# Marital Property

Nine states, representing roughly 30% of the population of the U.S., recognize community property for married people: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. Under community property regimes, marital property belongs to each spouse equally. Each spouse has a right to pass on his or her share to anyone by will, making community property different from joint tenancy; however, it is also possible to hold community property with a right of survivorship, highly similar to joint tenancy. In the absence of a right of survivorship, a surviving spouse is typically entitled to some of the community property when the other spouse dies intestate; his or her share generally depends on whether there are surviving issue (children and other descendants), and how many there are.

The basic idea of community property is that a marriage is a cooperative endeavor, and each spouse contributes to gains, whether directly or indirectly. Except for Alaska, which requires an explicit agreement, Alaska Stat. § 34.77.090 (2002), the default rule under a community property regime is that property earned by a spouse during marriage belongs to the marital community, and each spouse owns half of the community property as an equal undivided interest. This includes property purchased with income earned during the marriage. This contrasts to common law states, in which property belongs by default to the spouse who acquires it during the marriage.

Property owned before marriage, as well as property acquired by inheritance or gift during the marriage, remains separate property in most states. States are divided about whether and when income from separate property, such as interest, royalties, and rent, becomes part of the community property. Idaho, Louisiana, Texas and Wisconsin treat the income from all property as community property, while the other states allow such income to remain separate property. Classification may prove complicated: for example, is an award of damages from a bike accident involving one spouse community property? The answer may depend on whether the award represents economic harm such as lost earnings (community property) or pain and suffering (separate property). What if the award is for loss of a limb, which has both earnings-related and quality of life-related aspects? What if the award is for loss of consortium – the caretaking and intimate relations shared between spouses?

In general, spouses are free to take property as separate property by agreement, and to convert property from one regime to the other by agreement. If community and separate property are commingled, tracing the shares may prove very difficult, and the party with the burden of showing that the property is separate may have a hard time prevailing. Carefully kept records may allow a tracing spouse to overcome the presumption that assets held during marriage are community property. Under the “family expense presumption,” family expenses are presumed to have come from community assets in a commingled account. If such expenses exceeded deposits of community funds, the balance will be separate property. See v. See, 415 P.2d 776 (Cal. 1966). As for outstanding debt paid off in part with community property, California apportions community and separate property according to the contributions made. Thus, a person who has a house subject to a mortgage before she marries, and then pays the remainder of the mortgage with money earned during marriage, will own the house partly as separate property and partly as community property. Other states use an “inception” theory and consider the house entirely separate property because the purchase was made before the marriage. And other states use a “vesting” theory and consider the house entirely community property because title didn’t vest until the mortgage was paid off.

In most cases, either spouse may manage community property. However, if title is in only one spouse’s name, that spouse may be the only one who can manage the property. In addition, a spouse who runs a business that is community property may have exclusive control. The controlling spouse has a kind of fiduciary duty: she must act in good faith towards her spouse, but she is not required to act with good judgment. Transferring or mortgaging community property, unlike day-to-day management, requires the consent of both spouses in a number of community property states, though not all. *See* J. Thomas Oldham, *Management of the Community Estate During an Intact Marriage*, 56 L. & Contemp. Probs. 99 (1993). The fact that a deed says that property is separate property is not controlling, because the law prevents a spouse from converting community property to separate property unilaterally. In some states, such as Texas, the controlling spouse can make reasonable gifts of community property, while California and Washington allow any gift by the managing spouse to be set aside by the other spouse. In most states, a bona fide purchaser from any managing spouse is protected against invalidation of the sale.

In some states, creditors can reach whatever property a spouse is entitled to manage. If the spouses share the family car, for example, then a creditor of either spouse could seize the car to satisfy one spouse’s debt (after following the appropriate procedures). Others only allow creditors to reach community property if both spouses consented to the relevant debt, and others limit the amount of community property creditors of only one spouse can reach.

A spouse may dispose of half of the community property at his or her death. There is no right of survivorship, but the other half belongs to the survivor. The decedent can allocate the property however she wants in a will; if there is no will, then some community property states make the other spouse the heir, while others give the decedent’s issue priority.

