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## Elkus v. Elkus: A Step in the Wrong Direction

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# ELKUS V. ELKUS: A STEP IN THE WRONG DIRECTION

## I. INTRODUCTION

Since the women's movement began about three decades ago, the law has struggled to keep pace with the continually evolving status of women in society. This is particularly evident in the family law context,<sup>1</sup> most notably in marital dissolution. Although the various states deal individually with community property or common law property systems,<sup>2</sup> courts have uniformly endeavored to recognize each spouse's contribution to the marriage, monetary or otherwise. This progression was necessary, in light of the increase in the divorce rate and displacement of wives who had previously stayed home and come away with nothing but alimony after years of devotion.<sup>3</sup>

Examples of the law's effort to grant women equal status in marriage are California's community property laws and New York's equitable distribution statutes. As of 1975, California allowed spouses co-equal management and control over community assets,<sup>4</sup> with certain restrictions for real property transactions.<sup>5</sup> Prior to this enactment, the hus-

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1. Mary Ann Glendon, *Family Reform in the 1980's*, 44 LA. L. REV. 1553 (1984). The author states that "there was more activity in American family law in that twenty-year [1960-1979] period than there had been in the preceding hundred years." *Id.* at 1553.

2. Community property is defined as

[p]roperty owned in common by husband and wife each having an undivided one-half interest by reason of their marital status. [Nine states have community property systems.] The rest of the states are classified as common law jurisdictions. . . . In a common law system, each spouse owns whatever he or she earns. Under a community property system, one-half of the earnings of each spouse is considered owned by the other spouse.

BLACK'S LAW DICTIONARY 280 (6th ed. 1990).

3. Glendon, *supra* note 1, at 1553. "The 1960's and 1970's—[were times] when divorce rates and women's and mothers' labor force participation rates were increasing at unprecedented speed. . . ." *Id.*

4. California Civil Code section 5125(a) provides in relevant part: "[E]ither spouse has the management and control of the community personal property, whether acquired prior to or on or after January 1, 1975, with like absolute power of disposition, other than testamentary, as the spouse has of the separate estate of the spouse." CAL. CIV. CODE § 5125(a) (West 1991).

5. California Civil Code section 5127 provides in relevant part:

[E]ither spouse has the management and control of the community real property, whether acquired prior to or on or after January 1, 1975, but both spouses either personally or by duly authorized agent, must join in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered. . . .

CAL. CIVIL CODE § 5127 (West 1987).

band had complete dominion over the community property.<sup>6</sup> New York, a common law state, uses equitable distribution to divide the marital estate. Upon dissolution, the court is directed to consider tangible, as well as intangible, contributions to the marriage,<sup>7</sup> in order to compensate a spouse who chose to stay home and take care of the family instead of being a wage earner.<sup>8</sup>

The goals of New York's equitable distribution statutes are laudable. Recently, however, the New York Supreme Court, Appellate Division, has distorted them in an overreaching interpretation in the decision of *Elkus v. Elkus* ("*Elkus*").<sup>9</sup> This note discusses the *Elkus* court's purported division of an opera singer's voice, or talent, by categorizing it as a marital asset. Further, it criticizes the court's supposition that one's voice is subject to "distribution" upon divorce. This note concludes that the *Elkus* court unnecessarily went beyond the purposes behind equitable distribution and marital property in general, in an attempt to divide assets upon divorce which did not really exist.

## II. BACKGROUND: THE FACTS AND HOLDING OF *ELKUS*

Frederica von Stade was a minor player with New York's Metropolitan Opera Company (the "Met") in 1973, when she married Peter

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6. California Civil Code section 172 gave to the husband "the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate." CAL. CIV. CODE § 172 (repealed 1969). As stated in *Grolemund v. Cafferata*, 111 P.2d 641 (Cal. 1941), the effect of this statute is that it "subjects the entire community personalty . . . to any and all contracts of the husband as well as to judgments arising out of his tort." 111 P.2d at 643.

7. Domestic Relations Law (DRL) section 236(B)(5)(d), the statute relevant to this note, directs the court to consider:

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

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

...  
 (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;

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

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

(9) the impossibility or difficulty of evaluating any component asset or any interest in a business, corporation or profession;

...  
 N.Y. DOM. REL. LAW § 236(B)(5)(d) (McKinney 1990).

8. "The purpose behind the enactment of the legislation was to prevent inequities which previously occurred upon the dissolution of a marriage." *Elkus v. Elkus*, 572 N.Y.S.2d 901, 903 (N.Y. App. Div. 1991).

9. *Id.* at 901.

Elkus, a singer and teacher.<sup>10</sup> When they met, she was earning \$2,250 per year with the Met.<sup>11</sup> At dissolution, she was earning \$621,878 per year.<sup>12</sup> Mr. Elkus gave up his own singing career during the marriage, to coach his wife and nurture her career, which took off. He also looked after their two children.<sup>13</sup> Elkus claimed that because his efforts had contributed to his wife's rise to fame, her fame should be classified as a marital asset, subject to distribution upon divorce.<sup>14</sup> The Supreme Court of New York County held that celebrity status was not a marital asset.<sup>15</sup> Mr. Elkus had already reaped the financial benefits of their joint effort, and substantial tangible marital property existed to amply compensate any equitable claim he had.<sup>16</sup>

On appeal, the Supreme Court, Appellate Division, reversed on the basis of section 236 of the Domestic Relations Law ("DRL"), which authorizes a court to consider all tangible and intangible contributions by each spouse to the marital partnership.<sup>17</sup> Additionally, DRL section 236 broadly defines marital property as property acquired during the marriage "regardless of the form in which title is held."<sup>18</sup> The court interpreted this section to encompass items "outside the scope of traditional property concepts,"<sup>19</sup> including assets that cannot be transferred or exchanged. To buttress its position, the court referred to other decisions holding that various licenses, degrees, and other practices were subject to distribution as marital property.<sup>20</sup> The court primarily relied on the decision in *O'Brien v. O'Brien* ("*O'Brien*"),<sup>21</sup> in which Mrs. O'Brien was awarded a share in her husband's medical license because they had no other assets to divide.<sup>22</sup> To avoid the inequity that would befall Mrs. O'Brien if the court relied on traditional divorce remedies, the court pioneered an expansive reading of DRL section 236 and declared Mr. O'Brien's medical degree and license to be marital property.

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10. *Id.* at 901-02.

11. *Id.* at 902.

12. *Id.*

13. *Elkus v. Elkus*, 572 N.Y.S.2d 901, 902 (1991).

14. *Id.*

15. *Id.* at 901.

16. *Id.* at 902.

17. *See supra* note 7 for provisions of statute.

18. N.Y. DOM. REL. LAW § 236(B)(1)(c) (McKinney 1986).

19. *Elkus v. Elkus*, 572 N.Y.S.2d 901, 902 (1991).

20. *Savasta v. Savasta*, 549 N.Y.S.2d 544 (1989) (medical board certification); *Cronin v. Cronin*, 502 N.Y.S.2d 368 (1986) (a law degree); *Vanasco v. Vanasco*, 503 N.Y.S.2d 480 (1986) (an accounting degree); *Morton v. Morton*, 515 N.Y.S.2d 499 (1987) (a podiatry practice). *See Elkus*, 572 N.Y.S.2d at 902-03.

