

## ANALYSIS ON INTERNATIONAL CASE LAW OF EARNING CAPACITY IN DISTRIBUTION OF MATRIMONIAL ASSETS AFTER A DIVORCE

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### ABSTRACT

*The increased importance of the many courts on types of matrimonial assets on divorce settlements has been very challenging. Most courts limit their classification of the matrimonial assets distributed after divorce on claim related to the tangible assets such as matrimonial home and those properties acquired during the marriage. Nevertheless, with the development of economic conditions, this traditional claim has expanded to included claims on intangible assets such as professional education, licenses, company goodwill and etc. In foreign countries, they recognized the intangible assets as a matrimonial assets and subject to a division after divorce on the basis that the others spouses have also contributed either directly or indirectly in its acquisition. On this basis, most of the income are derived from intangible therefore it is not fair not to include these intangible as assets in distribution for matrimonial property after a divorce. This paper intends to look into approaches based on judicial decision applied in the international case law in determining the factors of earning capacity of the either spouse in matrimonial cases. Research methodology adopted in this paper are statutory and doctrinal analysis. The findings also indicated that the assessment of earning capacity of either spouse to be part of financial supports in distribution as matrimonial assets and the effective enforcement of court order were significant factors that might enlarge the welfare of women and the needs of the children after divorce. This improves our understanding of the economic implications of the divorcee and practice on taking into consideration on dividing earning capacity as matrimonial assets.*

**Keywords:** Human Capital, Earning capacity, Divorce Settlement, Matrimonial Assets.

### 1. INTRODUCTION

Divorce proceedings are one of the major contexts in which this is a significant concern on financial claim by the parties in the divorce. Generally, if there is financial claim, therefore a court is required to distribute assets acquired by either spouse during the marriage on their separation, so this so called assets will be classified as the matrimonial assets. The divorcee spouses will claim for financial support if there was acquisition on the properties or assets by either spouses (matrimonial assets) during the course of marriage. Therefore, when distributing the matrimonial assets to the spouse, their contribution towards its acquisition have to be taken into consideration as well as the factors and circumstances regarding its acquisition have to be considered in manner it can be divided with fair and just. It is a norm that, when it's come to the evaluation of assets acquired by the spouse during the marriage which have the tangible value such as home, land, vehicle, equipment or machinery will be distributed at the matrimonial settlements. The form of assets distributed was the tangible assets.<sup>1</sup> However, there are questions arise whether the existing law has provided best method on distribution of matrimonial assets to protect financially on divorcee wife with the dependent children because the claim usually will be based on income from tangible assets acquired by either spouses or both spouses during marriage.<sup>2</sup> Hence, there was theory raised that tangible assets are not the only assets acquired by the spouse, therefore there is another one which is intangible assets, such as skills and knowledge as well.<sup>3</sup> In most marriages, it can be seen that the form of the property acquired by the working spouse is knowledge thus are existing in the form of human capital. Each Spouse brings to their marriages both skills and talents as to labor market and nonmarket service in the forms of human capital, which then it becomes incorporated within the marriage to produce both external income and nonmarket services for their matrimonial living.<sup>4</sup> Thus, by knowing this truths, many countries accepted the so-called wealth of earning capacity of husband in human capital in considering as income from intangible assets that it should be distribute as matrimonial assets after divorce because it creates value added for spouse thus it can generate potential future earnings.<sup>5</sup>

<sup>1</sup> Kelly, A. B. (2001). The Marital Partnership Pretense and Career Assets: The Ascendancy of Self Over the Marital Community. *BUL Rev.*, 81, 59.

<sup>2</sup> Ibrahim, N., & Mohd Zin, N. (2011). Human capital as matrimonial property. IIUM Press.

<sup>3</sup> Kelly, A. B. (2004). Rehabilitating Partnership Marriage as a Theory of Wealth Distribution at Divorce: In Recognition of a Shared Life. *Wis. Women's LJ*, 19, 141.

<sup>4</sup> Parkman, A. M. (1986). The recognition of human capital as property in divorce settlements. *Ark. L. Rev.*, 40, 439.

<sup>5</sup> Ireland, T. R. (1997). The Cross Contributions of Spouses to Human Capital Creation within Families: What Economic Rights Should Outlast Marriage?. *Journal of Applied Economics & Policy*, 16, 71.

Thus, this article will examine the case laws pertaining to earning capacity and how they have evolved into current situation as distribution for matrimonial assets after a divorce. The following discussion deals with the meaning of “earning capacity” and the circumstances in which it may be an important factor to be considered in the distribution of matrimonial assets. This research would be very significant to show the reliability factors on intangible assets relating to the spouse so that they can adopt as distribution of the matrimonial property after divorce. The significant impacts on this paper would give some guidelines to the court in the countries like Malaysia and Singapore to adopt the reform of some countries’ case law approaches pertaining earning capacity as matrimonial settlement by taking consideration intangible assets as for distribution in matrimonial assets and its applicability on the practices. By adopting the approach of common law cases in our jurisdiction would somehow expand the classification of matrimonial assets and give more fairness and equity in decided the assets to be equally divided on the divorcee based on their contribution. Therefore, the courts shall consider the earning capacity of both the supporting spouse and the supported spouse in setting the amount of maintenance for the supporting spouse.<sup>6</sup> The court would consider what is reasonable and equitable under the particular facts of each case in light of the goals of matrimonial assets after divorce.<sup>7</sup>

