

WHAT'S LOVE GOT TO DO WITH IT? THE VALUE OF CELEBRITY STATUS IN DIVORCE PROCEEDINGS[♦]

INTRODUCTION	573
I. SEMINAL CASES AND POLICY ON CELEBRITY STATUS IN DIVORCE	
PROCEEDINGS	578
A. O'Brien v. O'Brien.....	578
B. Golub v. Golub	579
C. Piscopo v. Piscopo	580
D. Elkus v. Elkus.....	581
E. <i>More on Classification of Celebrity Status as Marital</i> <i>Property</i>	582
F. <i>Valuation and Distribution</i>	583
II. ARE CONTEMPORARY ARTS AND ENTERTAINMENT CELEBRITIES DIFFERENT FROM PAST ONES?	586
A. <i>1980s versus 2000s</i>	586
B. <i>"Bieber Fever"</i>	588
C. <i>"Here Today Gone Tomorrow" Problem</i>	592
D. <i>Celebrity Vitality After Death</i>	594
III. PROPOSAL	597
A. <i>Reserved Jurisdiction Approach</i>	597
B. <i>Modifiability of Property</i>	602
C. <i>More on Modification of Celebrity Status</i>	604
CONCLUSION.....	606

INTRODUCTION

Keeping Up With The Kardashians matriarch Kris Jenner and former Olympic athlete Caitlyn Jenner, singer Mariah Carey and television host Nick Cannon, high school sweethearts Robin Thicke and Paula Patton, and Grammy Award-winning duo Captain and Tennille have recently joined the list of divorced or soon-to-be-separated

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celebrity spouses.¹ Notably, actors Jennie Garth and Peter Facinelli, singer Katy Perry and comedian Russell Brand, and actors David Arquette and Courtney Cox were former married celebrity couples, who, during divorce proceedings, did not seek spousal support or, where applicable, child support.² Yet not all divorces end amicably.³ Some people want to believe that celebrities are just like the rest of us,⁴ but what really happens when a celebrity or celebrity couple has to divide up their property in a divorce? This Note will explore the notion that celebrity status is marital property.⁵

To grasp the legal issues of celebrity divorce, it is necessary to understand a preliminary definition of marital property. Robin P. Rosen suggests the following definition of property: a tangible or intangible asset that can be exchanged, sold, assigned, or transferred on an open-market.⁶ Further, there must be some monetary value attached to the asset.⁷ A broad definition of marital property is property that belongs to the married couple to which both spouses have a viable legal claim.⁸

In the context of marriage, American courts use three frameworks to discuss property: common law, community property, or hotchpot.⁹ The common law approach focuses on equitable distribution, or what is most fair to the spouses “under the totality of the circumstances,” as opposed to title ownership of the property.¹⁰ The community property

¹ See Buzz Bissinger, *Caitlyn Jenner: The Full Story*, VANITY FAIR, <http://www.vanityfair.com/hollywood/2015/06/caitlyn-jenner-bruce-cover-annie-leibovitz> (last visited July 22, 2015); Paula Patton Files for Divorce From Robin Thicke, CBS NEWS (Oct. 9, 2014, 8:01 AM), <http://www.cbsnews.com/news/paula-patton-files-for-divorce-from-robin-thicke/>; Diana Reese, *Captain and Tennille, Musical Duo of the '70s, Divorcing After 39 Years of Marriage*, WASH. POST (Jan. 23, 2014), <http://www.washingtonpost.com/blogs/she-the-people/wp/2014/01/23/captain-and-tennille-musical-duo-of-the-70s-divorcing-after-39-years-of-marriage/>; Rebecka Schumann, *Nick Cannon Speaks Out About Mariah Carey Divorce Drama, How His Kids Are Handling The Separation*, INT'L BUS. TIMES (Oct. 10, 2014, 3:59 PM), <http://www.ibtimes.com/nick-cannon-speaks-out-about-mariah-carey-divorce-drama-how-his-kids-are-handling-1703175>.

² *Divorce Settlements: These Celebs Didn't Want Their Exes' Money*, HUFFPOST DIVORCE (July 19, 2013, 2:30 PM), http://www.huffingtonpost.com/2013/07/19/divorce-settlements-these_n_3619930.html?utm_hp_ref=celebrity-divorce.

³ See *id.*

⁴ See Frank Furedi, *Celebrity Culture*, 47 J. SOC'Y 493, 494 (2010).

⁵ See Jonathan L. Kranz, *Sharing the Spotlight: Equitable Distribution of the Right of Publicity*, 13 CARDOZO ARTS & ENT. L.J. 917, 917–18 (1995) (distinguishing between celebrity status, celebrity reputation, and right of publicity). The distinction between status, reputation, and right of publicity is not critical to this Note. In this Note, the phrase “celebrity status” can be construed to mean any or all three of these distinctions.

⁶ Robin P. Rosen, *A Critical Analysis of Celebrity Careers As Property Upon Dissolution of Marriage*, 61 GEO. WASH. L. REV. 522, 531–35 (1993).

⁷ See *id.* at 532.

⁸ *Id.* at 528. This Note will not address any exceptions to the proffered definition of marital property. See, e.g., *id.* at n.29.

⁹ Rosen, *supra* note 6 at 524–25.