21. 489 N.E.2d 712 (N.Y. 1985).

22. *O'Brien*, 489 N.E.2d at 713.

The *Elkus* court characterized Mrs. Elkus' career as marital property in an attempt to fulfill the legislative intent behind DRL section 236:

The purpose behind the enactment of the legislation was to prevent inequities which previously occurred upon the dissolution of a marriage. Any attempt to limit marital property to professions which are licensed would only serve to discriminate against the spouses of those engaged in other areas of employment. Such a distinction would fail to carry out the premise upon which equitable distribution is based, i.e., that a marriage is an economic partnership to which both parties contribute. . . .<sup>23</sup>

The crux of the court's reasoning was that the contribution of the non-earning spouse, rather than the nature of the earning spouse's career, should be the determinative factor in characterizing an asset as marital property for distribution purposes.<sup>24</sup> Accordingly, because Mr. Elkus had been voice coach and primary babysitter, his wife's celebrity status was subject to valuation and distribution upon divorce.

### III. ANALYSIS

#### A. *Flaws in the Elkus Court's Reasoning*

##### 1. The Court's Interpretation of Property Under DRL § 236

There is no dispute that the definition of marital property under DRL section 236 is expansive: "all property acquired . . . during the marriage . . . regardless of the form in which title is held."<sup>25</sup> However, nothing in the statute creates the impression that the courts have free license to devise new forms of property. The courts merely have greater discretion to distribute the existing property. One commentator aptly noted this distinction, stating that:

[T]he *O'Brien* court intermingled the process of *classifying* marital property with that of *distributing* it. . . . An examination of the language of the nine distribution factors as a whole reveals that they are not definitional, but instead act as weights upon a balance, thereby tipping the property distribution decision toward one party or the other. These factors indicate a legislative intent to reward certain spousal contributions to the marital partnership with a favorable distribution of marital property,

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23. *Elkus*, 572 N.Y.S.2d at 903.

24. *Id.* at 904-05.

25. N.Y. DOM. REL. LAW § 236(B)(1)(c) (McKinney 1986).

not a favorable classification of it.<sup>26</sup>

Proper interpretation of the statute, without more, leads to a liberal award of property to the contributing spouse if his or her investment in the enhanced spouse has not been returned.

The court in *O'Brien*, however, indulged in an unnecessary, liberal interpretation of property to benefit the contributing spouse: it interpreted as property the enhanced earning capacity of Mr. O'Brien's degree. It reasoned that this was the only way to do justice to Mrs. O'Brien in light of the sparse marital assets acquired: Mr. O'Brien asked for a divorce just two months after graduation, after Mrs. O'Brien had supported his schooling for nine years.<sup>27</sup> A problem with this liberal award is the permanent effect it has on the enhanced spouse. As one court noted,

[W]hether a court awarded a lump sum or periodic payments [as in *O'Brien*], the receiving spouse would be given what is tantamount to a lifetime estate in the paying spouse's earnings that have no necessary relationship to the receiving spouse's actual contribution to the enhanced earning power or to that spouse's need, however broadly defined.<sup>28</sup>

A life estate in an ex-spouse's future earnings seems a Draconian penalty for getting a divorce, no matter how closely it follows upon graduation, when a liberal support award will usually compensate the non-enhanced spouse. Such a broad interpretation of a vague statute is unwarranted.

Alternatively, in *Lesman v. Lesman*,<sup>29</sup> where the wife raised children while the husband put himself through school,<sup>30</sup> the court rejected on policy grounds the proposition that the enhanced earning capacity of a license holder could ever be marital property: "[T]he concept of property cannot, as a matter of rationality or common sense, be defined by a purely circumstantial criterion. If a license or degree or its enhanced earning potential is not property five or ten or twenty years after graduation, it cannot be property on graduation day either."<sup>31</sup> It seems contrived to allow the definition of an asset to depend on the peculiarities of each case.

In analyzing the flaws of equitable distribution, one scholar noted

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26. Michael R. Herman, Comment, *Not What the Doctor Ordered—Medical License Declared Marital Property*: *O'Brien v. O'Brien*, 60 ST. JOHN'S L. REV. 539, 545-46 (1986).

27. *O'Brien v. O'Brien*, 489 N.E.2d 712, 713-14 (1985).

28. *Martinez v. Martinez*, 818 P.2d 538, 541 (Utah 1991).

29. 452 N.Y.S.2d 935 (N.Y. App. Div. 1982).

30. *Lesman*, 452 N.Y.S.2d at 936-37.

31. *Id.* at 939 (quoting *Mahoney v. Mahoney*, 442 A.2d 1062, 1068 (N.J. Super. 1982)).

that such a statutory scheme is "more properly called discretionary distribution, since what consistently distinguishes them from their predecessors, is not that they are more equitable, but that they are more unpredictable."<sup>32</sup> In *O'Brien*, the court declared the license marital property to protect the sacrifices Mrs. O'Brien had made, and the result may seem justified. The *Elkus* court, however, took a giant leap when it assumed that an opera singer's voice, the essence of her career, may also be characterized as marital property.

## 2. Talent Is a Personal, Inseparable Asset

A voice is an innate personal attribute, incapable of being divested from its owner. Additionally, the domestic relations statute's definition of marital property presupposes an asset with a title.<sup>33</sup> One's voice is incapable of being "titled"; it cannot be looked up in the county recorder's office, put on a sheepskin, or listed on a stock certificate. One cannot pay taxes on a voice. A bodily, personal attribute should not be dehumanized by suggesting that it can be divided upon divorce. It was never the spouse's attribute to acquire.

Marital property is defined by section 236 as "all property acquired during the marriage by either or both spouses."<sup>34</sup> It is difficult to assert that someone acquires her voice during marriage. One is born with a voice, assuming no unfortunate defects. In *Elkus*, it was established that Mrs. Elkus was already singing with the Met when she married Mr. Elkus;<sup>35</sup> therefore, she had her voice before their marriage. It is not disputed that her voice improved during marriage, and this fact forms the basis for Mr. Elkus' claim. Being an innate attribute, however, a voice should not be susceptible to a claim of division upon dissolution. It is analogous to a claim by Tom Hayden that Jane Fonda's body is a marital asset because it improved and made money during the marriage. Such a position is simply untenable.

Additionally, a possible Thirteenth Amendment problem exists in the *Elkus* court's decision to award Mr. Elkus a property interest in his wife's voice. This Amendment 'abolished slavery, or involuntary servitude.<sup>36</sup> To award a property right in the future labor of another, as with

32. Glendon, *supra* note 1, at 1556.

33. N.Y. DOM. REL. LAW § 236(B)(1)(c) (McKinney 1986) ("[M]arital property' shall mean all property acquired by either or both spouses during the marriage . . . regardless of the form in which title is held. . . .") (emphasis added).

