

THAT DOUBLE DIPPING GRUNFELD

by Peter J. Galasso

Matrimonial practitioners are uniformly cynical about how of the Court of Appeals decides family law matters. Indeed, it is generally acknowledged among the more

erudite in the matrimonial community that one of their main and most noble priorities
“Extreme Measures”, Galasso, Peter, NYLJ January 3, 1997, p2

Close over the past decade has been to protect and empower women. However, the unfortunate consequence of their zeal has been to establish precedent which

episodically perverts the very equity they were sworn to promote.

On April 4, the Court of Appeals entertained oral argument in the case of Grunfeld v. Grunfeld
NYLJ, May 12, 2000, p. 27, C3

Close , a long awaited event for the matrimonial community, segments of which chartered buses to Albany to witness it. The most pressing issue to be resolved by the high

court in Grunfeld turned on whether the husband would have to pay support from the same dollar of earnings used to calculate the value of his license to practice law.

In McSparron v. McSparron
87 N.Y.2d 275, 639 N.Y.S2d 265 (1995)

Close , decided in 1995, the Court of Appeals solidified its view, first articulated in the 1986 landmark case of O’Brien v. O’Brien

O’Brien v. O’Brien 66 N.Y.2d 576, 498 N.Y.S.2d 743 (1986)

Close , that a license, advanced degree, and certain other career enhancements that produced quantifiably greater earnings are marital assets subject to equitable

distribution. Before O’Brien, even contending that a degree or license was a distributable asset might have earned an attorney sanctions for frivolous conduct from some of

our more traditional jurists. In that regard, the Court’s stubborn return to its holding in O’Brien greatly disappointed the pragmatists among us who continue to believe that

O’Brien was simply a case where bad facts produced bad law.

Perceiving at least one potential inequity that it was unwilling to tolerate, the McSparron Court cautioned that the lower courts should “be meticulous in guarding against

duplication in the form of maintenance awards that are premised on earnings derived from professional licenses”. However, as the conflict among the lower courts

See Grunfeld, generally.

Close revealed, the lack of guidance extended by the McSparron Court opened the proverbial barn doors to varying interpretations of that concept.

In Grunfeld, the Court seized the opportunity to better define how ‘double-dipping’ could be avoided by establishing an equation that can be applied by the lower courts

with at least some measure of uniformity. However, in managing all this suspense, the Court’s decision on May 11th was more of a disappointment than a revelation. While

it acknowledged, once again, its commitment to the double dipping phenomenon, the high court devoted little thought to how inequitably the parties divide the marital assets

in the ‘normal’ license case.

As held by the Court in Grunfeld:

To the extent, then, that those same projected earnings used to value the license also form the basis of an award of maintenance, the licensed spouse is being twice charged

with the distribution of the same marital asset value, or with sharing the same income with the non-licensed spouse.

Whereupon, the Court went on to hold:

To comply with McSparron, Supreme Court had to reduce either the income available to make maintenance payments or the marital assets available for distribution or

some combination of the two. 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 [citation omitted]. . .

Where license income is considered in setting maintenance, a court can avoid double counting by reducing the distributive award based on that same income [citation

omitted]. . .

One advantage of this method is that the maintenance award may be adjusted in the future if the licensed spouse's actual earnings turn out to be less than expected at the

time of the divorce. . . This method is also consistent with our observation that in particular cases the value of the license "may be nominal" [citation omitted]. . .

On the other hand, there may be cases where it is more equitable to avoid double counting by reducing the maintenance award (see Domestic Relations Law §236 [B][6]

[a] [1]). Where the license is likely to retain its value in the future but the non-licensed spouse may only be entitled to receive maintenance for a short period of time, it may

be fairer actually 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.

While serious matrimonial minds are already at work planning to exploit the flexibility the Grunfeld Court has given the lower courts, the paradox is that while the husband

is awarded his license and practice as his share of the marital estate, the wife receives as an offset against the value of such assets, that simply enable the husband to work,

virtually all of the parties' more enjoyable assets, including; the marital residence, the parties' savings and, in many instances, even the husband's retirement account.

Because the various Departments have already seen fit to award child support as a statutory percentage of as much as \$300,000 in income without a seriously developed

link to the child's needs

See e.g. *Kosovosky v. Zahl*, May 4, 2000 NYLJ p. 27 C1 (1st Dept. 2000); *Jones v. Reese*, 629 N.Y.S.2d 311 (3rd Dept. 1996)

Close , practitioners walk into Court with great trepidation when representing the more affluent spouse these days. Indeed, complimenting child support with an award of

maintenance to prolong the wife's pre-separation standard of living
85 NY2d 647, 623 N.Y.S2d 537 (1995)

Hartog v. Hartog,

Close and with a 'maintenance reduced' distributive award under Grunfeld of the husband's license and practice, leaves the working spouse wondering why he is working

in the first place. Moreover, due to the Court's willingness to impute greater income to those who accept a lesser paying job

See Hickland

v. Hickland, 39 NY2d1 (1976); Liadis v. Liadis 207 AD2d 331 (2ndDept. 1994)

Close, the 'monied' spouse is generally locked into a profession until all support obligations are paid. Hence, 'equity' has officially left the building.

My personal litmus test is rather simple; if the total monthly obligations of the monied spouse (i.e. child support, maintenance and a distributive award) leaves less money in

his hands monthly than his dependent family, something is wrong. Indeed, it reminds me of the days before the 70% income tax rate was finally repealed. The fear then was

primarily focused on America's productivity. It was believed that pocketing only 30 cents out of every dollar earned discouraged further initiative. It is high time that the

high court articulate a more pragmatic overall approach to resolving complex matrimonials. For leaving it to attorneys to advocate for common sense over their client's best

case scenario is simply too risky.