There is no such thing as a tenancy by the entireties in a community property state; there can be joint tenancy or tenancy in common, but property held in those forms is separate property. Like a tenancy by the entireties, community property can only exist between married people. Moreover, neither spouse alone can convey his or her undivided share to another person, except to the other spouse. Community property is not subject to partition. Without agreement, the spouse’s only option to separate the couple’s undivided interests is divorce, which will result in an equal or “equitable” division of community property, depending on the state. California, New Mexico, and Louisiana divide community property and debts equally,[[1]](#footnote-1) while courts use the more flexible equitable division in the other community property states. In California, absent a written agreement to the contrary, a spouse who contributes separate property to acquiring community property must be reimbursed for the contribution at divorce, though the spouse can’t get interest or an adjustment for a change in the value of the property, and the reimbursement can’t exceed the net value of the property at the time the property was acquired. Cal. Family Code §2640(b). Can you see why the legislature felt it necessary to impose the net value cap? What kind of unsavory activities might result if the rule were different?

If a married couple moves to a non-community property state, community property retains its character, which can lead to some complicated situations.

A family law course will cover the significant differences between community property and joint tenancy in more detail, including tax implications. The regimes reward careful planning, especially for people with substantial assets. *See* Andrea B. Carroll, *Incentivizing Divorce*, 30 Cardozo L. Rev. 1925 (2009) (arguing that marital property rules, particularly in community property states, create perverse incentives toward divorce).

What marital assets count as property?

O’Brien v O’Brien

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

SIMONS, J.

In this divorce action, the parties’ only asset of any consequence is the husband’s newly acquired license to practice medicine. …

We now hold that plaintiff’s medical license constitutes “marital property” within the meaning of Domestic Relations Law § 236 (B) (1) (c) and that it is therefore subject to equitable distribution pursuant to subdivision 5 of that part. …

I

Plaintiff and defendant married on April 3, 1971. At the time both were employed as teachers at the same private school. Defendant had a bachelor’s degree and a temporary teaching certificate but required 18 months of postgraduate classes at an approximate cost of $3,000, excluding living expenses, to obtain permanent certification in New York. She claimed, and the trial court found, that she had relinquished the opportunity to obtain permanent certification while plaintiff pursued his education. At the time of the marriage, plaintiff had completed only three and one-half years of college but shortly afterward he returned to school at night to earn his bachelor’s degree and to complete sufficient premedical courses to enter medical school. In September 1973 the parties moved to Guadalajara, Mexico, where plaintiff became a full-time medical student. While he pursued his studies defendant held several teaching and tutorial positions and contributed her earnings to their joint expenses. The parties returned to New York in December 1976 so that plaintiff could complete the last two semesters of medical school and internship training here. After they returned, defendant resumed her former teaching position and she remained in it at the time this action was commenced. Plaintiff was licensed to practice medicine in October 1980. He commenced this action for divorce two months later. At the time of trial, he was a resident in general surgery.

During the marriage both parties contributed to paying the living and educational expenses and they received additional help from both of their families. They disagreed on the amounts of their respective contributions but it is undisputed that in addition to performing household work and managing the family finances defendant was gainfully employed throughout the marriage, that she contributed all of her earnings to their living and educational expenses and that her financial contributions exceeded those of plaintiff. The trial court found that she had contributed 76% of the parties’ income exclusive of a $10,000 student loan obtained by defendant. Finding that plaintiff’s medical degree and license are marital property, the court received evidence of its value and ordered a distributive award to defendant.

Defendant presented expert testimony that the present value of plaintiff’s medical license was $472,000. Her expert testified that he arrived at this figure by comparing the average income of a college graduate and that of a general surgeon between 1985, when plaintiff’s residency would end, and 2012, when he would reach age 65. After considering Federal income taxes, an inflation rate of 10% and a real interest rate of 3% he capitalized the difference in average earnings and reduced the amount to present value. He also gave his opinion that the present value of defendant’s contribution to plaintiff’s medical education was $103,390. Plaintiff offered no expert testimony on the subject.