34. N.Y. DOM. REL. LAW § 236(B)(1)(c) (McKinney 1986).

35. *Elkus v. Elkus*, 572 N.Y.S.2d 901, 901-02 (1991).

36. The Thirteenth Amendment to the Constitution provides that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly

the O'Briens, or in one's personalty, as with a voice, is a form of involuntary servitude, by judicially ordering one to work or sing for another. As one scholar has noted:

Our law rejected the notion that one person can have a property right in the labor of another when slavery was abolished. . . . It would seem a step backward now to propose that the wife, by her investment in the husband's education, should acquire a literal property right in his future labor.<sup>37</sup>

The personal and unique character of a voice has been protected by the courts. The court in *Wilson v. Wilson* ("*Wilson*") protected and recognized the unique character of one's personal attributes.<sup>38</sup> At issue in *Wilson* was the distribution of the husband's medical practice, including goodwill.<sup>39</sup> The court acknowledged that

where goodwill is a marketable business asset *distinct from the personal reputation of a particular individual*, . . . that goodwill has an immediately discernible value as an asset of the business. . . . On the other hand, if goodwill depends on the continued presence of a particular individual, *such goodwill, by definition, is not a marketable asset distinct from the individual*. [It therefore] is not a proper consideration in dividing marital property in a dissolution proceeding.<sup>40</sup>

The *Wilson* court concluded that for goodwill to be marital property, it had to be of the sort that could be "sold, transferred, conveyed or pledged."<sup>41</sup> It is unreasonable to attempt to divide an asset that is inseparable from its holder. As one court recently noted, "The time has long since passed when a person's personal attributes and talents were thought to be subject to monetary valuation for commercial purposes."<sup>42</sup>

Other cases have held that goodwill, even celebrity goodwill, can be considered a marital asset subject to distribution. In the *Piscopo v. Piscopo* ("*Piscopo*") decision, upon which the *Elkus* court relied, the court

convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1.

37. Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CAL. L. REV. 291, 313 (1987).

38. 741 S.W.2d 640 (Ark. 1987).

39. Goodwill is defined as "[t]he ability of a business to generate income in excess of normal rate on assets, due to superior managerial skills, market position, new product technology, etc." BLACK'S LAW DICTIONARY 694 (6th ed. 1990).

40. *Wilson*, 741 S.W.2d at 647 (quoting *Taylor v. Taylor*, 386 N.W.2d 851, 858 (Neb. 1986)) (emphasis added).

41. *Wilson*, 741 S.W.2d at 647.

42. *Martinez v. Martinez*, 818 P.2d 538, 542 (Utah 1991).



ruled that Joe Piscopo's<sup>43</sup> celebrity goodwill was marital property, since he rose to fame during the marriage.<sup>44</sup> The court held that the valuation and distribution of Piscopo's celebrity goodwill prevented his spouse from being deprived of what was perhaps the most significant marital asset of one involved in the lucrative entertainment industry.<sup>45</sup> Under New Jersey law, goodwill may be found in one's capacity "to earn net income in excess of the average practitioner of similar age, experience, education and expertise, who expends a similar number of work hours at the task in question."<sup>46</sup> This rigid definition, however, fails to take into account the dynamic of the entertainment industry, where often there is no "average practitioner" with which to compare highly successful performers.

The *Elkus* court also relied on *Golub v. Golub* ("*Golub*")<sup>47</sup> as a basis for classifying Mrs. Elkus' talent as a marital asset.<sup>48</sup> In *Golub*, Marisa Berenson married a successful, high-profile New York attorney.<sup>49</sup> At the end of their short, childless marriage, Mr. Golub claimed a stake in his wife's appreciated acting and modeling career.<sup>50</sup> His claim was based on his contribution of legal advice and business savvy, which had helped her to organize her financial affairs, resulting in appreciated assets.<sup>51</sup> The *Golub* court followed *O'Brien* blindly, applying it to a set of facts that was distinguishable from those in *O'Brien*, reasoning that the *O'Brien* holding had to be applied "even-handedly to all spouses."<sup>52</sup> The *Golub* court applied precedent much too broadly, ignoring the lack of unique necessities that had prompted the *O'Brien* court to propose its novel remedy.

The *Golub* court rejected Mrs. Golub's claim that celebrity goodwill should be immune from marital property classification.<sup>53</sup> The court cited other authorities that have protected fame where it was wrongfully divested from its holder, such as when non-licensed entities use a celebrity's likeness without permission.<sup>54</sup> If the precedent established by these cases means anything, it must mean that the law favors protecting one

43. Joe Piscopo is a former actor on the NBC television program *Saturday Night Live*.

44. 555 A.2d 1190 (N.J. Super. 1988).

45. *Piscopo*, 555 A.2d at 1193.

46. *Id.* at 1191 (citing *Dugan v. Dugan*, 457 A.2d 1, 9 (N.J. 1983)).

47. *Elkus v. Elkus*, 572 N.Y.S.2d 901, 903 (1991).

48. *Elkus*, 572 N.Y.S.2d at 903.

49. *Golub*, 527 N.Y.S.2d at 947.

50. *Id.* at 949.

51. *Id.* at 948.

52. *Id.* at 950.

53. *Id.* at 949.

54. *Golub v. Golub*, 527 N.Y.S.2d 946, 949 (1988) (citing *Price v. Hal Roach Studios*,

whose efforts result in celebrity status or fame. To now hold that it is acceptable to divest celebrity from its holder is to turn this precedent on its head. The outcome of this case contained an additional twist: after adopting its wholly new approach toward "celebrity" as a marital asset in New York, the *Golub* court never actually distributed it for lack of evidence as to its value.<sup>55</sup>

A Pennsylvania case, *Beasley v. Beasley* ("Beasley"),<sup>56</sup> demonstrates a more reasonable interpretation of personal goodwill. The court in *Beasley* found no separate goodwill where the earnings of a sole-practitioner lawyer depended on his individual skill and experience. The court concluded that the attorney's reputation should not be equated with goodwill: the practice was not saleable, the individual skill and presence of the attorney was key to continued business, and his enhanced earning capacity should not serve as a basis for valuing or establishing a separate goodwill component to the marital asset.<sup>57</sup> The *Beasley* court recognized that goodwill should be a separate marital property component to be divided when it is transferrable.<sup>58</sup> Since reputation and talent are not saleable, the court held, they should not be included in the realm of marital property.

As in the case of non-saleable goodwill, entertainers should not have their talent subject to marital distribution upon divorce. Entertainers are unique; they are valuable because of their innate talents. This principle was recognized by the court in *Parker v. Twentieth Century Fox Film Corp.*<sup>59</sup> Actress Shirley MacLaine had signed a contract with Fox to do a musical, which included a large guaranteed compensation.<sup>60</sup> When that particular film was scrapped, Fox presented her with another film, in a different genre, to fulfill her contract.<sup>61</sup> MacLaine refused to act in the subsequent film, and prevailed in a suit to recover her guaranteed compensation from the musical.<sup>62</sup> The court noted that performers cannot be prevailed upon simply to do a generic job of acting: one film is not substantially similar to any other, so an actor need not mitigate damages by

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Inc., 400 F. Supp. 836 (S.D.N.Y. 1975); Gary S. Stiffelman, Comment, *Community Property Interests in the Right of Publicity: Fame and/or Fortune*, 25 U.C.L.A. L. REV. 1095 (1978).

