed on the New York Stock Exchange, there is no obvious source of data to determine the appropriate risk adjustment for a particular celebrity.

³⁴ 489 N.E.2d 712 (N.Y. 1985).

³⁵ William F. Sharpe, *INVESTMENTS* (3d. ed. 1985), 2.

A debt approach to human capital at divorce will often be more attractive than the equity one for two reasons. The situation warrants it and it is easier to calculate.³⁶ The more likely situation for an actor is one in which the funds from the spouse were not essential, but made the aspiring entertainer's life more comfortable. Then, the more appropriate method for treating the spouse's investment is to treat it as a loan. At marriage, both spouses have human capital that is best treated as their separate property. During marriage, the incomes from their human capitals are available for spouses' use with most purchases benefiting all family members. However, some funds from their human capitals can be used not for the benefit of all family members but to invest in one spouse's human capital.³⁷ This can be a reasonable choice if the marriage lasts. However, the supported spouse's net income can be higher after a divorce than if the investments have been made from loans, so that spouse's human capital has been increased and an adjustment is necessary at divorce.

The value of the financial investment by the supporting spouse consists of half her income and half the difference between the actor's income net of training expenses and his best alternate income.³⁸ A married couple considers investing in the career of one spouse. Since marriage is a partnership, they can enjoy the income from their current human capitals or they can elect to increase one spouse's human capital through additional investments. For example, the non-celebrity and aspiring celebrity currently have annual net earnings of \$20,000 and \$5,000, respectively, while the aspiring celebrity could be earning \$25,000 in a job that would inhibit his ability to pursue his acting career. Their potential and actual incomes are \$45,000 and \$25,000, so the cost of the acting career is costing the couple \$20,000. Essentially, the wife's share of the cost is \$10,000, which probably is best treated as a loan to the celebrity spouse. If the marriage ends before the actor has become successful, the court should compensate the non-celebrity spouse for any loans plus interest. If the divorce occurs after the actor has established celebrity status, then the loan plus interest has to be reduced to reflect the enhanced income received by the non-celebrity spouse.

Sacrificed Career

Often the marriage will not affect the celebrity's human capital. That is not to say that the celebrity's income did not increase during the marriage. Human capital has a value based on an

³⁶ The analysis of how loans used to acquire human capital should be treated at divorce is contained in Allen M. Parkman, *An Investment Approach to Valuing Spousal Support of Education*, in Ron L. Brown, ed., *VALUING PROFESSIONAL PRACTICES AND LICENSES: A GUIDE FOR THE MATRIMONIAL PRACTITIONER* 18-1 (2d ed. 1994).

³⁷ The value of an individual's human capital at marriage incorporates any expected future investments. The larger the expected investments the lower is the value of the human capital.

³⁸ The relevant income here is after tax. This analysis ignores the non-financial contribution of household services.

individual's future income stream net of any anticipated investments.³⁹ Therefore, human capital increases only if this anticipated income stream increases rather than just actual income. For example, an actor marries who has completed his formal training and has obtained minor parts in New York theaters that provide an income that is not dissimilar from the income earned by people with a similar education. At this point, from an economic perspective most major investments have been made. If he becomes successful and his income increases, that should not be totally unanticipated, so his human capital has not increased.

Meanwhile, an adjustment may still be necessary at divorce if his spouse altered her career to accommodate his. The non-celebrity spouse had human capital at marriage that was conceptually her separate property. The value of that human capital was based on some future investments often in on-the-job training to maintain her skills. If she alters her career by placing more emphasis on being a homemaker and mother or to accommodate his career, the value of her human capital can decline. At 40 years of age, she could expect to earn \$40,000 per year if she had remained actively involved in the labor force. Alternatively, if she left the labor force for ten years and then is divorced, she may receive only \$25,000 per year because she has not maintained her skills. If her after-divorce income stream has declined because of communal decisions to limit her labor market participation, she is worse off. The value of her human capital declined during the marriage. Normally, she did not make these decisions gratuitously, but with the expectation that the marriage would continue and she would receive commensurate benefits from her spouse's success. Conceptually, the couple entered into an implied indemnification contract with the wife's claim at divorce being her asset and the marriage's debt. This claim is based on the present value of the difference between her expected after-divorce earnings and those that she could have expected except for the limitations that she imposed on her career.