¹⁰ See Elijah L. Milne, *Recharacterizing Separate Property at Divorce*, 84 U. DET. MERCY L. REV. 307, 310–11 (2007).

approach¹¹ presumes that “property that either spouse acquires during marriage . . . belongs to both spouses in equal halves—regardless of title.”¹² Yet, courts following this approach are granted discretion in property division.¹³ Finally, some courts use a hotchpot approach wherein “only marital property¹⁴ is available for distribution, but [non-marital] property¹⁵ may also be invaded in limited circumstances where the court finds that such action is necessary to promote justice and fairness.”¹⁶

This Note will discuss the common law approach only because, to date, the two states that recognize celebrity status as marital property are common law states (i.e., New York and New Jersey).¹⁷ In brief, under current law, when a celebrity spouse and non-celebrity spouse seek a divorce, New York and New Jersey courts will make a one-time assessment of the monetary value of the celebrity status and then distribute an equitable portion of that monetary value to the non-celebrity spouse.¹⁸

Rosen proposes that courts should no longer recognize celebrity status as marital property because celebrity status does not comport to the traditional definition of property.¹⁹ This Note takes a different approach by disputing the procedure for valuation and distribution of celebrity status rather than the classification of celebrity status as property or, more specifically, marital property. This Note agrees with the New York and New Jersey courts that celebrity status is a celebrity’s intangible asset that has a unique monetary value. The problem with the courts’ methods of valuation is that courts in precedent cases did not predict the unique volatility of a celebrity’s career in the present-day arts and entertainment industry.²⁰

¹¹ BARTH H. GOLDBERG, VALUATION OF DIVORCE ASSETS, REVISED EDITION § 1:3 (2014), available at Westlaw (identifying the following states as community property jurisdictions: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington).

¹² Milne, *supra* note 10, at 313.

¹³ *Id.* Notably, “[a]lthough strict equal division of the conjugal community is still required in California, Louisiana, and New Mexico, all other community-property states now apply equitable distribution standards.” *Id.* at 313–14. Consequently, some of those courts in community property states do not automatically grant divorcing spouses a 50-50 division of property. *See id.*

¹⁴ Marital property is often defined as property acquired by each spouse during marriage. *Id.* at 311.

¹⁵ Non-marital property is often defined as property acquired by each spouse prior to marriage or “by gift or inheritance during marriage.” *Id.*

¹⁶ *Id.* at 312.

¹⁷ *See* Kranz, *supra* note 5, at n.3. *See generally* Piscopo v. Piscopo, 557 A.2d 1040 (N.J. Super. Ct. App. Div. 1989); Elkus v. Elkus, 572 N.Y.S.2d 901 (App. Div. 1991); Golub v. Golub, 527 N.Y.S.2d 946 (Sup. Ct. 1988).

¹⁸ *See* Rosen, *supra* note 6, at 523. This Note will not address the situations in which both spouses are celebrities.

¹⁹ *Id.* at 555.

²⁰ This Note will only discuss celebrities primarily in the arts and entertainment industry because technological advancements have changed the dynamic between arts and entertainment celebrities

Because the longevity and nature of a celebrity's career in the arts and entertainment industry can fluctuate more easily than before due to technological advancements,²¹ the current valuation of celebrity status over a limited projected time is inaccurate and leads to inequitable monetary awards. Therefore, this Note argues that courts should change the one-time valuation and distribution of celebrity status in divorce proceedings to payments modifiable over time to reflect accurate and current valuation.

This Note will explore the recent advancements in technology that have contributed to the unpredictability of a celebrity's career. These recent advancements greatly contrast with the technological opportunities that were available to similar artists of the late 1980s and 1990s—the years in which the New York and New Jersey courts recognized celebrity status as marital property.²² Some of those technological advancements include the existence of Twitter²³ and Facebook,²⁴ the expansion of media platforms for content distribution²⁵ (e.g., generally, consumers are no longer restricted to enjoying their entertainment on traditional platforms, such as television or the proscenium stage, because now content creators and distributors encourage consumers to engage with their content and brands across new platforms, such as, mobile applications and interactive online services),²⁶ and development of live performance tools, such as holograms and motion-capture technology that bring life back to

and their fans, the consumers of those celebrities' content (e.g., music, movies, television). For further discussion on the inextricable link between technology and arts and entertainment celebrities and their content, see *infra* Parts I.F & II.A.

²¹ See *infra* Part II.

²² See generally *Piscopo*, 557 A.2d 1040; *Elkus*, 572 N.Y.S.2d 901; *Golub*, 527 N.Y.S.2d 946.

²³ *Open Source*, TWITTER, <https://about.twitter.com/company/open-source> (last visited Feb. 10, 2015) (identifying the company start date as 2006).

²⁴ *About*, FACEBOOK, <https://www.facebook.com/facebook/info> (last visited Feb. 10, 2015) (“Founded: February 4, 2004”).

²⁵ Adam Sternbergh, *Introduction: What It Means to Be Popular (When Everything Is Popular)*, N.Y. TIMES, http://www.nytimes.com/interactive/2013/09/08/magazine/the-culture-package.html?_r=0#/%23item_05#item_01 (last visited Feb. 10, 2015) (“[W]e no longer experience culture as one hulking, homogeneous mass . . . we’ve turned off Top 40 and loaded up Spotify; we’ve clicked away from NBC and fired up Netflix . . . thanks to the increasingly concierge-style delivery system of the Internet . . .”).