The court, after considering the life-style that plaintiff would enjoy from the enhanced earning potential his medical license would bring and defendant’s contributions and efforts toward attainment of it, made a distributive award to her of $188,800, representing 40% of the value of the license, and ordered it paid in 11 annual installments of various amounts beginning November 1, 1982 and ending November 1, 1992. The court also directed plaintiff to maintain a life insurance policy on his life for defendant’s benefit for the unpaid balance of the award and it ordered plaintiff to pay defendant’s counsel fees of $7,000 and her expert witness fee of $1,000. It did not award defendant maintenance.

 A divided Appellate Division … concluded that a professional license acquired during marriage is not marital property subject to distribution. …

II

The Equitable Distribution Law contemplates only two classes of property: marital property and separate property. The former, which is subject to equitable distribution, is defined broadly as “all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held.” Plaintiff does not contend that his license is excluded from distribution because it is separate property; rather, he claims that it is not property at all but represents a personal attainment in acquiring knowledge. He rests his argument on decisions in similar cases from other jurisdictions and on his view that a license does not satisfy common-law concepts of property. Neither contention is controlling because decisions in other States rely principally on their own statutes, and the legislative history underlying them, and because the New York Legislature deliberately went beyond traditional property concepts when it formulated the Equitable Distribution Law. Instead, our statute recognizes that spouses have an equitable claim to things of value arising out of the marital relationship and classifies them as subject to distribution by focusing on the marital status of the parties at the time of acquisition. Those things acquired during marriage and subject to distribution have been classified as “marital property” although, as one commentator has observed, they hardly fall within the traditional property concepts because there is no common-law property interest remotely resembling marital property. “It is a statutory creature, is of no meaning whatsoever during the normal course of a marriage and arises full-grown, like Athena, upon the signing of a separation agreement or the commencement of a matrimonial action. [Thus] [i]t is hardly surprising, and not at all relevant, that traditional common law property concepts do not fit in parsing the meaning of ‘marital property’” Having classified the “property” subject to distribution, the Legislature did not attempt to go further and define it but left it to the courts to determine what interests come within the terms of section 236 (B) (1) (c)….

Section 236 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” (emphasis added). Where *equitable* distribution of marital property is appropriate but “the distribution of an interest in a business, corporation or *profession* would be contrary to law” the court shall make a distributive award in lieu of an actual distribution of the property (emphasis added). The words mean exactly what they say: that an interest in a profession or professional career potential is marital property which may be represented by direct or indirect contributions of the non-title-holding spouse, including financial contributions and nonfinancial contributions made by caring for the home and family.

The history which preceded enactment of the statute confirms this interpretation. Reform of section 236 was advocated because experience had proven that application of the traditional common-law title theory of property had caused inequities upon dissolution of a marriage. The Legislature replaced the existing system with equitable distribution of marital property, an entirely new theory which considered all the circumstances of the case and of the respective parties to the marriage. Equitable distribution was based on the premise that a marriage is, among other things, an economic partnership to which both parties contribute as spouse, parent, wage earner or homemaker. Consistent with this purpose, and implicit in the statutory scheme as a whole, is the view that upon dissolution of the marriage there should be a winding up of the parties’ economic affairs and a severance of their economic ties by an equitable distribution of the marital assets. Thus, the concept of alimony, which often served as a means of lifetime support and dependence for one spouse upon the other long after the marriage was over, was replaced with the concept of maintenance which seeks to allow “the recipient spouse an opportunity to achieve [economic] independence.”

The determination that a professional license is marital property is also consistent with the conceptual base upon which the statute rests. As this case demonstrates, few undertakings during a marriage better qualify as the type of joint effort that the statute’s economic partnership theory is intended to address than contributions toward one spouse’s acquisition of a professional license. Working spouses are often required to contribute substantial income as wage earners, sacrifice their own educational or career goals and opportunities for child rearing, perform the bulk of household duties and responsibilities and forego the acquisition of marital assets that could have been accumulated if the professional spouse had been employed rather than occupied with the study and training necessary to acquire a professional license. In this case, nearly all of the parties’ nine-year marriage was devoted to the acquisition of plaintiff’s medical license and defendant played a major role in that project. She worked continuously during the marriage and contributed all of her earnings to their joint effort, she sacrificed her own educational and career opportunities, and she traveled with plaintiff to Mexico for three and one-half years while he attended medical school there. The Legislature has decided, by its explicit reference in the statute to the contributions of one spouse to the other’s profession or career, that these contributions represent investments in the economic partnership of the marriage and that the product of the parties’ joint efforts, the professional license, should be considered marital property.

