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Marriage in New York: An Economic Partnership?

Cheryl E. Hader†

I. Introduction

Marriage, it is sometimes humorously maintained, is many things to many people. A view prevalent today conceives of marriage as analogous to an economic partnership. The spouses act as partners, each of whom makes financial or nonfinancial contributions to the establishment of a household, the formation of a family, and the accumulation of property. Accordingly, the dissolution of a marriage is analogized to the dissolution or winding up of a business partnership in which the settling of accounts and the distribution of property to the members constitute an integral part of the partnership concept.

This Article compares and contrasts marriage in New York with an economic partnership. The primary comparison here is between the New York Domestic Relations Law¹ as interpreted by the courts, and the New York Partnership Law.² Part II summarizes the relevant provisions of the New York Partnership Law. A comparison of marriage and a business partnership follows in Part III. In Part IV, New York's Equitable Distribution Law³ and the underlying view of marriage as an economic partnership are discussed. This section further examines the statutory and judicial definitions of separate and marital property, and considers whether the results are in accord with the partnership view of marriage. Part V compares some nondissolution aspects of domestic relations law to analogous aspects of partnership law — specifically, the management and control of marital property and the agency relationship between the spouses. The

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1. N.Y. DOM. REL. LAW §§ 1-272 (McKinney 1988).

2. N.Y. PARTNERSHIP LAW §§ 1-126 (McKinney 1988).

3. N.Y. DOM. REL. LAW § 236 (McKinney 1986 & Supp. 1988).

Article then confronts the question of whether the legislature and the courts should treat marriage as if it were an economic partnership, and concludes that it may be preferable to do so.

II. Elements of a Partnership

A partnership is defined as "an association of two or more persons to carry on as co-owners of a business for profit."⁴ To determine that a partnership exists, a court must find that the parties have joined their skills, interests, property, and risks for a particular purpose, and that the respective contributions of the parties were based on the assumption that each member will act for the benefit of all.⁵

Partnership property consists of property originally brought into the partnership, property subsequently acquired on account of the partnership, and property acquired with partnership funds.⁶ The property rights of a partner include his rights in specific partnership property, his share of the profits and surplus of the partnership, and his rights in the management of the partnership.⁷ Each partner has equal rights in the management and conduct of the partnership business.⁸

Because each partner is an agent of the partnership for the purpose of its business, the partnership is bound by the act of every partner "for apparently carrying on in the usual way the business of the partnership"⁹ If the partner actually has no authority to act for the partnership in the particular matter, and the person with whom he is dealing is aware of that partner's lack of authority, then the partnership is not bound by that partner's action.¹⁰

Upon dissolution of the partnership, each partner is entitled to be repaid his contributions.¹¹ After all liabilities are satisfied, including those to other partners, the partners will share equally

4. N.Y. PARTNERSHIP LAW § 10 (McKinney 1988).

5. See *Steinbeck v. Gerosa*, 4 N.Y.2d 302, 151 N.E.2d 170, 175 N.Y.S.2d 1, *appeal dismissed*, 358 U.S. 39 (1958).

6. N.Y. PARTNERSHIP LAW § 12(1), (2) (McKinney 1988).

7. *Id.* §§ 50, 52.

8. *Id.* § 40.

9. *Id.* § 20(1).

10. *Id.*

11. *Id.* § 40(1).

in the profits and the surplus remaining (unless the partners had stipulated for an agreed share of the profits).¹² If the partnership sustains any loss, each partner must contribute toward it according to his share of the profits.¹³ Every partner has a right to be reimbursed by the partnership for "payments made and personal liabilities reasonably incurred by him in the ordinary and proper conduct of [the partnership] business, or for the preservation of [the] business or property."¹⁴

A partner may "receive interest on the capital contributed by him only from the date when repayment should be made."¹⁵ Furthermore, no partner has a claim to salary for performing services with respect to the partnership business.¹⁶ Since the partners have contracted to share in the gains of the partnership, no other compensation is due them in the usual case.

After the dissolution of the partnership, the liabilities owed to creditors other than partners are to be paid before liabilities owed to the partners.¹⁷ Next, liabilities "owing to partners in respect of capital" are to be paid, and, finally, in the absence of an agreed ratio, the sum remaining is to be divided equally and paid to the partners as profits.¹⁸

III. Partnership Aspects of Marriage

In many ways, marriage is analogous to an economic partnership. Although the profit motive of a partnership which is the basis of the Uniform Partnership Act (U.P.A.),¹⁹ is not present in a marriage, "a business partnership is also a human relationship, and the U.P.A. provisions form a basis for a sound human relationship."²⁰ Furthermore, the trend is toward viewing marriage as if it were a business transaction and defining the rights

12. *Id.*

13. *Id.*

14. *Id.* § 40(2).

15. *Id.* § 40(4).

16. *Id.* § 40(6).

17. *Id.* § 71(b).

18. *Id.*

19. UNIFORM PARTNERSHIP ACT, 6 U.L.A. 1 (1968). The Uniform Partnership Act is the basis of the New York Partnership Law. See N.Y. PARTNERSHIP LAW §§ 1-74 (McKinney 1988).

20. Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CALIF. L. REV. 1169, 1256 n.396 (1974).

of parties by the general principles of contract law.²¹ Marriage has been termed "a partnership to which each spouse makes a different but equally important contribution."²² The fact that many married couples consider marriage to be a joint enterprise is indicated by the widespread American custom of holding real estate and savings in joint tenancy with the right of survivorship.²³

The parties' contributions to their marital partnership are often put to several different uses. A portion of the contributions is consumed by the couple directly. The couple may also invest the contributions "in the accumulation of property, in the production and rearing of children, or in the enhancement of their own skills."²⁴ Presumably, the parties allot their contributions to these various competing goals under the assumption that the marital partnership will last for the rest of their lives. Nevertheless, each is aware that the marriage may end in divorce at any time and that his or her expectations may be unfulfilled.²⁵ Upon dissolution of the marriage, an accounting is necessary which is similar to that required upon liquidation of a business partnership.²⁶ The property is then apportioned and distributed, the marital partnership having ceased to exist.

IV. Marriage as a Partnership Under the Equitable Distribution Law

In approving the Equitable Distribution Law, formally referred to as "Domestic Relations Law," § 236 Part B,²⁷ Governor Hugh Carey stated that "[t]he bill recognizes that the marriage relationship is also an economic partnership."²⁸ Among the factors to be taken into account in determining the equitable

21. 52 AM. JUR. 2D *Marriage* § 4, at 867 (1970).

22. *Prefatory Note* to the Uniform Marital Property Act, 9A U.L.A. 97 (1983) [hereinafter UMPA] (quoting COMMITTEE ON CIVIL AND POLITICAL RIGHTS, REPORT TO THE PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN (1963)).

23. M. GLENDON, *STATE, LAW, AND FAMILY* 154-55 (1977).

24. *Conner v. Conner*, 97 A.D.2d 88, 99, 468 N.Y.S.2d 482, 490 (2d Dep't 1983).

25. *Id.* at 99, 468 N.Y.S.2d at 490-91.

26. Westfall, *Family Law and Marital Property* 296 (1986) (unpublished manuscript).

27. N.Y. DOM. REL. LAW § 236(B) (McKinney 1986 & Supp. 1988).

28. Governor's Memorandum of Approval, 1980 N.Y. LAWS 1863 (1980).

claims of the parties with respect to the distribution of the accumulated property upon dissolution are "the contribution and services of a partner in the marriage as a spouse, a parent, a wage earner, and a homemaker."²⁹

The Equitable Distribution Law reflects the view that the success of the marital partnership is contingent upon a number of factors in addition to the monetary contributions of each partner. The statute recognizes that nonfinancial contributions also assist in the joint enterprise. Such services include "home-making, raising children and providing the emotional and moral support necessary to sustain the other spouse in coping with the vicissitudes of life outside the home."³⁰ When a marriage comes to an end, each spouse has a right to share in any marital assets that have accumulated during the marriage because the marital property represents the capital product of the marital partnership.³¹ The portion of the property to which a spouse is entitled reflects the spouse's proportional share of the contributions made to the marital enterprise.³²

A. *Statutory Terms and Concepts*

An important aspect of the Equitable Distribution Law is the distinction between "separate property," which is to remain as such after dissolution of the marital partnership, and "marital property," which is to be divided between the parties upon dissolution.³³

1. *Separate Property*

"Separate property" includes:

- (1) property acquired before marriage or property acquired by bequest, devise, or descent, or gift from a party other than the spouse;
- (2) compensation for personal injuries;
- (3) property acquired in exchange for or the increase in value

29. *Id.* See also *Conner*, 97 A.D.2d at 99, 468 N.Y.S.2d at 490.

30. *Brennan v. Brennan*, 103 A.D.2d 48, 52, 479 N.Y.S.2d 877, 880 (3d Dep't 1984).

31. See *Wood v. Wood*, 119 Misc. 2d 1076, 1079, 465 N.Y.S.2d 475, 477 (Sup. Ct. Suffolk County 1983).

32. *Id.*

33. N.Y. DOM. REL. LAW § 236(B)(5)(b)-(c) (McKinney 1986).

of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse;³⁴

The fact that separate property is exempt from division upon divorce is in accordance with the underlying partnership rationale of the Equitable Distribution Law; such property is not the product of the efforts of the marital enterprise.³⁵ To be consistent with this interpretation, property acquired in exchange for separate property which is to be excluded from equitable distribution should similarly be limited to assets which cannot be considered part of the product of the marital economic partnership. "This would generally presume some rough equivalency in value at the time between the premarital property and that which was acquired in exchange"³⁶ When property that is produced by the activities of the marital enterprise is used to replace depreciated separate property of lower value, only the lower value of the original separate property should be exempt from equitable distribution.³⁷ Furthermore, a gift from a third party to an individual spouse is considered to be separate property, as it is not a result of the marital relationship.³⁸

2. *Marital Property*

"Marital property" is defined 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 Marital property shall not include separate property³⁹

Marital property is analogous to partnership property. It is the fruit of the marital partnership, which is to be divided equi-

34. *Id.* § 236(B)(1)(d).

