婚姻自由的內涵與夫妻共同財產的認定

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目　次

關鍵詞：

婚姻自由、身分契約、共同財產、離婚自由、衍生利益。

摘要

我國最高法院判決指出，民法第 1052 條第 1 項以外之重大事由，難以維持婚姻者，夫妻之一方得請求離婚，但其事由應由夫妻之一方負責者，僅他方得請求離婚；民法第 1052 條第 2 項定有明文，此規定之旨趣在使夫妻請求裁判離婚之事由較富彈性。故若婚姻之破裂事由應由夫妻一方負責者，僅他方得請求離婚，惟當夫妻雙方均有責時，僅准責任較輕之一方請求離婚，始符公平。惟前述見解似與我國大法官釋字第 748 號解釋要旨所揭：憲法保障人民婚姻自由的平等保護意旨有悖。究竟婚姻自由的內涵有否包括離婚自由？美國法上「通姦」得為離婚財產分配的評價項目，而非作為訴請離婚的條件之一，次就共同財產的認定有否包括配偶一方的

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專業證照、知名度所衍生的利益疑問，援引美國法院相關判決說明。

壹、問題提出

2017 年 5 月，針對民法親屬編婚姻章，未使相同性別二人，得為經營共同生活之目的，成立具有親密性及排他性之永久結合關係，是否違反憲法第 22 條保障婚姻自由及第 7 條保障平等權之意旨，我國大法官釋字第 748 號解釋出爐，意旨揭示：民法第 4 編親屬第 2 章婚姻規定，未使相同性別二人，得為經營共同生活之目的，成立具有親密性及排他性之永久結合關係，於此範圍內，與憲法第 22 條保障人民婚姻自由及第 7 條保障人民平等權之意旨有違。有關機關應於本解釋公佈之日起 2 年內，依本解釋意旨完成相關法律之修正或制定。至於以何種形式達成婚姻自由之平等保護，屬立法形成之範圍。逾期未完成相關法律之修正或制定者，相同性別二人為成立上開永久結合關係，得依上開婚姻章規定，持二人以上證人簽名之書面，向戶政機關辦理結婚登記。

一、婚姻自由之內涵

檢視上開婚姻自由的意涵，似乎僅有強調締結婚姻選擇配偶性別的自由，並不包括單方面離婚的自由。蓋因我國家庭觀念素來濃厚，婚姻關係受到極大重視，加上固有傳統認為“婚姻，乃維繫社會秩序穩定的重大要素”。因此，我國人民要離婚，相較於中國大陸或其他國家人民而言，誠屬不太自由，相對離婚率也偏低。尤其，當配偶一方不願協議離婚時，原告（欲離婚一方）則必須向法院起訴離婚，法院審查後，若發現被告（起訴方之配偶）並無落入民法第 1052 條所列離婚之情節，又欠缺前述條件的其他重大事由或應負過失責任，且主張不願意離婚者，法院只能判決駁回原告請求離婚之訴，即不准雙方離婚。退一步言，俗稱夫妻床頭吵床尾和，若僅因日常細故爭吵，配偶一方即能請求法院判決離婚，那婚姻豈不太過兒戲？又夫妻一方有責，對婚姻家庭有虧欠，倘若法院還准允其請求離婚，不等同贊成違背婚姻道義與信諾、率先破壞婚姻之神聖意義？這些都是導致我國過去常久以來，存在許多怨偶家庭的原因，如雙方結婚數十年，兩人因個性或理念不合而不幸福美滿，分分離離、吵吵鬧鬧數十寒暑，互相折騰至兒女長大成人，卻仍離不了婚的窘況。

參照我國民法第 1052 條關於起訴離婚的要件規定，夫妻之一方，有下列情形之一者，他方得向法院請求離婚：（一）重婚。（二）與配偶以外之人合意性交。（三）夫妻之一方對他方為不堪同居之虐待。（四）夫妻之一方對他

方之直系親屬為虐待，或夫妻一方之直系親屬對他方為虐待，致不堪為共同生活。（五）夫妻之一方以惡意遺棄他方在繼續狀態中。（六）夫妻之一方意圖殺害他方。（七）有不治之惡疾。（八）有重大不治之精神病。（九）生死不明已逾三年。（十）因故意犯罪，經判處有期徒刑逾六個月確定。有前項以外之重大事由，難以維持婚姻者，夫妻之一方得請求離婚。但其事由應由夫妻之一方負責者，僅他方得請求離婚。

對於 1052 條後段之規定，最高法院判決特別解釋[1]：民法第 1052 條第 2 項所稱“有前項以外之重大事由，難以維持婚姻者”，乃抽象的、概括性的離婚事由，係民法親屬編於 1985 年修正時，為因應實際需要，參酌各國立法例，導入破綻主義思想所增設。但其事由應由夫妻之一方負責者，僅他方得請求離婚，是其所採者為消極破綻主義精神，而非積極破綻主義。關於是否為難以維持婚姻之重大事由，其判斷標準為婚姻是否已生破綻而無回復之希望。而婚姻是否已生破綻而無回復之希望，則應依客觀的標準，即難以維持婚姻之事實，是否已達於倘處於同一境況，任何人均將喪失維持婚姻意欲之程度而定。至於同條但書所規定“難以維持婚姻之重大事由應由夫妻之一方負責者，僅他方得請求離婚”，乃因如肯定有責配偶之離婚請求，無異承認恣意離婚，破壞婚姻秩序，且有背於道義，尤其違反自己清白（clean hands）之法理，有欠公允，同時亦與國民之法感情及倫理觀念不合，因而採消極破綻主義[2]。所以，當夫妻雙方均為有責時，則應衡量比較雙方之有責程度，而許責任較輕之一方向應負主要責任之他方請求離婚，如雙方有責程度相同，則雙方均得請求離婚，以符合公平。

二、美國法「判決不准離婚」違憲

惟我國最高法院判決離婚所採的消極破綻主義和美國法院傾向裁判「不准離婚」違憲的見解，有很大差異。簡言之，美國法院認為憲法保障人民婚姻自由的內涵亦包括了離婚自由，又美國大多數州將離婚區分為無過錯離婚（no fault divorce）、與過錯離婚（fault divorce）兩種[3]：

（一）無過錯離婚，係指正在訴請離婚

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1 最高法院 2001 年臺上字第 2193、第 2215 號判決。

2 最高法院 2005 年臺上字第 2059 號判決、2006 年第五次民事庭會議決議。

3 See http://family.findlaw.com/divorce/an-overview-of-no-fault-and-fault-divorce-law.html#sthash. 7ENZ07sn.dpuf, visited on Dec. 30, 2015.

的配偶不必舉證證明另一方配偶有任何的過錯。配偶任一方只要給予法院准核離婚的理由。其中最普遍的理由不外是「無從和解的分歧」或「不能修補的婚姻破裂」。這些不過是制式的說法，真正的意思就是這對夫婦已經無法在一起相處，且婚姻關係無能修復。配偶一方不得反對另一方的無過錯離婚聲請，因該舉動的本身會被法院視為，雙方當事人其中一項不可妥協的差異性。美國各州皆承認無過錯離婚，但有些州法律亦規定配偶雙方必須分開共同居住處所一段時間後，如滿 1 年，配偶任一方才能提出無過錯離婚聲請。

（二）過錯離婚，在現代的美國社會並不普遍，事實上，許多州甚至已經不承認。有承認過錯離婚的州，通常准予配偶一方主張相對方違反婚姻信諾的義務規定，而起訴離婚，相當於我國民法第 1052 條所列舉之各項。法院裁判過錯離婚最常見的事由，包括：不堪配偶一方的通姦行為、遭配偶遺棄、配偶入監服刑、配偶不能履行同居義務、無法容忍配偶的家暴行為等。過錯離婚與無過錯離婚的差別是，沒有州法規定尋求過錯離婚的配偶必須滿足分居一段時間的條件。而證明過錯離婚的配偶一方比起無過錯離婚情形，則可以取得離婚後較多的剩餘財產分配。這也使得過錯離婚對某些人來說更具吸引力。簡言之，起訴過錯離婚的目的，事實上是將之作為共同財產分配的工具，而非離婚；因為離婚，無關過錯的舉證，只要一方配偶不願意再與相對方共同生活時，即可藉由分居達到目的。反之，我國法院卻僅允許責任較輕之一方向應負主要責任之他方請求離婚。

三、婚姻具契約性格

承上，夫妻尋求過錯離婚時，兩人皆可以舉證證明配偶有過錯，法院會採「比較正直」法則（comparative rectitude），去衡量哪一方過錯較小後，再以決定公平的共同財產分配。通常，法院會先同意無過錯一方主張之賠償請求，並裁判雙方當事人離婚。Plese v. Plese 案供參[4]，「比較正直」

[4] Plese v. Plese, 146 Ind. App. 545 (Ind. Ct. App. 1970).