IV. CELEBRITY STATUS AS MARITAL PROPERTY

While there have only been three cases that address the value of celebrity status,⁴⁰ two states--New York and New Jersey--now treat it as a potential source of marital property. Given the importance of these states and the injustices that often occur in the financial arrangements at divorce,⁴¹ these cases could provide the impetus for similar decisions in other states. Consequently, these cases should be analyzed using an economic framework to avoid the ad hoc approach often used in cases dealing with professional degrees, goodwill and licenses. The following section analyzes these celebrity career cases using the framework developed above.

Golub v. Golub

³⁹ See Becker, *supra* note 25 at 59.

⁴⁰ *Golub v. Golub*, 527 N.Y.S.2d 946 (1988), *Piscopo v. Piscopo*, 557 A.2d 1040(1989), and *Elkus v. Elkus*, 572 N.Y.S.2d 901 (1991).

⁴¹ See Weitzman, *THE DIVORCE REVOLUTION* (1985).

The first case that recognizes celebrity status as marital property is *Golub v. Golub*,⁴² which held that the increase in the value of model and actress, Marisa Berenson's, career was marital property subject to equitable distribution in her divorce from her attorney husband, A. Richard Golub. She had an established reputation and career before the marriage. Born in 1947, she started modeling at age 16 over the objections of her aristocratic family that included her grandmother, the fashion designer Elsa Schiaparelli.⁴³ By the mid 1970's, acting had been added to her modeling career as she had appeared in the movies *Cabaret* and *Barry Lyndon*. At her marriage to millionaire James Randall in 1976, she was described as the "Queen of the International Jet Set."⁴⁴ Her wedding was described as the most glamorous gathering that year of film, fashion, and high finance under one tent.⁴⁵ That marriage lasted two years and produced one child. She eventually married Richard Golub in 1982 a day before her 34th birthday. The couple often lived apart as Ms. Berenson's career required her to spend almost half of each year in Europe. Her income increased during the marriage with her earning more than \$150,000 in 1987. The marriage was failing by 1984 and effectively ended in 1985 with Ms. Berenson filing for a divorce in 1986.

While Ms. Berenson's income could have increased during the marriage for many reasons, the court concluded that Mr. Golub's assistance with his legal skills and business acumen was a primary reason.⁴⁶ It noted that marital property is defined in New York as "all property acquired by either or both spouses during the marriage"⁴⁷ and, therefore, held that the couples' marital property included the increase in the value of Mr. Golub's practice and Ms. Berenson's career. While it was well established that the increase in Mr. Golub's law practice was marital property, this is the first instance in which marital property has been extended to include the increase in a celebrity's career. The court recognized that treating Ms. Berenson's career as marital property was new law with the issue being whether the law of *O'Brien v. O'Brien*⁴⁸ should be extended to non-professional spouses. In *O'Brien*, the New Court of Appeals recognized a medical degree as marital property subject to division at divorce.

Mr. Golub contended that the increase in the value of Ms. Berenson's acting and modeling career was marital property and that he deserved an equitable distribution based on his

⁴² 527 N.Y.S.2d 946(1988).

⁴³ NEWSWEEK, October 6, 1975, 58.

⁴⁴ NEWSWEEK, December 6, 1979, 102.

⁴⁵ Id.

⁴⁶ *Golub*, 527 N.Y.S.2d at 948.

⁴⁷ Section 236 [B] [(1) [c].

⁴⁸ *O'Brien*, 489 N.E.2d 712 (N.Y. 1985).

contribution toward its increase. Under *Price v. Price*,⁴⁹ any increase in the value of separate property of a spouse occurring during the marriage that is due in part to the direct or indirect contributions of the other spouse may be considered marital property. Other academic degrees were added to the professional degrees recognized as property in *O'Brien by McGowan v McGowan*⁵⁰.

In her defense, Ms. Berenson cited *Morimando v Morimando*⁵¹, contending that her celebrity status was neither "professional" nor a "license" and therefore not an "investment in human capital subject to equitable distribution."⁵² Moreover, she argued that because a career in show business is subject to substantial fluctuation, it should not be considered. The court rejected that argument by noting that the fact that the professional license itself had no market value was irrelevant because the enhanced earning capacity that the license affords the holder had value. Consequently, all sources of enhanced earning capacity become indistinguishable.⁵³

Having made the point that the key to the creation of marital property is enhanced earning capacity, the court digresses to the potential financial gains from the commercial exploitation of famous personalities emphasizing commercial endorsements⁵⁴ and the right of publicity.⁵⁵ The right of publicity is then compared to professional goodwill noting that both can be the source for producing income. The court generalizes the holding in *O'Brien* because all matrimonial litigants should be treated equally and should not be prejudiced because they married a non-professional who becomes an exceptional wage earner. It concludes that the remedy in *O'Brien* should be applied evenhandedly to all spouses.⁵⁶ Continuing, it holds that "[w]hen 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 goodwill of a business."⁵⁷

⁴⁹ 503 N.E.2d 684 (1986).

