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Duplication.....Revisited



Where do we begin.....?



O'Brien v. O'Brien

[66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (Court of Appeals 1985)]

“Limiting a working spouse to a maintenance award...not only is contrary to the economic partnership concept underlying the statute but also retains the uncertain and inequitable economic ties of dependence that the Legislature sought to extinguish by equitable distribution.”

“Maintenance is subject to termination upon the recipient's remarriage and a working spouse may never receive adequate consideration for his or her contribution and may even be penalized for the decision to remarry if that is the only method of compensating the contribution.”



Duplication Finally Confronted



O'Brien Progeny

- *McSparron v. McSparron* 12/7/1995
- *Grunfeld v. Grunfeld* 5/11/2000
- *Erickson v. Erickson* 3/29/2001
- *Holterman v Holterman* 6/10/2004



McSparron v. McSparron

[87 N.Y.2d 275, 662 N.E.2d 745, 639 N.Y.S.2d 265 (Court of Appeals 1995)]

*“The merger doctrine should be discarded in favor of a commonsense approach that recognizes the ongoing independent vitality that a professional license may have and focuses solely on the problem of valuing that asset in a way that **avoids duplicative awards.**”*



McSparron v. McSparron

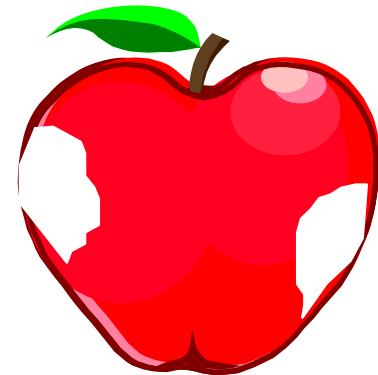
[87 N.Y.2d 275, 662 N.E.2d 745, 639 N.Y.S.2d 265 (Court of Appeals 1995)]

“Care must be taken to ensure that the monetary value..... does not overlap with the value assigned to other marital assets.....such as the licensed spouse’s professional practice.”



Duplication – First Level

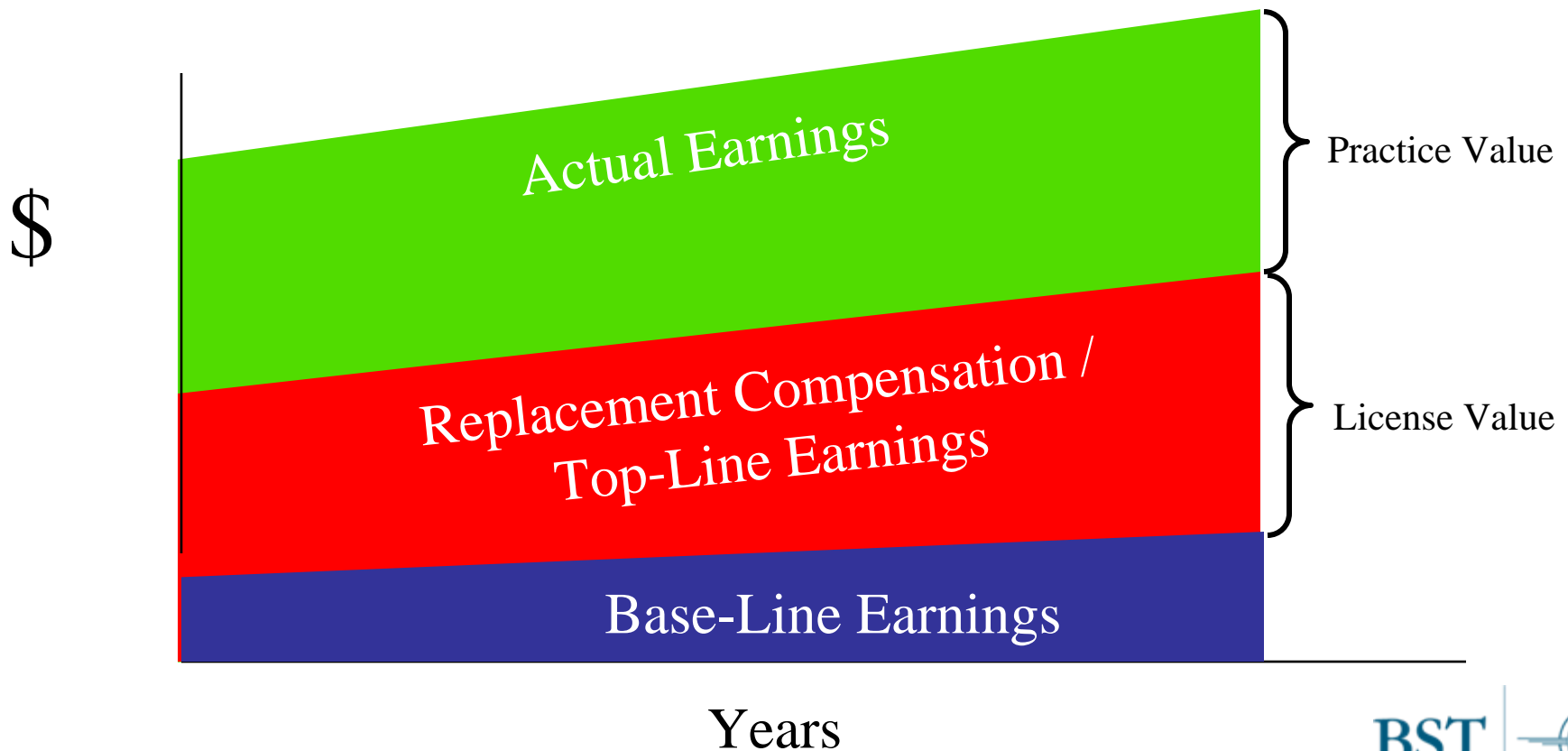
‘Double Dip’ (i.e., Duplication) Occurs When The Same Earnings Stream is Used to Generate License and Practice Goodwill Values