法則的創設，本係為提供離婚案件中無過錯或過錯較少一方的救濟。畢竟法院有公共政策的利益考量（public policy interest），不會強迫配偶雙方去維繫兩人的婚姻關係（not forcing two people to stay married）。相對於台灣民法上對於婚姻制度之糾結，美國法則傾向給予離婚以及金錢的救濟。其法理不外憲法保障婚姻自由權，此乃個人生活之一項基本權，婚姻締結必須雙方情投意合，法院不應去鼓勵一段勉強的婚姻生活。從而，即便婚姻的一方有過失，舉例，重婚，除前婚姻自動消滅外，重婚之他方，即前婚姻配偶、後婚姻配偶皆得訴請離婚、並附帶請求精神賠償；倘若後婚姻配偶不願意離婚，法院也不會去恢復前婚姻而撤銷後婚姻之效力。換言之，婚姻的本質，必須是兩個人情投意合、願意共同生活的基礎，而不是單方面取決於無過失方的決定。

又，繼 2013 年 6 月 26 日的 United States v. Windsor 案後，美國最高法院則宣告聯邦《捍衛婚姻法》（DOMA：Defense of Marriage Act）第 3 章中將「婚姻」定義為「一男和一女在法律上結合的夫妻關係」，以及「配偶」為「異性結合的一方」之規定，違背美國憲法增修條文第十四條實質正當程式與平等保護條款，緊接著於 2015 年 6 月 26 日通過 Obergefell v. Hodges 案判決，正式揭櫫同志婚姻（gay marriage）合法化，自此不同性別締結的婚姻關係走入歷史，全美各州同性伴侶與異性伴侶享有相同的婚姻權利，堪稱美國近百年來最具影響力的司法見解。理由書中點出了「婚姻」契約的內涵，屬個人自由範疇的一項基本權利。又憲法保障人民不同的選擇權，而婚姻中的選擇，包括個人最私密的行為，如通姦，也是個人自主權（individual autonomy）之一部。換言之，美國最高法院鹹認二十世紀始，婚姻已逐漸被視為一種契約關係，即一方違反婚姻契約，另一方得向法院尋求救濟。個人性自主的權利不會因置於婚姻契約下而被剝奪，同如其他契約的性格，婚姻形成的最初，採自由主義，雙方經由要約、接受、交換允諾的過程，共同於善意基礎下確立了婚姻關係，並且接受其所附隨的義務。婚姻締結的原因，非為所問，然婚後若未能遵守契約內容充其量構成違約，另一方得就「配偶權利地位」受有損害，請求賠償；同如契約本身得以解除、不限無過失一方提出。儘管如此，婚姻契約和普通商業契約存在差異，因為夫妻雙方有相互扶持照顧的義務，故而 Borelli v. Brusseau 案判決中，丈夫生病期間和妻子口頭約定，以贈與財產交換妻子在家裡照顧他，然丈夫過世後，卻未將生

前允諾贈與的財產部分寫入遺囑，妻子遂一狀告進法院，請求遺囑管理人執行其丈夫生前對她的口頭契約，最後遭法院判決駁回確定[5]。

欣慰的是，近幾年來我國法院判准離婚的案件比例，相較於十五年前的審查寬鬆許多。畢竟，現代的社會環境發展更迭太快、人民的思維和傳統也跟著開放和變動，法院在審理離婚案件時，若能充分考慮婚姻自由的本質內涵—“雙方都願意共同生活”，相信可以做出更合乎時宜的解釋。次論離婚時配偶得提起損害賠償之請求，參照民法第 1056 條規定，夫妻之一方，因判決離婚而受有損害者，得向有過失之他方，請求賠償。前項情形，雖非財產上之損害，受害人亦得請求賠償相當之金額；但以受害人無過失者為限。惟就夫妻共同財產的分配，「共同財產」有否包括配偶的名氣、專業證照所衍生的利益？查司法文獻資料庫，我國上級法院似乎尚未做出類似的判決。對此，本文特別引介美國法院在判決離婚時共同財產分配的法理，冀供參考。

貳、通姦為離婚財產分配的評價項目

原告彭女士與被告 Wood 先生（美國籍）於 76 年 12 月 6 日在美國結婚，婚後定居德州，而於 100 年 9 月 21 日在美國離婚。原告主張婚姻存續期間，被告 Wood 於來台工作期間，與被告鄒女士分別於 97 年、99 年各生育一女之事實，為被告所不爭執，堪認被告二人有通姦、相姦之事實為真，原告以其配偶關係之身分法益遭受侵害，且情節重大為由，復在台灣訴請被告連帶賠償精神慰撫金 100 萬元，有無理由？

按因故意或過失，不法侵害他人之權利者，負損害賠償責任。故意以背於善良風俗之方法，加損害於他人者亦同；不法侵害他人之身體、健康、名譽、自由、信用、隱私、貞操，或不法侵害其他人格法益而情節重大者，被害人雖非財產上之損害，亦得請求賠償相當之金額。前二項規定，於不法侵害他人基於父、母、子、女或配偶關係之身分法益而情節重大者，準用之，民法第 184 條第 1 項及第 195 條第 1 項、第 3 項分別定有明文。次按婚姻以夫妻之共同生活為其目的，配偶應互相協力保持其共同生活之圓滿及幸福，而夫妻互守誠實，係為確保其共同生活之圓滿安全

5 Borelli v. Brusseau, 12 Cal.App.4th 647, 16 Cal.Rptr.2d 16 (Ct. App. 1993).

及幸福之必要條件，故應解為配偶因婚姻契約而互負誠實之義務，如果配偶之一方為不誠實之行動，破壞共同生活之平和安定及幸福者，則為違背婚姻契約之義務，而侵害他人權利[6]。

本件被告 Wood 先生於來台工作期間，與被告鄒女士分別 97 年、於 99 年間各生育一女，為兩造所不爭執，則被告 Wood 於婚姻關係存續期間，與被告鄒姝媚確有通姦、相姦之行為，使原告基於配偶地位之身分法益遭受重大侵害，是被告二人上開通姦、相姦行為，係共同侵害原告之身分法益而情節重大，堪予認定，是原告因此所受精神上痛苦之非財產上損害，即應受填補。至被告以原告已因被告二人相姦、通姦之事實，於美國離婚訴訟中獲得較多之財產分配，其所受非財產上損害已於美國離婚訴訟中達成之財產分配協議中評價，不應重複受償等語為抗辯。

新竹地方法院受理審查後發現[7]，被告 Wood 於美國德州法院對原告提起離婚訴訟後，原告於 98 年 9 月 8 日提起離婚之反訴，並於 99 年 12 月 21 日提出第一修訂離婚反訴狀（First Amended Counterpetition For Divorce），其於第一修訂離婚反訴狀主張之離婚理由（Grounds for Divorce），包含「Respondent has committed adultery.（中譯）反訴被告（即被告 Wood）與他人發生性關係。」並於該訴狀中主張：「Counterpetitioner should be awarded a disproportionate share of the parties' estate for the following reasons, including but not limited to:a. fault in the breakup of the marriage.（中譯）基於以下理由，反訴原告即本件原告應獲得雙方財產較高比例之份額，包含但不限於：婚姻破裂之過失。」業據被告提出上開反訴離婚狀、第一修訂離婚反訴狀影本為憑，原告不爭執上開離婚反訴狀形式上為真正，亦自陳上開第一修訂離婚反訴狀應係原告於美國離婚訴訟中之律師所提，則原告於美國離婚訴訟程式，以被告 Wood 與他人發生性關係為由提起反訴，並主張基於被告 Wood 就婚姻破裂之過失，原告應獲分配較多之夫妻共同財產作為補償等情，堪信為真實。

次查，原告與被告嗣於 100 年 9 月 15 日簽署離婚協議書（Agreement incident to Divorce ），約明原告與被告 Wood 各獲分配之財產，並於 5.4 條約定：「This Agreement Incident to