35. *See* *Brennan v. Brennan*, 103 A.D.2d 48, 52, 479 N.Y.S.2d 877, 880 (3d Dep't 1984).

36. *Id.* at 53, 479 N.Y.S.2d at 880.

37. *Id.* at 53-54, 479 N.Y.S.2d at 881.

38. N.Y. DOM. REL. LAW § 236(B)(1)(d)(1) (McKinney 1986). *See also* 3 H. FOSTER, D. FREED & J. BRANDES, *LAW AND THE FAMILY — NEW YORK* § 2:1, at 36 (1986) [hereinafter *FOSTER, FREED & BRANDES*].

39. N.Y. DOM. REL. LAW § 236(B)(1)(c).

tably between the parties upon dissolution of the marriage.⁴⁰ The words "all property" in the definition above were intended to cover intangible as well as tangible property, real and personal property, and anything of value that may be evaluated, if it were the result of partnership or individual efforts during the marriage.⁴¹ Items that would not be considered "property" under the classical definition of the word may nevertheless be considered "marital property," provided they satisfy the criteria of having a provable economic worth and of being the fruit of the efforts of either or both spouses.⁴²

To be considered marital property, an asset must be acquired while the couple is legally married, and before the commencement of a matrimonial action.⁴³ "[T]he point of the statute is to earmark the commencement of a matrimonial action as an event that, legally, dissolves the economic partnership of the spouses, though the parties remain legally married until the conclusion of the action."⁴⁴ Actual distribution of marital property is made only when the marriage is being dissolved and not, for example, in an action for legal separation, because the marriage is considered still intact at that time.⁴⁵

The basic premise of the statute is that marriage is an economic partnership. This concept aids in understanding the scope of items covered by the term "marital property." Thus, a gift of property to both spouses by a third party should be viewed as belonging to the marital partnership, since the spouses have received the gift by virtue of the marital relation.⁴⁶ Similarly, the appreciation in value of separate property which is due to contributions of the nontitled spouse is considered to be marital property "consistent with the law of partnership with respect to capital, advances and personal services"⁴⁷

The subject of "marital property" is rarely considered

40. FOSTER, FREED & BRANDES, *supra* note 38, at 34.

41. *Id.* at 34-35.

42. N.Y. DOM. REL. LAW § 236(B), commentary at 192.

43. *Id.* at 194.

44. *Id.* at 196.

45. FOSTER, FREED & BRANDES, *supra* note 38, at 34.

46. *Ackley v. Ackley*, 100 A.D.2d 153, 155-56, 472 N.Y.S.2d 804, 805-06 (4th Dep't), *appeal dismissed*, 63 N.Y.2d 605, 471 N.E.2d 462, 481 N.Y.S.2d 1023 (1984).

47. *Conner v. Conner*, 97 A.D.2d 88, 98-99, 468 N.Y.S.2d 482, 490 (2d Dep't 1983).

outside the context of marital dissolution. Nevertheless, just as partnership property is deemed to be such while the business of the partnership is being carried on as well as upon the partnership's dissolution, marital property similarly exists outside the situation of divorce:

[T]here can be little doubt that the Legislature has created a heretofore unknown species of property right which comes into being, not with the service of the divorce summons, but with the marriage and acquisition of the first earned asset.

. . . [A]n inchoate interest in the asset is acquired by the spouse without title immediately on acquisition and during "coverture"; it becomes "consummate" on service of the divorce summons awaiting only "admeasurement" in the decree of divorce.⁴⁸

After the right has become "consummate," the titled spouse is restricted in his ability to dispose of the property and may be prevented from converting liquid assets into nonliquid assets or sound assets into questionable assets.⁴⁹ A member of a business partnership is restricted in his ability to dispose of property or to convert assets only when such disposition or conversion is not for the purpose of conducting the business of the partnership in the usual way, or if he is not authorized to act for the partnership in that particular matter.⁵⁰

B. *Case Law Under the Equitable Distribution Statute*

1. *What is Marital Property?*

A conclusive definition of marital property "remains elusive."⁵¹ Real estate and tangible personal property seem to fall most easily into the statutorily defined categories of separate and marital property. There are some types of intangible property, however, for which the determination is less obvious. Furthermore, in some contexts a dispute over whether something is marital property necessitates an initial inquiry into whether the subject of the dispute can be regarded as property at all.⁵² Once

48. *Kruger v. Kruger*, 115 Misc. 2d 595, 598-99, 454 N.Y.S.2d 500, 503 (Sup. Ct. N.Y. County 1982).

49. *Id.* at 599, 454 N.Y.S.2d at 503.

50. N.Y. PARTNERSHIP LAW § 20 (McKinney 1988).

51. *Kruger*, 115 Misc. 2d at 598, 454 N.Y.S.2d at 503.

52. *But see supra* note 34 and accompanying text.

an item is determined to be marital property, the additional question of valuation must be considered. The following subsections concern some of the more controversial property issues that can arise during marital dissolution. In some instances, reference to economic partnership aspects of marriage aids in the resolution of the issues, whereas in others, it merely fuels the controversy.

a. *Educational Degree*

When a couple gets married before a spouse has completed his or her professional education, the other spouse frequently contributes income toward household expenses and sometimes, toward the student's educational expenses. The working spouse's financial and nonfinancial contributions allow the student to continue his or her education and earn a professional degree. In return for these contributions, the working spouse may expect to be able to share in the increased income that the student will earn from practicing a profession. These reasonable expectations may be disappointed when the parties are divorced soon after the student's graduation. The question then arises as to whether and, if so, how the working spouse will be compensated for contributions and dashed hopes. "States with sharing principles in property distribution are recognizing these expectations when the marriage is dissolved"⁵³ and some form of restitution is often granted to the supporting spouse.⁵⁴

If an educational degree were regarded as marital property, then the courts could determine the value of the degree and make a distributive award to the working spouse. For a variety of reasons, however, the lower New York courts prior to the 1985 *O'Brien* decision,⁵⁵ have held that an educational degree is not

53. Comment, *The Development of Sharing Principles in Common Law Marital Property States*, 28 UCLA L. REV. 1269, 1310 (1981).

54. Boyer, *Equitable Interest in Enhanced Earning Capacity: The Treatment of a Professional Degree at Dissolution*, 60 WASH. L. REV. 431 n.1 (1985) (how most courts have held that a professional degree is not property for purposes of divorce). See also Moore, *Should a Professional Degree Be Considered a Marital Asset Upon Divorce?*, 15 AKRON L. REV. 543, 544-55 (1982) (compensating the wife solely by means of an award of maintenance is most frequently utilized by the courts, while treating the degree as marital property appears to be the position most favored by commentators).

55. *O'Brien v. O'Brien*, 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985), on

marital property.⁵⁶

One reason for declining to view an educational degree as marital property is that it does not have any of the traditional characteristics 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 the 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.⁵⁷

Some courts have stated that the future enhanced earning capacity of the degree holder should be classified as property. Enhanced earning capacity, however, cannot be considered property since "it is only an uncertain expectancy, for it is dependent upon the future success and efforts of the degree holder."⁵⁸

This view is countered by some commentators, who feel that it is "an unmitigated disaster to label a professional degree . . . as 'non property.'"⁵⁹ This "semantical judgment" destroys the expectancies and equitable claims of the working spouse, whose efforts enabled the other spouse to enhance his earning capacity.⁶⁰

Another reason given for the courts' refusal to regard an educational degree as marital property is the unfairness that could conceivably result from making a monetary award based upon the estimated enhanced future earnings of the degree holder. Once granted, a distributive award may not be modified to reflect changed circumstances.⁶¹ This would be inequitable in

remand, 120 A.D.2d 656, 502 N.Y.S.2d 250, *later proceeding*, 124 A.D.2d 575, 507 N.Y.S.2d 719 (2d Dep't 1986).

56. *See, e.g.*, *Conner v. Conner*, 97 A.D.2d 88, 468 N.Y.S.2d 482 (2d Dep't 1983); *Lesman v. Lesman*, 88 A.D.2d 153, 452 N.Y.S.2d 935 (4th Dep't 1982).

57. *Lesman*, 88 A.D.2d at 157, 452 N.Y.S.2d at 938 (quoting *Graham v. Graham*, 194 Colo. 429, 432, 574 P.2d 75, 77 (1978)).

58. *Id.* at 157, 452 N.Y.S.2d at 938.

59. *FOSTER, FREED & BRANDES supra* note 38, § 7:1, at 337.

60. *Id.*

61. *Lesman*, 88 A.D.2d at 157, 452 N.Y.S.2d at 938.

a situation where, due to factors beyond his control, the holder of the professional degree did not earn as much as had been anticipated by the court which made the distributive award.⁶² Furthermore, the student spouse may decide not to practice his profession, or to use his professional degree in a less profitable manner than had been expected.⁶³ That choice should not be restricted by an overly large award given to the former spouse that was based upon the student's anticipated future earnings.

The partnership premise of the Equitable Distribution Law has been cited as another reason that an educational degree should not be considered marital property. If the student's degree were marital property, then a share of anticipated future earnings reduced to present value would have to be awarded to the other spouse. However, "by virtue of the partnership premise, his earnings during any remarriage are necessarily attributable only to the student's efforts and the efforts of any such new spouse" and not to the former spouse.⁶⁴ Accordingly, the former spouse should not have any claim to the student's future earnings as marital property.⁶⁵

The working spouse's contributions toward the student's professional education do not go completely unrewarded. The student's present earnings and future earnings potential are taken into account in determining the amount of maintenance that will be awarded to the working spouse.⁶⁶

Ironically, there has also been an emphasis on the nonpartnership aspects of marriage as a reason to disregard an educational degree as marital property:

Marriage . . . is more than an economic undertaking. The parties agree upon the manner in which they will provide financial support and nonfinancial 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, financial as well as nonfinancial, but it does not result in a financial loss in

62. *Id.* at 157, 452 N.Y.S.2d at 938-39.

