

Duplication Revisited

By Johanne M. Floser, CBA¹

Ever since the *O'Brien v. O'Brien*² decision in 1985, one issue that matrimonial lawyers have confronted is “duplication” as it relates to awards of equitable distribution based, in whole, or in part, on the propertied spouse’s earnings and awards of spousal maintenance. This is commonly referred to as a “double dip”. Aside from child support, which has been effectively removed from consideration by *Holterman v. Holterman*³, there are recent troubling cases that have created significant problems for equitable distribution and spousal maintenance considerations in matrimonial matters.

Types of “Duplication”

The term “duplication” conjures several examples in the context of a matrimonial estate, including, but not limited to:

- Business assets that are reported on the company’s books as well as a separate asset on the titled spouse’s Statement of Net Worth;
- Capital accounts that contain undistributed earnings that were later distributed and reflected in other marital assets;
- An income stream that is used to value a professional practice and the professional’s enhanced earnings;
- An income stream that is used to value marital asset(s) for equitable distribution and to determine spousal maintenance and/or child support.

It is the last 2 bullet points that are the focus of this article.

Setting the Stage

The Court of Appeals in *O'Brien* (previously cited) ruled that a professional license is a valuable property right and “*if the license is marital property, then the working spouse is entitled to an equitable portion of it, not a return of funds advanced.*” The Court stated

that a maintenance award is contrary to the economic partnership concept of a marriage and retains the uncertain and inequitable economic ties of dependence that equitable distribution was to have extinguished. In addition, spousal maintenance is subject to modification and termination upon remarriage. Consequently the non-titled spouse may not be fully compensated for their contribution to the completion of the professional license under a spousal maintenance scenario but that obligation *would* be satisfied by equitable distribution of the license's monetary value.

Duplication Addressed and Challenged

In 1995 the Court of Appeals faced two issues with regard to the valuation of professional licenses – that of “merger” and “duplication”. The primary question in *McSparron v. McSparron*⁴ was that of merger, i.e., did the license that was established and used to maintain a career become “merged” into the career and thereby lose its character as a separate distributable asset? The Court said “No” but it stated “*The merger doctrine should be discarded in favor of a common sense 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.*” The Court continued to say “*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.*” Thus, the first level of duplication was born. This first level occurs when the same earnings stream is used to generate license and practice goodwill values. It is avoided by bifurcating the earnings stream into separate components for the professional's license and practice. The *McSparron* Court also identified a second level of duplication when it stated “*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.*”

In 2000 the Court of Appeals in *Grunfeld v. Grunfeld*⁵ affirmed the duplication premise when it stated “*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.” (bold underline added for emphasis, and will be readdressed later in this article)*

The following year, in 2001, the *Erickson v. Erickson*⁶ case furthered the *Grunfeld* duplication argument and introduced coverture. This concept addresses the scenario where the completion of a professional license bridges the time period before and during the marriage. In such an instance, the *Erickson* Court protected the pre-marital portion of the income stream (i.e., separate property) and made it available for maintenance since it had not been converted into a marital asset subject to equitable distribution.

The Attempted Child Support Challenge

In 2003, the Nassau County Supreme Court case of *Goodman v. Goodman*⁷ argued the novel theory of whether the 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 party’s respective child support obligation under the Child Support Standards Act (CSSA) §240(1-b). The *Goodman* Court said “Yes” thereby identifying a third level of duplication (i.e., using the same earnings stream to determine the value of a marital asset, calculate spousal maintenance, and determine each party’s respective child support obligation).

And then came the Court of Appeals decision in *Holterman* (previously cited). In this case, Dr. Holterman argued, citing *Goodman*, that the annual installment payments of the distributive award to his wife for his enhanced earnings should be deducted from his income and included in hers to determine their respective child support obligations. In a majority (5:2) decision, the Court ruled that the proposed reallocation of income is “impermissible under the CSSA” and that “the legislature did not wish to have a child’s lifestyle and support altered based on a distributive award”. The Court noted that “...neither *McSparron* nor *Grunfeld* discussed double counting vis-à-vis child support”.