6 最高法院 55 年臺上字第 2053 號判例。

7 新竹地方法院民事判決 101 年訴字第 325 號。

Divorce and the Agree Final Decree of Divorce supersedes all other agreements, either oral or in writing, between the parties relating to the rights and liabilities arising out of their marriage. This Agreement Incident to Divorce and the Agreed Final Decree of Divorce contains the entire agreement of the parties.（中譯）本協議取代其他雙方之間有關因婚姻關係衍生權利義務之所有口頭或書面協議，本協議合約包含雙方之完整合意。」美國法院於 100 年 9 月 21 日作成之離婚判決（Agreed Final Decree of Divorce），亦將上開離婚協議書納為附件，並核准依該離婚協議分割夫妻之財產，有上開離婚協議書、美國法院離婚判決可參，則上開離婚協議書既約明包含雙方有關婚姻衍生之一切權利義務，且原告與被告 Wood 達成上開離婚協議時，就被告 Wood 與他人發生性關係已明確知悉，並據此主張有分配較多夫妻共同財產之權利，應認上開離婚協議書已包含原告提起反訴離婚時之上開訴求，則被告抗辯被告二人通姦、相姦之情事，已於原告與 Wood 上開離婚協議書中審酌，應屬可採。

基上，被告二人通姦、相姦之行為，共同不法侵害原告之身分法益，雖已造成原告非財產上之損害，然該部分損害已經原告與被告 Wood 於美國之離婚協議中審酌，並透過該離婚協議書所載之財產分配方式，使原告所受損害獲得充分填補，原告復提起本件訴訟，就該部分損害請求被告二人連帶賠償，應屬無據。從而，原告基於共同侵權行為之法律關係，請求被告連帶給付原告 100 萬元，為無理由，應予駁回[8]。

參、配偶專業證照衍生的利益

美國法院見解認為，學位文憑的價值乃屬個人持有的專屬物件，其價值於持有人死亡時終止，故而無財產繼承之特性。惟就婚姻關係存續期間，夫妻一方所取得的教育學位或專業證照（例如，律師、醫師的資格證書），其未來衍生的財產利益，在離婚時夫妻一方能否主張財產分配的問題，仍須根據個案情形分析判斷。

一、Wehrkamp v. Wehrkamp 案

1983 年 6 月 21 日，美國南達科塔州第二巡迴上訴審法院准核本案雙方當事人的離婚之訴。惟原告兼上訴人 Audrey R. Wehrkamp，不服原審裁判中的財產分配，上訴請求美國南達科塔

8 同前註。

州最高法院（下稱本院）給予其主張的財產分配。對此，本院維持原審裁判。

本件事實，略以[9]：上訴人與被上訴人於 1975 年 8 月 2 日結婚，被上訴人 Scott R. Wehrkamp，從南達科塔州州立大學（South Dakota State University）取得理學士學位，而上訴人則已完成一年的大學學業。在第一年的婚姻關係中，被上訴人在伊利諾州芝加哥校區的 Loyola 大學就讀牙醫學院，並取得了牙醫師專業學位證書（received a D.D.S. degree）。同一期間，上訴人也完成了五年的大學課程，並取得口腔衛生專業的醫檢師資格證明（obtained a dental hygiene certification）。

又雙方當事人在芝加哥求學期間的花費主要倚靠助學貸款、獎學金，以及來自他們親戚的饋贈資助。雙方當事人在這些年當中也分別維持兼職的工作。

根據事實審法院的裁判要旨，其認定雙方當事人皆為擁有技術證照的專業人士、夫妻身體健康，並且都有足夠的謀生技能去維持習慣的生活模式，而不須仰賴對方的財力援助以能生活。離婚協議系就婚姻存續期間兩人所掙取的個人財產和房地產加總後，大致上平均分配，雙方當事人分別拿取一半財產。上訴人沒有要求贍養費，因此，該部分法院沒有做出裁定。

事實審法院進一步發現，雙方當事人未來所得的部分，因太難推測（too speculative），而不考慮列入財產分配之一部。此外，法院也不認為被上訴人的教育和專業證照屬於婚姻意義中的財產，而得為財產分割之項目。慮及雙方當事人各自的教育優勢、學歷、證書，以及雙方為取得前述技能所付出的貢獻，事實審法院爰裁判雙方當事人均不得請求分配相對一方因自身努力，而獲取學位證照作為生財工具的未來所得部分。

上訴人爭執，事實審法院錯誤未加以考慮被上訴人的牙醫師資格證書，其所附帶的高度生財能力。上訴人指稱該學位證書為他們婚姻關係中最寶貴的財產，況且從客觀上評價，專業醫師的學位證照都算是財產。上訴人進一步援引 1982 年 Palmer v. Palmer 案判決要旨[10]，主張原審未衡酌將其列為離婚財產的分割項目，不免有濫用裁量權之疑問。

二、判決分析

首先，本案系爭爭點在以裁斷，個人因高等教育學位證書所附加的潛在

[9] Wehrkamp v. Wehrkamp, 357.N.W.2d 264 (1984).

[10] Palmer v. Palmer, 316 N.W.2d 631 (S.D.1982).

生財能力，其是否為離婚案件中所指之財產專案？若為肯定，配偶一方得就該學位證照於未來衍生的收益，於離婚時請求財產之分配。

次就相關法律部分，法院援引相同事實基礎之裁判先例，包括 In re Marriage of Graham（1978）; In re Marriage of Goldstein（1981）; Grosskopf v. Grosskopf（Wyo.1984）; DeWitt v. DeWitt (1980）; Stern v. Stern（1975）; In re Marriage of Horstmann（Iowa 1978）; Inman v. Inman（Ky. App. 1979）等判決要旨說明。

美國南達科塔州最高法院之裁判要旨強調[11]：揆諸美國不同的司法管轄區域，有越來越多的相關案件在類似之議題上做出了裁判。參照 1981 年第四次的司法會議決議，多數觀點認為，一項高等的教育學位或專業證照不具離婚案件中所指「財產」的意義。又早期的案件中，最具指標性的案件可謂 In re Marriage of Graham 案，該裁判要旨闡述[12]：一個教育學位本來就沒有被普遍「財產」的概念意涵所包攝。其乃持有人的隱私物。其價值於持有人死亡時便消滅而不能被以繼承。它在一個開放市場中不具有交換的價值或任何客觀上轉讓的價值。它亦不能被指名過戶、銷售、讓與、轉讓、或者抵押。一張高等教育文憑系經過多年教育的累積，結合了個人的勤勉與努力。它不能被用以單純的金錢支付而獲得。它誠然是一項展現智慧的成果，而其附加了有助個人掙取未來財產的潛力……它根本欠缺普遍財產意義上的屬性。

參照 1981 年 In re Marriage of Goldstein 案[13]、1984 年 Grosskopf v. Grosskopf 案[14]的裁判要旨。又，1980 年威斯康辛州上訴審法院在 DeWitt v. DeWitt 案中重申[15]：事實審法院將該案中丈夫的法律學位視為婚姻財產之一部，乃濫用裁量權之錯誤。

是否專業教育的學位證明，具有未來收益的價值性，對擁有者而言，它尚須取決於其他若干因素，而非可以當下去預料或測量的一個事件。對於一個接受教育並且擁有專業證書的人也可以選擇不使用它、或者運用了卻失敗、甚

[11] Id.

[12] In re Marriage of Graham, 194 Colo. 429, 432, 574 P.2d 75, 77 (1978).

[13] In re Marriage of Goldstein, 423 N.E.2d 1201 (1981).

[14] Grosskopf v. Grosskopf, 677 P.2d 814(Wyo.1984).

[15] DeWitt v. DeWitt, 98 Wis.2d 44, 58, 296 N.W.2d 761, 768 (1980).

至利用它而得以在一個專業領域中執業，然渠等之地點或使用等方式，亦可能產生低於同業預期享有的平均收益。退一步言，教育的潛在價值也可能因為許多原因而永遠無法被以實現。根據學歷的成功去預測一個人在離婚後，在其選擇的職業領域中也會成功，兩者系毫無絕對關聯性。雖說贍養費得依據離婚後某些不可抗拒的因素去做調整，以反映現實情形所面臨的變化，其與學位證書作為離婚財產的分配情形並不相同。再者，最明顯地，不外就是擁有學位暨專業證照者，後來改變了職業生涯，果爾，其配偶一方所主張分配的利益，豈非本來就不存在任何真正的財產意義。

此外，查紐澤西州法院所建立的裁判，於相同事實基礎的案件中，承審法院亦認定個人的謀生技能非屬財產的特定項目，即便該項技能的學位證書取得系仰賴配偶資助而成[16]。同如其他類似的裁判案件，1982 年 Mahoney v. Mahoney 案[17]、或 1984 年由本轄區法院做成的 Saint-Pierre v. Saint-Pierre 案[18]，其多數意見認為：專業文憑、學位、證照、生財技能，均不能作為分配之財產項目。從而，本案中事實審法院的裁斷並無濫用裁量權之虞。

當然，本院也注意到，並非所有法院都拒絕了具潛在生財能力的學位證書，得為財產分配的這個概念。舉例，1978 年愛荷華州的 In re Marriage of Horstmann 案[19]、1979 年肯塔基州的 Inman v. Inman 案[20]，因該案事實特殊，當事人一方之生財技能遭到法院判定為離婚財產之一部。然而，法院的決定系考慮具體情節並加以審酌後所做成。例如 Horstmann 案，妻子為資助丈夫就讀法學院而放棄個人完成正規教育的機會，並於婚姻存續期間至銀行工作以獲取所得去支援丈夫完成學業。法院考慮丈夫被授予的法律學位與妻子的工作所得有絕對關聯性，因此妻子應該為其犧牲付出獲得補償。至於 Inman 案，肯塔基州最高法院揭示，固然學位被視為離婚財產之一部，是不可能被接受的提議，其亦要肯認個人於婚姻中為資助丈夫或妻子完成學業，而放棄個人學業所做出的犧牲，在婚姻關係結束

16 Stern v. Stern, 66 N.J. 340, 331 A.2d 257 (1975).
17 Mahoney v. Mahoney, 182 N.J. 598, 605, 442 A.2d 1062, 1066 (1982).
18 Saint-Pierre v. Saint-Pierre, 357 N.W.2d 250 (S.D.1984).
19 In re Marriage of Horstmann, 263 N.W.2d 885 (Iowa 1978).
20 Inman v. Inman, 578 S.W.2d 266 (Ky.App. 1979).