63. *Id.*

64. *Conner v. Conner*, 97 A.D.2d 88, 102-03, 468 N.Y.S.2d 482, 492 (2d Dep't 1983).

65. *Id.* at 103, 468 N.Y.S.2d at 492.

66. *Id.* at 103, 468 N.Y.S.2d at 493; *Lesman*, 88 A.D.2d at 159, 452 N.Y.S.2d at 940.

a commercial sense.⁶⁷

The working spouse's disappointed expectations in not sharing in the student's improved earning capacity are no more compensable than any other spouse's expectations and hopes which have been dashed by a failed marriage.⁶⁸

The economic partnership model of marriage can also be used to justify viewing an educational degree as marital property, although this reasoning has apparently never been accepted by a New York court. It may be presumed that the non-student spouse makes direct and indirect contributions toward the student's professional degree with the underlying purpose of increasing the flow of income to the marital partnership in the future. Those contributions give rise under the Equitable Distribution Law to an equitable claim by the supporting spouse against the value of the educational degree. Therefore, the degree should be considered by the courts to be marital property.⁶⁹

Accordingly, the fact that an educational degree does not fall within the traditional definition of property is not relevant to the decision of whether it should be valued and then divided. The term "marital property" is a statutory creation, "simply a shorthand for defining those things of value as to which the spouses have an equitable claim based upon a remedial statute and arising out of the marital relationship, irrespective of the common law ownership thereof."⁷⁰ A court should therefore define marital property with a view toward protecting the parties' "statutorily defined equitable claim[s]."⁷¹ Despite possible difficulties in valuation, a professional degree must be considered marital property so as not to unjustly deny to the nonstudent spouse an equitable share of the increased future earnings resulting from the degree.⁷²

67. *Lesman*, 88 A.D.2d at 159, 452 N.Y.S.2d at 939.

68. *Id.* at 159, 452 N.Y.S.2d at 939-40.

69. *Conner*, 97 A.D.2d at 108, 468 N.Y.S.2d at 496 (Bracken and Brown, JJ., concurring).

70. Florescue, "Market Value," *Professional Licenses and Marital Property: A Dilemma in Search of a Horn*, 14 FAM. L. REV. 13 (1982).

71. *Id.* See also Boyer, *supra* note 54, at 441-43 (a professional degree and its accompanying enhanced earning capacity should be recognized as a new form of property).

72. *Conner*, 97 A.D.2d at 109, 468 N.Y.S.2d at 496 (Bracken and Brown, JJ., concurring).

If an educational degree were viewed as marital property, then merely taking the student's future enhanced earning capacity into account in awarding maintenance would not by itself adequately compensate the working spouse for his or her investment in the marital partnership.⁷³ Since maintenance is awarded on the basis of need, and since the working spouse usually supports the student financially during the marriage, it is likely that the working spouse would remain self-supporting after the divorce and therefore not be entitled to maintenance.⁷⁴ Furthermore, since an award of maintenance ends upon the recipient's remarriage, the working spouse who remarries may not be fully rewarded for his or her contributions to the marital partnership.⁷⁵ Under this view, an educational degree, as marital property, should be divided equitably between the spouses in accordance with the contributions of each. The amount to be divided is the future earnings attributable to the degree, discounted to present value.⁷⁶

b. *Professional Licenses*

Another controversial issue that has arisen upon dissolution of a student spouse-working spouse marriage is whether a professional license that has been obtained during the marriage should be designated as marital property, to be valued and divided. Despite earlier contrary lower court holdings regarding an educational degree,⁷⁷ the court of appeals in *O'Brien v. O'Brien*⁷⁸ held that a professional license is to be considered marital property. Partnership principles were used to justify this holding:

The determination that a professional license is marital property is also consistent with the conceptual base upon which the statute rests [F]ew undertakings during a marriage better qualify as the type of joint effort that the statute's economic partnership theory is intended to address than the contributions to-

73. *Id.* at 112, 468 N.Y.S.2d at 498.

74. *Id.* at 111-12, 468 N.Y.S.2d at 498.

75. *Id.* at 112, 468 N.Y.S.2d at 498. A division of property is also preferable to a maintenance award for a variety of psychological, social, and economic reasons. See Boyer, *supra* note 54, at 446-48.

76. *Conner*, 97 A.D.2d at 110, 468 N.Y.S.2d at 497.

77. See, e.g., *Lesman v. Lesman*, 88 A.D.2d 153, 452 N.Y.S.2d 935 (4th Dep't 1982).

78. 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985).

ward one spouse's acquisition of a professional license 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.⁷⁹

Limiting relief for the working spouse to maintenance would frustrate the underlying purposes of the Equitable Distribution Law, because it would be contrary to the idea of an economic partnership. A working spouse who remarries may never be fully compensated for his or her contributions toward a former spouse's professional license.⁸⁰ Furthermore, merely reimbursing the working spouse for direct financial contributions is an inadequate solution. "If the license is marital property, then the working spouse is entitled to an equitable portion of it, not a return of funds advanced."⁸¹ The amount to be divided should be the projected enhanced earning capacity of the license holder, discounted to present value.⁸²

Once again, support for the contrary holding that a professional license is not marital property can be derived from the partnership model as well:

[T]he resource actually sought to be controlled by the working spouse to the exclusion of all others, including the student, is a percentage of . . . future labors that utilize the nonassignable privilege. In short, the privilege has no pecuniary value susceptible of ascertainment by the working spouse's expert apart from such labor. Labor, however, is merely the use by the student of his or her own best asset, his or her chief capital — the property of his or her own person.⁸³

79. *Id.* at 585-86, 489 N.E.2d at 716, 498 N.Y.S.2d at 747.

80. *Id.* at 587, 489 N.E.2d at 717, 498 N.Y.S.2d at 748. The *Conner* court rejected this reasoning, however, by holding that an educational degree was not marital property. See *Conner v. Conner*, 97 A.D.2d 88, 112, 468 N.Y.S.2d 482, 498 (2d Dep't 1983) (Bracken and Brown, JJ., concurring). See also Boyer, *supra* note 54 (the psychological, social, and economic reasons concerning why alimony is inappropriate presumably apply in the context of professional licenses as well as professional degrees).

81. *O'Brien*, 66 N.Y.2d at 588, 489 N.E.2d at 718, 498 N.Y.S.2d at 749.

82. *Id.*

83. *O'Brien v. O'Brien*, 106 A.D.2d 223, 226, 485 N.Y.S.2d 548, 551 (2d Dep't), *modified*, 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985).

According to the lower appellate court in *O'Brien*, a professional license should not be considered marital property for the same reasons that the court did not deem an academic degree to be such in two other cases, *Conner* and *Lesman*.⁸⁴

The court of appeals' decision in *O'Brien*,⁸⁵ holding that a professional license is marital property, has brought into question previous lower court holdings that an educational degree is not marital property.⁸⁶ Some commentators believe that, given the similarity between a license and a degree, the *O'Brien* decision constitutes a rejection of *Lesman*, and that an educational degree should henceforth be considered marital property.⁸⁷

In another case, *Cronin v. Cronin*,⁸⁸ however, the New York Supreme Court refused to extend the *O'Brien* holding to an academic degree. The court stated that the *O'Brien* holding was limited to professional licenses and did not overrule previous court rulings that academic degrees are not marital property subject to equitable distribution.⁸⁹ The *Cronin* court read the *O'Brien* decision to concur with the dissenting opinion of Justice Thompson in the appellate division below, which distinguished an academic degree from a professional license:⁹⁰

Unlike *Conner* . . . in this case we are dealing with more than a college degree. Here, plaintiff had been licensed to practice medicine prior to the commencement of this action. The licensing authority thus conferred upon him the regulated privilege of practicing medicine The privilege of applying his previous education and training vested, allowing plaintiff to finally convert his training into a professional practice, and also affording him certain due process rights In short, our case presents a scenario where the educational background has been converted into

84. *O'Brien*, 106 A.D.2d at 225, 485 N.Y.S.2d at 550. See also *Conner v. Conner*, 97 A.D.2d 88, 468 N.Y.S.2d 482 (2d Dep't 1983); *Lesman v. Lesman*, 88 A.D.2d 153, 452 N.Y.S.2d 935 (4th Dep't 1982).

85. *O'Brien*, 66 N.Y.2d at 576, 489 N.E.2d at 712, 498 N.Y.S.2d at 743.

86. But cf. *Conner*, 97 A.D.2d 88, 468 N.Y.S.2d 482; *Lesman*, 88 A.D.2d 153, 452 N.Y.S.2d 935.

87. FOSTER, FREED & BRANDES, *supra* note 38, § 16:6. See also Comment, *Family Law: Ought a Professional Degree Be Divisible as Property Upon Divorce?*, 22 WM. & MARY L. REV. 517, 519 (1981) (considers an educational degree to be substantially similar to a professional license in arguing that both should be subject to division upon divorce).

88. 131 Misc. 2d 879, 502 N.Y.S.2d 368 (Sup. Ct. Nassau County 1986).

89. *Id.* at 882, 502 N.Y.S.2d at 371.