## **2. SIGNIFICANCE OF MATRIMONIAL ASSETS AFTER DIVORCE**

### **2.1 Classification of Matrimonial Assets (Tangible assets).**

Majid in his book clarified that the matrimonial assets distributed after divorce to include assets owned by one party before the marriage that have been substantially improved during the marriage by the other party or by their joint efforts, are divided into two categories: those jointly acquired and those acquired by the sole effort of one spouse. These types of assets would be classified as the tangible assets.<sup>8</sup> The assets jointly acquired by the parties or any proceeds of the sale of jointly acquired assets are to be divided between the parties on a basis that leans towards equality, taking into account the extent of the contributions made by each party in money, property, or work towards acquiring the asset, any debts owing by either party that were contracted for their joint benefit, and the needs of any minor children of the marriage.<sup>9</sup> Assets or the proceeds of the sale of such assets acquired by the sole effort of one of the parties of the marriage may also be divided between the parties. Further He claimed that, the court must award a greater proportion of the assets or their proceeds to the party who acquired them and must take account of the contribution made by the other party to the welfare of the family by looking after the home or caring for the family and the needs of any minor children.<sup>10</sup> Provisions pertaining to property division and the maintenance of wives and children in the Acts essentially codify Islamic law. However, one can see echoes of the law that pertains to non-Muslims. Thus, for example, the Islamic Family Law (Federal Territory) Act 1984 provides for the division of *harta sepencarian*, property jointly acquired by the husband and wife during the subsistence of the marriage,<sup>11</sup> on terms that are identical to the Law Reform (Marriage and Divorce) Act 1976 for non-muslim, and the duty to maintain children is similarly identical.<sup>12</sup>

A wife or former wife is granted a right to maintenance in all cases, while a husband’s right is limited to situations where the wife has the means to pay and the man is unable, because of partial or total incapacity, mental or physical injury, or ill health, to earn a livelihood. In either case the amount of maintenance is based on the means and needs of the parties, without regard to the proportion the maintenance bears to the income of the husband or wife, but with regard to the degree of responsibility that the court apportions to each party for the breakdown of the marriage.<sup>13</sup> The custody of children of the marriage, defined as children of both parties of the marriage, a child of one party of the marriage accepted as one of the family by the other, or an illegitimate child of or a child adopted by either of the parties to the marriage under any adoption law, is an equal right of both parties, although guardianship of a child born within the marriage remains with the father unless precluded under the Guardianship of Infants Act 1961. A decision as to the custody of the child is based upon the principle that the child’s welfare is the paramount consideration, but the court is directed to consider the wishes of the parents and the child, if he or she is old enough to express such wishes.<sup>14</sup>

Hasim exploring the new patterns of interaction during conflict among married individuals in Malaysia regarding children and their contribution. He said, all parents are required to maintain or contribute to the maintenance of their children, whether in their custody or not, either by providing them with accommodation, clothing, food, and education, as is reasonable to the child’s

<sup>6</sup> Griffin, D. W. (2013). Earning Capacity and Imputing Income for Child Support Calculations: A Survey of Law and Outline of Practice Tips. *J. Am. Acad. Matrimonial Law.*, 26, 365.

<sup>7</sup> The Family Code California

<sup>8</sup> Majid, M. K. (1999). *Family law in Malaysia*. Malaysian Law Journal Sdn. Bhd..

<sup>9</sup> Ibid, p 26

<sup>10</sup> SANIZAH, A., NORIN RAHAYU, S., & HASFARIZAH, F. Determinants of Marital Dissolution: A Cox Regression Model.

<sup>11</sup> Abdullah, R., Martinez, P., & Radzi, W. M. (2010). Islam and Adat: Considering the wife's moral contribution in the division of harta sepencarian in Malaysia. *Indonesia and the Malay World*, 38(111), 161-180.

<sup>12</sup> Kamaruddin, Z. (2005). *Divorce laws in Malaysia*. Malayan Law Journal Sdn. Bhd..

<sup>13</sup> Chlen, S. C. H., & Mustaffa, M. S. (2008). Divorce in Malaysia. In *Proceedings of the Seminar Kaunseling Keluarga, Aug* (Vol. 30, pp. 23-28).

<sup>14</sup> Salleh, A. S., & Admad, N. A. (2010). Cross Boundary Marriage under Malaysian Family Law: Between a Dream of Life and Reality of Legal Requirements. *J. Pol. & L.*, 3, 148.

station in life, or the cost thereof. Although this obligation is framed in gender neutral terms, it is clear that the primary obligation of support is on the father of the child. The child's mother, on the other hand, may be ordered to maintain a child if the court is satisfied that considering her means it is reasonable so to order. A man, furthermore, has a duty to maintain a child who is not his but he has accepted the child as a member of his family if the child's father and mother refuse to maintain it. It would appear that a child born out of wedlock has an equal right to maintenance from his father as a child born in marriage.<sup>15</sup>

## 2.2 Classification of Earning Capacity Assets (Intangible assets).

Most courts limit their classification of the matrimonial assets distributed after divorce on claim related to the tangible assets such as matrimonial home and those properties acquired during the marriage.<sup>16</sup> Therefore, at the time of calculating the perceptive of divorce parties, the intangible assets such as earning capacity should be considering as matrimonial property after divorce.<sup>17</sup> Today, it is the knowledge and invention of a person that brings forth wealth which bring increase to the value added to a person that can generate income stream. Human brains contribute to the value-added of products as intangible assets.<sup>18</sup> Human capital and knowledge create value-added to modern businesses<sup>19</sup>. The concept of earning capacity or human capital investment as an intangible asset emerges from characteristics linked to the economy based on knowledge and information which is reliable source of income stream can resolving financial disputes during matrimonial settlement.<sup>20</sup>

There is court defined clearly on the classification of the earning capacity. In *In re Marriage of Cheriton*<sup>21</sup>, the California Court of Appeal defined as, 'earning capacity' represents the income the spouse is reasonably capable of earning based upon the spouse's age, health, education, marketable skills, employment history, and the availability of employment opportunities. The court have similar meaning in the case of *Mendoza v. Ramo*.<sup>22</sup> The court has demonstrated a willingness to frame its orders on capacity rather than actual earnings to calculate as property to be divided as matrimonial property<sup>23</sup>. The court may base financial awards on earning capacity rather than actual earned income of the parties to compensate the divorcee party for matrimonial settlement.<sup>24</sup>

In the case of divorce, it is efficient to be counted as equitable for distribution on the basic perspective that all cross contribution to human capital in considering in the division of matrimonial assets. There will be always a need factors to measure in the matrimonial settlement as to the financial support that is necessary to maintain the standard of living to which it is implies that the need of ex-wife and best interest of child are the factors to be considered by the court on establishing to pay for her support. The court have demonstrated a high level of interest in imputing earning capacity not only to the human capital of parties in the form of their ability to earn but attributed to investment human capital in the form of stocks, bonds, real estate and other investments.<sup>25</sup>

## 3. RECOGNISATION OF EARNING CAPACITY AS MATRIMONIAL PROPERTY AFTER A DIVORCE

There have been few studies conducted on law relating to distribution of matrimonial assets for divorcee, hence the issues on matrimonial property disputes are one areas of law which is daily litigated before registrar and judges. In Malaysia<sup>26</sup>, Austria,<sup>27</sup> New Zealand,<sup>28</sup> Scotland,<sup>29</sup> several US jurisdictions<sup>30</sup> and Singapore<sup>31</sup> have an approach whereby the division of the matrimonial

<sup>15</sup> Hasim, M. J. M., Mustafa, H., & Hashim, N. H. EXPLORING NEW PATTERNS OF INTERACTION DURING CONFLICT AMONG MARRIED INDIVIDUALS IN MALAYSIA.