²⁶ See John Anderson, *As You Watch, Invasion of the Platforms: Tribeca Film Festival Recognizes Transmedia*, N.Y. TIMES (Apr. 12, 2013), <http://www.nytimes.com/2013/04/14/movies/tribeca-film-festival-recognizes-transmedia.html> (“Now you’re starting to see independent projects harnessing [interactive] tools and creating stories that live on multiple platforms When you ask people what they’re doing while watching ‘Game of Thrones’ or ‘Walking Dead,’ Ms. Kopp said of those television series, ‘a lot of them are already doing exactly the stuff that I might describe in a more academic fashion. They watch ‘Walking Dead’ and they play the game, having a two-screen app experience, or they watch ‘Game of Thrones’ and they follow the characters on Twitter What I think is interesting is how creative artists, filmmakers, are taking these things that were considered more a part of marketing and thinking of the Web as an artistic medium.”).

deceased performers.²⁷

Because of the expanded availability and increased dependency on those technological advancements in the arts and entertainment industry,²⁸ celebrities are more susceptible to sudden increases or decreases in popularity that significantly affect the monetary value of their celebrity status.²⁹ Additionally, because of the same technological changes, a celebrity's career may no longer end at his or her death, which affects the monetary value of their celebrity status.³⁰

Parts I.A–D of this Note will elaborate on the New York and New Jersey courts' analysis for recognizing celebrity status in divorce proceedings. Part I.E will describe the policy reasons for the one-time assessment of property division by courts, compared to the ongoing procedures for spousal or child support. Part I.F will address the valuation and distribution methods used by the courts in detail. Part II.A will describe the different nature of the arts and entertainment industry today compared to the past due to technological advancements and how technology is inextricably linked to the volatility of celebrity status in the 2000s. Parts II.B–D will identify the problems with a one-time procedure for valuation and distribution of celebrity status due to

²⁷ See Michael Cavna, 'Furious 7': Is Paul Walker's Work the Most Striking 'Animated' Performance Ever?, WASH. POST (Apr. 6, 2015), <http://www.washingtonpost.com/news/comic-riffs/wp/2015/04/06/furious-7-is-paul-walkers-work-the-most-striking-animated-performance-ever/>. After Paul Walker's death, the director of the recent movie *Furious 7* "completed Walker's work by 'using the latest-technology CGI approach to make a digital body double using widespread techniques involving light matching, 3D tracking and camera match-moving . . .'" *Id.* See also Zack O'Malley Greenburg, *Michael Jackson Returns To The Stage In Vegas--As A Hologram*, FORBES (May 24, 2013), <http://www.forbes.com/sites/zackomalleygreenburg/2013/05/24/michael-jacksons-hologram-rocks-las-vegas-arena/>.

²⁸ See Matt Richtel, *Your Brain on Computers: Attached to Technology and Paying a Price*, N.Y. TIMES (June 6, 2010), http://www.nytimes.com/2010/06/07/technology/07brain.html?pagewanted=all&_r=0 ("For better or worse, the consumption of media . . . has exploded. In 2008, people consumed three times as much information each day as they did in 1960 At home, people consume [twelve] hours of media a day on average, when an hour spent with, say, the Internet and TV simultaneously counts as two hours. That compares with five hours in 1960, say researchers at the University of California, San Diego. Computer users visit an average of 40 Web sites a day . . .").

²⁹ See, e.g., TAMARA BROWN, CELEBRITY AND THE NEW MEDIA: FAME AND FORTUNE IN THE BLOGOSPHERE 6–7, 13 (2009), available at <http://aladinrc.wrlc.org/handle/1961/4858> ("[T]here is . . . the potential for a celebrity to ruin their reputation or sabotage a project that he or she might be working on with some kind of personal statement or negative behavior [while engaging with new media or technology].").

³⁰ E.g., Greenburg, *supra* note 27; Zack O'Malley Greenburg, *Top-Earning Dead Celebrities 2013*, FORBES (Oct. 31, 2013), <http://www.forbes.com/sites/zackomalleygreenburg/2013/10/31/top-earning-dead-musicians-2013/> ("More than four years after his death, [Michael Jackson] continues to lead a pack of postmortem performers . . . : He's the top-earning deceased musician once again. The King of Pop pulled in \$160 million over the past year, more than any musician dead or alive (or any other celebrity, for that matter). He banks the bulk of his bucks from two Cirque du Soleil shows—*Immortal* and *One*—and from his Mijac Music catalogue, his recorded music sales and his half of the Sony/ATV publishing empire, which includes copyrights to hits by the Beatles, Lady Gaga, Eminem and Taylor Swift, among others. Jackson's earnings are nearly three times as high as his nearest spectral competition, Elvis Presley, who totaled \$55 million.").

technological changes. Part III will propose a method for fairer assessment of the value and distribution of a divorcing couple's property when that property includes a celebrity status.