90. *Id.*

a concrete privilege to practice the profession of medicine. That privilege, being in the nature of a franchise, was properly considered by the trial court as marital property for the purpose of equitable distribution.⁹¹

It remains to be seen whether higher courts will agree with this distinction and hold professional licenses, but not degrees, to be marital property.⁹²

c. *Professional Practices*

The value of a professional practice consists of the sum of the value of the tangible assets of the practice,⁹³ such as medical or dental equipment, and the value of the intangible assets of the practice, including goodwill.⁹⁴ In accordance with the underlying view of marriage as an economic partnership, a professional practice is considered marital property to the extent of the value that has been acquired during the marriage.⁹⁵ Law,⁹⁶ accounting,⁹⁷ dental,⁹⁸ and medical⁹⁹ practices have all been found to be properly subject to valuation and a subsequent distributive award.¹⁰⁰ This is consistent with the intent of the legislature, which created the distributive award to encompass situations "where a division of the actual marital property between the spouses is impracticable, impossible, or illegal,"¹⁰¹ such as "the distribution of an interest in a . . . profession"¹⁰²

91. *O'Brien v. O'Brien*, 106 A.D.2d 223, 240, 485 N.Y.S.2d 548, 560 (2d Dep't) (Thompson, J., dissenting), *modified*, 66 N.Y.2d 576, 489 N.E.2d 712, 489 N.Y.S.2d 743 (1985).

92. N.Y. DOM. REL. LAW § 236(B), commentary at 192 (McKinney 1986).

93. *See Arvantides v. Arvantides*, 64 N.Y.2d 1033, 1034, 478 N.E.2d 199, 200, 489 N.Y.S.2d 58, 59 (1985).

94. *See Hirschfeld v. Hirschfeld*, N.Y.L.J., May 4, 1982, at 7, col. 1 (claims for work done is another example of an intangible asset of the practice).

95. *Litman v. Litman*, 93 A.D.2d 695, 463 N.Y.S.2d 24 (2d Dep't 1983).

96. *Id.*

97. *Cohen v. Cohen*, 104 A.D.2d 841, 480 N.Y.S.2d 358 (2d Dep't 1984), *appeal dismissed*, 69 N.Y.2d 773, 475 N.E.2d 457, 485 N.Y.S.2d 990 (1985).

98. *Arvantides v. Arvantides*, 64 N.Y.2d 1033, 478 N.E.2d 199, 489 N.Y.S.2d 58 (1985).

99. *Van Ess v. Van Ess*, 100 A.D.2d 848, 474 N.Y.S.2d 90 (2d Dep't 1984).

100. A distributive award is a monetary payment in lieu of an actual division of property. N.Y. DOM. REL. LAW § 236(B)(1)(b) (McKinney 1986).

101. *Litman v. Litman*, 93 A.D.2d 695, 696, 463 N.Y.S.2d 24, 25 (2d Dep't 1983).

102. N.Y. DOM. REL. LAW § 236(B)(5)(e).

In determining the effect of a professional career on the division of property, the court must pursue a three-part inquiry: (1) whether the history of the spouse's professional activity is consistent and extensive enough so that it can rightly be considered a marital asset; (2) as a marital asset, whether it is inappropriate or infeasible in the particular case to estimate the value of the practice and the share in it to which each spouse is entitled; and (3) under the circumstances of the case, whether the court should make a distributive award.¹⁰³

Various professional practices are valued in different ways. In *Cohen v. Cohen*,¹⁰⁴ for example, the husband became a partner in an accounting firm during the marriage and was assigned "units" in the firm, "comparable to shares of stock, which determine[d] his share of the profits of the accounting firm for a given fiscal year"¹⁰⁵ Using the husband's own estimate that each of his 560 units was worth \$200 in the year in which the divorce action was commenced, the court awarded his wife fifty percent of the total estimated value, noting that she had contributed to the marriage both as a wage earner and as a homemaker.¹⁰⁶

In determining one spouse's interest in the other's law practice, one approach is to evaluate goodwill by the "formula approach" permitted by the Internal Revenue Service:¹⁰⁷

[This method] capitaliz[es] earnings in excess of a fair salary paid to the law partner from net earnings. If the partner receives earnings deemed more than the average salary paid in corporate industry for similar legal services, the excess will be deemed a capital asset of which the spouse may receive an equitable share.¹⁰⁸

A similar approach could conceivably be taken to determine the value of the goodwill of another type of professional practice, such as a dental or medical practice.¹⁰⁹ If the practice was

103. *Barton v. Barton*, N.Y.L.J., May 20, 1982, at 10, col. 7.

104. 104 A.D.2d 841, 480 N.Y.S.2d 358 (2d Dep't 1984), *appeal dismissed*, 64 N.Y.2d 773, 475 N.E.2d 457, 485 N.Y.S.2d 990 (1985).

105. *Cohen*, 104 A.D.2d at 843, 480 N.Y.S.2d at 361.

106. *Id.*

107. *Hirschfeld v. Hirschfeld*, N.Y.L.J., May 4, 1982, at 7, col. 1 (citing REV. RUL. 68-609, 1968-2 C.B. 327).

108. *Id.*

109. Professional goodwill is considered by both common-law and community prop-

begun before marriage, however, only the appreciation in value of the practice from the date of the marriage to the commencement of the action will be considered marital property,¹¹⁰ for only that increase is due to the efforts of the marital partnership.

There are some instances in which a professional practice has neither goodwill nor sales value, such as a lawyer's negligence practice.¹¹¹ When a practice consists entirely of negligence cases handled on a contingency basis, there are no retainer clients and no way to estimate the size of future earnings. It would therefore be inappropriate to use a formula capitalizing the practice's value.¹¹² Nevertheless, a practice with a positive average yearly income does have a tangible economic value that should be taken into account during equitable distribution.¹¹³ If the court assumes that the attorney will continue to have a significant negligence practice, then the spouse may receive as a distributive award a sum equal to an appropriate percentage of one year's average gross or net income.¹¹⁴ A "continued share beyond one year [would] be inequitable and unjust," given the uncertain nature of a negligence practice.¹¹⁵

Although valuing a professional practice may be difficult or awkward,¹¹⁶ the process is necessary under the economic partnership view of marriage. When a spouse has spent time and effort building a reputation, adding to his professional skills, or becoming a partner in an already-established firm, a value is obtained in addition to the actual salary or income. The amount of this extra value acquired during the marriage should be considered to have resulted from partnership efforts that include the indirect contributions of one spouse that enabled the other to pursue and enhance his or her profession.¹¹⁷

erty jurisdictions to be a marital asset that is capable of being valued and divided upon dissolution. See Comment, *supra* note 87, at 545-46.

110. Van Ess v. Van Ess, 100 A.D.2d 848, 849, 474 N.Y.S.2d 90 (2d Dep't 1984). See also N.Y. DOM. REL. LAW § 236(B)(1)(d)(1), (5)(d)(1) (McKinney 1986).

111. See Barton v. Barton, N.Y.L.J., May 20, 1982, at 10, col. 7.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. See Comment, *supra* note 87, at 546.

d. *Pension Benefits*

The distribution of pension benefits is yet another area that has generated a great deal of litigation to determine whether those benefits should rightfully be regarded as marital property. The courts have considered various types of pensions:

[P]ension benefits are said to be vested when they are not forfeited even if the employee is discharged or voluntarily terminates his employment. The only condition precedent to the receipt of vested pension benefits is that the employee survive until retirement age. In contrast, nonvested pension benefits are contingent upon the employee continuing his employment with the employer or organization sponsoring the plan. Moreover, a pension plan is said to be matured when the employee has an unconditional right to immediate payment of the benefits upon retirement.¹¹⁸

Pensions have been found to constitute marital property subject to equitable distribution upon divorce regardless of whether they are vested and matured,¹¹⁹ vested but unmatured,¹²⁰ or nonvested.¹²¹ Only that portion of the pension that has accrued during the marriage and before the commencement of the divorce action, however, will be deemed to be marital property.¹²²

The reasons for holding that pension benefits are marital property are in accord with the concept of marriage as an economic partnership.¹²³ First, a pension is actually a type of deferred compensation arising from a spouse's employment. Since a spouse's income from a job is marital property, the income that is earned while working but not received until later should also be marital property.¹²⁴ Furthermore, the spouses reasonably

118. *Damiano v. Damiano*, 94 A.D.2d 132, 137, 463 N.Y.S.2d 477, 480 (2d Dep't 1983).

119. *Puzzi v. Puzzi*, 101 A.D.2d 884, 476 N.Y.S.2d 355 (2d Dep't 1984).

120. *Majauskas v. Majauskas*, 61 N.Y.2d 481, 463 N.E.2d 15, 474 N.Y.S.2d 699 (1984).

121. *Damiano*, 94 A.D.2d at 132, 463 N.Y.S.2d at 477. The treatment of pension and retirement benefits by the New York courts is similar to that of other jurisdictions. See Comment, *supra* note 87, at 547.

122. *Damiano*, 94 A.D.2d at 139, 463 N.Y.S.2d at 481.

123. Foster & Freed, *Spousal Rights in Retirement and Pension Benefits*, 16 J. FAM. L. 187, 188-89 (1977-78).

124. *Damiano*, 94 A.D.2d at 137, 463 N.Y.S.2d at 480. See also N.Y. DOM. REL. LAW § 236(B)(1)(c) (McKinney 1986).

expected during the marriage that they would both share in the future enjoyment of the pension benefits,¹²⁵ and this expectation can and should be fulfilled regardless of whether the marital partnership is still intact. Finally, the pension serves as a type of investment for the partnership. Because of the existence of the pension plan, the employee presently earns less while retaining the contractual right to future pension benefits.¹²⁶ "To the extent that they result from employment time after marriage and before commencement of a matrimonial action, they are contract rights of value, received in lieu of higher compensation which would otherwise have enhanced either marital assets or the marital standard of living and, therefore, are marital property."¹²⁷ These same reasons apply regardless of whether the pension is vested, nonvested, matured, or unmatured.¹²⁸

There are primarily two ways to enforce the nonemployee spouse's right to pension benefits.¹²⁹ One way is to award a lump sum to the nonemployee spouse, equal to an equitable portion of the present value of the pension benefits earned during the marriage.¹³⁰ This approach avoids future enforcement problems and uncertainty by providing an immediate settlement.¹³¹ The other method of enforcing the right to pension benefits is to provide that, upon maturity of pension rights, the recipient will pay a former spouse a predetermined equitable share of each payment as it is received.¹³² This method is preferable "where contingencies make the determination of present value difficult or where there are insufficient marital assets from which to derive large lump-sum payments"¹³³

125. *Damiano*, 94 A.D.2d at 137, 463 N.Y.S.2d at 480.