55. See Joel R. Brandes, *Family Law*, 40 SYRACUSE L. REV. 391, 425 (1989). The author termed *Golub* "an absurd extension of the *O'Brien* doctrine." *Id.* at 425.

56. 518 A.2d 545 (Pa. 1986).

57. *Beasley*, 518 A.2d at 552-53.

58. *Id.* at 556 n.4.

59. 474 P.2d 689 (Cal. 1970).

60. *Parker*, 474 P.2d at 690.

61. *Id.* at 690-91.

62. *Id.* at 691.

accepting other film offers.<sup>63</sup> Actors' talents are not fungible, as may be the skills of wage-earners in most other occupations. Divorce courts should recognize this distinction when dealing with entertainers, and refrain from categorizing their talents as ordinary marital property, to be distributed along with the family car.

### *B. Improper Application of O'Brien Rationale in Marriages of Long Duration*

After analyzing the relevant Domestic Relations statute, the *Elkus* court buttressed its reasoning by relying on principles stated in *O'Brien*.<sup>64</sup> In *O'Brien*, the wife supported her husband through medical school, sacrificing a teaching certification and following him to Guadalajara, Mexico, while he completed his schooling.<sup>65</sup> Two months after his graduation, he filed for divorce.<sup>66</sup> Because the husband was just out of school, and the wife's entire salary had been used to support them during the marriage, there were no marital assets.<sup>67</sup> Additionally, Mrs. O'Brien was ineligible for separate maintenance,<sup>68</sup> since at the time of the divorce, she was still earning more than her husband. To rectify the inequity of the situation, the court found that the medical license was the only asset of the marriage, and that Mrs. O'Brien was entitled to a percentage of her husband's increased earning capacity.<sup>69</sup>

The facts in *Elkus* are markedly different from those in *O'Brien*. Although Mr. Elkus gave up professional singing, he devoted his energies toward coaching his wife, in order to benefit both partners.<sup>70</sup> They were married for seventeen years, during which time they accumulated substantial marital assets.<sup>71</sup> The inequities compelling the *O'Brien* result

63. The court stated that:

plaintiff's failure to accept defendant's tendered substitute employment could not be applied in mitigation of damages because the offer of the "Big Country" lead was of employment both different and inferior. . . . [T]he female lead as a dramatic actress in a western style motion picture can by no stretch of imagination be considered the equivalent of or substantially similar to the lead in a song-and-dance production.

*Parker*, 474 P.2d at 693-94.

64. See *Elkus v. Elkus*, 572 N.Y.S.2d 901, 903 (1991).

65. *O'Brien*, 489 N.E.2d at 713-14.

66. *Id.* at 714.

67. *Id.* at 713.

68. Separate maintenance is defined as "[m]oney paid by one married person to the other for support if they are no longer living as husband and wife." BLACK'S LAW DICTIONARY 1365 (6th ed. 1990).

69. *O'Brien*, 489 N.E.2d at 720.

70. *Elkus v. Elkus*, 572 N.Y.S.2d 901, 902 (1991).

71. *Id.* at 901-02 (Her salary of \$621,878 in the last year of marriage, and the trial court's holding that distribution of the parties' other assets would compensate Mr. Elkus, lead to the conclusion that they had substantial marital assets.).

simply were not present in the *Elkus* case—Mr. Elkus reaped the benefits of their union through accumulation of assets, and was equipped to provide for himself by continuing as a voice coach. Their divided assets would have amply compensated Mr. Elkus for his years of devotion to the marriage, without invading the personal nature of Mrs. Elkus' voice.

### 1. Mechanical Application of the Statute

Courts should refrain from mechanically applying DRL section 236(B) without regard to the statute's intent. Section 236(B) was intended to cure inequities that arise upon divorce when one spouse owns all of the assets and the other will be left with nothing.<sup>72</sup> The language of the statute directs courts to consider "the circumstances of the case";<sup>73</sup> nothing in the statute indicates that the court must divide every conceivable facet of the relationship. The Elkus family enjoyed years of substantial income brought in by Mrs. Elkus. Thus, Mr. Elkus had no need to double-dip by taking an equitable share of tangible assets and a share in his wife's future singing career, when he would have been well taken care of with a traditional divorce settlement. The court did not seem to take note of this doubly compensatory result in its mechanical application of the statute.

The *Elkus* court further mechanically applied the statute without regard to its intent when it ignored the language of DRL section 236(B)(5)(e). This section provides that a court should grant distributive awards when it would be "impractical or burdensome" to divide an interest in a profession.<sup>74</sup> It is extremely burdensome to Mrs. Elkus to have her voice parceled out to effectuate a property settlement. Because of this burden to Mrs. Elkus, the court should have selected an equally effective but nonburdensome distributive award or method, such as permanent alimony or a greater share of the traditional marital assets. The court seemed blind to all language except the clause stating that "indirect

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72. One commentator noted that the law was "advocated because experience had proven to the New York Legislature that the traditional common-law title theory of property, as applied under the Domestic Relations statute, had caused inequities upon the dissolution of a marriage." David Kaufman, Comment, *The New York Equitable Distribution Statute: An Update*, 53 BROOK. L. REV. 845, 846 (1987).

73. N.Y. DOM. REL. LAW § 236(B)(5)(c) (McKinney 1990).

74. DRL section 236(B)(1)(b) defines a distributive award as "payments provided for in a valid agreement between the parties or awarded by the court, in lieu of or to supplement, facilitate or effectuate the division or distribution of property where authorized in a matrimonial action, and payable either in a lump sum or over a period of time in fixed amounts." N.Y. DOM. REL. LAW § 236(B)(1)(b) (McKinney 1990).

contributions" are to be given weight in dividing marital property.<sup>75</sup> Indirect contributions are present in virtually every marriage in the form of house cleaning, child-rearing, and emotional support for the other spouse. If courts apply the *Elkus* holding literally, spouses will be awarded a future stake in each other's careers simply because they were spouses. This interpretation makes a mockery of divorce, which is supposed to terminate a relationship, not permanently tie two people together who wish to be apart.