The majority at the Appellate Division held that the cited statutory provisions do not refer to the license held by a professional who has yet to establish a practice but only to a going professional practice. There is no reason in law or logic to restrict the plain language of the statute to existing practices, however, for it is of little consequence in making an award of marital property, except for the purpose of evaluation, whether the professional spouse has already established a practice or whether he or she has yet to do so. An established practice merely represents the exercise of the privileges conferred upon the professional spouse by the license and the income flowing from that practice represents the receipt of the enhanced earning capacity that licensure allows. That being so, it would be unfair not to consider the license a marital asset.

Plaintiff’s principal argument, adopted by the majority below, is that a professional license is not marital property because it does not fit within the traditional view of property as something which has an exchange value on the open market and is capable of sale, assignment or transfer. The position does not withstand analysis for at least two reasons. First, as we have observed, it ignores the fact that whether a professional license constitutes marital property is to be judged by the language of the statute which created this new species of property previously unknown at common law or under prior statutes. Thus, whether the license fits within traditional property concepts is of no consequence. Second, it is an overstatement to assert that a professional license could not be considered property even outside the context of section 236 (B). A professional license is a valuable property right, reflected in the money, effort and lost opportunity for employment expended in its acquisition, and also in the enhanced earning capacity it affords its holder, which may not be revoked without due process of law. That a professional license has no market value is irrelevant. Obviously, a license may not be alienated as may other property and for that reason the working spouse’s interest in it is limited. The Legislature has recognized that limitation, however, and has provided for an award in lieu of its actual distribution).

Plaintiff also contends that alternative remedies should be employed, such as an award of rehabilitative maintenance or reimbursement for direct financial contributions). 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. It is sufficient to observe that normally a working spouse should not be restricted to that relief because to do so frustrates the purposes underlying the Equitable Distribution Law. Limiting a working spouse to a maintenance award, either general or rehabilitative, not only is contrary to the economic partnership concept underlying the statute but also retains the uncertain and inequitable economic ties of dependence that the Legislature sought to extinguish by equitable distribution. Maintenance is subject to termination upon the recipient’s remarriage and a working spouse may never receive adequate consideration for his or her contribution and may even be penalized for the decision to remarry if that is the only method of compensating the contribution. As one court said so well, “[t]he function of equitable distribution is to recognize that when a marriage ends, each of the spouses, based on the totality of the contributions made to it, has a stake in and right to a share of the marital assets accumulated while it endured, not because that share is needed, but because those assets represent the capital product of what was essentially a partnership entity.” The Legislature stated its intention to eliminate such inequities by providing that a supporting spouse’s “direct or indirect contribution” be recognized, considered and rewarded.

Turning to the question of valuation, it has been suggested that even if a professional license is considered marital property, the working spouse is entitled only to reimbursement of his or her direct financial contributions. By parity of reasoning, a spouse’s down payment on real estate or contribution to the purchase of securities would be limited to the money contributed, without any remuneration for any incremental value in the asset because of price appreciation. Such a result is completely at odds with the statute’s requirement that the court give full consideration to both direct and indirect contributions “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*” (Domestic Relations Law § 236 [B] [5] [d] [6] [emphasis added]). If the license is marital property, then the working spouse is entitled to an equitable portion of it, not a return of funds advanced. Its value is the enhanced earning capacity it affords the holder and although fixing the present value of that enhanced earning capacity may present problems, the problems are not insurmountable. Certainly they are no more difficult than computing tort damages for wrongful death or diminished earning capacity resulting from injury and they differ only in degree from the problems presented when valuing a professional practice for purposes of a distributive award, something the courts have not hesitated to do. The trial court retains the flexibility and discretion to structure the distributive award equitably, taking into consideration factors such as the working spouse’s need for immediate payment, the licensed spouse’s current ability to pay and the income tax consequences of prolonging the period of payment and, once it has received evidence of the present value of the license and the working spouse’s contributions toward its acquisition and considered the remaining factors mandated by the statute, it may then make an appropriate distribution of the marital property including a distributive award for the professional license if such an award is warranted. When other marital assets are of sufficient value to provide for the supporting spouse’s equitable portion of the marital property, including his or her contributions to the acquisition of the professional license, however, the court retains the discretion to distribute these other marital assets or to make a distributive award in lieu of an actual distribution of the value of the professional spouse’s license.