I. SEMINAL CASES AND POLICY ON CELEBRITY STATUS IN DIVORCE
PROCEEDINGS

A. O'Brien v. O'Brien

Legal recognition of celebrity status evolved from the 1985 New York case *O'Brien v. O'Brien*, which recognized a professional license as marital property.³¹ In *O'Brien*, the husband had acquired his medical degree during the marriage.³² The wife gave up her "opportunity to obtain permanent certification [as a teacher, in New York State,] while [the husband] pursued his education."³³ Instead, the wife "held several teaching and tutorial positions and contributed her earnings to their joint expenses."³⁴ The husband filed for divorce two months after getting his medical license.³⁵

The New York Court of Appeals rejected the husband's argument that a professional license "represents a personal attainment in acquiring knowledge," and is therefore not property, or moreover, marital property.³⁶ Instead, the court held that a professional license is property, and marital property if acquired during the marriage.³⁷ The court relied on New York Domestic Relations Law § 236:

[T]he court shall consider . . . any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party [,][and] . . . the impossibility or difficulty of evaluating any component asset or any interest in a business, corporation or *profession*.³⁸

The court emphasized that equitable distribution is about each partner's fair share to assets acquired during the marriage, as opposed to the traditional reliance on title ownership to a particular property.³⁹ The

³¹ *O'Brien v. O'Brien*, 489 N.E.2d 712, 716 (N.Y. 1985).

³² *Id.* at 713.

³³ *Id.* at 713–14.

³⁴ *Id.* at 714.

³⁵ *Id.*

³⁶ *Id.* at 715.

³⁷ *Id.* at 716.

³⁸ *Id.* at 715–16.

³⁹ *Id.* at 715–17.

medical license is a valuable asset because it represents “the money, effort and lost opportunity for employment expended in its acquisition, and also in the enhanced earning capacity it affords its holder [i.e., the husband, in this case].”⁴⁰

Additionally, the court interpreted the New York statute cited above to value and distribute the husband’s medical license.⁴¹ Specifically, the court reasoned “[w]here equitable distribution of marital property is appropriate but ‘the distribution of an interest in a business, corporation or profession would be contrary to law’ the court shall make a distributive award in lieu of an actual distribution of the property.”⁴² The specific valuation and distribution of the medical license will be discussed in Part I.F.

B. *Golub v. Golub*

Three years later, in *Golub v. Golub*, the New York County Supreme Court first recognized celebrity status as marital property using reasoning analogous to that of *O’Brien*.⁴³ In *Golub*, model and actress, Marisa Berenson, argued that celebrity status is not analogous to a professional license and “because a career in show business is subject to substantial fluctuation, it should not be considered [marital property].”⁴⁴ The court rejected Berenson’s argument because the *O’Brien* court had recognized that assets that enhance earning capacity, whether tangible or intangible, can be categorized as marital property.⁴⁵ Celebrities in the arts and entertainment industry have enhanced earning capacity because “[t]here is tremendous potential for financial gain from the commercial exploitation of famous personalities.”⁴⁶ Additionally, “[a] [c]ommercial [e]ndorsement is essentially a ‘license’ to use a person’s fame.”⁴⁷

Finally, celebrities cannot escape equitable distribution of their status because courts “should not prejudice [or penalize a spouse who is married to an [artist] who may nevertheless become an exceptional wage earner.”⁴⁸ Although the non-celebrity spouse is entitled to equitable distribution of celebrity status in a divorce proceeding, the non-celebrity’s share of the celebrity spouse’s status is limited “by the degree to which that fame is attributable to the non-celebrity spouse The source of the fame must still be traced to the marital

⁴⁰ *Id.* at 717.

⁴¹ *Id.* at 715–16.

⁴² *Id.* at 716.

⁴³ *Golub v. Golub*, 527 N.Y.S.2d 946, 949 (Sup. Ct. 1988).

⁴⁴ *Id.*

⁴⁵ *See id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 950.

efforts.”⁴⁹

C. Piscopo v. Piscopo

During the same year as *Golub*, New Jersey courts also recognized celebrity status as marital property.⁵⁰ The court’s analysis in *Piscopo v. Piscopo* differed from that of the New York courts because “in New York the value of a license alone is considered marital property,” whereas in New Jersey, the courts recognize status or license as marital property only if it is tied to a business.⁵¹ In this case, J.P. Productions, Inc. owned the celebrity spouse’s entire work product.⁵² Here, the celebrity was Joe Piscopo, former Saturday Night Live comedian and actor.⁵³ The court emphasized “goodwill,” or the “reputation that will probably generate future business,” as its reason to uphold celebrity status as marital property.⁵⁴ Contrarily, the celebrity spouse argued that goodwill associated with a celebrity is different from that of a business because a celebrity entertainer is “more susceptible to attenuation by illness, politics, reputation and connections.”⁵⁵ The court rejected this argument because the court can predict—not merely speculate—the probability of an entertainer’s longevity and celebrity value based on his or her past earning capacity.⁵⁶ Such considerations should outweigh the speculative possibilities suggested by the celebrity spouse here.⁵⁷

Also, the *Piscopo* court upheld the notion that “difficulty of determination is no deterrent to valuation where equity demands monetary compensation.”⁵⁸ Moreover, the court-appointed accountant suggested that courts apply a discount to a celebrity’s excess earnings to accommodate the difference between professionals in the entertainment