⁵⁰ 535 N.Y.S.2d 990 (1987).

⁵¹ 536 N.Y.S.2d 701 (1987).

⁵² *Golub*, 527 N.Y.S.2d at 949.

⁵³ *Id.*

⁵⁴ Stiffelman, *supra* note 3, argues that public personalities have an interest in their right of publicity and that this interest is a divisible asset.

⁵⁵ *Id.*

⁵⁶ Samuelson, *The Valuation of Non-Tangible Assets of Non-Professionals*, 19 FAM. L. R. 1 [NY St B Assn, June 1987].

⁵⁷ *Golub*, 527 N.Y.S.2d at 950.

Having noted that the important consideration in determining whether marital property has been created is whether the celebrity's earning capacity has been enhanced, the court contradicts itself. This occurs when it discusses *Morimando*,⁵⁸ in which a physician's assistant's spouse sought to have that spouse's license declared marital property for equitable distribution purposes upon divorce. That court distinguished that case from *O'Brien*, because a physician's assistant does not share the same level of opportunity as does an M.D. because a physician's assistant must always rely on an employer. Unlike a physician's assistant, someone like Ms. Berenson often functions independently and is not at the mercy of his or her employer.⁵⁹ From an economic perspective this is an unfortunate comparison, since, if the key is enhanced earning capacity, the source is not relevant. Although becoming a physician's assistant does not enhance income earning capacity as much as becoming a medical doctor, if the essential investments occurred during the marriage then the enhanced income earning capacity should be treated as marital property. This analysis reflects the ad hoc nature of decisions involving human capital in essentially all jurisdictions. At least in New York it seems fair to give a supporting spouse a share of the wealth of a medical doctor, but not a physician's assistant. However, when it comes to the proper definition of a term, fairness should not be a consideration. If enhanced earning capacity is property, then it should be treated as property whenever it occurs.

After the digression, the court returns to *O'Brien* by arguing that if it is to remain as good law, its rule should be uniformly applied, which is surprising given *Morimando*. Consequently, there is 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. If one spouse has sacrificed and assisted the other trying to increase that other spouse's earning capacity, it should make no difference what shape or form that asset takes so long as it in fact results in an increased earning capacity."⁶⁰ This follows from treating the marriage as an economic partnership with the enhanced earning capacity the result of the joint efforts of the parties.

Having stated in unambiguous terms that the key is enhanced earning capacity attributable to joint efforts during the marriage, the court digresses again to a discussion of equity. If a spouse, such as Mrs. O'Brien, devotes herself "to the family during the marriage, giving up career opportunities, and no liquid assets exist, the court should compensate this spouse for his or her contribution enabling him or her to pursue his or her career and not just a terminable maintenance award."⁶¹ If the court is comfortable that enhanced earning capacity is marital property,

⁵⁸ 536 N.Y.S.2d 701 (1987).

⁵⁹ *Golub*, 527 N.Y.S.2d at 950.

⁶⁰ *Id.*

⁶¹ *Id.*

considerations of equity should concern how it is divided rather than whether it replaces a maintenance award.

While it is a desirable step to expand the *O'Brien* rule to include as marital property any joint efforts during marriage that enhance earning capacity, this case can lead to confusion about when marital property has been created and how it should be valued. This is illustrated by the recognition that Ms. Berenson had a very established career when she married Mr. Golub. Having had a high income for many years, it was no longer reasonable to assume that she was attempting to maximize her current earnings. If her earnings rose during the marriage, this could as likely be due to attractive opportunities as to Mr. Golub's assistance.

A more fundamental concern about the court's conclusions is the confusion between an increase in income and in income earning capacity. The former to the extent that it could have been anticipated may just reflect human capital possessed by an individual at marriage, i.e., their separate property, which requires no adjustment at divorce. Meanwhile, the latter reflects an increase in human capital that would require an adjustment at divorce due to an increase in marital property. The court had evidence that Ms. Berenson's income rose during the marriage and, while there are many reasons why this may have occurred, they identify Mr. Golub's assistance as being a contributing factor.⁶² This increased income was available during the marriage for both spouses. However, for the marriage to have resulted in an enhanced earning capacity for Ms. Berenson, her *after the marriage* income has to have increased based on the efforts of Mr. Golub. While Ms. Berenson continues to be a social celebrity, her career, especially as an actress, since her divorce has not returned to the success that she experienced in the 1970's--long before she married Mr. Golub. Consequently, Mr. Golub's affect on her human capital appears to have been small. By associating marital property with past income increases rather than with an increase in anticipated future income, this decision could easily result in substantial future injustices. There is no evidence that either spouse made substantial alterations in their careers to further the career of the other. So it was appropriate for the court to ignore any analysis of their sacrificed careers.