One additional problem with the *Elkus* court's interpretation of section 236 is the non-remunerative intent of the statute. The *Elkus* court recognized that marriage should be viewed as an economic partnership.<sup>76</sup> The court's interpretation of this concept, however, is incompatible with the implications of "partnership." As one scholar noted, "This [partnership] concept reflects the modern awareness that marriage is a union dependent upon a wide range of non-remunerated services to the partnership, such as homemaking, raising children and providing emotional and moral support necessary to sustain the other spouse."<sup>77</sup> Yet, if the *Elkus* court insists upon dividing assets so innately personal to the holder, remuneration is exactly what the court effects. As one court recently noted,

Although marriage is a partnership in some respects, a marriage is certainly not comparable to a commercial partnership. The efforts each spouse makes for the other and for their common marital interests cannot be quantified in monetary terms, their respective contributions netted out, and a balance struck at the termination of a marriage. The very idea of marriage contemplates mutual effort and mutual sacrifice.<sup>78</sup>

In *Mahoney v. Mahoney*,<sup>79</sup> for example, the court noted that "[m]arriage is not a business arrangement in which the parties keep track of debits and credits, their accounts to be settled upon divorce."<sup>80</sup> Similarly, the court in *DeWitt v. DeWitt* ("*DeWitt*")<sup>81</sup> concluded that awarding a percentage interest in the other spouse's intangible assets "treats the parties as though they were strictly business partners, one of whom has made a calculated investment in the commodity of the other's profes-

75. N.Y. DOM. REL. LAW § 236(B)(5)(d)(6) (McKinney 1990). See *Elkus v. Elkus*, 572 N.Y.S.2d 901, 903 (1991).

76. *Elkus*, 572 N.Y.S.2d at 902.

77. Kaufman, *supra* note 72, at 846.

78. *Martinez v. Martinez*, 818 P.2d 538, 540-41 (Utah 1991).

79. 453 A.2d 527 (N.J. 1982).

80. *Mahoney*, 453 A.2d at 533.

81. 296 N.W.2d 761 (Wis. Ct. App. 1980).

sional training, expecting a dollar for dollar return. We do not think that most marital planning is so coldly undertaken."<sup>82</sup> In *Lesman v. Lesman*,<sup>83</sup> the court reasoned that in a marriage, "[t]he parties agree upon the manner in which they will provide financial support and non-financial services to each other, and they do not place values on their respective contributions, nor do they expect to pay each other for those contributions. Every unsuccessful marriage results in the disappointment of expectations. . . ."<sup>84</sup> The reasoning of these courts contrasts with the *Elkus* court's blind application of the statute. It was as if the court kept a balance sheet:  $x$  number of hours spent babysitting, plus  $x$  number of hours cooking dinner, entitles you to  $x$  percentage of your wife's career. This approach is quite the opposite of a non-remuneration concept, which simply directs a court to divide property equitably. A non-remunerative division can usually be accomplished without delving into intangible assets.

In explaining its conclusion, the *Elkus* court reasoned that "the *O'Brien* court did not restrict its holding to professions requiring a license or degree."<sup>85</sup> While this may be true, the *O'Brien* court was confronted with the following injustice: one spouse using the other as a ticket to an education, then asking for divorce upon graduation before the marriage has reaped the benefits of the educated spouse's earning capacity. The court accordingly awarded the supporting spouse a share in the educated spouse's degree. Any expansion of this solution should occur only in circumstances similar to those the *O'Brien* court faced: (1) unavailability of all traditional solutions; and (2) failure to devise a new solution would impose a great inequity. The *O'Brien* court realized that its solution was not necessary if the marriage had other assets to divide: "When other marital assets are of sufficient value to provide for the supporting spouse's equitable portion of the marital property, . . . the court retains the discretion to distribute these other marital assets . . . in lieu of an actual distribution of the value of the professional spouse's license."<sup>86</sup> The *Elkus* court seems to have selectively read *O'Brien* when it ignored this reasoning, since both maintenance and distribution of assets were tools available to the court. The court's unorthodox solution was overreaching in that it gave Mr. *Elkus* more than he deserved.

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82. *DeWitt*, 296 N.W.2d at 767.

83. 452 N.Y.S.2d 935 (1982).

84. *Lesman*, 452 N.Y.S.2d at 939.

85. *Elkus v. Elkus*, 572 N.Y.S.2d 901, 903 (1991).

86. *O'Brien v. O'Brien*, 489 N.E.2d 712, 718 (1991).

## 2. "Reaping the Benefits" Theory Is More Appropriate

A more reasonable scheme of compensating spouses for contributions to education is codified at section 4800.3 of the California Civil Code.<sup>87</sup> This statute provides for reimbursement of the marital community's contributions to a spouse's education or training that substantially enhances that spouse's earning capacity.<sup>88</sup> Although "community contributions" are limited to payments made,<sup>89</sup> the *Elkus* court could have reached a just result by imputing a fair market value to Mr. Elkus' coaching services.

The statute limits reimbursement to the community, however, if the marriage lasts long enough to have reaped the benefits of the enhanced earning capacity: "There is a rebuttable presumption, affecting the burden of proof, . . . that the community has substantially benefited from community contributions to the education or training made more than 10 years before the commencement of the proceeding."<sup>90</sup> This limitation seems reasonable if the rationale for awarding or reimbursing a stake in a spouse's increased earning capacity stems from the idea that the contributing spouse has not seen a return on his or her investment. If the parties remain married for a period after earning more money, however, the contributing spouse has then benefited from the investment and is entitled to nothing more than a division of the tangible marital property. A court's awarding of anything more amounts to overreaching.

This "reaping the benefits" theory has been recognized in equitable distribution states. In *Inman v. Inman*,<sup>91</sup> the court held that the wife was entitled to a return on her investment in her husband's dental degree.<sup>92</sup> The court noted, however, that this approach was not appropriate in all cases:

Proper guidelines for determining whether a marital property classification is proper in a particular instance might include whether there is more tangible marital property whose division would work equity, and the extent to which there was reciprocal aid. . . . [An] important factor to consider might be the extent to which the nonlicenseholder has already or otherwise benefited financially from his or her spouse's earning capacity,

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87. CAL. CIV. CODE § 4800.3 (West 1984).

88. CAL. CIV. CODE § 4800.3(b)(1) (West 1984).

89. CAL. CIV. CODE § 4800.3(a) (West 1984).

90. CAL. CIV. CODE § 4800.3(c)(1) (West 1984).

91. 578 S.W.2d 266 (Ky. Ct. App. 1979).

92. *Inman*, 578 S.W.2d at 270.

or is eligible for maintenance.<sup>93</sup>

This theory was also recognized in *In re Marriage of Graham*.<sup>94</sup> In that case, the majority of the court denied relief to a wife who had supported her husband while he attained his master's degree in business administration.<sup>95</sup> The dissent, which would have awarded the wife a share in her husband's increased earning capacity, nevertheless recognized that such an award was not appropriate if the working spouse has already benefited from her investment: "If the parties had remained married long enough after the husband had completed his post-graduate education so that they could have accumulated substantial property, there would have been no problem."<sup>96</sup> Similarly, the court in *Lesman* refused Mrs. Lesman's claim upon her husband's medical degree, based upon her lack of contribution and her benefit from the degree.<sup>97</sup> Articulating the rationale behind the "reaping the benefits" theory, the court concluded that "where the parties live together for a number of years after the husband enters his profession, the wife's expectation is realized, in part at least, and by participating in her husband's income, she receives a return which may exceed the amount of her contributions to his education."<sup>98</sup> In these cases, no need exists to fashion an extraordinary equitable remedy. Standard alimony will achieve justice between the parties.