⁴⁹ *Id.* In the same year, *Golub* was not extended to *Bystricky v. Bystricky* because the Nassau County Supreme Court distinguished between the careers of a police officer and a celebrity entertainer. *See Bystricky v. Bystricky*, 677 N.Y.S.2d 443, 444–45 (Sup. Ct. 1998). In *Bystricky*, the wife sought to have her husband’s promotion as police sergeant classified as marital property. *Id.* at 443–44. The *Bystricky* court did not follow *Golub* or any similar cases, including *O’Brien*, because a promotion, which yields increased income, is not the same as a license or status, which grants the license holder or celebrity an enhanced earning capacity—a capacity that is inextricably tied to that person. *See id.* at 444. Moreover, the *Bystricky* court seems to characterize “increased income” as income associated directly to a particular job, not the employee spouse, and therefore the spouse married to the employee did not contribute to that income. *See id.* Subsequently, the spouse was not entitled to that increase under a theory of equitable distribution. *See id.* Although *O’Brien* and *Golub* were not extended to job promotions, both cases remain good law.

⁵⁰ *Piscopo v. Piscopo*, 557 A.2d 1040 (N.J. Super. Ct. App. Div. 1989).

⁵¹ *Id.* at 1043.

⁵² *Piscopo v. Piscopo*, 555 A.2d 1190, 1191 (N.J. Super. Ct. Ch. Div. 1988).

⁵³ *Bio*, JOE PISCOPO, http://www.joepiscopo.com/jp_bio.html (last visited Dec. 27, 2013).

⁵⁴ *Piscopo*, 555 A.2d at 1191.

⁵⁵ *Id.* at 1192.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 1191.

industry from those in other professions.⁵⁹

A 2007 New Jersey case reiterates the distinction between the analysis of New York and New Jersey.⁶⁰ In *Dubois v. Brodeur*, the Appellate Division did not extend *Piscopo* to the disputed asset, which was in this case a spouse's hockey contract.⁶¹ The court reasoned that "goodwill has never been found to exist where an individual does not own a business and acts only as an employee contracted to work for someone else."⁶² *Piscopo* remains precedent law in New Jersey, although it is not extended to cases where the asset in dispute does not derive from a business, (e.g., J.P. Productions, Inc.).⁶³

D. Elkus v. Elkus

Years after *Piscopo*, a New York appellate court, in *Elkus v Elkus*, held "to the extent the [husband]'s contributions and efforts led to an increase in the value of the [wife]'s career, [including her fame as an international recording artist and performer,] this appreciation was a product of the marital partnership; and therefore, marital property subject to equitable distribution."⁶⁴ Some of the husband's contributions and efforts included international travel to attend and critique his celebrity wife's performances, photography for her album covers and other promotional materials, and service as a vocal coach.⁶⁵ Additionally, the court recognized that the husband lost the opportunity to pursue his own career in singing and vocal training.⁶⁶ Because the wife's celebrity status increased during the marriage, in part due to the husband's contributions, the court granted him equitable distribution of the value of her celebrity status.⁶⁷

Moreover, the court quoted a New York Court of Appeals decision that further explored the meaning of contribution:

"[A]n increase in the value of separate property of one spouse, occurring during the marriage and prior to the commencement of matrimonial proceedings, which is due in part to the indirect contributions or efforts of the other spouse as homemaker and parent, should be considered marital property" In this case, it cannot be overlooked that the [husband]'s contributions to [the wife]'s career

⁵⁹ *Id.* at 1192–93.

⁶⁰ *Dubois v. Brodeur*, 2007 WL 2012387 (N.J. Super. Ct. App. Div. July 11, 2007).

⁶¹ *Id.* at *1, *22.

⁶² *Id.* at *22.

⁶³ *Piscopo*, 555 A.2d at 1191; *Dubois*, 2007 WL 2012387, at *22.

⁶⁴ *Elkus v. Elkus*, 572 N.Y.S.2d 901 (App. Div. 1991).

⁶⁵ *Id.* at 902.

⁶⁶ *Id.*

⁶⁷ *Id.*

were direct and concrete, going far beyond child care and the like, which he also provided.⁶⁸

Specifically, the *Elkus* court addressed the wife's argument that her celebrity came into fruition prior to the marriage.⁶⁹

E. *More on Classification of Celebrity Status as Marital Property*

Notably, spousal and child support are different from equitable distribution. Although child and spousal support are procedurally grounded in fairness,⁷⁰ like equitable distribution, spousal and child support can be ongoing issues in a divorce proceeding—unlike the one-time assessment of property division.⁷¹ The distinction between support and equitable distribution or property division can be summarized as follows:

The property award divides . . . the tangible assets that the parties have accumulated during the course of the marriage. Alimony, in contrast, is a payment from one spouse to the other that . . . turns on the . . . needs of one party and the ability to pay of the other.⁷²

The same is true about child support.⁷³

The distinction between need of support and entitlement to property relates to the finality of equitable distribution. The court's consideration of child support ends when: 1) the child reaches majority age; 2) the child becomes legally emancipated; or 3) a parent proves that the child is constructively emancipated.⁷⁴ Similarly, spousal support ends upon: 1) death of the receiving spouse; 2) remarriage by the

⁶⁸ *Id.* (citation omitted) at 904.