III

… Plaintiff also contends that the trial court erred in excluding evidence of defendant’s marital fault on the question of equitable distribution. Arguably, the court may consider marital fault under factor 10, “any other factor which the court shall expressly find to be just and proper” (Domestic Relations Law § 236 [B] [5] [d] [10]). Except in egregious cases which shock the conscience of the court, however, it is not a “just and proper” factor for consideration in the equitable distribution of marital property. That is so because marital fault is inconsistent with the underlying assumption that a marriage is in part an economic partnership and upon its dissolution the parties are entitled to a fair share of the marital estate, because fault will usually be difficult to assign and because introduction of the issue may involve the courts in time-consuming procedural maneuvers relating to collateral issues. We have no occasion to consider the wife’s fault in this action because there is no suggestion that she was guilty of fault sufficient to shock the conscience….

Meyer, J. (Concurring).

I concur in Judge Simons’ opinion but write separately to point up for consideration by the Legislature the potential for unfairness involved in distributive awards based upon a license of a professional still in training.

…[A] professional in training who is not finally committed to a career choice when the distributive award is made may be locked into a particular kind of practice simply because the monetary obligations imposed by the distributive award made on the basis of the trial judge’s conclusion (prophecy may be a better word) as to what the career choice will be leaves him or her no alternative.

The present case points up the problem. A medical license is but a step toward the practice ultimately engaged in by its holder, which follows after internship, residency and, for particular specialties, board certification. Here it is undisputed that plaintiff was in a residency for general surgery at the time of the trial, but had the previous year done a residency in internal medicine. Defendant’s expert based his opinion on the difference between the average income of a general surgeon and that of a college graduate of plaintiff’s age and life expectancy, which the trial judge utilized, impliedly finding that plaintiff would engage in a surgical practice despite plaintiff’s testimony that he was dissatisfied with the general surgery program he was in and was attempting to return to the internal medicine training he had been in the previous year. The trial judge had the right, of course, to discredit that testimony, but the point is that equitable distribution was not intended to permit a judge to make a career decision for a licensed spouse still in training. Yet the degree of speculation involved in the award made is emphasized by the testimony of the expert on which it was based. …

The equitable distribution provisions of the Domestic Relations Law were intended to provide flexibility so that equity could be done. But if the assumption as to career choice on which a distributive award payable over a number of years is based turns out not to be the fact (as, for example, should a general surgery trainee accidentally lose the use of his hand), it should be possible for the court to revise the distributive award to conform to the fact. And there will be no unfairness in so doing if either spouse can seek reconsideration, for the licensed spouse is more likely to seek reconsideration based on real, rather than imagined, cause if he or she knows that the nonlicensed spouse can seek not only reinstatement of the original award, but counsel fees in addition, should the purported circumstance on which a change is made turn out to have been feigned or to be illusory.

Notes

As of 2014, Dr. O’Brien was apparently still practicing emergency medicine.

Are lump-sum payments or periodic payments better means of handling the property division issues here?

How does the court’s ruling influence the husband’s choices post-divorce? What *should* happen if he switches to a less lucrative specialty? Would it matter if the switch were made out of spite, versus if there were no demand for his specialty and he switched as a matter of economic rationality? What should happen if he switches to a more lucrative specialty? What if he leaves the field entirely – could the court order him to work? What should happen if he wins $50 million in the lottery and quits working?