Piscopo v. Piscopo

The second case involving the value of celebrity status was *Piscopo v. Piscopo*⁶³ in which the court held that celebrity goodwill is a distinct asset that could be distributed at divorce if it was acquired during the marriage.⁶⁴ Joe and Nancy Piscopo met in 1970 and then lived together while students at Jones College in Jacksonville, Florida, before married in 1973. Mr. Piscopo's career was a primary focus for them. "Their arrangement required that defendant attend to

⁶² Id. at 948.

⁶³ 555 A.2d 1190 (N.J.Super.Ct.Ch.Div.1988), *aff'd*, 557 S.2d 1040 (N.J.Super.Ct.App.Div.1989). This is the first court to recognize celebrity goodwill as marital property. See Francis W. Donahue & Gary N. Skoloff, *Court Views Celebrity Goodwill as Part of Assets in Divorce Case*, NAT'L L. J., Aug. 14, 1989, at 18.

⁶⁴ For a discussion of the problems associated with applying goodwill to professionals, see Parkman, *supra* note 2.

plaintiff's every personal special need while keeping house, bearing and raising their child and being a sounding board for plaintiff's artistic ideas."⁶⁵ He became a regular at the Improv comedy club and eventually found his greatest fame as a headliner on "Saturday Night Live" in 1980. In 1984, Eddie Murray and he left "Saturday Night Live" and, while Mr. Murray's career flourished, Mr. Piscopo had two movies that flopped--*Johnny Dangerously* and *Wise Guys*. He then drifted into relative obscurity.⁶⁶ Meanwhile, in 1985, Mr. Piscopo filed for a divorce that resulted in a particularly messy child custody battle in part because of his affair with an 18-year old former family baby sitter.

In the divorce action, the only disputed asset was Mr. Piscopo's celebrity goodwill.⁶⁷ Mrs. Piscopo claimed that it would be unfair and inequitable to deprive her of a share in her husband's excess earning capacity, i.e., his celebrity goodwill, which both agreed she had aided in his obtaining. The court was confronted with whether the "professional goodwill" established as marital property in *Dugan v. Dugan*⁶⁸ should be extended to include "celebrity goodwill" is a distinct distributable asset. As noted above, the New York court in *Golub* focused on enhanced earning capacity because of its earlier holdings in *O'Brien* and *McGowan* that degrees enhanced earning capacity and, therefore, could be marital property. The New Jersey court was asked to classify celebrity goodwill as marital property because it had done so for professional goodwill in *Dugan*. In *Piscopo*, the court made that extension.

In *Dugan*, the New Jersey Supreme Court extended the definition of marital property to include an attorney's "professional goodwill" as an intangible asset to which monetary value can be attributed.⁶⁹ Reaching that decision, it extended the earlier holding in *Stern v. Stern*⁷⁰ that a professional practice either as a partnership or corporation was a distributable asset. The *Dugan* court defined professional goodwill as "essentially reputation that will probably generate future business. It is the probability that old customers will resort to the old place."⁷¹ Reputation is the cornerstone of this legally protectible interest. The New Jersey Supreme Court mandated certain findings as antecedent to a determination that goodwill exists: the practitioner's demonstrated capacity, over a few years preceding the complaint filing, to earn net income in excess of the

⁶⁵ Id. at 1191.

⁶⁶ Goug Hill, *At Lunch with Joe Piscopo*, THE NEW YORK TIMES, December 1, 1993, C1.

⁶⁷ *Piscopo*, 555 A.2d at 1191.

⁶⁸ 92 N.J. 423 (1983).

⁶⁹ Id. at 437-438.

⁷⁰ 66 N.J. 340 (1975).