⁶⁹ *Id.* Notably, the *Bystricky* court distinguished the facts of *Elkus* from its own facts because, unlike with a celebrity career, "there is no logical or tangible basis upon which or from which [a job promotion] can be identified and traced . . . which would lead to significant speculation and grossly unfair, unjust and inequitable results." *Bystricky v. Bystricky*, 677 N.Y.S.2d 443, 444 (Sup. Ct. 1998).

⁷⁰ See MARIAN F. DOBBS, DETERMINING CHILD & SPOUSAL SUPPORT § 1:1 (2014), available at Westlaw.

⁷¹ See June Carbone, *The Futility of Coherence: The ALI's Principles of the Law*, 4 J. L. & FAM. STUD. 43, 54 (2002) ("[P]roperty division is a final decree, support payments are modifiable"); Dobbs, *supra* note 70 at § 6:1 ("Modification of child and spousal support awards is frequently necessary to adjust for changes in the parties' relative economic circumstances since entry of the prior [court] order. Court-ordered support modification can be based on a showing of changed circumstances. Spousal support is subject to change upon showing of materially changed circumstances. To modify a judgment or consent decree awarding alimony and child support, the party seeking modification bears the burden of showing that there has been a substantial change in circumstances of one, or both, of the spouses.").

⁷² Carbone, *supra* note 71, at 54–55.

⁷³ Dobbs, *supra* note 70.

⁷⁴ Rebecca E. Hatch, *Proof of the Emancipation of Child in Order to Terminate Child Support*, 108 Am. Jur. Proof of Facts 3d 177 (2009).

receiving spouse; or 3) a court order to end support within a specific term of years and that term expires.⁷⁵ Child or spousal support is not indefinite, but without the occurrence of the above exceptions, courts may modify the terms of the support.⁷⁶ A court's determination of equitable distribution is a one-time final assessment.⁷⁷ Because courts prefer to disentangle a divorcing couple's finances, there is no room, generally, for modification in property division proceedings.⁷⁸

F. Valuation and Distribution

After a trial court classifies certain property as marital property, then the court must value the property and then distribute it or its value.⁷⁹ The valuation and distribution process is a one-time final assessment by the trial court.⁸⁰

For example, in *O'Brien*, the court valued the husband's medical license to be worth \$472,000.⁸¹ That valuation was based on the following testimony by the wife's expert witness:

[C]ompar[e] the average income of a college graduate and that of a general surgeon between 1985, when plaintiff's residency would end, and 2012, when he would reach age 65. After considering Federal income taxes, an inflation rate of 10% and a real interest rate of 3% [,] . . . capitalize[] the difference in average earnings and reduce[] the amount to present value.⁸²

Ultimately, the court awarded the wife 40% (i.e., \$188,800) of what it valued the medical license to be, among other monetary awards.⁸³ Also, the court ordered the husband to pay the value of the license in eleven annual installments in various amounts over a span of ten years.⁸⁴

Additionally, the court rejected the notion that the unlicensed spouse is only entitled to her financial contributions to the husband acquiring the degree.⁸⁵ The court reasoned that the unlicensed spouse

⁷⁵ See Brett R. Turner, *Rehabilitative Alimony Reconsidered: The "Second Wave" of Spousal Support Reform*, 10 NO. 10 DIVORCE LITIG. 185 (1998).

⁷⁶ See *supra* Part I.E.

⁷⁷ See *Laing v. Laing*, 741 P.2d 649, 657–58 (Alaska 1987).

⁷⁸ See *id.* at 657 (allowing parties to continue their financial entanglement would be a counterintuitive goal of divorce).

⁷⁹ BARTH H. GOLDBERG, *VALUATION OF DIVORCE ASSETS*, REVISED EDITION § 1:2 (2013), available at Westlaw.

⁸⁰ *Id.*

⁸¹ *O'Brien v. O'Brien*, 489 N.E.2d 712, 714 (N.Y. 1985).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 717–18.

“is entitled to an equitable portion of it, not a return of funds advanced.”⁸⁶ Analogously, the court would not refund a spouse his or her down payment on a house or some other real property because a refund does not reflect “any incremental value in the asset.”⁸⁷

Comparatively, Michigan courts also recognize that an unlicensed spouse should “be compensated whenever the advanced degree is the end product of a *concerted family effort* involving mutual sacrifice and effort by both spouses.”⁸⁸ Yet, Michigan courts only reimburse an unlicensed spouse the value of his/her contribution as opposed to a portion of the value of the license.⁸⁹ Specifically, a present-day valuation of a license “emphasizes the notion that a nonstudent spouse possesses some sort of pecuniary interest in the degree itself.”⁹⁰ Instead, a Michigan court would reimburse an unlicensed spouse “for unrewarded sacrifices, efforts, and contributions toward attainment of the degree on the ground that it would be equitable to do so *in view of the fact* that that spouse will not be sharing in the fruits of the degree.”⁹¹

This Note rejects the Michigan approach for the very reason that New York courts reject the reimbursement approach—it does not capture the incremental value of the asset.⁹² The reimbursement approach is especially unfair because the license holder not only retains the license,⁹³ but also is awarded the growing benefits (i.e., the incremental value) of the license.⁹⁴

Finally, the *O’Brien* court acknowledged that valuing a professional degree—as opposed to calculating the value of contribution efforts—is not an odd task for courts because the same method is used in tort cases to determine diminished earning capacity of an injured party.⁹⁵

⁸⁶ *Id.* at 718.