<sup>16</sup> Parkman, A. M. (1995). Human Capital as Property in Celebrity Divorces. *Family Law Quarterly*, 141-169.

<sup>17</sup> Estin, A. L. (1995). Economics and the Problem of Divorce. *U. Chi. L. Sch. Roundtable*, 2, 517.

<sup>18</sup> Posner, R. A. (2014). *Economic analysis of law*. Wolters Kluwer Law & Business.

<sup>19</sup> Bontis, N., Chua Chong Keow, W., & Richardson, S. (2000). Intellectual capital and business performance in Malaysian industries. *Journal of intellectual capital*, 1(1), 85-100.

<sup>20</sup> Martín-de-Castro, G., Delgado-Verde, M., López-Sáez, P., & Navas-López, J. E. (2011). Towards 'an intellectual capital-based view of the firm': origins and nature. *Journal of Business Ethics*, 98(4), 649-662.

<sup>21</sup> 111 Cal. Rptr. 2d 755 (Cal. Ct. App.2001)

<sup>22</sup> 214 Cal. App. 3d at 1372-73).

<sup>23</sup> Weinstein v. Weinstein, 934 A.2d 306, 311; Werblood v. Birnbach, supra, 41 Conn.App. at 730-31, 678 A.2d

<sup>24</sup> Bleuer v. Bleuer, 59 Conn.App. 167, 170, 755 A.2d 946 (2000).

<sup>25</sup> Griffin, D. W. (2013). Earning Capacity and Imputing Income for Child Support Calculations: A Survey of Law and Outline of Practice Tips. *J. Am. Acad. Matrimonial Law.*, 26, 365.

<sup>26</sup> Norliah Ibrahim, (2015) 'Domestic Contracts' The Effect of Family Contracts; The Malaysian Law Perspectives, *Journal of Management Research*, 2015, Vol. 7, No. 2

<sup>27</sup> Goossens, E. (2013). JM Scherpe (ed.), *Marital Agreements and Private Autonomy in Comparative Perspective*, Hart, Oxford 2012, 518 p.

<sup>28</sup> Scherpe, J. M. (Ed.). (2012). *Marital agreements and private autonomy in comparative perspective*. Bloomsbury Publishing.

<sup>29</sup> Norrie, K. (2012). *Marital agreements and private autonomy in Scotland*.

property is, in principle, discretionary. However, this discretion is guided either by express statutory provisions or by case-law that has firmly established that the matrimonial property is to be divided equally on the tangible assets acquired by both spouse during the course of marriage, absent special circumstances, although the discretion to decide otherwise is retained. Due to economic constraints by both spouse, the approach on adopting the intangible assets as matrimonial assets has been beginning to be recognized by some court on making decision for the distribution of the matrimonial assets.<sup>32</sup> The intangible assets an asset that is not physical in nature and it can be defined as corporate intellectual property, including items such as patents, trademarks, copyrights and business methodologies, are intangible assets, as are goodwill and brand recognition.<sup>33</sup>

There is some case law identify on embracing the earning power of the spouse to the maintenance after divorce. This can be seen in the case of *re Marriage of Schlafly*, the court considers the earning capacity of the parent's income, consistent with the best interests of the children by stating that the earning capacity embraces the ability to earn from capital as well as labor. Further the court emphasized that in assessing earning capacity, a trial court may take into account the earnings from invested assets. Therefore parent cannot shirk his parental obligations by reducing his earning capacity through unemployment or underemployment, he cannot shirk the obligation to support his child by underutilizing income producing assets.<sup>34</sup> In *Kay v. Kay*,<sup>35</sup> the New York Court of Appeals found that the evidence justified a finding that the husband's true income was much higher than his reported income. The husband had significant investment assets in the form of real estate and securities, most of which were in a stock that did not produce dividend income of any material amount but rather had been selected for its 'growth' potential. In imputing an earning capacity to his investments, the court stated, and the husband is may be required to make his considerable assets earn income to divorcee parties. In *Miller v. Miller*, the Supreme Court of New Jersey made that both income earned through employment and investment income may be considered in a court's calculation for matrimonial settlement.<sup>36</sup> The court in the most of case regarding imputing the earning capacity as matrimonial property are prepared to look into any potential source of income, including investment income to craft a support order to the dependent wife. In most situation court will look to actual earning and then they will calculate of 'investment return' earning capacity to make a reasonable rate of return.

This turn on a better understanding of the concept that recognize earning capacity as matrimonial assets, and its classification is in itself highly contentious as to intangible assets. There are conflicting opinions as to whether it should include earning capacity that the couple have acquired during a marriage or whether it should be possible to draw a distinction between assets that are matrimonial assets that are not.<sup>37</sup> This is the issue upon which valuing the whole area of distribution of matrimonial assets concerning the earning capacity of the either spouse, is to be constructed. Issue on earning capacity it's still arguable on whether these types asset should be included as part of distribution of matrimonial property<sup>38</sup>, however there are some countries like Australia<sup>39</sup>, the United States of America<sup>40</sup>, and United Kingdom<sup>41</sup>, considering earning capacity from business interest into substantial contribution to the welfare of the family. The academic literature published in relation to this topics has developed with a view on providing solution on this matters has been discussed by J. Douglas Barics<sup>42</sup>, Gina Quijano<sup>43</sup> Ronald b Standler<sup>44</sup>, and Susanne Ferrari<sup>45</sup> when they do some comparative study on other jurisdiction to find the applicability of existing law on treating the distribution of matrimonial property to be equally and fairly divided without hiding their earning powers.