⁷¹ *Dugan*, 92 N.J. at 429.

average practitioner of similar age, experience, education and expertise, who expends a similar number of work hours at the task in question.”⁷²

Mr. Piscopo contended that "professional goodwill" is distinguishable from "celebrity goodwill" because the former has educational and regulatory prerequisites that any person with diligence could attain while the latter requires talent against which there is no "average" to which it can be measured.⁷³ While the New Jersey court had recognized professional practices and goodwill as property, they had not recognized either education or a license as an asset.⁷⁴

The court criticized Mr. Piscopo for asserting that celebrity goodwill is not a distinct asset with monetary value, while he has the right to stop others from appropriating his acts or work product without his consent. Similarly to the *Golub* court, the New Jersey Court digressed into a discussion of the right of publicity that prohibits infringement upon "the celebrity's pecuniary interest in commercial exploitation of his identity" -- with monetary compensation.⁷⁵ This discussion leaves the impression that a celebrity's importance is reflected in the ability to make endorsements, while the critical reason being a celebrity has value is because that individual has an enhanced earning capacity. This enhanced earning capacity is more likely to result from more stable and higher paying employment than endorsements. Most high income celebrities seldom rely on endorsements as a major source of income.

While acknowledging that the entertainment business generates billions of dollars as does law and medicine,⁷⁶ Mr. Piscopo asserted that his excess earnings were more susceptible to attenuation by illness, politics, reputation and connections than other personal service professionals so that valuation of goodwill is impossible.⁷⁷ Rejecting this argument, the court held that the same seven factors used for assessment of professional goodwill enunciated in *Dugan* are equally applicable to detecting the existence of celebrity goodwill.⁷⁸

⁷² Id. at 439.

⁷³ *Piscopo*, 555 A.2d at 1191.

⁷⁴ *Mahoney v. Mahoney*, 91 N.J. 488 (1982).

⁷⁵ 555 A.2d at 1192.

⁷⁶ STATISTICAL ABSTRACT OF THE UNITED STATES 1987 (1987), 746.

⁷⁷ *Piscopo*, 555 A.2d at 1192.

⁷⁸ Walzer and Gabrielson, *A Celebrity's Goodwill and Publicity Value*, in Brown, *supra* note 36 at 236, makes a distinction between celebrity status and publicity value. They argue that celebrity goodwill is the expectation of future patronage or future employment, while a right of publicity is a right to capitalize on the celebrity's name and likeness. The court disagreed believing the two to be inextricably interrelated. *Piscopo*, 557 A.2d at 1042-3. See Rosen, *supra* note 3, at 547.

The court then incorrectly--from a financial perspective--holds that the heightened vulnerability of celebrity goodwill alluded to by Mr. Piscopo does not invalidate it, but just calls for a different formula to arrive at its value. From a financial perspective, the increased risk associated with celebrity goodwill in contrast to professional goodwill would not call for a different formula, but instead for a higher discount rate or lower capitalization rate being used in the capitalization formula using the standard financial formula for valuing an asset.⁷⁹ The court-appointed accountant testified that embryonic but accepted accounting methodology in the entertainment field treats entertainers and professionals differently by applying a discount rather than a multiple to excess earnings in order to reach the capitalization factor.⁸⁰

The court adds that the recognition of celebrity goodwill avoids the non-celebrity spouse being deprived of what could be the most significant marital asset in this lucrative industry. That analysis compelled the court to conclude that celebrity goodwill is a distinct asset susceptible of evaluation which is distributable if acquired during the marriage in accordance with the factors outlined in N.J.S.A. 2A:34-23 (1988).⁸¹

Because the court was not satisfied that it had sufficient testimony to draw conclusions related to either the average earning rate of an entertainer of Mr. Piscopo's age and experience, or as to an appropriate discount rate for a person of plaintiff's level of stardom the parties were given 60 days to supplement the record or to accept the figures reached by the court in its oral decision. The court held that the non-celebrity spouse has a claim on half the appreciation of celebrity goodwill during the marriage. The non-celebrity spouse's interest is based on an equity claim. Eventually, the appellate court accepted a formula in which 25% of Mr. Piscopo's average gross

⁷⁹ The formula for the present value of a future income stream is $V = F_0 / (r - g)$ in which V is the present value, F_0 is the initial flow, r is the required rate of return, and g is the anticipated growth rate. See Sharpe, *supra* note 35, at 426. The required rate of return is strongly influenced by the potential variability, i.e., risk, of the flows. This year's income may be a good indicator of next year's income for a surgeon, but not for a standup comic. As the risk increases, so does the required rate of return, which reduces the value of the asset. A common practice is to restate the formula as $V = 1 / (r - g) * F_0$ with $1 / (r - g)$ being called the capitalization rate. If the required rate of return on a flow that was expected to grow by 5% per year was 25% then the capitalization rate would be $(1 / (.25 - .05))$ or 5. Therefore, if the flow was enhanced earnings of \$10,000 per year, then its present value--that of celebrity goodwill--would be \$50,000.