時，法院給予相對公平的補償應系合理。儘管如此，肯塔基州最高法院不免進一步補充，個人接受教育所取得的學位證書本身不屬婚姻意義的財產。更遑論該案中還有兩位大法官持不同意見。

反觀本案情形，雙方當事人於婚姻中皆有申請助學貸款、獎學金、並各自完成學業、也分別兼職工作、共同分擔家務。質言之，本案並無發現特別明顯的不正義，而必需給予特別的救濟。

另外上訴人爭執，事實審法院裁量錯誤而未將被上訴人與其兄弟一起創業，成立合夥公司（Wehrkamp-Wehrkamp, D.D.S., P.C.）的收益列入財產分配項目，又被上訴人於該公司佔有 50% 的股份。惟經會計師提出的財務報表以及被上訴人的作證證明，被上訴人於該公司簽有工作契約，每年薪資所得為 $32,760 美元，該公司成立之初的前幾年，被上訴人實際上只有支領原所得的三分之一。上訴人主張未支領的部分仍系被上訴人的財產。然查被上訴人並無其他額外所得，囿於新公司的緣故，該公司的價值可謂為零。被上訴人作證表示，對公司創業時的預期理想過高，嗣後發現成本超出他們的想像。所以不得不刪減個人薪資。法院確有考慮被上訴人額外的職業所得，並要求被上訴人在離婚時以當時公司營利的二分之一作為離婚協議的專案。據上論結，事實審法院於本案之裁判並無濫用裁量權。

職是，美國南達科塔州最高法院維持原審決定（第二巡迴法院裁判結果的作成）。本件上訴案的律師費用及上訴人獲 1000 美元的補償由被告負擔。

肆、配偶知名度衍生的利益

既然婚姻實質上締結了一種契約關係，倘若欠缺婚前協定的情況下，雙方當事人在解除婚姻關係時，就婚姻存續期間的共同財產，究否包括配偶一方因個人的努力、或專業成果等在社會上獲取的知名度，又其於離婚後繼續衍生的潛在利益？換言之，配偶一方于結婚後因其知名身分所衍生的所得利益，相對一方能否於離婚時主張其為共有財產之一部，進而就該收益部分請求分配？以下援引美國經典裁判 Golub v. Golub 案說明，配偶于婚姻存續期間因知名度帶來的收益，認屬夫妻共同財產，而得於離婚時協議或請求分配。

一、Golub v. Golub 案

本件審判法官 Jacqueline W. Silbermann, J.; 原告 Marisa Golub 女士 ; 被告 A. Richard Golub 先生。1986 年 6 月法院先傳喚當事人到庭應訊。在被告適時的出庭後，訴狀於 1986 年 8 月 29 日送達當事人完成。本件事實的爭執部分於 1986 年 11 月 4 號就緒，

庭審過程中充分顯現當事人的婚姻早在 1984 年至 1985 年間瀕臨破裂，當事人主張構成遺棄和被遺棄的理由，法院准允本件離婚訴訟與輔助救濟程式一併進行。在聽取證詞後的幾天，檢視證人的陳述和作證方式，以及研究雙方提出的許多物證後，法院作出以下結論[21]：

1982 年 2 月 14 日，當事人在很矚目的情況下結婚，那時的新聞報導都是他們，雖然在這段婚姻中他們沒有生小孩，不過原告在前段婚姻中有一個叫 Starlite 的女兒。原告 Marisa Berenson 女士，是一位原知名的電影、電視女演員，同時也是一位模特兒。身為著名服裝設計師 Elsa Schiaparelli 的孫女，在她結婚的時候顯然正享受進入演藝界及時尚界的風采。被告 A. Richard Golub 先生，在結婚時是一位成功的律師，他經營了一間多年的私人律師事務所，吸引了許多媒體界和知名人士的注意。事實上，在他們閃電結婚前，他正忙於處理一件涉及 Brooke Shields 的官司，而該案件也被大量的媒體報導。

很清楚地，雙方當事人都是媒體寵兒，也擁有社會認同的富裕和知名度。

在剛結婚的前幾個月他們住了許多不同的地方，直至 1982 年的秋天，當事人在 209 East 83rd Street 買下一棟四層樓的住宅，這棟房子是被告以 $575,000 美元交易，該次買房是當事人以現有的小額抵押貸款，其中原告拿出 $58,000 美元，被告則拿出 $75,065.61 美元一起購置。

嗣 1984 年 2 月 1 日，上開的住所以 $950,000 美元售出，被告又以新合約購買了一間位於 42 East 64th Street 的房子，該份合約要用 $50,000 美元及額外的 $55,787.65 美元來支付總共 $105,787.65 美元的現金。因為 East 64th Street 的交易發生在 83rd Street 的交易前 6 天，該交易的剩餘差額正好由 $675,000 的購房貸款和 $25,0000 的臨時性貸款支付。當事人提出各類事證和證詞，恰恰揭露了當事人運用很彈性、實際的方法去有效平衡收入及開支的事實。

原告的資產包括了電影、電視、模特兒和出了一本書的版稅收入，全都存在了兩個主要的帳戶（另外還有一個分開的巴黎帳戶）。其中一個帳戶為 A. Richard Golub Special Account，另一個帳戶為 Echoes of Eternity。被告擁有使用這兩個帳戶與簽名的權利。這個婚姻從頭至尾，很明顯地，是由被告做成許多管理原告資金以及他們花費財產的決定。因此，他們可以互相使用對方

[21] Golub v. Golub, 139 Misc.2d 440 (N.Y. Misc. 1988).

的錢來支付他們的許多花費，包括了位於 East 83rd Street、East 64th Street 上的房子、繳稅、以及日常生活的開銷。

婚姻開始後持續了一段日子的生活，原告幾乎每年有一半的時間待在歐洲。1985 年的 9 月，原告在巴黎投資一棟公寓並用她的名字出租。為取得該棟公寓的權益，被告也出資 $32,500 美元。不過原告擁有這棟公寓的唯一使用權。

從整段婚姻中可以看出原告忙於追求自己在美國和海外的工作，無庸置疑地她非常成功。然而在紐約時，兩位當事人都經常去餐廳用晚餐，而鮮少享受家居生活。家事及小孩的瑣事都是雇用專人打理，另外每年大約有半年的時間因原告在歐洲的緣故，家務事全部由被告管理及監督。同樣地，被告也有效率地管理房屋修繕、租賃的一切事務，以及任何與租屋人之間解除租約的談判和官司。

二、判決分析

本案系爭爭點在以裁斷，夫妻共有財產應否有 O'Brien 案的延伸適用，即不去對一名與非專業者結婚的配偶產生偏見？配偶一方因知名度所產生的財產收益，另一方配偶能否于離婚時請求分配？

次就相關法律部分，法院首先參照紐約州家事法規定 the Domestic Relations Law §236(B)(6), 236(B)(1)(c), 236(B)(5)(d); 另援引相同事實基礎之裁判先例，略以 Price v. Price; Wood v. Wood; McGowan v. McGowan; O'Brien v. O'Brien; Morimando v. Morimando 等案判決要旨說明。

美國紐約郡民事審判法院最後做成裁決，理由略以[22]：

（一）生活維持

在決定應否維持原告生活所需的請求前，紐約州民事審判法院（以下簡稱本院）考慮家事關係法第 236(B)(6) 條規定的體現。

本院注意到本件是一段沒有小孩的短暫婚姻，雙方當事人皆身體健康。原告自少年時期就從事模特兒表演工作，並登載于 Vogue/Bazaar/Time/People 等知名雜誌上。她同時也是一名成功的演員，她在美國及國外工作，能講幾種外國語言。原告還寫了一本名為「穿著」的時尚專書，是由 G.P. Putnam Sons 出版。她的才華和美麗賦予原告成為一名領有可觀工資的收入者。

在婚姻的過程中，原告資產的累積有一部分來自被告法律技能的協助和原告自己的商業頭腦。在這方面，被告幫

[22] Id.