The trial court in *Elkus* properly adhered to the "reaping the benefits" theory, because sufficient assets existed to compensate Mr. Elkus for his contributions to the marriage. This 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."<sup>99</sup> Thus, it was unnecessary for Mr. Elkus to take a piece of his wife's personalty—her voice—in addition to half of the traditional marital property. The outcome subsequently reached by the appellate division imposed an inequitable result upon the innately talented Mrs. Elkus, who left the marriage with half of the tangible property, and less than all of her voice, which she now owes to her former husband.

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93. *Id.* at 269.

94. 574 P.2d 75 (Colo. 1978).

95. *Graham*, 574 P.2d at 78.

96. *Id.* (Carrigan, J., dissenting).

97. *Lesman v. Lesman*, 452 N.Y.S.2d 935, 939 (1982).

98. *Id.*

99. *Elkus*, 572 N.Y.S.2d 901, 902 (appellate division characterizing the lower court's judgment).



### C. *Equity Is Not Served by Placing a Dollar Amount on Talent*

The *Elkus* court purported to speak in the name of equity when it awarded a share of Mrs. Elkus' voice to Mr. Elkus in return for his contributions to the marriage. The court did not address the means of valuation of the voice; this issue was left for the trial court on remand. Because valuation is crucial to the concept of equity, the court shirked an important aspect of the case.

#### 1. The *Elkus* Court Relied on Inequitable Methods of Valuation

Two cases the *Elkus* court relied on to conclude that Mrs. Elkus' voice was worth something at divorce were *O'Brien* and *Piscopo*. The court in *O'Brien* attempted to place a value on the entire career of a surgeon in order to do justice to a wife who had waited for her husband to become a surgeon, only to receive a divorce decree. Awarding a forty percent share of her husband's entire practice to the wife, the court reduced this amount to present value.<sup>100</sup> The total amount was arrived at by comparing the average income of a college graduate to that of a surgeon, and multiplying it by the number of years the surgeon would probably practice.<sup>101</sup> How does the *O'Brien* court's valuation method apply to an opera singer's voice? The simple answer is that it does not.

In *Piscopo*, the court awarded Joe Piscopo's wife a share in his celebrity goodwill, because his wife had contributed by raising their children and critiquing his ideas.<sup>102</sup> To appraise his celebrity, the court used a standard borrowed from *Dugan v. Dugan*,<sup>103</sup> a goodwill case. In determining if goodwill under this test exists, a court should look to "the practitioner's demonstrated capacity, over a number of years preceding the complaint filing, to earn net income in excess of the average practitioner of similar age, experience, education and expertise, who expends a similar number of work hours at the task in question."<sup>104</sup> Although this analysis is more suited to evaluating an opera singer's voice than the *O'Brien* formulation, it is still problematic. Is Mrs. Elkus to be compared to an average of all opera singers, to one average opera singer, or to the average superstar opera singer? In Joe Piscopo's case, there were other former *Saturday Night Live* actors to compare him to and the answer was a little clearer.

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100. *O'Brien v. O'Brien*, 489 N.E.2d 712, 714 (1985). The court does not explain why it chose the 40% figure.

101. *Id.*

102. *Piscopo v. Piscopo*, 555 A.2d 1190, 1191 (1988).

103. 457 A.2d 1 (N.J. 1983).

104. *Piscopo*, 555 A.2d at 1191 (citing *Dugan v. Dugan*, 457 A.2d 1, 9 (N.J. 1983)).

Yet, valuation in this milieu is inherently problematic. One scholar notes:

On the one hand, it might be unfair to the other spouse [to award a share of the degree as property] because it may limit compensation to whatever use the enhanced spouse makes of the capacity. This may give the enhanced spouse too much control over the compensation actually paid to the other spouse. On the other hand, it may be unfair to the enhanced spouse because it may force him to stay in a job which he no longer wants, or force him to struggle to earn money that his skill does not allow him to make. Furthermore, the calculation is based on future earnings for the rest of the professional life of the enhanced spouse, reduced to present day value. This may be overly generous to the other spouse and is a lien on the rights and interests of subsequent other spouses.<sup>105</sup>

## 2. Maintenance Awards Are More Equitable

Inequities that need to be addressed may exist in a divorce where one spouse has made contributions to the other's career that have not been remunerated. The answer, however, is not to place a monetary value on something so intangible as a degree or a talent. The court in *DeWitt*<sup>106</sup> agreed that the supporting spouse needed to be compensated for putting her husband through law school, but concluded that "We cannot agree, however, that equity is served by attempting to place a dollar value on something so intangible as a professional education, degree, or license."<sup>107</sup> This holding would necessarily apply with even greater force to a talent that is innate to its holder.

Additionally, the *DeWitt* court rejected the reimbursement approach, explaining:

It fails to consider the scholastic efforts and acumen of the degree holder, which may well have a bearing on the income-yielding potential of the education. It treats the parties as though they were strictly business partners, one of whom has made a calculated investment in the commodity of the other's professional training, expecting a dollar for dollar return.<sup>108</sup>

The *DeWitt* court concluded that the most equitable solution is a mainte-

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105. Deborah A. Batts, *Remedy Refocus: In Search of Equity in "Enhanced Spouse/Other Spouse" Divorces*, 63 N.Y.U. L. REV. 751, 780-81 (Oct. 1988) (citation omitted).

106. 296 N.W.2d 761 (Wis. Ct. App. 1980).

107. *DeWitt*, 296 N.W.2d at 767.

108. *Id.*

nance award, which does not surcharge the enhanced spouse by placing a lien on future earnings.<sup>109</sup> After all, contributions by the working spouse are factors to be considered in awarding maintenance, regardless of need.<sup>110</sup> The maintenance solution avoids awkward classifications of property and enhanced earning capacity as marital assets.<sup>111</sup>

Some courts have rejected maintenance awards on the ground that they terminate upon remarriage, so that the contributing spouse fails to receive full reimbursement.<sup>112</sup> This argument lacks merit, however, because permanent alimony is an available option: judges can award alimony or maintenance in a permanent or fixed duration, regardless of future circumstances such as marriage.<sup>113</sup> Additionally, section 236 dictates that maintenance awards are to be based on the parties' standard of living during the marriage, in such amounts as justice requires.<sup>114</sup> Thus, contrary to what the *O'Brien* court reasoned, courts have considerable leeway in fashioning support for the non-enhanced spouse and are not limited by what is "expressly" provided.<sup>115</sup>

This solution of maintenance awards also avoids the spurious speculation that some courts engage in when valuing an intangible asset such as talent and future earning capacity. The *O'Brien* court dismissed the argument that future earning capacity is too speculative by analogizing to tort damages.<sup>116</sup> This summary dismissal was unwarranted because tort damages for wrongful death are distinguishable in an important way: no future variables can affect the award. The court in *Martinez v. Martinez*<sup>117</sup> noted this distinction, explaining that "in wrongful death, the measurement begins at death and is subject to no future variables introduced by the decedent. Here, we must guess at the future course of defendant's career."<sup>118</sup> Because of this difficulty in predicting future

109. *Id.* at 768.

110. *Id.* at 769.

111. See *supra* note 26 and accompanying text.

112. *O'Brien v. O'Brien*, 489 N.E.2d 712, 717 (1985).