⁸⁰ When the required rate of return minus the growth rate is less than 100%, the capitalization rate is greater than one, i.e., a multiple. Alternatively, when the required rate of return minus the growth rate is greater than 100%, then the capitalization rate is less than one, i.e., a discount. The primary factor affecting the required rate of return is the risk of the future flows with it being higher for riskier events such as those associated with celebrities' future income.

⁸¹ *Piscopo*, 555 A.2d at 1193.

earnings for three of the five years preceding the valuation date was deemed to be a good estimate of his celebrity goodwill.⁸²

While Mrs. Piscopo provided valuable domestic services to Mr. Piscopo, there is little evidence that his income stream during and after the marriage was any different from what it would have been without the marriage. In other words, the marriage does not appear to have greatly affected his human capital although his income rose dramatically during the marriage--and fell afterwards. As in many professional goodwill cases, the outcome here has a certain attraction from a fairness perspective although the financial analysis is flawed. The injustice that would have occurred under preexisting law would not have been the court's ignoring Mr. Piscopo's success but because it would have ignored Mrs. Piscopo's sacrifices. Mrs. Piscopo had a potential career at marriage. She limited that career for their benefit. At divorce, she can expect to earn less--and potentially have poorer marriage prospects--than she had at the time that she married Mr. Piscopo. She sacrificed her human capital for the benefit of the marriage. As mentioned above, the reduction in the value of her human capital should be treated as an implied indemnification contract resulting in a debt of the marriage to her.

While the courts in both the *Golub* and *Piscopo* cases make a point of emphasizing the relationship between a celebrity's right to be paid for endorsements, Mr. Piscopo is the only celebrity discussed here who substantially relied on endorsements as a source of enhanced income--in his case from General Nutrition Centers.⁸³ In part, he had to rely on endorsements, because of the failure of his career. To the extent that the endorsements followed from his earlier success as a comedian and his success as a comedian could have been anticipated at marriage, then this is all a return to his separate property human capital.

Elkus v. Elkus

The most recent and probably most famous case holding that celebrity status can be marital property subject to division at divorce occurred in the divorce of opera singer Frederica von Stade Elkus and her husband Peter Elkus.⁸⁴ Ms. von Stade had a patrician background--a great-grandfather had been a partner of J. P. Morgan. She saw her first opera at age 16 in Salzburg. After high school she went to Paris where she worked as a nanny and perfected her French. Upon returning home, she worked in New York and started acting in summer stock at the Long Wharf Theatre in New Haven. Meanwhile, she started to take courses at Mannes College of Music funding her education with part time jobs. Her original goal was to learn how to read music, but soon found that the better investment was in her voice. Eventually, she was plucked out of the Metropolitan Opera Auditions by the Met's general manager, the legendary

⁸² *Piscopo*, 557 A.2d at 1041. Before oral argument on the appeal, the parties stipulated that Mr. Piscopo's celebrity goodwill was worth \$98,708.60. *Id.* at 1042, n. 4. Also see Gary N. Skoloff and Francis W. Donahue, *Peace and Goodwill to Celebrities*, in Ronald L. Brown, VALUING PROFESSIONAL PRACTICES AND LICENSES, (2d ed. 1993) 25-1, 25-5.

⁸³ Hill, *supra* note 66.

⁸⁴ *Elkus*, 572 N.Y.S.2d 901 (1991).

Rudolf Bing, given a private audition and was immediately offered a three-year contract.⁸⁵ In 1969, she made her Met debut with a "one-liner" in Mozart's *The Magic Flute*. By early 1973, she was starring with established performers such as Marilyn Horne with the New Jersey Symphony. She won international recognition in April 1973, when she sang Cherubino in the *Marriage of Figaro* with the Paris Opera. As result of that performance, she made her debut in almost every European opera house returning to the U.S. as a star.⁸⁶

Just as her career was taking off, she married Peter Elkus, who she met at Mannes, on February 9, 1973. When she married, she was 27 years old, had completed her conservatory training, had a Metropolitan Opera contract and was already headlining programs with singers of the stature of Marilyn Horne. While her income was low, she had established a record that showed strong evidence of a highly successful career. From an economic perspective, she had substantial human capital based on earlier investments and, therefore, it is best treated as separate property.

During the marriage, the Ms. von Stade's career flourished and her income rose from \$2,250 in the first year to \$621,878 in 1989 just before her divorce. She continued her association with the Metropolitan Opera, while becoming an international star. During the marriage, Mr. Elkus sacrificed his career and travelled with Ms. von Stade and their children critiquing her performances and photographing her for album covers and magazine articles. He also was the plaintiff's voice coach and teacher for ten years of the marriage.