助原告，特別是，在婚姻的開始透過原告個人的財務人脈關係使其事業更往前推進。確實，原告的收入在婚姻期間大幅增加，尤其 1987 年更超過 $150,000 美元的收入。原告顯然能維持自己的資源以及平均分配她和被告在婚姻中享有的生活標準。故而，准核贍養費並不恰當，至其他部分也不予准核。

（二）共有財產和個別財產

夫妻共有財產的定義明定於家事關係法第 236(B)(1)(c) 節中，指在婚姻期間一方或雙方配偶取得的所有財產。亦即財產所呈現的資金成果其實就是一種合夥關係的實體[23]。法院認定下列項目屬本案婚姻共有財產：東 64 街的住所、被告的工作收益、原告職業生涯的收益、住所內的家俱、在巴黎公寓的家俱、以及 Andy Warhol 的美元符號畫作。

（三）公平分配

在決定夫妻財產公平分配的問題上，法院已充分考慮家庭關係法第 236(B)(5)(d) 條列舉的因素，其所指公平分配的功能是當婚姻結束時，每個配偶，對於婚姻家庭做出的整體貢獻，公正平分在婚姻存續期間夫妻累積的財產收益[24]。

（四）表演與模特兒生涯的收益

被告陳述主張：原告的表演和模特工作是婚姻財產，他尋求公平分配作為他付出的報酬。該州法律明確規定，在婚姻存續期間發生的配偶一方的個人財產增加的部份，若是由於另一個人直接或間接貢獻所造成者，都可能被視為財產。此外，法律明確規定專業執照包括在財產的定義內[25]。而這個定義已經擴展到包括學位以及專業證照。

原告陳述主張：參照 Morimando v Morimando 案中名人身分既非“專業”也不是“證照”的意見，因此沒有“投入人力資本公平分配”的問題[26]。又原告爭執，表演事業受到相當的波動影響，故而它不應該被考慮。

至 O'Brien 案中，專業證照的本身不具市場價值是不相關的。而是證照提升持有人賺錢的能力。在這方面，增強收益能力的所有來源變的難以區分。它能否被合理地匯出結論說，基於離婚公平分配的目的，上訴審法院打算將其作為婚姻財產的部分限制在教育法上所

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[23] Wood v. Wood, 119 Misc.2d 1076 (Sup Ct, Suffolk County 1983).

[24] McGowan v. McGowan, 136 Misc.2d 225, 227 (Sup Ct, Suffolk County 1987).

[25] O'Brien v. O'Brien, 66 N.Y.2d 576 (1985).

[26] Morimando v Morimando (NYLJ, Feb. 6, 1987, at 16, col 1 [Sup Ct, Nassau County]).

列舉的證照？一張證照價值的定義鮮少被闡述，如同於 O'Brien 案中被視為提升掙錢的能力一樣。McGowan 案給予“增強掙錢能力”寬泛的含意。相同的道理曾於 McGowan 案被延伸為夫妻財產之一部，包括學位，也可以包含像是配偶一方能在商業上被獨特運用的能力或者她的名聲。在 O'Brien 案中，影響法院決定的關鍵在於，學位的授予而非證書那張紙。在 McGowan 案中，並不是配偶的學位可以分配；而是藉由該學位所獲取的收益，沒有學歷的一方配偶尋求共用該收益的分配。

在 O'Brien 案中，法院表達的是無形資產，即“提升掙錢的能力”，而不是“有形資產”或“資源”。參見 Morimando v. Morimando 案。

公平起見，如同 McGowan 案是 O'Brien 案一個合乎邏輯的延伸，配偶尋求分享其他有價值的財產權利必須是下一階段的推進。

知名度于商業上的利用具有財務收益的巨大潛力。尤其是名人的高知名度可以為產品帶來可觀的收益。更何況名人的名氣可以持續甚至傳承給他的子嗣。這體現了知名人士因知名度衍生的財產特質。換言之，利用一個人的名氣可謂商業代言的重要“證照”。這些無形的收益提點了司法部門應重新評估的財產觀念內涵。有鑑於此，名氣於共有財產的問題似乎早就該考慮到的。

有項模擬得作成是介於知名度和專業權之間。在這兩種權利當中的第二個含義，也就是因姓名所帶來的好處。在任一情況下，權利成為收入產生的來源。

法院應該平等地對待所有婚姻當事人，不應有偏見或懲罰一個與非專業人士結婚的配偶，其可能成為一個傑出的工薪者。O'Brien 案的救濟應公平無私地適用於所有配偶。否則，其結果將對某些人是一種經濟暴利或對其他人是不公平地剝奪。顯然，某些領域的收益能力超過了需要執照領域的收益。當一個人在某個領域的專業，讓他或她成為一名優秀的工資收入者，這也會產生類似一個企業的商譽價值。

在 Morimando 案中，醫師助理的配偶尋求在離婚後公平分配到其配偶因執照帶來的收益。法院特別缺分其與 O'Brien 案的差異，是因為醫師助理不享有同醫師學位證照相同水準的機會。醫師助理通常需要仰賴雇主。法院參照適用醫師助理的規定並發現其“明確規範行使他們功能的限制”。“醫生的助手註定是個雇員”。 不同于醫生助理，一個女演員 / 模特兒往往是獨立的功能，立於一個自由職業的基礎上，而不是由他或她的雇主安排。

O'Brien 案就是法律。如果它繼續作為良法，規則應統一適用。似乎沒

有區分學位、證照或其他特殊技能產生可觀收入的合理依據。要能決定婚姻財產的價值，所有這些累積的資產應連同婚姻經歷的包容一併考慮。如果夫妻一方犧牲並協助增加其配偶的收入能力，那麼對於長時間下來的資產累積應該沒有什麼形式的區別，因為它實際上導致了收益增加的能力。在 O'Brien 案和 McGowan 案中，為獎勵夫妻在無形資產創設的經濟利益就是基於雙方以婚姻作為經濟夥伴關係共同投資努力的一項論理。McGowan v. McGowan 案供參。

即便默默無名的配偶也應享有名人配偶一定程度的名氣和因之而帶來的利益，當然，一方的成名是可以歸因於其無名配偶的。而成名的來源必須能追溯婚姻的努力。

因此，在 O'Brien 案中，如果一方配偶致力於自己的婚姻家庭，而放棄就業機會，也沒有流動性資產存在者，法院應該對他或她的貢獻，補償這一方配偶以使他或她能去追求其職業生涯，而不僅僅是一筆終止的補償金。例如，如果一方配偶去就讀音樂學校而放棄醫學院，嗣成為一位著名的鋼琴家，就成果收益的權利而言必須被平等對待。

果爾，本案的問題應否有 O'Brien 案的延伸適用，從而不去對一名與非專業者結婚的配偶產生偏見？

本院的回答是肯定的，並強調一個工匠、演員、專業運動員或任何人，就其專業知識在他或她的職業生涯，使他或她成為一個出色的工資收入者，仍應保障夫妻財產受到公平的分配，即便原告的名人身分既非“專業”，也非“證照”。Morimando v. Morimando 案供參。簡言之，儘管上揭難題帶來了評估財產價值的疑慮，但結論就是其增加的收益價值屬於婚姻共有財產。

據上，原告請求贍養費未獲准允，另婚姻存續期間當事人知名度的收益應認屬夫妻共同財產。

伍、結論

婚姻乃男女雙方以終身共同生活為目的而締結之身分契約，夫妻之一方對於婚姻關係之完整享有人格利益，故於婚姻關係中，當事人間互負有貞操、互守誠信及維持圓滿之權利與義務，此種利益即我國民法第 195 條第 3 項所稱之「基於配偶關係之身分法益」，是通姦及相姦行為使被害人對完整圓滿之婚姻生活無法期待，婚姻關係之身分契約所賴以維繫之基礎受到重大破壞，被害人之社會評價亦因此而受到損害，精神上陷於痛苦之狀態，可認定通姦及相姦為幹擾他人婚姻關係情節重大之行為。惟，美國法上配偶通姦與婚姻的締結與

解除無關，其不過是作為離婚財產分配的評價項目，而非如同我國法上將之視為“無過失方得訴請離婚”之條件。蓋因婚姻自由的內涵，本質上已包括婚姻締結的自由與解除的自由，而無過失方得向有過失方請求精神損害方面的補償，即在離婚時請求較高的財產分配份額，而非單方面由無過失方去主導婚姻要否解除或擁有勉強他方繼續共同生活的權利。

至於離婚訴訟的財產分配，任一方能否以專業證照、知名度衍生的利益，主張夫妻「共有財產」之疑問，宜先判斷配偶一方在婚姻存續期間所衍生的各種「利益所得」，能否與請求分配的一方有因果關係的連結；亦即，配偶一方在結婚後至離婚期間所獲取的收入，不論是來自教育學位、專業證書、或知名度的緣故而產生，如果是因為相對一方做出了「犧牲」，例如，中斷學業工作以資助對方學習，從而放棄他（她）原有能行使之權利者，那麼其對於配偶一方今日的成就曾經做出了貢獻，是可以提出事證主張，並向法院請求認列共同財產分配。此法理不外在強調婚姻除夫妻因締結身分契約所附帶的責任義務關係外，也是一種類似合夥事業的經營關係，殊值思考。

陸、法學英文

一、原文裁判摘要

Audrey R. WEHRKAMP, Plaintiff and Appellant,

v.