### 3.1 Analysis on Malaysian and Singapore Case Law.

<sup>30</sup> Scherpe, J. M. (Ed.). (2012). *Marital agreements and private autonomy in comparative perspective*. Bloomsbury Publishing.

<sup>31</sup> Leong, W. K. (2007). *Elements of family law in Singapore*. LexisNexis.

<sup>32</sup> Norlia Ibrahim, (2015) 'Domestic Contracts' The Effect of Family Contracts; The Malaysian Law Perspectives, *Journal of Management Research*, 2015, Vol. 7, No. 2

<sup>33</sup> <https://www.investopedia.com/terms/i/intangibleasset.asp> (assessed on 14 March 2018)

<sup>34</sup> 57 Cal. Rptr. 3d 274 (Cal. Ct. App. 2007).

<sup>35</sup> 339 N.E.2d 143 (N.Y. 1975)

<sup>36</sup> 734 A.2d 752 (N.J. 1999)

<sup>37</sup> *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24 [153].

<sup>38</sup> Abd Ghadas, Zuhairah Ariff and Ibrahim, Norlia (2011) *Business assets as matrimonial property from the civil law and shariah perspectives; implication for national family policy*. In: Seminar Kebangsaan Polisi Keluarga Malaysia 2011, 14-15 September 2011, Universiti Putra Malaysia & Kementerian Pembangunan Wanita Keluarga dan Masyarakat & Lembaga Penduduk dan Pembangunan Keluarga Negara Malaysia.

<sup>39</sup> Caldwell, J. (1987). *Settling Up. Property and Income Distribution on Divorce in Australia*.

<sup>40</sup> LeRoy, A. F. (1986). Weitzman, "The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America"(Book Review). *Social Science Quarterly*, 67(3), 663.

<sup>41</sup> Davis, G., MacLeod, A., & Murch, M. (1983). *Divorce: Who supports the family?*. *Family Law*, 13(7), 217.

<sup>42</sup> Oldham, J. T. (2017). *Divorce, Separation and the Distribution of Property*. Law Journal Press.

<sup>43</sup> Kingma, K. W. (2009). Property Division at Divorce or Death for Married Couples Migrating Between Common Law and Community Property States. *ACTEC J.*, 35, 74.

<sup>44</sup> O'Brien, R. C. (2009). Integrating Marital Property into a Spouse's Elective Share. *Cath. UL Rev.*, 59, 617.

<sup>45</sup> Garrison, M. (2011). What's Fair in Divorce Property Distribution: Cross-National Perspectives from Survey Evidence. *La. L. Rev.*, 72, 57.

There are provision in the law in Malaysia<sup>46</sup> and Singapore<sup>47</sup>, enacting for distribution of matrimonial assets, it has been a subject for discussion in several jurisdictions whether such earning power constitutes a form of property divisible between husband and wife on divorce.<sup>48</sup> The traditional norm, on taking into consideration on tangible assets acquired by both spouse during the course of marriage. However, this can be seen on the judges' approaches differs in applying the law from one to another. Some of them choose to adhere strictly to the available provisions which clearly emphasize the need to interpret the provision literally with a fear that it might cause injustice to either party by taking consideration on existing assets as seen in the case of Wee Ah Lian v. Teo Siak Weng Weng<sup>49</sup>, Sivanes Rajaratnam v. Usha Rani Subramaniam<sup>50</sup>, Koay Cheng Eng V. Linda Herawati Santoso<sup>51</sup>, Anna Ng @ Marget Ng V. Chan Lin Kin<sup>52</sup>, Liu Pui Siong V. Mok Wei Lin<sup>53</sup>, Chan Moey Wai V. Lim Yuus Hook & Anor<sup>54</sup>, Chin Yoke Yin V. Tan Theam Huat<sup>55</sup>, Hii Chan Seng V. Aida Balingan Baron<sup>56</sup>, Yew Yin Lai V. Teo Meng Hai & Anor<sup>57</sup> and many more.

Some foreign judges prefer to be more flexible by takes into account the needs and other future factors besides various possible ways in order to come out with a fair and equitable division of the property. This approach is in conformity with the purpose of the law, which aims at providing a just and equitable distribution of the matrimonial assets between the spouses which was emphasized by the court in several cases in Malaysia and Singapore including the case Ng Hwee Keng v. Chia Soon Hin William<sup>58</sup>, Ching Seng Woah v. Lim Shook Lin,<sup>59</sup> Wachtel v. Wachtel,<sup>60</sup> Sivanes a/l Rajaratnam v Usha Rani a/p Subramaniam<sup>61</sup>, McGowan v. McGowan<sup>62</sup>, Pope & Pope,<sup>63</sup> Stanford & Stanford,<sup>64</sup> Fisher v. Worth,<sup>65</sup> Hartog v. Hartog,<sup>66</sup> TV v TW,<sup>67</sup> Yeo Chong Lin v Tay Choo and another appeal,<sup>68</sup> TQ v TR and another appeal.<sup>69</sup>

Lim Hui Min<sup>70</sup> in her article identify the key principles and factors guiding the court in the division of matrimonial assets upon divorce, and explores how consistently they have been applied, by examining the relevant decisions on the division of matrimonial assets which have been made by the High Court for the benefit of the family. She further stated that the court is more likely to conclude that the wife's direct or indirect contributions to the acquiring the business whether it was greater or not, based on particularly where there are children to the marriage on making decision for division of matrimonial assets.

The court would recognise and accord mutual respect and equal value to non-financial contributions in a marriage on the basis that both roles are important to and fundamental to the building of the marriage. During a marriage the spouses had seen fit and readily agreed to distribute their roles between them, one to undertake the economic role and the other the homemaking role and that both must work in tandem to promote the well-being of the family, the Court, can in an appropriate case and where the facts justify it, say of a very long marriage, and there are children, accord almost equal value to the non-financial role as the financial role i.e. give due recognition of that marriage as an equal partnership of efforts.