Ms. von Stade filed for divorce in 1990. In those proceedings, Mr. Elkus contended that Ms. von Stade's career and/or celebrity status increased in value during the marriage due in part to his efforts and, therefore, he was entitled to equitable distribution of this marital property.⁸⁷ The Supreme Court disagreed refusing to extend the holding in *O'Brien* to include Ms. Von Stade's career as an opera singer. "The court found that since the defendant enjoyed a substantial life style during the marriage and since he would be sufficiently compensated through distribution of the parties' other assets, the plaintiff's career was not marital property."⁸⁸ Ms. von Stade argued that since her career and celebrity status are not licensed, are not entitles which are owned like a business, nor are protected interests which are subject to due process of law, they are not marital property.⁸⁹

⁸⁵ For a discussion of her career, see Joseph Koenenn, *The Artistry of Her Operatic Craft*, NEWSDAY, January 10, 1988, Part II, 13.

⁸⁶ Judith Michaelson, *Oh, The Life of a Diva*, L. A. TIMES, Calendar, March 4, 1990, 7.

⁸⁷ *Elkus*, 572 N.Y.S.2d at 902.

⁸⁸ *Id.*

⁸⁹ *Id.*

The Appellate Division reversed holding that neither the Domestic Relations Law, nor relevant case law, allowed for such a limited interpretation of the term marital property.⁹⁰ In the statute, marital property is broadly defined as property acquired during the marriage “regardless of the form in which title is held.”⁹¹ The law broadly defines the term “marital property” intending to emphasize the “economic partnership” concept of the marriage relationship. The courts were left to find what interests are marital property.⁹² *O'Brien* expanded the marital property beyond traditional property concepts to include assets that do not necessarily have an exchange value or are tangible. Medical licenses were held in *O'Brien* to enhance the earning capacity of their holders, thereby enabling the supporting spouse to share their value as part of an equitable distribution.

Although Ms. von Stade’s career--in contrast to the husband in *O'Brien*--is not licensed, the court did not restrict its holding to professions requiring a license or degree. In reaching its conclusion that a medical license is marital property, the *O'Brien* court referred to the language contained in N.Y. Domestic Relations Law § 236 that provides that in making an equitable distribution of marital property, “the court shall consider: ... (6) any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party [and] . . . (9) the impossibility or difficulty of evaluating any component asset or any interest in a business, corporation or profession.”⁹³

The Appellate Division held that the analysis in *O'Brien* was equally applicable to Ms. von Stade's celebrity career. This legislation was intended to prevent inequities that previously occurred upon the dissolution of a marriage. If marital property was restricted to licensed professions, it would discriminate against spouses of individuals working in other areas. This outcome would conflict with the equitable distribution premise that marriage is an economic partnership to which both parties contribute based on their abilities and preferences. These contributions occur as a spouse, parent, wage earner or homemaker.

The court then cited *Golub*⁹⁴ to emphasize that it is the enhanced earning capacity that a medical license affords its holder that the court deemed valuable, not the document itself. It emphasized that “[t]here is no rational basis upon which to distinguish between a degree, a license

⁹⁰ Id.

⁹¹ N.Y. DOM. REL. LAW §236(B)(1)(c).

⁹² 572 N.Y.S.2d at 902.

⁹³ N.Y. DOM. REL. LAW § 236(B)(5)(d)(6), (9).

⁹⁴ *Golub*, 527 N.Y.S.2d 946 (1988).

or any other special skill that generates substantial income."⁹⁵ It further notes the *Golub* court's discussion of the potential gains from the commercial exploitation of famous personalities.

Comparing the *Elkus* and *Piscopos*, the Court noted that in both cases the couples focused on one goal the facilitation of the celebrity's rise to stardom.⁹⁶ It agreed with the courts that considered a celebrity's career and concluded that the enhanced skills of an artist such as Ms. von Stade, although growing from an innate talent that have enable her to become an exceptional earner, may be valued as marital property subject to equitable distribution.