Earnings Used in Valuation

Non-Duplicative





McSparron v. McSparron

[87 N.Y.2d 275, 662 N.E.2d 745, 639 N.Y.S.2d 265 (Court of Appeals 1995)]

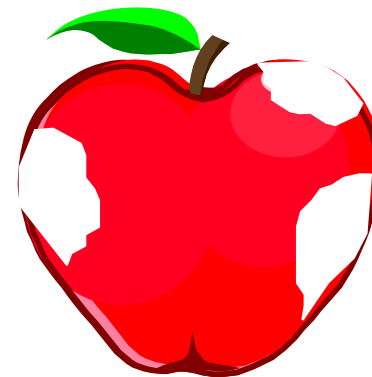
The Court went on to say.....

“The courts must also be meticulous in guarding against duplication in the form of maintenance awards that are premised on earnings derived from professional licenses.”



Duplication – Second Level

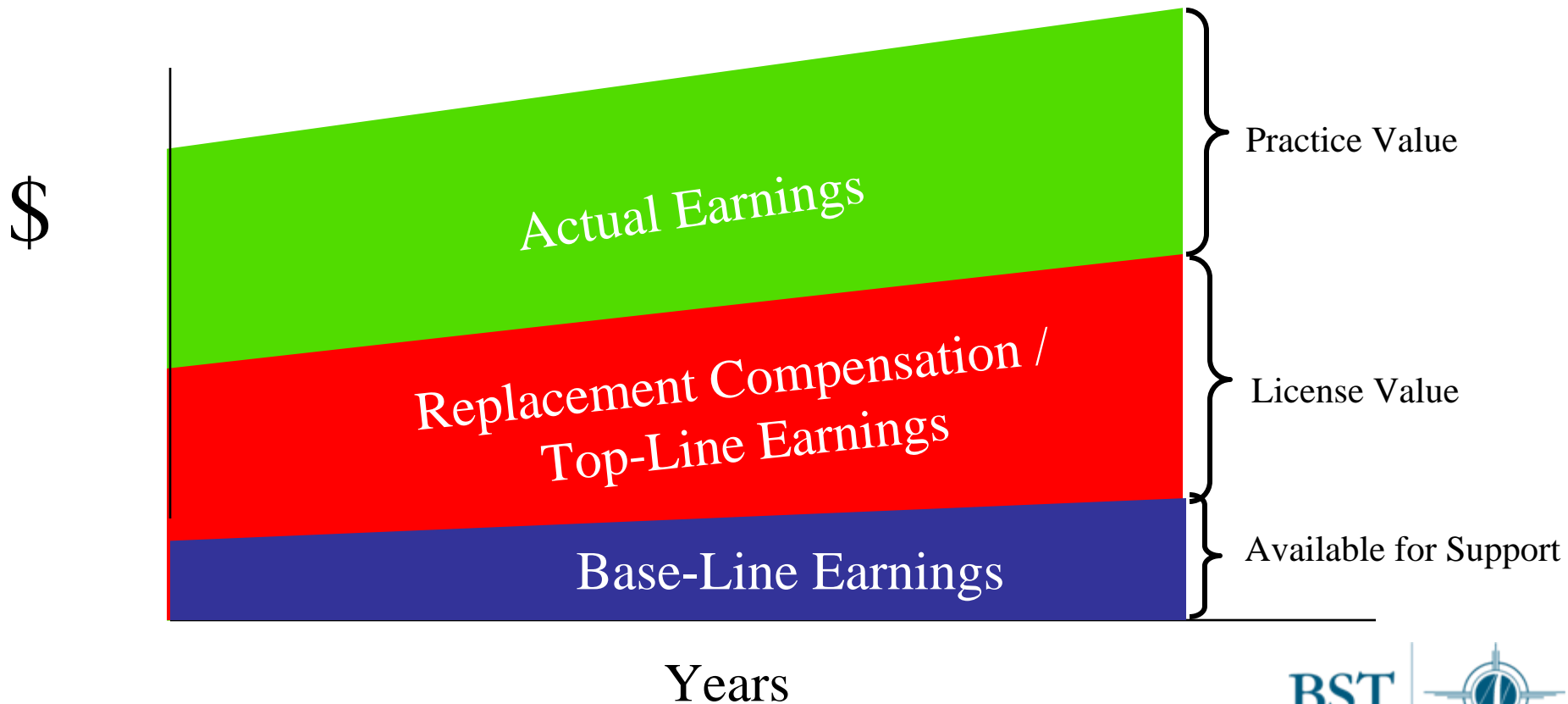
‘Double Dip’ (i.e., Duplication) Occurs When The Same Earnings Stream is Used to Generate License and Practice Goodwill Values and Is Also Used to Calculate Spousal Maintenance.





Earnings Used in Valuation

Non-Duplicative





Grunfeld v. Grunfeld

[94 N.Y.2d 696, 731 N.E.2d 142, 709 N.Y.S.2d 486 (Court of Appeals 2000)]

“Where license [Practice/Business] income is considered in setting maintenance, a court can avoid double counting by reducing the distributive award based on that same income” [Parenthetical added]

“One advantage of this method is that the maintenance award may be adjusted in the future...”



Grunfeld v. Grunfeld

[94 N.Y.2d 696, 731 N.E.2d 142, 709 N.Y.S.2d 486 (Court of Appeals 2000)]

*“There is no double counting to the extent that maintenance is based on spousal income which is not capitalized and then converted into and distributed as **marital property.**”*

*“Once a court converts a specific stream of income into **an asset**, that income may no longer be calculated into the maintenance formula and payout.”*

However.....



Grunfeld v. Grunfeld

[94 N.Y.2d 696, 731 N.E.2d 142, 709 N.Y.S.2d 486 (Court of Appeals 2000)]

“Where...the license is likely to retain its value in the future but the nonlicensed spouse may only be entitled to receive maintenance for a short period of time, it may be fairer actually to distribute the value of the license as marital property rather than to take the license income into consideration in determining the licensed spouse's capacity to pay maintenance.”