126. *Majauskas v. Majauskas*, 61 N.Y.2d 481, 491-92, 463 N.E.2d 15, 20-21, 474 N.Y.S.2d 699, 704-05 (1984).

127. *Id.*

128. *Damiano*, 94 A.D.2d at 139, 463 N.Y.S.2d at 481.

129. *Id.*

130. *Id.*

131. *Id.* See also *Rodgers v. Rodgers*, 98 A.D.2d 386, 392, 470 N.Y.S.2d 401, 405 (2d Dep't 1983), *appeal dismissed*, 62 N.Y.2d 646, 464 N.E.2d 990, 476 N.Y.S.2d 1028 (1984).

132. *Damiano*, 94 A.D.2d at 139-40, 463 N.Y.S.2d at 481.

133. *Id.* at 139, 463 N.Y.S.2d at 481.

e. *Compensation for Personal Injuries*

Among the items designated as separate property by the Equitable Distribution Law is "compensation for personal injuries."¹³⁴ To the extent that the compensation is awarded for pain and suffering, it is rightly excluded from equitable distribution. The pain and suffering is personal to the victim, rather than a loss by the partnership entity.¹³⁵ The damage award, however, may also include compensation for loss of income and for medical expenses resulting from the injury.¹³⁶ These losses deplete the assets of the marital partnership, and the portion of the compensation attributable to them should be distinguished from the portion attributable to the pain and suffering.¹³⁷ "Compensation for lost pay should be treated just the same as wages paid by an employer during the same period. Medical and related expenses incurred and reimbursed should be treated as other expenses incurred and paid."¹³⁸

An analogous issue is raised by disability pensions. Although some awards are made for disability alone, others are a combination of compensation for physical injury and a regular retirement pension. Still others simply take the place of a regular retirement pension and allow the recipient to retire earlier or with higher payments.¹³⁹ Consequently, courts have held that the portion of a disability pension which represents retirement pay will be regarded as marital property subject to equitable distribution.¹⁴⁰

The distinction between the portion of the compensation al-

134. N.Y. DOM. REL. LAW § 236(B)(1)(d)(2) (McKinney 1986).

135. FOSTER, FREED & BRANDES, *supra* note 38, § 2:5, at 49-50. While this appears to be a commonly held view, several courts in other states have nevertheless found a personal injury award to be marital property subject to division upon dissolution. See Comment, *supra* note 87, at 550. See also Comment, *Horstmann v. Horstmann: Present Right to Practice a Profession as Marital Property*, 56 DEN. L.J. 677, 688 (1979) (California's characterization of a spouse's cause of action for personal injury as community property is illustrative of the view that the damage is an injury to the community).

136. FOSTER, FREED & BRANDES, *supra* note 38, § 2:5, at 50.

137. *Id.*

138. Rich v. Rich, 126 Misc. 2d 536, 536, 483 N.Y.S.2d 150, 150 (Sup. Ct. Ontario County 1984).

139. Newell v. Newell, 121 Misc. 2d 586, 588, 468 N.Y.S.2d 814, 816 (Sup. Ct. Queens County 1983).

140. West v. West, 101 A.D.2d 834, 475 N.Y.S.2d 493 (2d Dep't 1984); Newell v. Newell, 121 Misc. 2d 586, 468 N.Y.S.2d 814 (Sup. Ct. Queens County 1983).

lotted to the employee's pain and suffering and that allotted to income, expenses, and retirement benefits is consistent with the marital partnership view of the Equitable Distribution Law, insofar as only the latter portion can truly be said to be owed to the partnership as a whole.¹⁴¹ This dichotomy has not been treated uniformly throughout the country, however, and commentators feel that amendatory legislation is needed in New York "to achieve the recommended dichotomy and to make a distinction between personal and family loss."¹⁴²

2. *Direct and Indirect Contributions*

By statute, the nontitled spouse is allowed to share in the increase in value of separate property which occurred during the marriage "to the extent that such appreciation is due in part to that spouse's contributions or efforts"¹⁴³ "Contributions" is defined in other parts of the statute in terms of a party's efforts and services "as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party."¹⁴⁴ Two issues that have been raised in litigation are: (1) should the nontitled spouse's share of the appreciated separate property be based on an indirect as well as a direct contribution; and (2) if indirect contributions are to be taken into account in dividing the increases in value of the separate property, what should those indirect contributions encompass.

It is undisputed that where the nontitled spouse makes "direct" contributions toward the appreciation of the other spouse's separate property, he or she is entitled to share in the appreciation to the extent that it was due to his or her efforts.¹⁴⁵ Such direct contributions include managing the separate property and contributing financially towards its enhancement.¹⁴⁶ It is less clear from the statute whether "indirect" contributions should

141. FOSTER, FREED & BRANDES, *supra* note 38, § 2:5 at 50.

142. *Id.* at 50-51.

143. N.Y. DOM. REL. LAW § 236(B)(1)(d)(3) (McKinney 1986).

144. *Id.* § 236(B)(5)(d)(6).

145. *Price v. Price*, 113 A.D.2d 299, 302-03, 496 N.Y.S.2d 455, 459 (2d Dep't), *later proceeding*, 115 A.D.2d 530, 496 N.Y.S.2d 455 (2d Dep't), *later proceeding*, 115 A.D.2d 531, 496 N.Y.S.2d 689 (2d Dep't 1985), *aff'd*, 69 N.Y.2d 8, 503 N.E.2d 684, 511 N.Y.S.2d 219 (1986).

146. *Price*, 113 A.D.2d at 302-03, 496 N.Y.S.2d at 459.

be considered in determining whether to award the nontitled spouse a share in the appreciation.¹⁴⁷ Some types of indirect contributions, such as attending business related functions with the titled spouse or preparing social events for business, can be more easily associated with appreciation of the separate property than can other types of indirect contributions, such as raising children, maintaining the marital home, or providing companionship.¹⁴⁸ Nevertheless, viewing marriage as an economic partnership requires that all of these various contributions by the nontitled spouse be considered in determining his or her rightful share of the increase in value of the separate property.¹⁴⁹

The Equitable Distribution Law recognizes that a marriage involves both economic and noneconomic components, and that the effect of each component on the overall success of the marriage must be acknowledged when dividing the property that has accumulated during the marriage.¹⁵⁰

Certainly, nonremunerated services of a nontitled spouse to the joint marital enterprise in the form of homemaking, raising children and providing the moral, psychic and emotional support necessary to sustain the other spouse in coping with the vicissitudes of life outside the home, thus enabling the other spouse to concentrate his or her efforts successfully in the furtherance of the economic interests of the marital partnership, are no less important or valuable than direct contributions made by the nontitled spouse to enhance the value of separate property.¹⁵¹

The nontitled spouse who works in the home should not be rewarded any less for his or her efforts than the nontitled spouse who works outside the home and directly contributes to the marital enterprise.¹⁵² Although the parenting and homemaking contributions of the nontitled spouse are not directly related to

147. *Id.* at 303, 496 N.Y.S.2d at 459.

148. *Wood v. Wood*, 119 Misc. 2d 1076, 1078, 465 N.Y.S.2d 475, 476 (Sup. Ct. Suffolk County 1983).

149. *Id.* at 1079, 465 N.Y.S.2d at 477.

150. *Price*, 113 A.D.2d at 302, 496 N.Y.S.2d at 459.

151. *Id.* at 305, 496 N.Y.S.2d at 460.

152. *Id.* at 305, 496 N.Y.S.2d at 460-61. "Services as a wife, homemaker, mother, and career builder for her husband, no longer are to be regarded as strictly a labor of love." *Foster & Freed*, *supra* note 123, at 187.

the appreciation of the separate property, they are deemed to have enabled the other spouse "to engage in efforts so related."¹⁵³ The partnership principle of equitable distribution therefore mandates that the nontitled spouse share in the enhancement of the separate property.¹⁵⁴

3. *Division of Property*

In a commercial partnership, unless otherwise stipulated, the members are to share equally in the profits.¹⁵⁵ The Assembly memorandum in support of the Equitable Distribution Law applies this assumption to a marital partnership while providing for an exception in circumstances where an equitable division of the marital property would result in injustice:

The basic premise for the marital property and alimony . . . reforms of this legislation (§ 236) is that modern marriage should be viewed as a partnership of co-equals. Upon the dissolution of a marriage there should be an equitable distribution of all family assets accumulated during the marriage From this point of view, the contributions of each partner to the marriage should ordinarily be regarded as equal, and there should be an equal division of family assets, unless such a division would be inequitable under the circumstances of the particular case.¹⁵⁶

According to this view, the contributions of a homemaker wife are presumed to be equal in value to the contributions of an income earning husband.¹⁵⁷

153. *Price*, 113 A.D.2d at 306, 496 N.Y.S.2d at 461. See also Note, *The Implied Partnership: Equitable Alternative to Contemporary Methods of Postmarital Property Distribution*, 26 U. FLA. L. REV. 221, 227 (1974).

154. See *Capasso v. Capasso*, 119 A.D.2d 268, 506 N.Y.S.2d 686 (1st Dep't 1986). See also *Nolan v. Nolan*, 107 A.D.2d 190, 486 N.Y.S.2d 415 (3d Dep't 1985); Note, *supra* note 153, at 227.