### 3.2 Analysis on International Case Law.

<sup>46</sup> Section 76 of the Law Reform (Marriage and Divorce) Act 1976

<sup>47</sup> Section 112 of Singapore's Women Charter

<sup>48</sup> Ibrahim, N., & Ghadas, Z. A. A. (2014). Rights Of Future Interest As Matrimonial Property: Special Reference To Earning Capacity. *IJUM Law Journal*, 22(2), 249.

<sup>49</sup> [1992] 1 SLR 688

<sup>50</sup> [2002] 3 CLJ 300

<sup>51</sup> [2005] 1 CLJ 247

<sup>52</sup> [2000] 6 MLRH 639

<sup>53</sup> [2015] MLRHU 1

<sup>54</sup> Unreported, Divorce Petition No: 33-106-04/2014

<sup>55</sup> Unreported, [Divorce Petition No: 33-894-05/2013]

<sup>56</sup> [2011] 2 MLRH 88

<sup>57</sup> [2012] MLRHU 1

<sup>58</sup> [1995] 2 SLR 231

<sup>59</sup> [1997] 1 MLJ 109

<sup>60</sup> [1973] 1 All ER 829

<sup>61</sup> [2002] 3 MLJ 273

<sup>62</sup> (1988)142 A.D.2d 355

<sup>63</sup> 2012 FamCA 204

<sup>64</sup> (2012) 247 CLR 108; (2012) FLC 93-518

<sup>65</sup> 326 N.Y.S.2d 308 (N.Y. App. Div. 1971)

<sup>66</sup> 623 N.Y.S.2d 537 (Ct. App. N.Y. 1995).

<sup>67</sup> [2007] SGHC 11341

<sup>68</sup> [2011] 2 SLR 1157

<sup>69</sup> [2009] 2 SLR(R) 961

<sup>70</sup> Tang, H. W. (2011). Let's call the whole thing off: divorce and trusts in Singapore. *Trusts & Trustees*, 17(9), 855-865.

In 1985, the New York Court of Appeals, in *O'Brien v. O'Brien*,<sup>71</sup> recognized that a professional license obtained during marriage, was matrimonial property subject to equitable distribution. The court specifically stated that Mrs. O'Brien's contributions represented an investment in the 'economic partnership' of their marriage and to hold otherwise would be contrary to the underlying precepts of the equitable distribution statute. In the case of *Kalnins v Kalnins*<sup>72</sup>, the New York County Supreme Court held that masters' degree from Harvard Business School was matrimonial property to be valued the enhanced earning capacity afforded to the husband by the acquisition of his MBA to be divided to the wife.

Sally Burnett stated that the development of equitable distribution was based on that the marriage is an economic partnership.<sup>73</sup> Further argued, the economic partnership model of marriage can also be used to justify viewing an educational degree as matrimonial assets. It may be presumed that the nonstudent spouse makes direct and indirect contributions toward the student's professional degree with the underlying purpose of increasing the flow of income to the matrimonial partnership in the future. Further, scholar Deborah, emphasized that the contributions give rise to an equitable claim by the supporting spouse against the value of the educational degree acquired by her husband. Therefore, upon the divorce, there should be a severance of the parties' economic ties by a fair and equitable distribution of the matrimonial assets.<sup>74</sup>

The contributory element can be seen in the case of *Stern v. Stern*,<sup>75</sup> the husband's law firm kept an account for the payments that would be due to each partner upon his death. Although adopting that value and the value of his capital account as the presumptive value of his partnership interest.<sup>76</sup> The court nevertheless held that the husband's earning capacity was not a separate asset subject to distribution.<sup>77</sup> The Stern court stated, however, that enhanced earning capacity is a permissible consideration when determining an equitable distribution or calculating alimony. It is suggested that the premise underlying the decision in Stern was that spousal contributions to the education of the other spouse constitute investments in the marriage partnership.

In the case of *Inman v. Inman*<sup>78</sup>, a Kentucky appellate court remanded a case with instructions to ascertain a wife's proprietary interest in her husband's dental education based on her monetary contribution toward his enhanced earning capacity. The reason behind it because the educational costs precluded the acquisition of significant matrimonial assets, the court stated that this was the only way to achieve an equitable result. In the New York jurisdiction it include an educational degree are within the matrimonial assets subject to equitable distribution since the statute requires the consideration of "any equitable claim to, interest in, or direct or indirect contribution made . . . to the career potential of the other party"<sup>79</sup>

In the recent case *Aguirre v Sabbeth*<sup>80</sup>, the Supreme Court properly determined that the wife was entitled to a 30% share of the husband's enhanced earning capacity even though the wife did not make direct financial contributions however she made substantial indirect contributions to the husband's attainment of his veterinary degree and license.

The court of appeals in *O'Brien v. O'Brien* held that a professional license is to be considered matrimonial property. The Court further stated that if the license is matrimonial property, then the working spouse is entitled to an equitable portion of it, not a return of funds advanced. The amount to be divided should be the projected enhanced earning capacity of the license holder, discounted to present value.<sup>81</sup> In the case of *Duspiva v Duspiva*<sup>82</sup>, Mrs Duspiva, the working spouse brought in an expert to value Mr Duspiva's certified public accounting CCP's license the methodology employed by the expert witness and ultimately adopted by the court was a calculation of the husband's enhanced earning capacity created by the license. In another case, *Lynn v. Lynn*,<sup>83</sup> a New Jersey Superior Court addressed this question, holding that a medical degree and license to practice medicine obtained during the marriage are matrimonial assets subject to equitable distribution.<sup>84</sup> In the case *Brian Maloney v. Rita Maloney*<sup>85</sup>, the court held that a professional license was matrimonial property for purposes of equitable distribution and that

<sup>71</sup> 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985).

<sup>72</sup> N.Y.L.J., Nov. 16, 1989

<sup>73</sup> Wong, H. P. C. (2016). Credible Commitments and Marriage: When the Homemaker Gets her Share at Divorce. *Journal of Demographic Economics*, 82(3), 241-279.

<sup>74</sup> Elgas, J. (2014). Supported Spouse's Contribution to Supporting Spouse's Advancement. *J. Contemp. Legal Issues*, 22, 139.