Best of Both Worlds



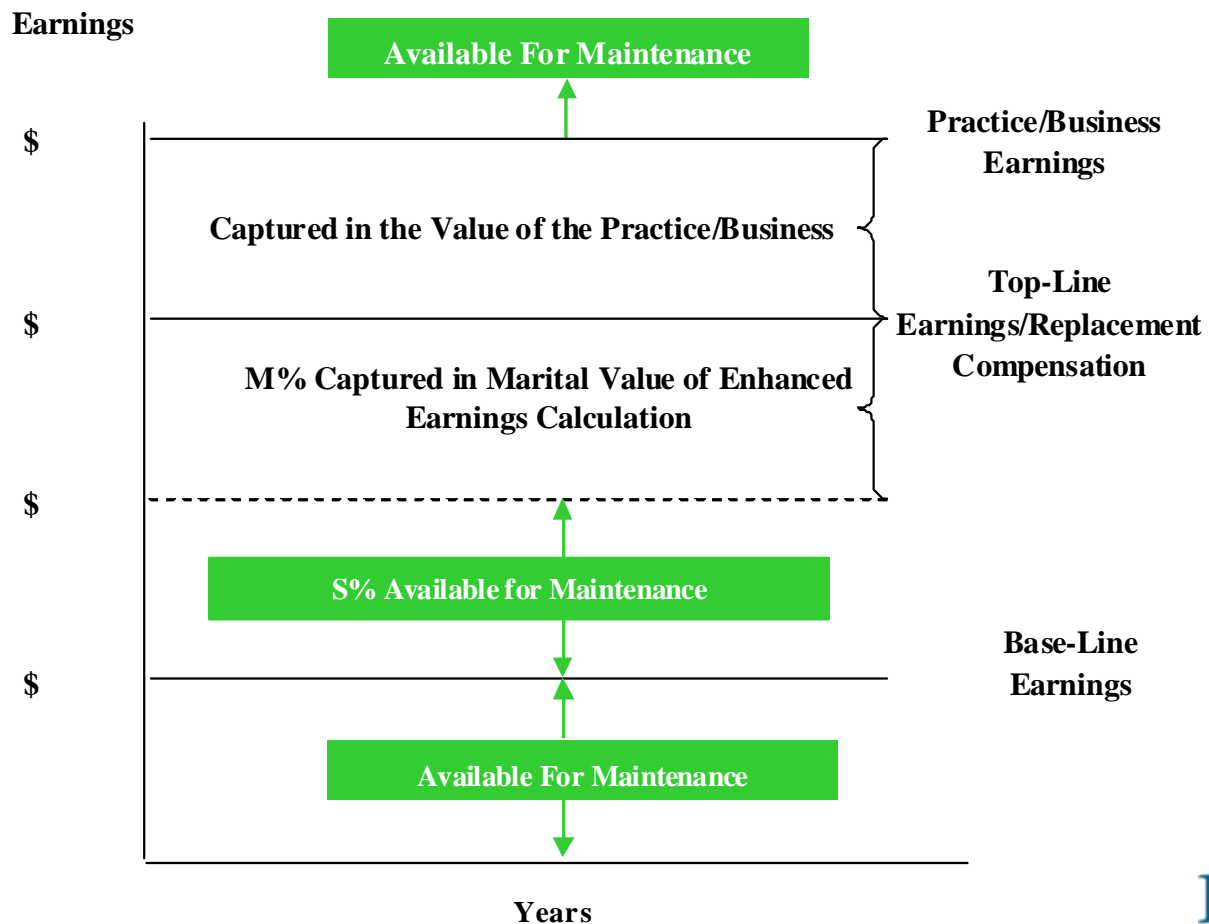
Erickson v. Erickson

[281 A.D.2d 862,723 N.Y.S.2d 521 (AD 3rd Dept. 2001)]

- The *Erickson* Court furthered the Grunfeld duplication argument and introduced **coverture** by stating
“to the extent that only a portion of plaintiff's license was subject to equitable distribution because he had completed two years of his education prior to the marriage, the income stream attributable to the undistributed portion of the license was available for purposes of maintenance.”