155. N.Y. PARTNERSHIP LAW § 40 (McKinney 1988).

156. *Conner v. Conner*, 97 A.D.2d 88, 96, 468 N.Y.S.2d 482, 488 (2d Dep't 1983) (quoting 11c J. ZETT, M. KAUFMAN, & C. KRAUT, NEW YORK CIVIL PRACTICE App. B, at 8).

157. *Id.* at 96, 468 N.Y.S.2d at 488. This policy is consistent with the view of one commentator who has likened marriage to an implied partnership: "initially, a court should presume that upon termination of a marriage where a partnership is determined to exist, the property should be equally divided." Note, *supra* note 153, at 221. Given the fact that certain circumstances may warrant an unequal distribution of the marital property, however, "the burden should be upon the party asserting an unequal distribution to show that he or she is entitled to it." *Id.*

The statute lists thirteen factors that the court is to consider in determining what would be an equitable division of the marital property, including the duration of the marriage, an award of maintenance, and the future financial circumstances of the parties.¹⁵⁸ The fact that the court must consider so many factors makes each case turn on its individual facts. Nevertheless, upon examination of the cases, some generalizations can be made.

In cases where the court has declined to divide the marital property equally, the marriage was often childless and of short duration.¹⁵⁹ Where both parties in a childless marriage were employed and contributed to the household expenses and acquisition of marital property in proportion to their respective earn-

158. The delineated factors include:

- (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;
- (3) the need of a custodial parent to occupy or own the marital residence and to use or own its household effects;
- (4) the loss of inheritance and pension rights upon dissolution of the marriage as of the date of dissolution;
- (5) any award of maintenance under subdivision six of this part;
- (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, and the economic desirability of retaining such asset or interest intact and free from any claim or interference by the other party;
- (10) the tax consequences to each party;
- (11) the wasteful dissipation of assets by either spouse;
- (12) any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration;
- (13) any other factor which the court shall expressly find to be just and proper.

N.Y. DOM. REL. LAW § 236(B)(5)(d) (McKinney 1986).

159. See, e.g., *Cappiello v. Cappiello*, 110 A.D.2d 608, 488 N.Y.S.2d 399 (1st Dep't), *aff'd*, 66 N.Y.2d 107, 485 N.E.2d 983, 495 N.Y.S.2d 318 (1985); *Michalek v. Michalek*, 114 A.D.2d 655, 494 N.Y.S.2d 487 (3d Dep't 1985). This is the correct outcome, according to one commentator. See Oldham, *Is the Concept of Marital Property Outdated?*, 22 J. FAM. L. 263, 267-68 (1984) (a marriage is not truly a partnership unless a couple has been married for a substantial period or unless a child is born).

ings, the courts have divided the property according to the ratio of the parties' earnings during the marriage.¹⁶⁰ In marriages where the wife did not work outside the home, courts have awarded the husband a larger share of the marital property for reasons such as: it was acquired as a result of the husband's efforts,¹⁶¹ the wife had a relatively high earning potential,¹⁶² and the wife had received other property of substantial value.¹⁶³ The underlying rationale for the court's dividing the property proportionally to accumulated income is that "[e]quitable distribution, as a remedy in marital actions, is not designed to result in a penalty or windfall."¹⁶⁴

An equal division of marital property is often made when the wife has contributed homemaking services in addition to working outside the home.¹⁶⁵ In cases where the wife has provided homemaking services but has been out of the work force during the marriage, the court will frequently divide the marital property equally between the spouses if the marriage was of long duration.¹⁶⁶ Finally, even where the parties are divorced after a short, childless marriage during which the wife worked only part time, an equal division of marital property may nevertheless be warranted if the marriage began as an equal partnership and the husband subsequently asked his wife to stop working.¹⁶⁷

160. See, e.g., *Michalek*, 114 A.D.2d at 655, 494 N.Y.S.2d at 487; *Kobylack v. Kobylack*, 96 A.D.2d 831, 465 N.Y.S.2d 581 (2d Dep't 1983). For a justification, see *Oldham*, *supra* note 159, at 278 (working wives without minor children to support should easily be able to fend for themselves after divorce).

161. *Cappiello*, 110 A.D.2d at 609, 488 N.Y.S.2d at 400. See also *Brennan v. Brennan*, 103 A.D.2d 48, 54, 479 N.Y.S.2d 877, 881 (3d Dep't 1984).

162. *Cappiello*, 110 A.D.2d at 609, 488 N.Y.S.2d at 400.

163. *Arvantides v. Arvantides*, 64 N.Y.2d 1033, 1034, 478 N.E.2d 199, 200, 489 N.Y.S.2d 58, 59 (1985).

164. *Cappiello*, 110 A.D.2d at 609, 488 N.Y.S.2d at 400-01.

165. See, e.g., *Day v. Day*, 112 A.D.2d 972, 492 N.Y.S.2d 783 (2d Dep't 1985); *Cohen v. Cohen*, 104 A.D.2d 841, 480 N.Y.S.2d 358 (2d Dep't), *appeal dismissed*, 64 N.Y.2d 773, 475 N.E.2d 457, 485 N.Y.S.2d 990 (1984); *Harness v. Harness*, 99 A.D.2d 658, 472 N.Y.S.2d 234 (4th Dep't 1984).

166. See, e.g., *Bisca v. Bisca*, 108 A.D.2d 773, 485 N.Y.S.2d 302 (2d Dep't), *appeal dismissed*, 66 N.Y.2d 741, 488 N.E.2d 111, 497 N.Y.S.2d 365 (1985); *Perri v. Perri*, 97 A.D.2d 399, 467 N.Y.S.2d 226 (2d Dep't 1983), *appeal dismissed*, 61 N.Y.2d 603, 460 N.E.2d 136, 472 N.Y.S.2d 1026 (1984).

167. See *Bentley v. Knight*, 92 A.D.2d 638, 459 N.Y.S.2d 935 (3d Dep't 1983); *Oldham*, *supra* note 159, at 268 (because neither spouse has usually made much of a sacrifice in a short, childless marriage, such a marriage should not be considered a partnership).

Since the presumption of an equal division of property seems to be easily rebutted, the marriage differs from a business partnership in that respect. Dividing the property in a way that is equitable if not equal, however, may actually bring marriage closer to resembling an economic partnership in a different way: most spouses do not sign a prenuptial agreement stipulating the future proportional division of the marital property in case of dissolution. The property, however, may be divided by the court in such a way as to correspond to the way the profits of the marital partnership would have been divided had the members, before the marriage began, agreed upon a certain division after taking into account such factors as the duration of their projected partnership and the respective contributions of each partner. By dividing the marital property between the spouses proportionally to accumulated income, the court is implementing a partnership agreement that might have been created by the parties had they actually treated their projected marriage as if it were solely an economic partnership.

4. *Maintenance*

"[M]aintenance" is defined as "payments provided for in a valid agreement between parties or awarded by the court . . . to be paid at fixed intervals for a definite or indefinite period of time" ¹⁶⁸ As when determining the appropriate division of marital property, the court considers a number of different factors in order to determine the amount and duration of maintenance. ¹⁶⁹ Such factors include the duration of the marriage, the present and future earning potential of each party, and the contributions made during the marriage of the party seeking maintenance. ¹⁷⁰ According to the Assembly memorandum:

[t]he objective of the maintenance provision is to award the recipient spouse an opportunity to achieve independence. However, in marriages of long duration, or where the former spouse is out of the labor market and lacks sufficient resources, or has sacrificed her business or professional career to serve as a parent and a homemaker, 'maintenance' on a permanent basis may be

168. N.Y. DOM. REL. LAW § 236(B)(1)(a) (McKinney 1986).

169. *Id.* § 236(B)(6)(a).

170. *Id.*

necessary.¹⁷¹

In some respects, the maintenance provision of the Equitable Distribution Law appears as a departure from the partnership analogy. Upon the dissolution of a business partnership, the members receive their respective contributions as well as their respective share of the profits.¹⁷² There is no provision in the Partnership Law, however, for the continued support of any of the partners.¹⁷³ An award of maintenance is like a claim to the future labors of a former co-partner. No member of a dissolved business partnership has such a claim, "even though he may have sacrificed some of his more lucrative skills in order to advance the interests of the partnership . . . thus enabling the other partner to enhance his marketable skills."¹⁷⁴

On the other hand, it is possible to view an award of maintenance as a logical, if not necessary, part of a true marital partnership:

One view is that marriage is a partnership with a lifelong commitment to another individual and a complete sharing of economic costs and rewards. Implicit in the lifelong-partnership view is the idea that the risk of divorce is small and that alimony provides a kind of insurance against this risk. Without alimony, there is no protection of the wife's homemaking investments.¹⁷⁵

By raising children and maintaining the marital home, the wife is investing in her husband's earning capacity. His income and the standard of living that she expects to share become partnership assets.¹⁷⁶ "If the husband's earning capacity is their major asset, and if it is treated as his alone at divorce, the essence of the equal partnership is violated."¹⁷⁷

These divergent views can be reconciled when temporary, rehabilitative maintenance is awarded in order to give the recipi-

171. *Conner v. Conner*, 97 A.D.2d 88, 97, 468 N.Y.S.2d 482, 489 (2d Dep't 1983) (quoting 11c J. ZETT, M. KAUFMAN, & C. KRAUT, NEW YORK CIVIL PRACTICE App. B, at 8).

172. N.Y. PARTNERSHIP LAW § 71 (McKinney 1988).

173. *Cf. Olsen v. Olsen*, 98 Idaho 10, 22, 557 P.2d 604, 616 (1976) (Shepard, J., dissenting).