⁸⁷ *Id.*

⁸⁸ *Postema v. Postema*, 471 N.W.2d 912, 915 (Mich. Ct. App.1991).

⁸⁹ *Id.* at 919.

⁹⁰ *Id.*

⁹¹ *Id.* The *Postema* court further analyzed the meaning of contribution:

Where, for instance, the parties remain married for a substantial period of time after an advanced degree is obtained, fairness suggests that the value of an equitable claim would not be as great, inasmuch as the nonstudent spouse will already have been rewarded, in part, for efforts contributed by . . . having already shared, in part, in the fruits of the degree Similarly, where the extent of support or assistance provided by the nonstudent spouse, financial or otherwise, is not significant, or where such assistance comes primarily from outside sources for which the nonstudent spouse was not responsible or is not liable, fairness and equity would also suggest that the value of an equitable claim would not be as great.

Id. at 920 (citations omitted).

⁹² *O’Brien*, 489 N.E.2d at 719.

⁹³ See *Postema*, 471 N.W.2d at 915 (“Although the degree holder will always have the degree to show for the efforts, the nonstudent spouse is left with nothing.”).

⁹⁴ *O’Brien*, 489 N.E.2d at 718.

⁹⁵ *Id.*

2015] VALUE OF CELEBRITY STATUS IN DIVORCE 585

In *Piscopo*, a court-appointed accountant applied a discount to offset the unique quality of celebrity entertainers' goodwill, as described in Part I.C:

[T]he valuation of [the celebrity spouse]'s business was analogous to valuing any other professional corporation. [The accountant] used three out of five years of income from which to derive an average adjusted net income of \$288,150 and average adjusted gross receipts of \$635,452

[The accountant took] a percentage of the celebrity's average gross earnings and [applied] an appropriate discount. He calculated [the celebrity spouse]'s . . . goodwill by taking 25% of [the celebrity's] average gross earnings over the three year period . . . [The accountant] attributed to plaintiff's celebrity goodwill a value of \$158,863.⁹⁶

This Note does not disagree with the calculation methods of the court. Instead, this Note proposes only to change the valuation and distribution of celebrity status from a one-time assessment to deferred assessment(s) under the reserved jurisdiction approach.⁹⁷ Although courts have rejected some arguments about the volatility of a celebrity career,⁹⁸ the reasons raised in Part III of this Note differ from previous arguments brought before those courts.⁹⁹

⁹⁶ *Piscopo v. Piscopo*, 557 A.2d 1040, 1041 (N.J. Super. Ct. App. Div. 1989).

⁹⁷ See discussion *infra* Part III.

⁹⁸ See Rosen, *supra* note 6, at 546.

⁹⁹ See, e.g., *Piscopo v. Piscopo*, 555 A.2d 1190, 1191 (N.J. Super. Ct. Ch. Div. 1988) *aff'd*, 557 A.2d 1040 (N.J. Super. Ct. App. Div. 1989). (“[P]laintiff asserts that his excess earnings are somehow different from, and so much more susceptible to attenuation by illness, politics, reputation and connections, other personal service professions that valuation of goodwill is impossible.”)

II. ARE CONTEMPORARY ARTS AND ENTERTAINMENT CELEBRITIES DIFFERENT FROM PAST ONES?¹⁰⁰

A. 1980s versus 2000s

The technology present in the 2000s did not exist or was not used to the same degree as the technology in the 1980s or even the early 1990s.¹⁰¹ For example, the Internet was not widely used by the average person in the 1980s and 1990s.¹⁰² Interestingly, in February 1988, at least one Internet user correctly predicted the interaction between technology and the arts in future years: “In the Computer Age we don’t look at [a]rt, we participate. So, the correct questions are: ‘What does it do to me? What do I do to it?’”¹⁰³

Not only has the accessibility and commercialization of the Internet expanded, but also new technologies have injected themselves to the arts and entertainment industry.¹⁰⁴

Consider the phenomenon of YouTube¹⁰⁵ and its wildly popular user-created content, or the ability to download movies and TV