113. Kaufman, *supra* note 72, at 850. "Judges can no longer avoid awarding substantial long-term or permanent maintenance awards to women whose standard of living will significantly decrease following a divorce." *Id.*

114. DRL section 236 provides that maintenance shall be awarded "in such amount as justice requires, having regard for the standard of living of the parties established during the marriage. . . ." N.Y. DOM. REL. LAW § 236(B)(6)(a) (McKinney 1985).

115. See *O'Brien*, 489 N.E.2d at 717 ("The statute does not expressly authorize retrospective maintenance or rehabilitative awards and we have no occasion to decide in this case whether the authority to do so may ever be implied from its provisions.").

116. *Id.* at 718.

117. 754 P.2d 69 (Utah App. 1988), *rev'd on other grounds*, 818 P.2d 538 (Utah 1991).

118. *Martinez*, 754 P.2d at 75 n.7.

events, the court declined to find the medical degree marital property.<sup>119</sup>

In *O'Brien*, the court estimated how much the enhanced spouse would earn before he had even earned anything.<sup>120</sup> Then, taking into account all contributions, the court chose an arbitrary percentage to represent what the other spouse had contributed to his earning capacity.<sup>121</sup> The court used these two unsubstantiated figures to determine the amount of the distributive award, "thus building uncertainty upon uncertainty in setting the award."<sup>122</sup> This kind of speculation is generally discouraged in the law, and should not be encouraged in questionable classifications of property.

The court in *In re Marriage of Goldstein* confronted the issue of speculative future earnings.<sup>123</sup> A wife who had supported her husband through medical school claimed that his increased earning potential should be categorized as marital property.<sup>124</sup> The court declined to do so, based on the speculative nature of future employment.<sup>125</sup> The court drew meaningful distinctions between what kinds of future income are properly classified as marital property, and which are speculative and therefore separate.<sup>126</sup> The kinds of future income that a non-enhanced spouse has a claim to are items such as military retirement pay, disability benefits presently being paid, vested interests in pensions, and pension benefits.<sup>127</sup> The reason that these income sources are characterized as marital property to which both spouses may lay claim is that there is no contingency in receiving them—they have already been earned.<sup>128</sup> These types of income differ from future employment, in which the enhanced spouse may become injured, may not earn as much as expected, or may choose a different job.<sup>129</sup> These contingencies should not be included in marital assets that are subject to distribution. As one court stated, "En-

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119. *Id.* at 78.

120. Batts, *supra* note 105, at 777. See *O'Brien v. O'Brien*, 489 N.E.2d 712, 714 (1985) ("Plaintiff was licensed to practice medicine in October 1980. He commenced this action for divorce two months later.").

121. Batts, *supra* note 105, at 777. See *O'Brien*, 489 N.E.2d at 714 (Forty percent was the figure the court chose.).

122. Batts, *supra* note 105, at 777.

123. 423 N.E.2d 1201 (Ill. App. 1981).

124. *Goldstein*, 423 N.E.2d at 1204.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. These contingencies were recognized in *O'Brien v. O'Brien*, 489 N.E.2d 712, 720 (1985) (Meyer, J., concurring). Judge Meyer's solution, however, was not to immunize the license from distribution, but to make the award subject to modification if there are changed circumstances, much like alimony. *Id.*

hanced earning capacity is not property. It is not vested; it is only an uncertain expectancy, for it is dependent upon the future success and efforts of the degree holder."<sup>130</sup>

#### D. Talent Requires Treatment Different from a Degree

Even if one successfully argues that a degree should be classified as marital property, as it is a family investment, extension of this logic to include a talent is untenable. In *Woodworth v. Woodworth*,<sup>131</sup> the court concluded that the husband's law degree was divisible marital property, because it was the product of "concerted family investment."<sup>132</sup> In valuing the degree for purposes of property settlement, the court estimated what the degree holder would make in his profession, and subtracted from that what he might have earned without the degree.<sup>133</sup> This method is problematic for degree valuation because someone with the drive to complete a professional education would likely be doing well in another occupation.<sup>134</sup> Additionally, this method is impossible to apply to a talent. A judge cannot "subtract" what Mrs. Elkus would have earned without her voice.

#### 1. Talent Is Personal

Some courts have declined to award one spouse a portion of the other spouse's degree because of its personal nature. In *Martinez v. Martinez*,<sup>135</sup> for example, the court stated that "distribution ignores the fact that the degree is personal to [the] defendant."<sup>136</sup> Similarly, the court in *In re Marriage of Graham*<sup>137</sup> declared that "[a]n advanced degree is a cumulative product of many years of previous education, combined with diligence and hard work. It may not be acquired by the mere expenditure of money. It is simply an intellectual achievement that may potentially assist in the future acquisition of property."<sup>138</sup>

As personal as a degree is, a voice is even more so. People do not start out with degrees in their pockets and build upon them—they are

130. *Lesman v. Lesman*, 452 N.Y.S.2d 935, 938 (1982).

131. 337 N.W.2d 332 (Mich. App. 1983).

132. *Woodworth*, 337 N.W.2d at 334.

133. *Id.* at 337.

134. In *Mahoney v. Mahoney*, 453 A.2d 527 (N.J. 1982), the court stated that "a person with the ability and motivation to complete professional training or higher education would probably utilize those attributes in concomitantly productive alternative endeavors." *Id.* at 532 (quoting the appellate division's opinion, 182 N.J. Super. 598, 609).

135. 754 P.2d 69 (Utah App. 1988), *rev'd on other grounds*, 818 P.2d 538 (Utah 1991).

136. *Martinez*, 754 P.2d at 75.

137. 574 P.2d 75 (Colo. 1978).

138. *Graham*, 574 P.2d at 77.

wholly acquired and earned. In contrast, one does not "earn" or "acquire" a voice. One can improve upon the voice that one already has, but one cannot acquire a talent by any amount of effort. Few people are capable of singing with the New York Metropolitan Opera, regardless of how many voice lessons they pay for. A part of the classic movie *Citizen Kane*<sup>139</sup> illustrates this point well. Although Kane's second wife received the best voice lessons money could buy, no one wanted to hear her because she did not have the qualities necessary to sing opera. A talent is even more personal to the holder than a degree, and cannot be acquired even through hard work. Thus, it is illogical to extend the marital property definition to include either talent or degrees.

The law has historically granted protection to such personal attributes as voices, but declined to uniformly protect educational degrees. A recent example of this occurred in *Midler v. Ford Motor Co.*, in which Bette Midler sued Ford for hiring an impersonator of her voice to use in their commercials without her permission.<sup>140</sup> The Ninth Circuit held in favor of Ms. Midler upon the theory that Ford had misappropriated her voice.<sup>141</sup> The driving motivation behind the court's decision was the uniquely personal nature of one's voice. As the court reasoned:

A voice is not copyrightable. The sounds are not "fixed." What is put forward as protectible here is more personal than any work of authorship. . . . A voice is more distinctive and more personal than the automobile accouterments [sic] protected in *Motschenbacher*.<sup>142</sup> A voice is as distinctive and personal as a face. The human voice is one of the most palpable ways identity is manifested. . . . A fortiori, these observations hold true of singing, especially singing by a singer of renown. The singer manifests herself in the song. To impersonate her voice is to pirate her identity. . . . California will recognize an injury from an appropriation of the attributes of one's identity.<sup>143</sup>

The Ninth Circuit recognized the highly personal nature of one's voice, especially to one who makes a living by it.<sup>144</sup> The *Elkus* court's attempt to divest Mrs. Elkus of sole rights in her voice was tantamount

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139. *CITIZEN KANE* (RKO 1941).