174. *Conner*, 97 A.D.2d at 98, 468 N.Y.S.2d 489-90.

175. J. CASSETTY, THE PARENTAL CHILD-SUPPORT OBLIGATION 91 (1983).

176. L. WEITZMAN, THE DIVORCE REVOLUTION 374 (1985).

177. *Id.* at 390.

ent spouse the opportunity to become financially independent.¹⁷⁸ In that situation, a severance of the economic ties of the former partners is eventually achieved. The wife is allowed to increase her standard of living, however, and she will therefore not lose her entire investment in the marital partnership.

5. *Agreements Between Spouses*

A partnership entered into for profit involves one or more agreements made between the members of the partnership,¹⁷⁹ in addition to any business contracts made between the partnership and third parties. The Equitable Distribution Law likewise contemplates that the members of the marital partnership may contract with each other, either before or during the marriage.¹⁸⁰ Because marriage is a "status with which the state is deeply concerned,"¹⁸¹ however, a contract between spouses is viewed differently by the courts than a contract between other individuals.¹⁸²

In order to be enforceable in a matrimonial action, an agreement between spouses must be "in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded."¹⁸³ Furthermore, agreements between spouses will be scrutinized more closely by the court than will ordinary business contracts.¹⁸⁴ Even when a marriage is breaking up, the spouses share a confidential fiduciary relationship "requiring that they exercise the utmost good faith in con-

178. See *O'Brien v. O'Brien*, 66 N.Y.2d 576, 585, 489 N.E.2d 712, 716, 498 N.Y.S.2d 743, 747 (1985). In recent years, alimony "has come to be regarded as an interim stipend which is available for a relatively short time while a former spouse in need prepares for the labor market." Foster & Freed, *supra* note 123, at 191.

179. See, e.g., *Hartford Accident and Indemnity Co. v. Oles*, 152 Misc. 876, 274 N.Y.S. 349 (Sup. Ct. Delaware County 1934) (a partnership results from an express or implied contract and does not arise by operation of law).

180. N.Y. DOM. REL. LAW § 236(B)(3) (McKinney 1986).

181. *Christian v. Christian*, 42 N.Y.2d 63, 65, 365 N.E.2d 849, 851, 396 N.Y.S.2d 817, 819 (1977).

182. Marital contracts which predetermine property and alimony rights upon divorce were at one time uniformly held unenforceable by American courts. Since 1970, however, many courts have allowed such contracts to be enforced, with some limitations. See generally Oldham, *Premarital Contracts Are Now Enforceable, Unless . . .*, 21 HOUS. L. REV. 757, 758-59 (1984).

183. N.Y. DOM. REL. LAW § 236(B)(3).

184. *Pennise v. Pennise*, 120 Misc. 2d 782, 784, 466 N.Y.S.2d 631, 633 (Sup. Ct. Nassau County 1983).

tracting with each other"¹⁸⁵ An agreement between a husband and wife that includes a provision for maintenance or other conditions of the marital relationship must be "fair and reasonable" at the time the agreement is made, and must not be unconscionable at the time the final judgment is entered.¹⁸⁶ A separation agreement "may be set aside as unconscionable because of facts which would be insufficient to vitiate a contract between strangers."¹⁸⁷

The legislative policy behind this special treatment of contracts between spouses is to permit "enforcement of property and support agreements in accordance with the wishes of the parties, but subject to principles of fairness and justice."¹⁸⁸ Enforcing agreements to conform to the intentions of the parties is, of course, a goal that is applicable in a business as well as in a marital context. Furthermore, there is little if any conceptual difference between the state's "interest in promoting good faith in a business deal and its interest in promoting honesty and fairness in a marital agreement."¹⁸⁹ The stricter requirements of fairness and reasonableness, however, that are imposed upon transactions between married persons are probably necessary in light of the intimate relationship between husband and wife and the potential vulnerability of the parties that results from such a relationship.¹⁹⁰

V. The "Marital Partnership" Intact

Up to this point, the focus of this comparison between a marital partnership and an economic partnership has been the dissolution of the relationship. Litigation between spouses over property, support, and enforcement of contracts is relatively rare

185. *Martin v. Martin*, 74 A.D.2d 419, 423, 427 N.Y.S.2d 1002, 1005 (4th Dep't 1980). See also *In re Duckman's Will*, 110 Misc. 2d 575, 576, 442 N.Y.S.2d 909, 910 (Sur. Ct. Monroe County 1981).

186. N.Y. DOM. REL. LAW § 236(B)(3). American courts are split over whether the fairness of the spousal agreement should be judged at the time of execution of the contract or at the time of divorce. Oldham, *supra* note 182, at 766-67.

187. *Martin*, 74 A.D.2d at 423, 427 N.Y.S.2d at 1005.

188. *Propp v. Propp*, 112 A.D.2d 868, 870, 493 N.Y.S.2d 147, 149 (Sup. Ct. Nassau County 1985).

189. Comment, *Marriage Contracts for Support and Services: Constitutionality Begins at Home*, 49 N.Y.U. L. REV. 1161, 1189 (1974).

190. See *id.*

during an ongoing marriage, but is "typically the last resort of spouses whose marriage is breaking down, so that the couple separates or seeks divorce" ¹⁹¹ Furthermore, in the absence of conduct by the parents that is harmful to the welfare of a child, New York has a policy of nonintervention in the internal affairs of the family. ¹⁹² To complete the partnership comparison, a brief discussion of some relevant issues in the context of an ongoing marriage is necessary.

A. *Management and Control of Property*

All members of a partnership entered into for profit have an equal voice in the management and conduct of the business of the partnership. ¹⁹³ Furthermore, unless authorized by the other partners, unanimous consent of all the partners is necessary to "[a]ssign the partnership property in trust for creditors or on the assignee's promise to pay the debts of the partnership." ¹⁹⁴

In New York, despite the view that "an inchoate interest in [marital property] is acquired by the spouse without title immediately on acquisition and during 'coverture,'" ¹⁹⁵ the right to manage and control the property belongs to the titled spouse ¹⁹⁶ and not to the marital partnership as an entity. ¹⁹⁷ There are exceptions to this general rule, however. As noted earlier, ¹⁹⁸ after service of a divorce summons, the title holding spouse is no longer free to convert the property at issue from sound assets

191. D. Westfall, *supra* note 26, at 294-95.

192. Schwarzman v. Schwarzman, 88 Misc. 2d 866, 872-73, 388 N.Y.S.2d 993, 997-98 (Sup. Ct. Nassau County 1976).

193. N.Y. PARTNERSHIP LAW § 40 (McKinney 1988).

194. *Id.* § 20.

195. Kriger v. Kriger, 115 Misc. 2d 595, 599, 454 N.Y.S.2d 500, 503 (Sup. Ct. N.Y. County 1982).

196. Such is generally the case in noncommunity property states. See D. Westfall, *supra* note 26, at 415.

197. The joint ownership, management, and control of marital property by both spouses is an essential element of the "partnership family model" proposed by Krauskopf and Thomas. See Krauskopf and Thomas, *Partnership Marriage: The Solution to an Ineffective and Inequitable Law of Support*, 35 OHIO ST. L.J. 558, 587 (1974). See also Weitzman, *Legal Regulation of a Marriage: Tradition and Change*, 62 CALIF. L. REV. 1169, 1257 (1974) (recommending periodic division of assets and immediate vesting as more equitable, where the housewife without management or control may be left with few financial assets at dissolution).

198. See *supra* text accompanying notes 48-49.

into risky assets.¹⁹⁹ Even before service of the summons, the dissipation of assets is indirectly prevented in several ways. In matrimonial proceedings in which maintenance or support is at issue, the parties are required to list all the "assets transferred in any manner during the preceding three years, or the length of the marriage, whichever is shorter"²⁰⁰ Furthermore, in determining the division of marital property, the court is to take into consideration "the wasteful dissipation of assets . . . ,"²⁰¹ and in determining the proper maintenance award the court is to consider "the wasteful dissipation of marital property"²⁰²

These rules may inhibit the title holding spouse from using his ability to control the assets to make transfers in contemplation of divorce to the detriment of the other spouse. Once again, however, it is only in the context of the dissolution of the marital partnership that the court steps in. The title holder appears free to make any disposition of the property that he cares to during the course of a marriage that will not end within the following three years.

B. Agency

Every member of a commercial partnership is an agent of the partnership regarding the partnership business.²⁰³ The partnership is bound by the act of every partner who conducts the business of the partnership in the usual way, unless the acting partner has no authority to act for the partnership in that matter, and the person with whom he is dealing is aware of the partner's lack of authority.²⁰⁴ The partnership is also deemed to have knowledge of any matter relating to the affairs of the partnership.²⁰⁵

These same rules of agency are not applicable to the marital partnership.²⁰⁶ An agency relationship may not be inferred from

199. *Kruger*, 115 Misc. 2d at 597, 454 N.Y.S.2d at 502.

200. N.Y. DOM. REL. LAW § 236(B)(4) (McKinney 1986).

201. *Id.* § 236(B)(5)(d)(11).

202. *Id.* § 236(B)(6)(a)(9).

203. N.Y. PARTNERSHIP LAW § 20 (McKinney 1988).

204. *Id.*

205. *Id.* § 23.

206. Such a result is warranted, especially where one spouse maintains the home while the other operates the business. Binding one marital partner for the acts of the

the mere fact that the parties are married,²⁰⁷ although "actual agency may be implied from the conduct of the parties or established by proof of subsequent ratification . . . , and, as to third persons, may arise by estoppel."²⁰⁸ Furthermore, the marital relationship does not, without direct proof, provide a basis for imputing actual or constructive knowledge on the part of either spouse.²⁰⁹

An exception to the lack of an agency relationship between husband and wife exists where the husband has not provided his wife with necessities or with funds sufficient to purchase them. In this situation, the wife has implied authority to act as her husband's agent to pledge his credit for the purchase of necessities.²¹⁰

VI. The Uniform Marital Property Act

The Uniform Marital Property Act (UMPA), with its approach of shared property rights during marriage,²¹¹ serves as a basis for comparison to New York law with respect to the examination of marriage as an economic partnership.