Duplication Graph to Avoid Duplication





The Child Support Challenge

Excerpt from PowerPoint slides presented to

Judges School in 1998

Concept exactly as argued in

Goodman v. Goodman

And by me in

Holterman v. Holterman

State of New York
Unified Court System
Matrimonial Seminar

Fundamentals of Valuation

*Businesses, Professional
Practices and Enhanced
Earnings*

Presented By: John R. Johnson CPA, CBA, BCFA

Can Child Support Awards
Constitute Another Level of
Duplication?

If the Courts are unwilling to consider this level of potential duplication in favor of protecting the interests of the children, what is a workable solution?

SOLUTION

- Subtract from the titled spouse's income that portion of the earnings distributed to the non-titled spouse associated with practice value and enhanced earnings
- Impute income to the non-titled spouse by the same amount
- Then determine each spouse's relative responsibility for child support



The Attempted Child Support Challenge

- *Goodman v. Goodman* 2/21/2003
- *Holterman v. Holterman* 6/10/2004



Goodman v. Goodman

[195 Misc.2d 204 (Sup Ct, Nassau County 2003)]

- Income from a distributive award for enhanced earnings capacity should be included in the income of the non-titled spouse and removed from the income of the titled spouse for the court's purpose of determining each parties' respective child support obligation under CSSA DRL§240(1-b).
- The *Goodman* Court said.....“Yes” to reallocation



Duplication – Third Level

The *Goodman* Trial Court Said ‘Double Dip’ (i.e., Duplication) Occurs When The Same Earnings Stream is Used to Determine the Value of an Asset (i.e., License, Practice, Business), and Is Used to Calculate Spousal Maintenance, **and** is Used to Determine Each Parties’ Respective Child Support Obligation Under CSSA DRL§240(1-b).





And then came.....

Holterman v. Holterman

[3 N.Y.2d 1, 781 N.Y.S.2d 358, 814 N.E.2d 765 (Court of Appeals 2004)]



Holterman v. Holterman

[3 N.Y.2d 1, 781 N.Y.S.2d 358, 814 N.E.2d 765 (Court of Appeals 2004)]

- H argued, citing *Goodman*, for annual installment payments of W's distributive award of his enhanced earnings to be deducted from his income (and included in hers) for child support obligation



Duplication – Third Level

- In *Holterman*, although 4 “bites” were taken out of the “income apple” (license, practice, spousal & child support) the court refused to recognize the 4th for duplication consideration (excluded child support).





Holterman v. Holterman

[3 N.Y.2d 1, 781 N.Y.S.2d 358, 814 N.E.2d 765 (Court of Appeals 2004)]

- Court (5:2) ruled that H's proposed reallocation of income is "*impermissible under the CSSA*"
 - ignoring DRL §240 1-b.(g)
- Court stated that "*the Legislature did not wish to have a child's lifestyle and support altered based on a distributive award*"
- Court noted that "*...neither McSparron nor Grunfeld discussed double counting vis-à-vis child support*"





Holterman v. Holterman

[3 N.Y.2d 1, 781 N.Y.S.2d 358, 814 N.E.2d 765 (Court of Appeals 2004)]

- Dissenting Justice Smith correctly identifies flaws in the majority decision
 - It fails to consider or justify the total burden...placed on defendant (H)
 - It adopts an illogical and unfair method of allocating the parties' income for child support payment – ignoring the “unjust and inappropriate” escape clause of DRL §240 (1-b.)(g)



DRL §240 (1-b.)(g)

“Where the court finds that the non-custodial parent’s pro rata share of the basic child support obligation is unjust or inappropriate, the court shall order the non-custodial parent to pay such amount of child support as the court finds just and appropriate, and the court shall set forth, in a written order, the factors it considered; the amount of each party’s pro rata share of the basic child support obligation; and the reasons that the court did not order the basic child support obligation.”



Recent Courts – A “Keane” idea....could it get worse???