<sup>75</sup> 66 N.J. 340, 345, 331 A.2d 257, 260 (1975),

<sup>76</sup> 66 N.J. at 346, 331 A.2d at 259-61

<sup>77</sup> id. at 345, 331 A.2d at 260

<sup>78</sup> 578 S.W.2d

<sup>79</sup> N.Y. DoM. REL. LAW § 236(B)(5)(d)(6) (McKinney Supp. 1981-1982) enables courts to consider, "any equitable claim to, interest in, or direct or indirect contribution made . . . to the career or career potential of the other party."

<sup>80</sup> 126 A.D.3d 732; 5 N.Y.S.3d 481; 2015 N.Y. App. Div. LEXIS (2015)

<sup>81</sup> *O'Brien*, 66 N.Y.2d at 588.

<sup>82</sup> No. 4961/87 (N.Y. Sup. Ct. June 30, 1989)

<sup>83</sup> *Lynn v. Lynn*, 7 Fan. L. Rep. 3001 (N.J. Super. Ct. Ch. Div. December 5, 1980)

<sup>84</sup> *Barry W. Raff v Anne M. Raff*, 120 A.D.2d 507; 501 N.Y.S.2d 707; 1986 N.Y. App. Div.

LEXIS 56579 (1986)

<sup>85</sup> 137 A.D.2d 666; 524 N.Y.S.2d 758; 1988 N.Y. App. Div. LEXIS 1862

*the record showed that awarding ex-wife a portion of the value of ex-husband's license fairly reflected her partnership interest in that asset while recognizing that its acquisition was largely the result of a personal achievement of Husband.*

In the case of *Mihea Kim v Bradford C. Schiller*, the supreme court properly determined that the wife was entitled to a share of the husband's enhanced earning capacity given her substantial indirect contributions to the attainment of a medical degree and license, but the award amount was reduced given the husband's accommodations for the sake of the wife's career and desire to stay near her family.<sup>86</sup> On declaring the 'enhanced earnings potential' created by the professional licenses are matrimonial property, the court took a major step toward protecting the rights of those who support their spouse through obtaining professional license by takes into account the husband's earnings and to award the wife a part of the license's thus determined monetary value.<sup>87</sup>

The value of a professional practice consists of the sum of the value of the tangible assets of the practice such as law,<sup>88</sup> accounting,<sup>89</sup> dental,<sup>90</sup> and medical<sup>91</sup> practices and it also include goodwill<sup>92</sup> are considered matrimonial property to the extent of the value that has been acquired during the marriage in accordance with the underlying view of marriage as an economic partnership. All these practices have all been found to be properly subject to valuation and a subsequent to the matrimonial settlement.<sup>93</sup>

The court in *Arvantides v Arvantides* reached an analogous decision concerning the appreciation of a dental practice. The husband graduated from dental school and established a practice before marrying. During the marriage the practice flourished. Although finding that the wife's contribution and efforts as a spouse toward the dental practice were modest therefore the court granted the wife twenty-five percent of its value.<sup>94</sup> In another case, *Litman v Litman*, there was a question of whether a spouse's law practice is subject to equitable distribution upon the dissolution of a marriage. The Court of Appeals affirmed that the law practice constituted matrimonial property subject to equitable distribution and granted the defendant's application for fees to hire an expert to evaluate its value.<sup>95</sup>

In *Cohen v. Cohen*, 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 his share of the profits of the accounting firm for a given fiscal year. 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.<sup>96</sup> There are some approaches made on the attempt of assessing the professional practices to be taken into consideration as a distribution assets in the divorce settlement when there is room for determining the value of the type of professional practice for only that increase is due to the efforts of the marriage partnership by estimate the size of future earnings.<sup>97</sup>

The celebrity status of spouse is a form of human capital, it should be considering for the divorce settlements in two situations, when there are significant investments were made in human capital during the marriage to acquire celebrity status which is known as celebrity investments or when the non-celebrity spouse sacrificed her human capital by supporting her spouse for the benefit of the husband celebrity spouse which is known as sacrificed career. The celebrity investments can produce matrimonial property that can be divided. With a sacrificed career, the supporting spouse is contributing to separate property of human capital to the marriage under circumstances demanding for compensation at divorce. *In the nutshell, in order for a wife to get a share in the enhanced earnings attributable to husband's degree, the wife is required to establish that a substantial contribution was made to the acquisition of the degree or license.*

The first case that recognizes celebrity status as matrimonial property is *Golub v. Golub*,<sup>98</sup> which held that the increase in the value of model and actress Marisa Berenson's career was matrimonial property subject to equitable distribution in her divorce from her attorney husband. Having made the point that the key to the creation of matrimonial property is enhanced earning capacity, the court digresses to the potential financial gains from the commercial exploitation of famous personalities. The court

<sup>86</sup> 2013 NY Slip Op 8229

<sup>87</sup> Parkman, A. M. (2000). *Good intentions gone awry: No-fault divorce and the American family*. Rowman & Littlefield.

<sup>88</sup> *Litman v. Litman*, 93 A.D.2d 695, 463 N.Y.S.2d 24

<sup>89</sup> *Cohen v. Cohen*, 104 A.D.2d 841, 480 N.Y.S.2d 358

<sup>90</sup> *Arvantides v. Arvantides*, 64 N.Y.2d 1033, 1034, 478 N.E.2d 199, 200, 489 N.Y.S.2d 58, 59 (1985).

<sup>91</sup> *Van Ess v. Van Ess*, 100 A.D.2d 848, 474 N.Y.S.2d 90 (2d Dep't 1984).

<sup>92</sup> *Hirschfeld v. Hirschfeld*, N.Y.L.J., May 4, 1982

<sup>93</sup> 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).

<sup>94</sup> 489 N.Y.S.2d 58 (1985)

<sup>95</sup> 463 N.Y.S.2d 24 (1983)

<sup>96</sup> 104 A.D.2d 841

<sup>97</sup> *Van Ess v. Van Ess*, 100 A.D.2d 848

<sup>98</sup> 527 N.Y.S.2d at 946

generalizes the holding in *O'Brien* because all matrimonial litigants should be treated equally and should not be prejudiced because they married a nonprofessional who becomes an exceptional wage earner. It concludes that the remedy in *O'Brien* should be applied evenhandedly to all spouses.