Scott R. WEHRKAMP, Defendant and Appellee.

No. 14325.

Supreme Court of South Dakota.

Decided October 3, 1984.

HENDERSON, Justice.

A divorce was granted to both of these parties by the Second Judicial Circuit Court on June 21, 1983. Appellant, Audrey R. Wehrkamp, appeals the property award provided in the judgment of divorce. We affirm.

At the time of their marriage on August 2, 1975, appellee Scott R. Wehrkamp held a Bachelor of Science degree from South Dakota State University, Brookings and appellant had completed one year of college. During the first years of the marriage, appellee attended dental school at Loyola University in Chicago, Illinois, where he received a D.D.S. degree. Appellant, during this same period, completed five years of college and obtained a dental hygiene certification.

While in Chicago attending school, both parties received educational loans, grants, and gifts from relatives. Both parties also maintained part-time employment during these years.

Under the decision of the trial court, it was found that both parties had saleable skills as licensed professionals. Both parties were in good health and both had a trade or skill sufficient to maintain their accustomed station in life without financial contribution from

the other party. The personal property and real estate acquired during marriage were divided equitably between the parties, each receiving roughly one-half. Appellant did not ask for alimony and it was not awarded.

The trial court further found that the future earnings of the parties, being too speculative, were not to be considered part of the property award. Also, the court did not consider appellee's education and professional license a marital asset for property division purposes. Considering the respective educational benefits, degree, certification and the contributions of both parties in obtaining these, the trial court held that neither party had established they were individually entitled to a contribution award.

Appellant contests the trial court's failure to take into consideration appellee's increased earning capacity resulting from his D.D.S. degree. Appellant claims this is the most valuable asset acquired by the parties during the term of their marriage and that it is an asset subject to appraisal. She contends it was an abuse of discretion not to consider this in dividing the marital property. See Palmer v. Palmer.

We are faced with this question: Is an individual's future earning capacity resulting from an advanced degree "property" in divorce cases? There is a growing body of case law on this subject throughout the various jurisdictions. See generally, Annot., 4 A.L.R.4th 1294 (1981). The majority view is that an advanced degree or professional license is not "property" as that term is used in divorce settlement cases. An early leading case in this area was In re Marriage of Graham, wherein it was stated:

An educational degree... 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... it has none of the attributes of property in the usual sense of that term.

See In re Marriage of Goldstein; Grosskopf v. Grosskopf.

It was an abuse of discretion for a trial court to value husband's law degree as a marital estate asset, according to a Wisconsin Appeals Court in DeWitt v. DeWitt.

Whether a professional education is and will be of future value to its recipient is a matter resting on factors which are at best difficult to anticipate or measure. A person qualified by education for a given profession may choose not to practice it, may fail at it, or may practice in a speciality, location or manner which generates less than the average income enjoyed by fellow professionals. The potential worth of the education may never be realized for these or many other reasons. An award based upon the prediction of the degree holder's success at the chosen field may bear no relationship to the reality he or she faces after the divorce. Unlike an award of alimony, which can be adjusted after divorce to reflect unanticipated changes in the parties' circumstances, a property division may not. The potential for inequity to the failed professional or one who changes careers is at once apparent; his or her spouse will have been awarded a share of something which never existed in any real sense.

In New Jersey, it has been held that a person's earning capacity should not be recognized as a separate, particular item of property, even where its development has been aided and enhanced by the other spouse. Stern v. Stern. Further, "[obviously, if the enhanced earning capacity itself is not distributable property, then neither is the license or degree, which is merely the memorialization of the attainment of the skill, qualification and educational background which is the prerequisite of the enhanced earning capacity and on which it is predicated." Mahoney v. Mahoney. It has none of the attributes of distributable property.

As we did in Saint-Pierre v. Saint-Pierre, decided this day, we align ourselves with the majority rule in now holding that a professional degree or license and/or the potential earning capacity stemming there from is not distributable property. We therefore find that the trial court did not abuse its discretion in failing to consider appellee's enhanced earning capacity a marital asset subject to property division upon divorce. The factors and variables involved in such a consideration are simply too speculative and could only act to turn the possibility of inequity on the one hand into a probability of such on the other.

We note that not all courts have rejected the concept that potential earning capacity made possible by an advanced degree may be considered an asset for distribution by the court. See In re Marriage of Horstmann; Inman v. Inman. However, it was the particular circumstances of each case which motivated these decisions. In Horstmann, wife did not complete her formal education and provided the major source of support through employment with a bank while husband attended law school. The court found husband's law degree was conferred upon him with the aid of his wife's efforts, and thus, she should share in the potential for increase in earning capacity made possible by the degree.

Despite strong reservations to the contrary, similar circumstances prompted the holding in Inman, 578 S.W.2d at 268, that under "certain instances ... treating a professional license as marital property is the only way in which a court can achieve an equitable result." The court cited the most common instance as being a situation where one spouse supports the other through school, only to have the marriage dissolve immediately upon graduation. In a subsequent decision involving the same parties, see Inman v. Inman, the Kentucky Supreme Court expressed that it could not accept a proposition that an educational degree is, upon dissolution of a marriage, marital property. However, that court recognized the issue of fair compensation to a person who has supported his or her spouse while the other was in school, when the marriage dissolves before the family is able to realize the benefits from the spouse's advanced education. Yet, the Kentucky Supreme Court went on to express a formula in placing a value on an educational degree but expressly indicated

that the degree itself was not marital property. There were two dissents to this decision.

Appellant argues that the case before us is a classic situation requiring application of equitable principles to prevent an extraordinary injustice. She claims that appellee's earning capacity was conferred upon him by her extraordinary efforts and that she sacrificed her educational degree for the benefit of her husband. Appellant further contends the trial court abused its discretion in failing to consider this substantial contribution to her husband's D.D.S. degree.

We concede the equities to be adjusted between the parties will vary with the facts and circumstances of each particular case.

Thus, the parties seeking divorce may be from a marriage that lasted many years in which substantial property was accumulated. An equitable division of that property should result in each party realizing the benefits of the college degree. On the other hand, where the working spouse supports the family while the other attends college, obtains an advanced professional degree, and promptly seeks a ... divorce, there is no property accumulated to divide. The inequity of a divorce with no award to the working spouse is obvious. In this situation, an award to that spouse which would afford an opportunity to obtain the same degree under the same circumstances, or in the alternative, a sum of money equal to that benefit seems equitable; and cases falling between these two extremes should be adjusted accordingly.

Grosskopf, 677 P.2d at 822-23. Some authorities dub this "rehabilitative alimony." Even the majority of cases, while refusing to recognize that potential earning capacity is property, do indicate that it is "doubtless a factor to be considered by a trial judge in determining what distribution will be `equitable' and it is even more obviously relevant upon the issue of alimony." Accord, DeWitt; In re Marriage of Vanet; see also, Hubbard v. Hubbard, (consideration based on theory of unjust enrichment). However, these issues are

not pertinent to this case. Appellant did not request alimony, nor is she in need of some sort of rehabilitative contribution. She has already pursued a career of her choice, one that should provide adequate support in the manner to which she is accustomed.

Appellant attended school concurrently with her spouse. She received a certification in dental hygiene as a result of her endeavor. Though she insists she sacrificed receiving a bachelor's degree, the record does not bear out that this was a sacrifice in furtherance of appellee's career. It was appellant's decision to pursue her certificate. She realized that which she desired. She was, and is now, only one course short of her bachelor's degree. Testimony indicates that failure to finish the course, after two correspondence attempts, is due more to lack of motivation than anything else.