The underlying concept embodied in the UMPA is similar to that contained in New York's Equitable Distribution Law: property is classified as either "marital property" or "individual property,"²¹² and the kinds of property that fall under each classification are similar to the "marital property" and "separate

other in such a context may unjustifiably impose liability. See Note, *supra* note 153, at 232.

207. *Four Winds Hospital v. Keasby*, 92 A.D.2d 478, 479, 459 N.Y.S.2d 68, 69 (1st Dep't), modified, 59 N.Y.2d 943, 453 N.E.2d 529, 466 N.Y.S.2d 300 (1983); *Kozecke v. Humble Oil & Refining Co.*, 46 A.D.2d 986, 362 N.Y.S.2d 272, 274 (3d Dep't 1974).

208. *Kozecke*, 46 A.D.2d at 987, 362 N.Y.S.2d at 274.

209. *Woodbine v. We Try Harder, Inc.*, 124 Misc. 2d 573, 576, 477 N.Y.S.2d 969, 971 (N.Y. Civ. Ct. Queens County 1984).

210. *Saks & Co. v. Nager*, 74 Misc. 2d 855, 857, 345 N.Y.S.2d 883, 886 (Sup. Ct. N.Y. County 1973); *Amplo v. DiMauro*, 52 Misc. 2d 810, 813, 276 N.Y.S.2d 817, 821 (Sup. Ct. Suffolk County 1967). Note, however, that the right does not belong to the wife, but, rather is a right of action that belongs to the supplier of the necessities which may be asserted against the husband. *Krauskopf & Thomas*, *supra* note 197, at 570.

211. UMPA, *Prefatory Note*. The policy of sharing is considered "the guiding principle of the Act," and its goal is to "institutionalize cooperative ownership of the property that belongs to a married couple." Cantwell, *Drafting the Uniform Marital Property Act: The Issues and Debate*, 21 Hous. L. Rev. 669, 670 (1984).

212. UMPA § 4.

property” of equitable distribution.²¹³ Other sections of the UMPA, however, carry the marital partnership/business partnership analogy further than it is carried under New York law.

Under the UMPA, during marriage each spouse has “a present undivided one-half interest in marital property.”²¹⁴ The spouses continue to hold their interest after a dissolution as tenants in common, unless a decree or written consent provides otherwise.²¹⁵

Under the act, the sharing of property is recognized by creation of a present interest simultaneously with acquisition of property by effort during marriage. The interest is legally defined and enforceable. It permeates assets as they are acquired and continues to permeate them as they are invested and reinvested, as they are exchanged and transferred, and as they grow or diminish.²¹⁶

A spouse acting alone may manage and control marital property that is held in that spouse’s name alone, in the name of both spouses, or not held in the name of either spouse.²¹⁷ Unlike equitable distribution, however, there are several restrictions that are put on such control during the marriage. For example, a spouse who manages marital property may not, acting alone, make a gift of such property to a third person if the value of the transferred property is substantial considering the economic position of the spouses.²¹⁸ Furthermore, to protect a spouse’s claim to her undivided one-half interest in the marital property during the marriage, a court may order both an accounting of the property and an addition of a spouse’s name to any marital property held by the other spouse alone.²¹⁹

It is primarily at the time of dissolution that a marriage governed by New York law resembles an economic partnership. Given that the UMPA provisions focus on spousal rights to property held *during* the marriage, an ongoing marriage that is governed by the sharing principles of the UMPA could more easily be termed a “partnership” than an intact marriage in New

213. *Id.* See also N.Y. DOM. REL. LAW § 236 (B)(1)(c), (d) (McKinney 1986).

214. UMPA § 4.

215. *Id.* § 17.

216. *Id.*, *Prefatory Note*.

217. *Id.* § 5.

218. *Id.* § 6.

219. *Id.* § 15.

York.

VII. Should Marriage Be Treated as a Partnership?

The foregoing discussion has examined the question of whether a view of marriage as an economic partnership would produce legal results different from those caused by the current law regulating marital relationships. At this point, some perspective may be gained by a brief inquiry into the desirability and practicality of comparing a marriage to a business partnership.

According to Mary Ann Glendon, two modern views of marriage are in conflict. One envisions a marital partnership involving cooperation between the spouses and a "community of interest."²²⁰

But there is another idea that has regained great currency in contemporary society and which is in conflict with the ideology of community. This is the notion that marriage exists primarily for the personal fulfillment of the individual spouses and that it should last only so long as it performs this function to the satisfaction of each.²²¹

This latter perception of marriage, which is contrary to partnership principles, may actually undermine the institution of marriage itself.²²² If marriage were not viewed as a partnership, and if one's educational degree, enhanced earning capacity, or other career assets were not subject to equal division upon dissolution, then "the law's implicit message is that one's own career is the only safe investment."²²³ Rather than investing in each other, their marriage, or their children, the spouses will first and foremost be concerned with investing in themselves.²²⁴ "[I]t is arguable that to the extent both spouses come to rely on themselves, both gain less from the union. Indeed, a pattern of less stable relationships when spouses are less interdependent has already been observed . . . in a recent study . . ."²²⁵

Economic fairness is another reason for fitting a marriage

220. M. GLENDON, *supra* note 23, at 264.

221. *Id.* at 321.

222. See L. WEITZMAN, *supra* note 176, at 373.

223. *Id.* at 376.

224. *Id.* at 374.

225. *Id.* at 375.

into the partnership mold. In a traditional marriage, where the husband serves as the sole wage earner and the wife maintains the home and cares for the children, the wife would be unfairly harmed if she were not given an ownership interest in currently held assets,²²⁶ as well as in any career assets her husband may have. Because a family could live neither as cheaply nor as well as it does without the services of a homemaker, the wife is actually providing economic contributions to the marriage, despite the fact that homemaking does not generate any independent income.²²⁷ A spouse who has promoted the well-being of the marriage and the family, regardless of whether any income was generated while doing so, should have the same rights as would a member of a commercial partnership.

Even in a marriage where both spouses work outside the home, fairness calls for the partnership model.

The expectation of stability and continuity and the desire for a shared life suggest that married people are unlikely to make decisions on an individual basis, but rather, the needs of each person tend to be taken into account. Thus married people will often make decisions differently than they would if there were no marriage or marriage-like relationship functioning.²²⁸

Such decisions may involve subordinating one's own career potential so that the other spouse can take advantage of a better job opportunity or go to school to enhance future earnings. The sacrificing spouse, however, expects that the relationship will be permanent and, therefore, should be compensated for shattered expectations when the relationship ends.²²⁹

Despite the possible desirability of classifying marriage as a form of economic partnership, doing so may simply be infeasible, given the nature of the marital relationship. A business partnership arises from an express or implied contract.²³⁰ While

226. Comment, *supra* note 53, at 1310.

227. *Id.*

228. Prager, *Sharing Principles and the Future of Marital Property Law*, 25 UCLA L. Rev. 1, 6 (1977).

229. *Id.* at 9. But see Oldham, *supra* note 159, at 305 (since expectations of couples are shaped by current law, it is circular reasoning to justify a particular policy merely because it is consistent with the expectations of the parties).

230. *Hartford Accident & Indemnity Co. v. Oles*, 152 Misc. 876, 274 N.Y.S. 349 (Sup. Ct. Delaware County 1934).

marriage, too, is contractual in nature, it nevertheless differs from other contracts.²³¹ "Indeed, it has been observed that marriage resembles other contracts only in the slightest degree. It is something more than an ordinary contract in that it involves a personal union of those participating in it, of a character unknown to any other human relation."²³² Marriage differs from other contractual relationships both in the many restrictions that are placed upon the ability of the parties to enter into such a relationship, and in the inability of the parties to terminate the relationship at will, without court approval.²³³ Furthermore, unlike ordinary contracts, neither the rights nor the obligations derived from marriage can be "assigned, transferred, or delegated."²³⁴

In addition to creating the rights and duties inherent in all contracts, the marriage contract creates a unique kind of status.²³⁵

In fact, some courts have gone to the extent of holding that a marriage is not a contract, but a status created by mutual consent of one man and one woman, and that the rights and obligations of the parties are not contractual, but are fixed, changed, or dissolved by law.²³⁶

Treating marriage entirely as if it were an economic partnership may not be practical, given that few marriages are formed solely for the purpose of economic profit. The nature of the spousal bond warrants treatment greater than a mere contract between two individuals. This unique relationship, however, should not serve as an excuse for permitting inequitable treatment that is impermissible in similar nonmarital situations.²³⁷

231. 52 AM. JUR. 2D *Marriage* § 4, at 867 (1970).

232. *Id.* § 5, at 868.

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.* § 7, at 869.

237. "The [m]arital relationship lends itself well to commercial concepts embodied in the UPA and the implied interspousal partnership. Certain commercial statutory provisions are nevertheless at odds with the realities of everyday marital life." Note, *supra* note 153, at 235. A court should therefore apply those partnership principles which would be equitable in a given situation.

VIII. Conclusion

This Article has examined various aspects of the marital relationship as they are governed by New York statutory and case law to determine the extent that marriage is treated as an economic partnership in New York. To promote healthy marriages as well as economic fairness, it may be desirable to treat marriage in some respects as if it were a commercial partnership. The unique spousal relationship, however, also calls for limits to the degree that a marriage can be regarded as an economic partnership. A balance must be struck between protecting each spouse's monetary as well as nonfinancial investments in the marriage, and viewing the bond between husband and wife as something other than merely a convenient association motivated by pecuniary gain.