Even without all these possibilities, the present value of a lengthy career can be hard to predict. Valuation of things like pensions (if there ever are any again) or other non-vested rights (such as potential stock options) may likewise be very complicated, but nonetheless they may form a significant part of a couple’s assets.

Should the wife’s post-divorce choices matter? What if she founds a web startup that makes her three times as much money as he has? What if, during the pendency of the divorce proceedings, the startup is doing wonderfully, but five years later her business partner embezzles the cash and leaves her responsible for a $250,000 debt? What if she dies before the support period ends – should her estate receive the remaining money due?

Suppose, instead of earning a degree, the husband had simply lain around all day, allowing his wife to support him. Would she be entitled to support to compensate her for her lost years? Would *he* be entitled to support because his skills had deteriorated over time? Would it matter if the divorce occurred before the husband received a degree and a license to practice?

Do your answers give you any insight into whether the label “property” is helpful in this case?

The majority view is that a degree is not “property.” *See* In re Marriage of Graham, 574 P.2d 75 (Colo. 1978):

An educational degree, such as an M.B.A., is simply not encompassed even by the broad views of the concept of ‘property.’ It does not have an exchange value or any objective transferable value on an open market. It is personal to the holder. It terminates on death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed, or pledged. An 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. In our view, it has none of the attributes of property in the usual sense of that term.

However, even in majority-rule states, principles of equitable division include considerations such as each party’s contribution to the acquisition of the property, including contributions that assisted one spouse in developing the other’s earning power. *See* Ferguson v. Ferguson, 639 So. 2d 921 (Miss. 1994); Schaefer v. Schaefer, 642 N.W.2d 792 (Neb. 2002) (graduate degree isn’t property, but one spouse’s support of the other’s education is a factor to be considered in dividing the marital assets, as well as in determining whether to award alimony). As the New Jersey Supreme Court stated in Mahoney v. Mahoney, 453 A.2d 527 (N.J. 1982):

[E]very joint undertaking has its bounds of fairness. Where a partner to marriage takes the benefits of his spouse’s support in obtaining a professional degree or license with the understanding that future benefits will accrue and inure to both of them, and the marriage is then terminated without the supported spouse giving anything in return, an unfairness has occurred that calls for a remedy.

…. In effect, through her contributions, the supporting spouse has consented to live at a lower material level while her husband has prepared for another career. She has postponed, as it were, present consumption and a higher standard of living, for the future prospect of greater support and material benefits. The supporting spouse’s sacrifices would have been rewarded had the marriage endured and mutual expectations of both of them been fulfilled…. In this sense, an award that is referable to the spouse’s monetary contribution to her partner’s education significantly implicates basic considerations of marital support and standard of living-factors that are clearly relevant in the determination and award of conventional alimony.

Under *Mahoney*, courts can’t make a permanent distribution of the value of professional degrees and licenses, because of the “potential for inequality to the failed professional or one who changes careers” and the difficulty of valuation. However, New Jersey courts may award reimbursement alimony, based on the contributions received from the supporting spouse, because marriage shouldn’t be a “free ticket” to education and training. *See* Guy v. Guy, 736 So.2d 1042 (Miss. 1999) (professional degrees are not marital property, but former husband would be entitled to some reimbursement if he paid for former wife’s education).

Similarly, California law presumes that reimbursement is appropriate for contributions to a spouse’s education that substantially enhance her earning potential. This presumption can be overcome, and reimbursement reduced or eliminated, if the couple has already substantially benefited from the education; California further presumes this substantial benefit has occurred after ten years of marriage; if the supporting spouse received similar support for his own education; or if the education allows the supported spouse to get employment that reduces support to which she would otherwise be entitled. Cal. Fam. Code §2641.[[2]](#footnote-2)

Is a reimbursement theory sufficient? Should housekeeping and childcare services, if provided by the supporting spouse, be factored into the necessary reimbursement? What about emotional support, such as a counselor or “life coach” might provide?