- *Keane v. Keane* 12/21/2006
- *Groesbeck v. Groesbeck* 5/13/2008
- *Rodriguez v. Rodriguez* 2/9/2010
- *Kerrigan v. Kerrigan* 3/9/2010



Keane v. Keane

[8 N.Y.3d 115, N.Y.S.2d (Court of Appeals 2004)]

- Basing its decision on *Grunfeld & McSparron*, the *Keane* Court ruled that the same principle of avoiding duplication of income associated with spousal support and the value of a professional license (an intangible asset), does not extend to rental property (a tangible, income-producing asset).

.....Say What?##?!!!



Keane v. Keane

[8 N.Y.3d 115, N.Y.S.2d (Court of Appeals 2004)]

- Body shop rental property valued at \$290K (income approach) and \$324K (market approach)
- Supreme Court awarded \$1,292 monthly spousal support until end of lease term (reduced to \$471 thereafter) & other ED; Supreme Court identifies “double counting” with “*intangible assets such as professional licenses or goodwill, or the value of a service business.*”
- Appellate Division reversed the trial court’s holding on spousal support citing “double counting” of income used to value property





Keane v. Keane

[8 N.Y.3d 115, N.Y.S.2d (Court of Appeals 2004)]

- Court of Appeals reinstated \$1,292 spousal support award stating

“We do not see why an inquiry as to double counting should depend on the valuation method used... To prevent any income derived from any income-producing property from being ‘double counted’ would, therefore, significantly limit the trial court’s considerable discretion in equitably distributing marital property and awarding maintenance.”



A Duplication See-Saw After Keane

- ***Groesbeck v. Groesbeck***

[51 A.D.3d 722, 858 N.Y.S.2d 707 (Supreme Ct, Appellate Division 2008)]

- Court awarded marital residence, \$1,000 monthly spousal income and \$312 weekly child support to W; and H’s home improvement contracting business to H
- Citing *Grunfeld, Keane and Griggs* (not discussed in this presentation), the *Groesbeck* Court stated “*there is no merit to [H]’s contention that the...maintenance award was improper because it ‘double counted’ the value of his business...That rule is inapplicable here because [H]’s business is a tangible, income-producing asset...*”

.....flash back to *Grunfeld*



A Duplication See-Saw After Keane

- In *Grunfeld*, the Court stated

*“Once a court converts a specific stream of income into **an asset**, that income may no longer be calculated into the maintenance formula and payout.”*



A Duplication See-Saw After Keane

- ***Rodriguez v. Rodriguez***

[70 A.D.3d 799, 894 N.Y.S.2d 147 (Supreme Ct, Appellate Division 2010)]

- Citing *Grunfeld*, the *Rodriguez* Court reinstated the duplication principle that disallows “double counting” of income for spousal maintenance that was used in valuing marital assets (H’s medical degree/license & practice)



A Duplication See-Saw After Keane

- ***Kerrigan v. Kerrigan***

[--- A.D.3d ---, --- N.Y.S.2d (Supreme Ct, Appellate Division 2010)]

- One month after *Rodriguez*, *Keane* “doctrine” resurfaces....
- Among other things, awarded 35% of the appreciated value of H’s business interest and \$1,500 weekly spousal support for 5 years to W
- The *Kerrigan* Court stated the award of \$1,500 weekly maintenance “was appropriate” and, citing *Keane*, stated that “[H]’s contention [of] ‘double dipping’ ...is without merit, as [H]’s business constitutes a tangible, income-producing asset, rather than an intangible asset.”



Responses & Unintended Consequences

- Most practitioners want NY Legislature to abolish EEC vis-à-vis new legislation, but that doesn't solve the duplication issue.
- Courts are awarding extremely low ED percentages to non-titled spouses, especially involving enhanced earnings



Recent EE Cases

Enhanced Earnings Cases (2007-2009) % of EEC valuation awarded:

- | | |
|---|-----|
| 1. <i>Spreitzer v. Spreitzer</i> , 40 A.D.3d 840, 837 N.Y.S.2d 658 (2nd Dept. 2007) | 20% |
| 2. <i>Ochs v. Ochs</i> , 40 A.D.3d 1061, 837 N.Y.S.2d 290 (2nd Dept. 2007) | 25% |
| 3. <i>O'Donnell v. O'Donnell</i> , 41 A.D.3d 447, 836 N.Y.S.2d 703 (2nd Dept. 2007) | 30% |
| 4. <i>Midy v. Midy</i> , 45 A.D.3d 543, 846 N.Y.S.2d 220 (2nd Dept. 2007) | 25% |
| 5. <i>Judge v. Judge</i> , 48 A.D.3d 424, 851 N.Y.S.2d 639 (2nd Dept. 2008) | 25% |
| 6. <i>Higgins v. Higgins</i> , 50 A.D.3d 852, 857 N.Y.S.2d 171 (2nd Dept. 2008) | 0% |
| 7. <i>Kaplan v. Kaplan</i> , 51 A.D.3d 635, 857 N.Y.S.2d 677 (2nd Dept. 2008) | 30% |
| 8. <i>Wiener v. Wiener</i> , 57 A.D.3d 241, 868 N.Y.S.2d 197 (1st Dept. 2008) | 10% |
| 9. <i>Simmons v. Simmons</i> , 57 A.D.3d 1400, 871 N.Y.S.2d 559 (4th Dept. 2008) | 15% |
| 10. <i>O'Halloran v. O'Halloran</i> , 58 A.D.3d 704, 873 N.Y.S.2d 87 (2nd Dept. 2009) | 20% |
| 11. <i>Kriftcher v. Kriftcher</i> , 59 A.D.3d 392, 874 N.Y.S.2d 153 (2nd Dept. 2009) | 10% |
| 12. <i>Guha v. Guha</i> , 61 A.D.3d 634, 877 N.Y.S.2d 151 (2nd Dept. 2009) | 5% |
| 13. <i>Mairs v. Mairs</i> , 61 A.D.3d 1204, 878 N.Y.S.2d 222 (3rd Dept. 2009) | 25% |
| 14. <i>Jayaram v. Jayaram</i> , 62 A.D.3d 951, 880 N.Y.S.2d 305 (2nd Dept. 2009) | 35% |
| 15. <i>Schwartz v. Schwartz</i> , 67 A.D.3d 989, —N.Y.S.2d— (2nd Dept. 2009) | 10% |

Source: *New York Family Law Monthly* "Tracking Enhanced Earnings Awards" by Ronnie P. Gouz, Esq. and Benjamin E. Schub, Esq.; March 2010, Volume 11, Number 7, pg. 3.



Consequences of Recent EE Cases

- Average & median awards of 19% & 20%, respectively, during 2007-2009, as compared to 40% awarded in *O'Brien*
- Lower ED %'s exacerbate the problem for the non-titled spouse as it relates to duplication and spousal maintenance awards
- The Courts seem to be disregarding fundamental valuation and financial principles



Consequences of Recent Cases

- The non-titled spouse may be left with little, or no, distributive award and little, or no, spousal maintenance in EEC cases.
- Business owners/real estate investors —high potential for duplicative awards



Got it Right?
Or
Blew It?

	Practice & EE	Practice/Business and/or EE & Maintenance	Tangible &/or EE, Maintenance & Child Support	Other Assets & Duplication
O'Brien '85	n.a.	n.a.	n.a.	n.a.
McSparron '95	n.a.	Yes	n.a.	n.a.
Grunfeld '00	Yes	Yes	n.a.	n.a.
Erickson '01	n.a.	Yes	n.a.	n.a.
Goodman '03	n.a.	Yes	Yes	n.a.
Holterman '04	n.a.	Yes	No-majority, Yes-dissent	n.a.
Keane '06	n.a.	n.a.	n.a.	No-trial, Yes-AD, No-CA
Groesbeck '08	n.a.	No	n.a.	n.a.
Rodriguez '10	Yes	Yes	n.a.	n.a.
Kerrigan '10	n.a.	No	n.a.	No



- Under the category “be careful what you ask for”, maybe pursuing EEC for the non-titled spouse may not be in hers/his best interest in a maintenance case

OR.....

- Utilize the piecemeal approach allowed under Grunfeld. This will require a detailed and very technical offer of proof



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