140. 849 F.2d 460 (9th Cir. 1988).

141. *Midler*, 849 F.2d at 463.

142. In *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974), the court protected unauthorized use of a famous race car driver's car in commercials to sell cigarettes.

143. *Midler*, 849 F.2d at 462-63 (citation omitted).

144. *Id.*

to misappropriating her identity—an action for which some courts will provide a remedy. Although various jurisdictions differ in their laws upon many subjects, every state should afford some degree of protection to something as important as one's identity.

## 2. Talent Cannot Be Appropriated or Licensed

Variation on this theory of personal rights was expressed by Dean William Prosser, a recognized authority on tort law. Prosser characterized the right to be protected from appropriation as a *personal* right, which is not assignable.<sup>145</sup> This interest in non-appropriation of one's privacy or publicity is an exclusive proprietary right. Although some forms of publicity are assignable, they should not be mistaken for property. One court "refused to affix the 'property' label to [the right of publicity] on the ground that it was 'immaterial' . . . since 'the tag "property" simply symbolizes the fact that courts enforce a claim which has pecuniary worth.'" <sup>146</sup> This interpretation undercuts the *O'Brien* line of cases, which hold that various personal attributes and accomplishments are property simply because the law affords a remedy for their invasion.

As one court recognized, "a personal right is limited to the lifetime of the celebrity. Thus, once the person protected by the right expires, so does the personal right. Conversely, a property right would theoretically descend for as long as a single heir exists to inherit the assets of the estate."<sup>147</sup> This statement demonstrates the distinction between a personal right, such as the right to vote, which is not property, and a property right, which can descend to heirs. A human voice defies classification as property because of its inherently personal nature. Where the law has been used to shield voices from unwarranted misappropriation, this law should not be turned on its head for use as a sword to divest one of one's very identity. Seemingly, the New York divorce courts would like to apportion everything that they can see and hear.

No reason exists not to afford protection to a distinctly personal attribute in divorce, when attributes less personal than a voice have been

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145. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117, 814-15 (4th ed. 1971).

146. Jeanne Ann McManus, *Right of Publicity—Famous Persons Right of Publicity Is Descendible—The Need for a Durational Limit on the Right of Publicity—Groucho Marx Productions, Inc. v. Day & Night Co.*, 689 F.2d 317 (2d Cir. 1982), 14 SETON HALL L. REV. 190, 198 (1983) (quoting *Haelan Lab., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.), cert. denied, 346 U.S. 816 (1953)).

147. McManus, *supra* note 146, at 206 (quoting *Lugosi v. Universal Pictures*, 603 P.2d 425, 430-31 (1979)).

protected from appropriation. In *Carson v. Here's Johnny Portable Toilets*,<sup>148</sup> for example, the court protected a phrase associated with comedian and talk show host Johnny Carson from being appropriated: "Here's Johnny."<sup>149</sup> Carson found it objectionable that a business was using a phrase associated with him to sell their toilets,<sup>150</sup> and the court agreed, enjoining such usage.<sup>151</sup> Similarly, the court in *Motschenbacher v. R.J. Reynolds Tobacco Co.*<sup>152</sup> protected a famous race car driver's car against unauthorized use in a televised cigarette commercial—the car was an identifying characteristic.<sup>153</sup> In *Lombardo v. Doyle, Dane & Bernbach, Inc.*,<sup>154</sup> the court protected Guy Lombardo's distinctive conducting gestures. A commercial for automobiles had aired with a "Lombardo likeness" conducting a big band playing *Auld Lang Syne*, with concomitant New Year's decorations, while new cars rotated around them.<sup>155</sup> The court found that the commercial contained identifying characteristics peculiar to Lombardo—his conducting style—and enjoined further airing of the commercial.<sup>156</sup> These cases demonstrate instances of the law's protection of much more generic characteristics than one's voice. Surely, the law should not protect one's car before protecting one's voice.

#### IV. CONCLUSION

In the law's attempt to remedy the inequities faced by women in the family law context, the New York courts have reached beyond reason in *Elkus v. Elkus*. The decisions following *O'Brien* seem to take too much liberty in construing the legislative intent to afford liberal distribution of marital property as a green light to make liberal classifications of property. The courts' interpretations of the Domestic Relations statute are not only flawed because they confuse classification with distribution, but they have also rendered the future of divorcing couples unpredictable and potentially inequitable in cases of talented or otherwise enhanced spouses. The *Elkus* court's unorthodox solution was unwarranted; traditional remedies, such as permanent alimony or other forms of maintenance, adequately achieve equity upon dissolution.

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148. 698 F.2d 831 (6th Cir. 1983).

149. *Carson*, 698 F.2d at 836.

150. *Id.* at 834.

151. *Id.* at 836.

152. 498 F.2d 821 (9th Cir. 1974).

153. *Motschenbacher*, 498 F.2d at 822.

154. 396 N.Y.S.2d 661 (App. Div. 1977).

155. *Lombardo*, 396 N.Y.S.2d at 665.

156. *Id.* at 664.



The *Elkus* court's holding implies that couples will be permanently bound to each other by owing their livelihood to the other, unless all education and training are complete before marriage. Keeping track of contributions goes against the fiber of marriage, in which each spouse is dedicated to furthering the good of the partnership. To keep a record of daily chores undermines the essence and meaning of a marriage. The expectation of compensation for every task performed transforms marriage into an arm's length business transaction.

Even if the award to a contributing spouse of a share in a license can be justified, awarding a contributing spouse a share in a voice can never be. A voice is an attribute that is too personal to be divested from its holder, regardless of the magnitude of the other spouse's contributions. The *Elkus* court had no necessity to expand *O'Brien* because there were abundant assets to satisfy both parties. Further, any contribution Mr. Elkus had made was well-compensated during the duration of the marriage, as evidenced by the substantial income that the family enjoyed. To also award him a share in his wife's identity was an insult to her, and over-compensated Mr. Elkus for his contributions.

A voice cannot be earned or passed to descendants. It is distinguishable, therefore, from a property right. Additionally, courts should afford protection to assets that are personal to their holder, when race cars, arm movements, and phrases introducing celebrities have been protected from unauthorized divestment. The provision of lesser protection to a more important personal attribute is an anomaly that should not be sanctioned. The spouses of New York cannot be expected to abide by such an inconsistency in the law: equity demands that one's identity be protected in court, and that divorce laws be interpreted accordingly.

*Janine R. Menhennet\**

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\* The author would like to dedicate this comment to her husband Mark, for his love and support; to her sister Charlene, for her love and admiration; and to her parents, for their love and inspiration.