Nonetheless, the dissenting Judge correctly stated that the majority decision contained three flaws:

- It fails to consider or justify the total burden placed on the defendant;
- It adopts an illogical and unfair method of allocating the parties' income for child support payment; and
- It results in the application of *O'Brien* that does no good...but does considerable harm.

For visual impact, the dissenting Judge provided an analysis to present the impact of the significant burden to Dr. Holterman that resulted from the Court's decision. In essence Dr. Holterman was required to pay to his ex-wife for the distributive award, spousal maintenance, and child support an amount that ranged from 50% to nearly 91% of his after-tax income for a period of 14 years following the divorce.

Consequently, in the *Holterman* case, the third level of duplication (i.e., child support) was ignored by the Court for duplication consideration, so the "bites" out of the "income apple" were significant bites for 14 years.

A "Keane" Idea...or a Slippery Slope?

More recently the Court of Appeals in *Keane v. Keane*⁸, basing its decision on *Grunfeld* and *McSparron*, ruled that the same principle relating to duplication of income associated with spousal support and the value of a professional license (an intangible asset) does not extend to rental property (where the Court introduced the new distinction of a "tangible, income-producing asset"). In this 30-year marriage there were three assets under consideration. One asset was an inherited vacation property which was determined to be separate property and excluded from the marital estate. A real estate entity contained the remaining two assets – an interest-bearing mortgage note and rental property that was leased to a car repair shop. The rental property was valued at \$290,000 using the income approach and \$324,000 using the market approach. The Supreme Court awarded \$1,292 monthly spousal support until the end of the lease term, with a reduced amount thereafter,

and other equitable distribution, stating that it identifies “double counting” with “*intangible assets such as professional licenses or goodwill, or the value of a service business.*”

On appeal, the Appellate Division deleted the spousal support citing “double counting” of income used to value property. The case was remanded to the Court of Appeals wherein it reinstated the \$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.*” The *Keane* decision is a troublesome one and opened the door for a “duplication see-saw”.

A Duplication See-Saw After Keane

Keane was followed, three years later, by *Griggs v. Griggs*⁹. Notwithstanding that the *Griggs* Court cited *Keane*, it, nonetheless, contended no merit with regard to duplication since it stated that the *Griggs*’ asset was “*a ‘tangible income-producing asset’, rather than an intangible asset, such as a professional license, the value of which can only be based on projected earnings.*” However, it is clearly stated in *Keane* that “double counting” is identified with service businesses. So, did the *Griggs* Court miss the mark since the asset in question was a medical practice...i.e., a service business? It appears that *Griggs* not only misconstrued the older *Grunfeld* Court that restricted a specific stream of income that was converted into “an asset” from being included in the spousal maintenance formula, but it also ignored the more recent *Keane* Court that, at the very least, recognized the existence of duplication relative to service businesses.

The following year, in 2008, provided the Appellate Court decision of *Groesbeck v. Groesbeck*.¹⁰ In this case the trial court awarded the marital residence, \$1,000 monthly spousal support and \$312 weekly child support to the wife, and the husband was awarded his home improvement contracting business. On appeal, the Supreme Court Appellate

Division, citing *Grunfeld*, *Keane* and *Griggs*, 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...*”

Then, in 2010, in the matter of *Rodriguez v. Rodriguez*¹¹ the same argument of duplication was once again appealed. This time, however, the Appellate Division correctly reinstated the duplication principle and disallowed “double counting” of income for spousal maintenance that was used in valuing the marital assets (i.e., the husband’s medical degree/license and practice). One month after *Rodriguez*, however, *Keane* resurfaced in the *Kerrigan v. Kerrigan*¹² case. Among other things, the Court awarded 35% of the appreciated value of the husband’s business interest and \$1,500 weekly spousal support for five years to the wife. On appeal the *Kerrigan* Court stated the award of \$1,500 weekly maintenance “was appropriate” and, after citing *Keane*, which in part, cited *Grunfeld*, 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.”