The second case involving the value of celebrity status was *Joseph Piscopo v Nancy Piscopo*<sup>99</sup> in which the court held that celebrity goodwill is a distinct asset that could be distributed at divorce if it was acquired during the marriage. The court was confronted with whether the 'professional goodwill' established as matrimonial property in *Dugan v. Dugan*<sup>100</sup> should be extended to include 'celebrity goodwill' as a distinct distributable asset. As noted above, the New York court in *Golub* focused on enhanced earning capacity because of its earlier holdings in *O'Brien* and *McGowan* that degrees enhanced earning capacity and, therefore, could be matrimonial property. In *Dugan*, the New Jersey Supreme Court extended the definition of matrimonial property to include an attorney's 'professional goodwill' as an intangible asset to which monetary value can be attributed. The *Dugan* court defined professional goodwill as "essentially reputation that will probably generate future business.

In the case of *McAlpine v. McAlpine*,<sup>101</sup> holding that a fellowship in the Society of Actuaries was matrimonial property because of the enhanced earning capacity it created but that the plaintiff wife was not entitled to share in that increased earning capacity as she did not contribute to its attainment. In the case of *Golub v. Golub*,<sup>102</sup> holding that the celebrity status gained during marriage as a result of the other spouse's efforts was considered matrimonial property because of the enhanced earning capacity it generated.

In *Elkus v. Elkus*<sup>103</sup>, when Frederica von Stade, an opera singer, was married in 1973, she performed minor roles at the Metropolitan Opera, earning an annual income of approximately \$2,000. During the course of her seventeen-year marriage, she achieved international acclaim, and her income rose meteorically. In 1989, the year prior to her divorce, she earned over \$600,000. Through much of the marriage, her husband functioned as her voice coach and teacher, travelled with her on tour, critiqued her rehearsals and performances, and photographed her for magazines and album covers.<sup>104</sup>

The New York County Supreme Court, in *Golub v. Golub*,<sup>105</sup> said that actress Marisa Berenson's celebrity status was matrimonial property. At trial, the court found that her husband, by dint of his legal skills and business acumen, helped her boost her modeling and acting career, and, thus, her annual earnings. The court held 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 matrimonial property subject to equitable distribution.

In the recent Supreme Court of New York, in the case of *Ball v Ball*<sup>106</sup>, the appellate court held that the wife was not entitled to a distribution of the share of the husband's enhanced earnings as a judge because the election to a judicial position was not like a license or degree that enabled a person to engage in a certain, presumably more lucrative career, was not 'celebrity goodwill', and the law degree and license that permitted the husband to become a judge were earned prior to the marriage. The law broadly defines the term matrimonial property intending to emphasize the economic partnership concept of the marriage relationship. The courts were left to find what interests are matrimonial property. The court expanded the matrimonial property beyond traditional property concepts to include assets that do not necessarily have an exchange value or are tangible. Professional singer was held enhance the earning capacity of their holders, thereby enabling the supporting spouse to share their value as part of an equitable distribution.

The monetary value of a professional license is determined by calculating the present value of the enhancement of the future earning potential of the holder of the license even though the license is not being use for some times. *This is case of unused license after retirement, Marcus v Marcus*<sup>107</sup>, The court affirmed the trial court's overall distribution of matrimonial assets and held that the husband's medical license should have been considered as part of the matrimonial assets even though husband retired at the time of commencement of divorce proceeding due to the wife supported the husband early in his medical career. Therefore, court awarded her half base on the husband's retirement plan. Such was the case in *Savasta v. Savasta*<sup>108</sup>. The husband was a medical student in Belgium, when he met his wife, who was a nurse. The couple married in Canada, while the husband was finishing his internship. Five years later, the husband received board certification to practice internal medicine. During the next seven years, however, until the couple divorced, he never practiced in this specialty, opting instead to practice emergency medicine which is less lucrative. Holding that the husband's license to practice internal medicine was matrimonial property, the court rejected the husband's argument that because he had never practiced internal medicine, the license was not matrimonial property. The court finds that based upon the length of the marriage and the indirect contribution by the wife, she is

<sup>99</sup> 555 A.2d 1190

<sup>100</sup> 92 N.J. 423 (N.J. 1983).

<sup>101</sup> 143 Misc. 2d 30, 539 N.Y.S.2d 680 (Sup. Ct. 1989)

<sup>102</sup> 139 Misc. 2d 440, 527 N.Y.S.2d 946 (Sup. Ct. 1988)

<sup>103</sup> 572 N.Y.S.2d 901

<sup>104</sup> Burns, Leslie F., and Gregg A. Grauer. "Human Capital as Martial Property." *Hofstra L. Rev.* 19 (1990): 499.

<sup>105</sup> 139 Misc. 2d 440

<sup>106</sup> 150 A.D.3d 1566; 56 N.Y.S.3d 583; 2017 N.Y. App. Div. LEXIS 4138

<sup>107</sup> 137 AD2d 131

<sup>108</sup> 46 Misc.2d 101 (N.Y. Misc. 1989)



entitled to 10% of the enhanced earning potential acquired by the husband by virtue of the board certification in internal medicine.

In *Freyer v. Freyer*,<sup>109</sup> the court held that the wife's medical license, acquired six months after she initiated divorce proceedings, should still be regarded as matrimonial property. The court reasoned that since Mr. Freyer had made significant contributions towards his wife's effort at obtaining her license it would be unjust to hold otherwise. In another case *Lentz v. Lentz*,<sup>110</sup> the court also reasoned that since a non-vested pension is an asset subject to equitable distribution, a non-vested license or degree should be considered a matrimonial asset as well.