It also rejected Ms. von Stade's argument that her career is not marital property because she had already become successful before her marriage to Mr. Elkus, by noting the increase in her income between 1973 and 1989. Further in *Price v. Price*,⁹⁷ the Court of Appeals held that "under the Equitable Distribution Law *an increase in the value of separate property* of one spouse, occurring during the marriage and prior to the commencement of matrimonial proceeding, which is due in part to the indirect contributions or efforts of the other spouse as homemaker and parent should be considered marital property Domestic Relations Law § 236[B][1][d][3]"[emphasis added].⁹⁸

In its role as the trier of fact, the Court concluded that while Ms. von Stade was born with talent and had already been hired by the Metropolitan Opera at her marriage, her career was only in the initial stages of development. During the marriage, Mr. Elkus's involvement in her career clearly contributed to the increase in its value and to the extent the appreciation in the plaintiff's career was due to the defendant's efforts and contributions, this appreciation constitutes marital property.⁹⁹ In sum, the Court found that it is the supporting spouse's contribution, rather than the nature of the career, which should determine whether a career is marital property.¹⁰⁰

There are two major problems with this case. First, the Appellate Division associates the increase in Ms. von Stade's income during her marriage with an increase in the value of her human capital. At her marriage in 1973, there was already strong evidence of her future successes. It is the income that an individual can expect in the future rather than her current income that establishes her human capital. Only if the expected income increases does the human capital increase. There is no evidence that the income that she could expect after her divorce was different from the income that could have been expected then at her marriage. Given her age, training and successes before marriage, the burden of proof should have been on her spouse to

⁹⁵ *Elkus*, 572 N.Y.S.2d at 904.

⁹⁶ *Id.*

⁹⁷ 69 N.Y.S.2d 8 (1986).

⁹⁸ *Id.* at 11.

⁹⁹ *Elkus*, 572 N.Y.S.2d at 904.

¹⁰⁰ *Id.* at 904-5.

show that changes occurred in her career during the marriage that would not otherwise have occurred. To show that he helped her and her income increased does not come even remotely close to that standard. Therefore, the court should have ruled that her celebrity career was her separate property that did not appreciate during the marriage and, therefore, it was not marital property. The court's recognition of enhanced earning capacity as property and, therefore, potentially marital property is a very constructive development. Unfortunately, its application of that principle here is flawed.

Second, and related to the first, is the assumption that Mr. Elkus's coaching, photographing and child care made a significant contribution toward the success of her career. Ms. von Stade's career would probably have required some coaching, photographing and child care. While like any good spouse Ms. von Stade speaks warmly of Mr. Elkus's assistance,¹⁰¹ there is no evidence that the services that he provided were unique and, therefore, could not have been provided by someone else. The services that he provided could have been purchased from someone else resulting in a decrease in her disposable income that they shared. Essentially, his providing professional services increased the disposable income from Ms. von Stade's career while reducing it from Mr. Elkus'. Moreover, there is no evidence that his services increased her gross income during or after divorce above what could have been expected at marriage.

Meanwhile, Mr. Elkus clearly sacrificed his career for the benefit of his wife's career. He had human capital when they married. Since he was already in his 30's then, there should be substantial evidence of his potential career. As with Ms. von Stade, that human capital was his separate property based primarily on prior investments. The essential question at divorce should have been the marriage's effect on his human capital. Could he then expect to make more or less over the rest of his work life than could have been expected when he married? His career before the marriage might warrant the conclusion that he would be an established singer by the time of the divorce except for his devotion to Ms. von Stade. To the extent that his absence from the opera world reduced his income after the divorce, his human capital has been reduced and compensation would be justified. Alternatively, his association with Ms. von Stade might have increased his income after his divorce above that which could have been expected then without the marriage. In that case, his human capital increased. In summary, the court analyzed the wrong person.

V. CONCLUSION

The courts have not systematically expanded their definition of property to include human capital, i.e., individuals' income earning capacity, which--if marital--can be distributed at divorce. Human capital is just as much property as are stocks, bonds or houses and, therefore, it should be considered at divorce. Human capital has been handled inconsistently by the courts in divorces involving professionals. Now, the courts have extended their recognition of human capital to celebrity's careers in an equally ad hoc manner. This article emphasizes that the value of human capital is based on its future returns rather than current income. It is created through investments that can result in either an equity or debt claim on the property. The investments before marriage

¹⁰¹ Lon Tuck, *Cinderella from Georgetown*, THE WASHINGTON POST, September 16, 1979, L1.

are usually so large and essential that a celebrity's career should normally be treated as separate property. When there are substantial investments during marriage that increase the celebrity's future income stream and, therefore, his human capital, its recognition at divorce is appropriate.

If the investments would not have been made except for the supporting spouse, an equity claim is established and that spouse should be awarded a share of the increased human capital.

Alternatively, if the funds replaced other forms of debt financing, the more appropriate adjustment at divorce is to treat the unamortized share of the loan as a basis for reimbursement to the supporting spouse. In effect, it was funded from the supporting spouse's income derived from her separate property human capital. A common problem occurs and, therefore, must be addressed at divorce when the non-celebrity spouse sacrifices a career during the marriage.