But, as previously noted above, didn’t the *Grunfeld* Court state that once a specific income stream was converted into “an asset”, that income may no longer be included in the maintenance formula? Apparently the *Keane*, *Groesbeck* and *Kerrigan* courts have chosen to redefine the *Grunfeld* Court’s broad-based term of “an asset” to mean a specific type of asset – i.e., not to include tangible, income-producing property. Similarly, the *Griggs* Court appears to have redefined the meaning of a “service business” by excluding a medical practice from its mix. Such a narrowing of these definitions has seemingly opened the door to unintended consequences resulting from attempts to resolve the issue.

An Attempted Resolve

In an attempt to solve the duplication issue on at least one level, most practitioners want the New York State Legislature to abolish enhanced earnings valuations of professional

degrees/licenses *vis-à-vis* legislation. Until the Legislature takes definitive action the courts are circumventing the existing law by awarding extremely low equitable distribution percentages to non-titled spouses. An excellent article published in the March 2010 edition of *the New York Family Law Monthly* (volume 11 number 7, page 3) “Tracking Enhanced Earnings Awards” by Ronnie P. Gouz, Esq. and Benjamin E. Schub, Esq. presented a listing of the equitable award percentages for a sampling of cases awarded in 2007 through 2009, ranging from 0% to 35%. The average and median awards of 19% and 20%, respectively, during that time period is significantly lower than the 40% awarded in *O’Brien*.

The unintended consequence of the lowered equitable distribution percentages, however, tends to 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. As a result the non-titled spouse may be left with little, or no, distributive award and little, or no, spousal maintenance in enhanced earnings cases, which is absolutely contrary to the economic partnership concept that the *O’Brien* Court sought to protect. In addition, business owners and real estate investors have a higher potential for duplicative awards based on the interpretation of recent court decisions.

Consequently, the pendulum seems to be shifting toward the titled-spouse. With lower distributive awards and an ever shrinking pot available for spousal maintenance the titled-spouse becomes incentivized to prove value and shift that value into an asset and away from spousal maintenance consideration.

At this juncture one could only wonder if this sea change suggests that equitable distribution/maintenance awards are headed down a slippery slope to the road of inequity.

Endnotes:

¹ **Johanne M. Floser** is a Certified Business Appraiser (CBA) and Senior Manager with BST Valuation & Litigation Advisors, LLC, with offices in Albany, NY, and New York City. She has extensive experience in the valuations of privately held business enterprises, professional practices, professional licenses, advanced academic degrees and pension/retirement plans for use in matrimonial matters, litigation, buy/sell transactions, estate tax proceedings and other circumstances.

² *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)]

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

⁴ *McSparron v. McSparron* [87 N.Y.2d 275, 662 N.E.2d 745, 639 N.Y.S.2d 265 (Court of Appeals 1995)]

⁵ *Grunfeld v. Grunfeld* [94 N.Y.2d 696, 731 N.E.2d 142, 709 N.Y.S.2d 486 (Court of Appeals 2000)]

⁶ *Erickson v. Erickson* [281 A.D.2d 862, 723 N.Y.S.2d 521 (AD 3rd Dept. 2001)]

⁷ *Goodman v. Goodman* [195 Misc.2d 204 (Sup Ct, Nassau County 2003)]

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

⁹ *Griggs v. Griggs* [44 AD3d 710 (2nd Dept, Appellate Division 2007)]

¹⁰ *Groesbeck v. Groesbeck* [51 A.D.3d 722, 858 N.Y.S.2d 707 (2nd Dept, Appellate Division 2008)]

¹¹ *Rodriguez v. Rodriguez* [70 A.D.3d 799, 894 N.Y.S.2d 147 (2nd Dept, Appellate Division 2010)]

¹² *Kerrigan v. Kerrigan* [--- A.D.3d ---, --- N.Y.S.2d (2nd Dept, Appellate Division 2010)]