#### **4. ARGUMENTS ON EARNING CAPACITY AS MATRIMONIAL ASSETS**

Genadek's research indicates that, most married couples invest heavily in assets such as 'career assets'. The human capital investment or career assets include such things as education, professional training, job seniority, employment security, and future earning capacity.<sup>111</sup> One spouse's financial support and personal contributions towards other spouse's educational costs assist in the pursuit of a graduate degree. The spouse who provides the financial support during the period of the education, the working spouse, often sets aside own personal goals with the expectation that their spouses professional degree will enhance the couple's financial future. Based on the above, upon divorce, the only real economic asset is the professional education, leaving a tremendous economic disparity between the enhanced spouse and the non-degree spouse.<sup>112</sup> Therefore the educational degree were regarded as matrimonial property, then the courts could determine the value of the educational degree and make a distribution settlement to the non-degree spouse who contribute for the others spouse's education.<sup>113</sup> There are cases supported the view that the enhanced earning capacity of the degree holder should be classified as matrimonial assets. The student's present earnings and future earnings potential are taken into account in determining the amount of matrimonial property that will be awarded to the non-working spouse.<sup>114</sup> The value of a degree is the enhanced earning capacity it affords the holder. Many courts simply award the spouse, who has made a contribution to the education and living expenses of their spouse, a greater share of the matrimonial assets as compensation.<sup>115</sup>

Allison Tait stated that enhanced earning capacity was not a separate asset of the individual thus it has to be taken into consideration to be distributed as matrimonial settlement. The earning capacity or potential of the professional degree holder can calculate a return on an investment in education as this human capital, including skills, talents, and knowledge will help to increase productivity in the form of wealth and economists.<sup>116</sup> Therefore, it is further argued that when a divorce occurs shortly after a wife has supported her husband through college or professional degree, simple justice demands that she will be reasonably compensated for her contribution because the husband's professional earnings over his probable working life can repay his wife for her direct and reasonably related contributes to his professional education.

Additional to that view, Giannakis clarified that the courts may attempt to compensate the supporting spouse by considering the value of the license when dividing matrimonial assets by assessing the professional license in making as the maintenance award. The licensed spouse may receive increased income for life after acquired professional license, while the supporting spouse may only receive little in return for financing the other spouse's professional license.<sup>117</sup> Therefore some court come out with the approach compensating the supporting spouse with maintenance base on the other spouse enhance earning capacity on professional license. Williams have addressed the issue agree that supporting spouses should receive compensation for their efforts.<sup>118</sup> Some scholars also suggest that the contributing spouse has made an investment in 'human capital' by helping the educated spouse to obtain a license and that the contributing spouse deserves a return on that investment.<sup>119</sup>

<sup>109</sup> 138 Misc. 2d

<sup>110</sup> 103 A.D.2d 822

<sup>111</sup> Genadek, K. R. (2018). Unilateral Divorce and Time Allocation in the United States. *Feminist Economics*, 24(1), 63-87.

<sup>112</sup> Elgas, J. (2014). Supported Spouse's Contribution to Supporting Spouse's Advancement. *J. Contemp. Legal Issues*, 22, 139.

<sup>113</sup> LOVE, T. DAY-THE PROFESSIONAL DEGREE IN LIGHT OF THE UNIFORM MARITAL PROPERTY ACT. *AMERICAN UNIVERSITY LAW REVIEW*, 34, 839.

<sup>114</sup> Krause, H. D., Elrod, L. D., Garrison, M., & Oldham, J. T. (2007). *Family law: Cases, comments, and questions*. West Group.

<sup>115</sup> Kelly, Carol Ann. "Domestic Relations: Consideration of Enhanced Earning Capacity of Recently Educated Spouse in Divorce Settlements." *Suffolk UL Rev.* 17 (1983): 901.

<sup>116</sup> Tait, A. A. (2015). Divorce Equality. *Wash. L. Rev.*, 90, 1245.

<sup>117</sup> Giannakis, N. (2014). Faking Equity: A Critique of the New York Equitable Distribution Statute as Applied to Licenses and Degrees under the O'Brien Decision. *Touro L. Rev.*, 30, 181.

<sup>118</sup> Williams, J. (2001). *Unbending gender: Why family and work conflict and what to do about it*. Oxford University Press.

<sup>119</sup> Williams, J, *supra* note 25

## 5. CONCLUSION AND POLICY RECOMMENDATIONS

This article emphasizes that the value of human capital is based on its earning capacity or future returns rather than current income. It is created through investments that can result in either an equity or debt claim on the property. The investments before marriage are usually so large and essential that contribution should normally be treated as separate property. However, when there is substantial contribution to one spouse's human capital during marriage that increase the spouse's future income stream and, therefore, his human capital, its recognition at divorce is appropriate.<sup>120</sup> If the contribution would not have been made except for the supporting spouse, a fairness claim is established and that spouse should be awarded a share of the increased human capital of another spouse.<sup>121</sup>

Many scholars justified the reliabilities on taking into consideration the intangible assets such as earning capacity to be classified as the matrimonial assets after divorce. The above discussion on cases law highlighted the approach of the court in determining the right of divorces parties who contributed directly or indirectly to the acquisition of intangible assets acquired by other spouses to claim share after divorce. It is further submitted that earning capacity should be recognizing as matrimonial assets which is subject to distribution after divorce. The courts have not automatically expanded their definition of property to include human capital, i.e., individuals' income earning capacity, can be distributed after a divorce.<sup>122</sup> There was a theory that human capital investments have been handled consistently by the courts in divorces involving earning capacity.<sup>123</sup> Further, the courts have extended their recognition of earning capacity in the distribution of matrimonial property.<sup>124</sup> The duty to support one's spouse extends through the end of the marriage. Hence, the court has broad discretion in determining the "just and reasonable" amount of spousal support one party must pay for the support of the other party upon divorce not only considering on tangible assets but also intangible assets such as earning capacity. However, the court must consider all factors in making this determination and one of that factor is the "earning capacity" of each party at the time of divorce as adopted in many countries by their case laws.<sup>125</sup>

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<sup>122</sup> *Grunfeld v. Grunfeld*, 731 N.E.2d 142, 94 N.Y.2d 696, 709 N.Y.S.2d 486 (2000).

<sup>123</sup> Wilhite, R. B. (2001). The Effect of Goodwill in Determining the Value of a Business in a Divorce. *Family Law Quarterly*, 35(2), 351-381

<sup>124</sup> *ibid*

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