Further, the record indicates that both parties received government financial aid and help from both sets of parents in the furtherance of their respective educations. Both parties held part-time jobs throughout school. Both parties shared in household duties during this time.

Appellant received her certificate late in 1978 and did work for some six months until appellee graduated in May of 1979. Upon graduation from dental school, appellant did help appellee establish a dental practice, but was paid a regular salary for her services as a dental hygienist.

We do not dispute that "[t]o flatly refuse to find any sort of protected property interest would work the grossest inequity in certain instances." Inman, 578 S.W.2d at 268. It was those special instances which prompted the findings in Inman and Horstmann. But, the equities simply do not cry out in a situation such as the one before us, where the only real detriment is that appellant chose to pursue a career in a field potentially less lucrative than that of her spouse. No extraordinary injustice is apparent in this case necessitating an extraordinary remedy.

Appellant also argues that the trial court erred in failing to consider certain interests appellee allegedly has in Wehrkamp-Wehrkamp, D.D.S., P.C. Appellee and his brother each own approximately 50% interest in this professional corporation. Appellee has an employment contract with the corporation under which he is to be paid $32,760 a year. However, for the past several years, appellee has only received one-third of that amount as salary. Appellant claims that the unpaid portion should have been credited as an asset of appellee. The additional income pursuant to the employment contract has never been collected by appellee. The corporation is a fairly new business. It has a zero value. As appellee testified, when the employment contract was drawn, he and his brother had high expectations of success. They found, shortly thereafter, that expenses were much beyond their anticipation. Therefore, cuts in salary had to be made. The court did not abuse its discretion in failing to include as an asset an amount which does not exist. Further, though the corporation has contracted to pay bonuses, they have not had any excess income to defray same. Thus, there was no error in failing to include appellee's anticipated share of bonuses. Based on an accountant's financial statement and the testimony of appellee, the trial court valued appellee's interest in the corporation and required that he pay one-half of this amount to appellant as a part of the property settlement. There was no abuse of discretion in this valuation.

The judgment of the Second Judicial Circuit Court is affirmed.
Appellant is awarded $1,000 costs and attorney's fees for this appeal.
FOSHEIM, C.J., WOLLMAN and MORGAN, JJ., and DUNN, Retired Justice, concur.
DUNN, Retired Justice, participating.
WUEST, Circuit Judge, Acting as Supreme Court Justice, not participating.

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MARISA GOLUB, PLAINTIFF,

v.

A. RICHARD GOLUB, DEFENDANT

139 Misc.2d 440 (N.Y. Misc.)

SUPREME COURT, NEW YORK COUNTY.

MARCH 8, 1988

" When a person's expertise in a field has allowed him or her to be an exceptional wage earner, this generates a value similar to that of the goodwill of a business. "

"There seems to be no rational basis upon which to distinguish between a degree, a license, or any other special skill that generates substantial income. In determining the value of marital property, all such income-generating assets should be considered if they accumulated while the marriage endured. If one spouse has sacrificed and assisted the other in an effort to increase that other spouse's earning capacity, it should make no difference what shape or form that asset takes so long as it in fact results in an increased earning capacity. "

"This court answers the question in the affirmative and holds that the skills of an artisan, actor, professional athlete or any person whose expertise in his or her career has enabled him or her to become an exceptional wage earner should be valued as marital property subject to equitable distribution. "

JACQUELINE W. SILBERMANN, J.

This matrimonial action was commenced by service of a summons in June 1986. After a timely appearance by defendant, a verified complaint was served on or about August 29, 1986. Issue was thereafter joined on November 4, 1986. A sufficient showing having been made at trial that the marriage which had been dying in 1984 was moribund as of 1985, a

dual divorce on the grounds of constructive abandonment and abandonment was granted and the trial proceeded as to the ancillary relief.

After listening to the many days of testimony, observing the witnesses' demeanor and manner of testifying and studying the many exhibits offered in evidence, the court makes the following findings.

STATEMENTS OF FACTS

The parties were married amidst a great deal of fanfare including television coverage on February 14, 1982. Although there are no children of this marriage, plaintiff has a daughter, Starlite, by a former marriage.

Plaintiff, Marisa Berenson, is a renowned and celebrated film and television actress and model. At the time of the marriage she apparently enjoyed enormous entree to the world of arts and fashion both in her own right and as the granddaughter of Elsa Schiaparelli, the celebrated couturiere.

At the time of the marriage, defendant A. Richard Golub was a successful attorney who had been in private practice for many years and who attracted media and celebrity attention. Indeed, at the time immediately preceding their marriage, defendant was engaged in the trial of a matter involving Brooke Shields which was getting a substantial amount of media coverage.

It is clear that both parties coveted and gained the attention of the press and the company of the "Rich and Famous".

After living at several different locations during the first few months of their marriage, in the fall of 1982, the parties purchased a four-story townhouse at 209 East 83rd

Street. This house was found by defendant and purchased for $575,000. The purchase was accomplished by the parties' assumption of a then existing small mortgage, and a contribution by plaintiff of $58,000 and defendant of $75,065.61.

On February 1, 1984 the 83rd Street property was sold for $950,000. Defendant had acquired the contract to purchase the townhouse at 42 East 64th Street for $50,000 and paid an additional $55,787.65 for a total cash payment of $105,787.65. Because the purchase of East 64th Street preceded the sale of 83rd Street property by six days, the remainder of the purchase price was covered by a purchase-money mortgage of $675,000 and a bridge loan of $250,000.

An examination of the various checks introduced into evidence as well as the testimony of the parties reveals the fact that the parties in effect pooled their income and defrayed their expenses using a flexible and/or pragmatic approach.

Plaintiff's funds, including income from films, television, modeling and a book, were placed mainly in two accounts. (Plaintiff had a separate Paris account as well.) One was called "A. Richard Golub Special Account No. 2" and the second "Echoes of Eternity". Defendant had signatory powers on both these accounts. Throughout the marriage it is evident that defendant made many of the decisions concerning the management of plaintiff's financial matters and how their moneys would be spent. Thus, their moneys were used interchangeably to pay their various expenses including expenses for the East 83rd Street house, the East 64th Street house, taxes and general living costs.

Beginning at the start of the marriage and continuing thereafter, plaintiff spent almost half of every year in Europe. In September 1985, plaintiff found an apartment in Paris which she leased in her name. Defendant contributed $32,500 toward obtaining the Paris apartment. Plaintiff has had exclusive use of the Paris apartment.

Throughout the marriage plaintiff appeared to have been engaged in pursuing her career both in the United States and abroad, concededly successfully. While in New York, the parties ate frequently in restaurants and seemingly entertained little at home. Housekeeping and child care were tended to by hired help. These homemaking services were solely supervised by the defendant for approximately half of every year while plaintiff was in Europe. Likewise, defendant supervised the renovations made to the marital real estate as well as the negotiations and litigation necessary to vacate the rental apartments that were contained therein.

CONCLUSIONS OF LAW

Maintenance

In deciding plaintiff's request for maintenance, the court considered the statutory standards embodied in section 236(B)(6) of the Domestic Relations Law.

The court notes that this is a short childless marriage in which both parties are in excellent health. Plaintiff has been a model since she was a teen-ager, appearing on the covers of such magazines as Vogue, Bazaar, Time and People. She is also a successful film and television actress. She works in this country as well as abroad, since she speaks several foreign languages. Plaintiff also wrote a book on fashion titled "Dressing Up" which was published by G.P. Putnam Sons. Her talent and beauty have enabled plaintiff to become a substantial wage earner.

During the course of the marriage due in part to defendant's assistance by dint of his legal skills and business acumen plaintiff's earnings have appreciated. In this connection, defendant assisted plaintiff, inter alia, by getting her personal financial affairs in order at the inception of the marriage and making efforts throughout the marriage to advance her career. Indeed, plaintiff's income has significantly increased during the marriage to a point

where she earned in excess of $150,000 in 1987.

Plaintiff is clearly able to maintain out of her own resources, as well as the equitable distribution to be awarded herein, the standard of living she has enjoyed during the marriage to defendant. Thus, an award of maintenance is inappropriate and none is awarded.

Marital Property and Separate Property

Marital property is defined in section 236(B)(1)(c) as "all property acquired by either or both spouses during the marriage". That is, the assets that represent the capital product of what was essentially a partnership entity.

The court finds the following items to be marital property: the marital residence at East 64th Street; the increase in value of defendant's practice; the increase in value in plaintiff's career; the furnishings in the marital residence; the furnishings in the Paris apartment; and the dollar sign painting by Andy Warhol.