If most gifts between people who are engaged, except for the engagement ring, are unrecoverable donative transfers, why should the result be any different after marriage? Consider the Pennsylvania Supreme Court’s reasoning in Bold v. Bold, 524 Pa. 487, 574 A.2d 552 (Pa. 1990):

While we agree … that marriage is not a business enterprise in which strict accountings are to be had for moneys spent by one spouse for the benefit of the other, it appears to us that this case does not involve strict accountings, but gross accountings. Supporting spouses in these cases feel entitled to reimbursement, we believe, not because they have sacrificed to support the other spouse, but because they are, to use a strong word, ‘jettisoned’ as soon as the need for their sacrifice, albeit in part a legal obligation, comes to an end. In retrospect, perhaps unintentionally, the supporting spouse in such a case can be said to have been ‘used.’ At least this is the perception of the supporting spouse, and we believe that this perception is not totally without foundation in all cases … [T]he supporting spouse in a case such as this should be awarded equitable reimbursement to the extent that his or her contribution to the education, training or increased earning capacity of the other spouse exceeds the bare minimum legally obligated support….

Questions

1) Do you think the court reached the correct result in O’Brien v O’Brien as a matter of law, justice, and/or policy?

2) New York is a common law (separate property) state. How do you think a case like O’Brien v O’Brien would be decided in a community property state?

3) Suppose the parties in O’Brien v O’Brien had signed an agreement, before they married, which contained the following provision: “If husband and wife divorce without children, husband will pay wife $1000 per month. If husband and wife divorce after having children, husband will pay wife $1000 per month plus $500 per child under 18.” As a matter of law, policy, and/or justice, what do you think the outcome of the O’Brien v O’Brien would or should have been, given these additional facts? For this question, assume (as is true) that New York is a common law state.

For the purposes of the next two problems, assume:

The statutory share in a common law state is 50%.

A common law state considers property acquired during marriage to be marital property, regardless of the source and excludes from marital property only property owned before the marriage began.

A community property state considers income (e.g. rents or dividends) from separate property to be separate property.

4) Suppose that when Bill and Hillary marry they have no assets. They each work as lawyers and deposit their paychecks into a joint account. Hillary earns twice as much as Bill. When Bill receives a 25K bonus, he deposits it into a Vanguard account in his name only. He invests the money in a stock market mutual fund. Later, Hillary inherits 100K from her father, which she deposits in a Fidelity account in her name only. On December 31, 2018, there is 10K in their joint account, the Vanguard mutual fund in Bill’s name is worth 50K (as the result of 10K in dividends and 15K in capital appreciation), and the Fidelity mutual fund in Hillary’s name is worth 110K (as the result of 10K in dividends and no capital appreciation). Suppose, on December 31, 2018:

A) Bill and Hillary divorce. How much do each get, if they live in a common law state?

B) Bill and Hillary divorce. How much do each get, if they live in a community property state?

C) Bill dies leaving all his property by will to Monica. How much does Hillary get, if they live in a common law state?

D) Bill dies leaving all his property by will to Monica. How much does Hillary get, if they live in a community property state?

5) Suppose that when Donald and Ivana married, he had 100 million in assets, and she had 200K. During their marriage, they kept their assets separate and by the end of 2018, as a result of their investment decisions, Donald’s assets were worth 100 million and Ivana’s were worth 400K. Suppose that on December 31, 2018:

A) Donald and Ivana divorce. How much do each get, if they live in a common law state? For this and the next question, assume that Donald and Ivana signed a prenuptial agreement, but a court declared it invalid.

B) Donald and Ivana divorce on December 31. How much do each get, if they live in a community property state?

C) Donald dies leaving all his property to Stephanie by will. How much does Ivana get if they live in a common law state?

D) Donald dies leaving all his property to Stephanie by will. How much does Ivana get if they live in a community property state?

1. In the absence of agreement to the contrary or deliberate misappropriation of community property by one spouse. [↑](#footnote-ref-1)
2. Contribution to education that increases a spouse’s earning potential is also relevant to whether a court should award alimony, along with other factors such as the extent to which each person’s earning capacity is sufficient to maintain the marital standard of living, the length of the marriage, and the needs of the parties. Cal. Fam. Code §§4320, 4330. [↑](#footnote-ref-2)