Equitable Distribution

In deciding the issue of the equitable distribution of the marital property the court has duly considered the factors enumerated in Domestic Relations Law §236(B)(5)(d) and being cognizant that "[the 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"

Increase in Value of Acting and Modeling Career

Defendant contends that the increase in value of plaintiff's acting and modeling career is

marital property and he seeks equitable distribution thereof as a result of his contributions thereto. The law of this State is clear that any increase in the value of separate property of a spouse occurring during the marriage which is due in part to the direct or indirect contributions of the other spouse may be considered property. Further, the law is clear that professional licenses are included in the definition of property and that this definition has been extended to include academic degrees as well as professional licenses.

Plaintiff, citing Morimando v Morimando, contends that her celebrity status is neither "professional" nor a "license" and hence not an "investment in human capital subject to equitable distribution." Moreover, plaintiff argues that because a career in show business is subject to substantial fluctuation, it should not be considered.

In O'Brien (supra), the fact that the professional license itself had no market value was irrelevant. It is the enhanced earning capacity that the license affords the holder that is of value. In this respect, all sources of enhanced earning capacity become indistinguishable. "Could it rationally be concluded that, for purposes of equitable distribution upon divorce, the Court of Appeals intended to limit as marital property, licenses enumerated in the Education Law? Hardly, given the definition of a license's value as enunciated in O'Brien as being enhanced earning capacity." (McGowan v McGowan) McGowan (supra) gives "enhanced earning capacity" an expansive meaning. The same logic used in McGowan to extend marital property to include degrees can be applied to include as marital property a spouse's unique ability to commercially exploit his or her fame. In O'Brien (66 N.Y.2d 576, supra), it was the privileges conferred by the license that were critical to the court's decision, not the piece of paper itself. In McGowan, it was not the spouse's degree that was divisible; it was the income generated by exercising the privileges associated with the degree that the nondegreed spouse was seeking to share.

In O'Brien (supra), the court appears to be speaking of an intangible asset, i.e., "enhanced earning capacity" and not a tangible asset or "res". (See, Morimando v Morimando, supra.)

In fairness, just as McGowan (supra) was a logical extension of O'Brien (supra), the right of a spouse to share in other valuable assets must be the next step forward.

There is tremendous potential for financial gain from the commercial exploitation of famous personalities (25 UCLA L Rev 1095). There is a proprietary interest in the product of a celebrity's labors. The right to exploit a celebrity's fame has been held to descend to his heirs (Price v Roach Studios, 400 F. Supp. 836). This exemplifies the property nature of a celebrity's fame. A commercial endorsement is essentially a "license" to use a person's fame. "Recognition of the community's interest in certain of these intangible interests indicates a disposition on the part of the judiciary to re-evaluate old notions of property. In light of this, consideration of the community property issues posed by the right of publicity seems overdue" (25 UCLA L Rev 1095, 1113).

There is an analogy to be made between the right of publicity and professional goodwill. In both rights, there is a secondary meaning generated by a name and benefits derived therefrom. In either case, the right becomes an income-producing source.

The courts should treat all matrimonial litigants equally and should not prejudice nor penalize a spouse who is married to a nonprofessional who may nevertheless become an exceptional wage earner. The O'Brien remedy should be applied evenhandedly to all spouses. (Samuelson, The Valuation of Non-Tangible Assets of Non-Professionals, 19 [No. 2] Fam L Rev 1 [NY St B Assn, June 1987].) Otherwise, what will result is an economic windfall to some and an unfair deprivation to others. Clearly, there are certain fields in which the earning capacity exceeds that of other fields which require licensure. When a person's expertise in a field has allowed him or her to be an exceptional wage earner, this generates a value similar to that of the goodwill of a business.

In Morimando (supra), the spouse of a physician's assistant sought to have that spouse's license declared marital property for equitable distribution purposes upon divorce. The

court distinguished this case from O'Brien (66 N.Y.2d 576, supra) because a physician's assistant does not share the same level of opportunity as does an M.D. A physician's assistant was said to always rely on an employer. The court also referred to the statute applicable to physician's assistants and noted that it "clearly imposes limitations upon the exercise of their functions." The physician's assistant is "destined to remain an employee." Unlike a physician's assistant, an actress/model often functions independently, on a free-lance basis and is not at the mercy of his or her employer.

O'Brien (supra) is the law. If it is to remain as good law, the rule should be uniformly applied. There seems to be no rational basis upon which to distinguish between a degree, a license, or any other special skill that generates substantial income. In determining the value of marital property, all such income-generating assets should be considered if they accumulated while the marriage endured. If one spouse has sacrificed and assisted the other in an effort to increase that other spouse's earning capacity, it should make no difference what shape or form that asset takes so long as it in fact results in an increased earning capacity. The rationale in both O'Brien and McGowan (supra) for awarding the spouse an economic interest in the intangible asset seems to have been based on a view of the asset as "investments in the economic partnership of the marriage and * * * the product of the parties' joint efforts". (McGowan v McGowan, supra, at 230.)

The noncelebrity spouse should be entitled to a share of the celebrity spouse's fame, limited, of course, by the degree to which that fame is attributable to the noncelebrity spouse (25 UCLA L Rev 1095). The source of the fame must still be traced to the marital efforts.

Thus, as in O'Brien (supra), if a spouse devotes himself or herself to the family throughout the marriage, giving up career opportunities, and no liquid assets exist, the court should compensate this spouse for his or her contribution enabling him or her to pursue his or her career and not just a terminable maintenance award. For example, if

instead of medical school the spouse went to music school and became a celebrated pianist, in equity both accomplishments must be treated equally.

The question, therefore, presented is should O'Brien (supra) be extended so as not to prejudice a spouse who is married to a nonprofessional?

This court answers the question in the affirmative and holds that the skills of an artisan, actor, professional athlete or any person whose expertise in his or her career has enabled him or her to become an exceptional wage earner should be valued as marital property subject to equitable distribution. Thus, although plaintiff's celebrity status is neither "professional" nor a "license" (Morimando v Morimando, supra) its increase in value is marital property, despite the difficulties presented in valuing such property.

[Portions of opinion omitted for purposes of publication.]

二、實用法律語彙

1. Appellant did not ask for alimony. 上訴人沒有要求贍養費。
2. …the future earnings of the parties, being too speculative, were not to be considered part of the property award. 雙方當事人未來所得的部分，因太難推測，而不被考慮列入財產之一部。
3. An educational degree ... is simply not encompassed even by the broad views of the concept of "property." 一個教育學位 ... 本來就沒有被普遍「財產」的概念涵攝。
4. It does not have an exchange value or any objective transferable value on an open market. 它在一個開放市場中不具有交換或任何客觀上轉讓的價值。
5. It is personal to the holder. 其乃持有人的隱私物。
6. It terminates on death of the holder and is not inheritable. 其價值於持有人死亡時便消滅而不能被以繼承。
7. It cannot be assigned, sold, transferred, conveyed, or pledged.

它不能被指名過戶、銷售、讓與、轉讓、或者抵押。

8. An advanced degree is a cumulative product of many years of previous education, combined with diligence and hard work. 一個高等學位是經過多年教育的累積，結合了勤勉與努力。
9. It may not be acquired by the mere expenditure of money. 它不能被用以單純的金錢支付而取得。
10. It is simply an intellectual achievement that may potentially assist in the future acquisition of property ... it has none of the attributes of property in the usual sense of that term. 它不過就是一個展現智慧的成果，而其將有助於個人掙取未來財產的潛力 ..... 它根本不具有普遍財產意義上的屬性。
11. It was an abuse of discretion for a trial court to value husband's law degree as a marital estate asset. 事實審法院將該案中丈夫的法律學位視為婚姻財產之一部，乃濫用裁量權錯誤。
12. …the degree itself was not marital property. 學位本身非屬婚姻之財產。
13. No extraordinary injustice is apparent in this case necessitating an extraordinary remedy. 本案中並無發現特別明顯的不正義而必需給予特別的救濟。

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14. distinguish：識別
15. substantial：大量的
16. accumulate：累積
17. intangible asset：無形財產
18. entitle：有資格為
19. attributable：可歸因於 ...
20. liquid：流動性的
21. terminable：終止的
22. maintenance：贍養費
23. affirmative：肯定的
24. expertise：專門技術
25. prejudice：對 ... 不利或有偏見
26. equitable：公正公平的
27. distribution：分配
28. accomplishment：成就
29. compensate：補償
30. mortgage：抵押貸款
31. bridge loan：臨時性貸款
32. pragmatic：實用的
33. fanfare：炫耀
34. assumption：設想
35. precede：在 ... 之前
36. testimony：證詞、證明
37. leasable：可出租的
38. concede：不得不承認、讓步、妥協