¹⁰⁰ This Note makes a distinction between arts and entertainment celebrities and other celebrities, including politicians and athletes. For example, “the longevity of professional athletes . . . does not result from changes in technology, economic factors, training improvements, etc.” Alexander M. Petersen, et al., *Quantitative and Empirical Demonstration of the Matthew Effect in a Study of Career Longevity*, 108 PROCEEDINGS OF THE NAT’L ACAD. OF SCI. OF THE UNITED STATES OF AMERICA 18, 22 (2010), available at <http://www.pnas.org/content/108/1/18.full>. A professional athlete’s career rests on “in-game opportunities,” whereas an arts and entertainment celebrity (e.g., musician, actress) does not have his or her career only rest on their work. *Id.* See also Sheila Marikar, *Top 5 Celebrities Famous for ... Nothing*, ABC NEWS (June 5, 2009), <http://abcnews.go.com/Entertainment/CelebrityCafe/story?id=7762876&page=1&singlePage=true>. Similarly, the celebrity status of politicians usually lessens once politicians’ campaigns or public service are over. Katie Garrity, *Mitt Romney Slow Jammed The News On Late Night; Do We Hate Him Less Because Of It?*, COLLEGE CANDY (Jan. 25, 2014, 1:00 PM), <http://collegecandy.com/2014/01/25/mitt-romney-slow-jammed-the-news-on-late-night-do-we-hate-him-less-because-of-it/>. Because celebrity status of athletes or politicians rests predominantly on intrinsic talent or skill, technological changes do not affect the volatility of their status in the same manner celebrity status fluctuates in the arts and entertainment industry. Also, the distinction is partly affected by the nature of the industry. Specifically, content creators and distributors in the television, music, and movie industries, in particular, promote personalized interaction between celebrities and their fans to encourage consumers (i.e., the fans) to buy their content by relying on technological advancements, such as Twitter, Facebook, YouTube, blogs, etc. See Thomas Clayton, *5 Ways Celebrities’ Social Media Presence Evolved in 2012*, HUFFPOST MEDIA (Jan. 22, 2013, 5:43 PM), http://www.huffingtonpost.com/thomas-clayton/celebrities-social-media_b_2529151.html.

¹⁰¹ See *This Is What People Thought Of The Internet In The 1980s And 1990s*, HUFFPOST ARTS & CULTURE (Oct. 14, 2013, 8:53 AM), http://www.huffingtonpost.com/2013/10/14/1980s-internet_n_4085953.html.

¹⁰² See *id.*

¹⁰³ *Id.*

¹⁰⁴ See *id.*; PHILIP E. MEZA, COMING ATTRACTIONS?: HOLLYWOOD, HIGH TECH, AND THE FUTURE OF ENTERTAINMENT inside cover (2007).

¹⁰⁵ *About YouTube*, YOUTUBE, <http://www.youtube.com/yt/about/> (last visited Feb. 11, 2015) (describing the on-line video distribution platform that was founded in 2005). Also, YouTube

shows from sites such as iTunes and watch them on your iPod or computer, anytime and anywhere. The dual forces of consumer demand and rapidly changing content distribution are combining in new ways to create changes that will strike at the very foundations of the entertainment and technology industries.¹⁰⁶

A non-exhaustive list of other new technology that has changed content distribution in today's arts and entertainment industry includes: Facebook,¹⁰⁷ Twitter,¹⁰⁸ DVR (time-shifting),¹⁰⁹ Netflix, Hulu¹¹⁰ and smartphones.¹¹¹ These technological innovations represent the speed and accessibility of information between content distributors and consumers.

Specifically, social media has changed the perception of celebrity:

Sites like Facebook, Twitter, YouTube and Tumblr¹¹² are penning deals with big celebrities, which involve the infiltration of marketing behaviors into their accounts to keep users interested and engaged. Celebrities' accounts continue to tweet¹¹³ and post updates even after they die, like in the cases of Michael Jackson and Whitney Houston—though they've passed on, their celebrity brand lives.

....

streams videos from Vevo which is a "music video and entertainment platform . . ." *Company Profile*, VEVO, <http://www.vevo.com/about> (last visited Jan. 8, 2014). See *YouTube Renews Vevo Partnership*, DIGITAL STRATEGY CONSULTING (Aug. 7, 2013), http://www.digitalstrategyconsulting.com/intelligence/2013/07/youtube_renews_vevo_partnership.php.

¹⁰⁶ *Description*, STANFORD UNIVERSITY PRESS, <http://www.sup.org/books/title/?id=11476> (last visited Apr. 13, 2015).

¹⁰⁷ "Facebook's mission is to give people the power to share and make the world more open and connected." *About*, FACEBOOK, *supra* note 24.

¹⁰⁸ "Bring the power of Twitter to TV, music, sports, entertainment and news. We help media organizations engage with audiences more directly on Twitter." *About*, TWITTER, <https://about.twitter.com/> (last visited Jan. 8, 2014).

¹⁰⁹ Brian Stelter, *As DVRs Shift TV Habits, Ratings Calculations Follow*, N.Y. TIMES (Oct. 6, 2013), http://www.nytimes.com/2013/10/07/business/media/dvrs-shift-tv-habits-and-ratings.html?pagewanted=all&_r=0 (describing delays in viewing television programming).

¹¹⁰ *Id.* (identifying services like Netflix and Hulu that provide consumers with on-demand viewing).

¹¹¹ Dawn C. Chmielewski, *Nielsen study: Social Networking Dominates Smartphone, Tablet Use*, L.A. TIMES (June 9, 2013), <http://articles.latimes.com/2013/jun/09/entertainment/la-et-ct-nielsen-study-social-networking-smartphone-tablet-20130609> ("Consumers are taking advantage of their portable devices to watch videos, access news and information . . . engage in social networking."). See Henry Blodget, *The Number of Smartphones in Use is About to Pass the Number of PCs*, BUS. INSIDER (Dec. 11, 2013), <http://www.businessinsider.com/number-of-smartphones-tablets-pcs-2013-12>.

¹¹² Founded in 2007, "Tumblr lets you effortlessly share anything. Post text, photos, quotes, links, music, and videos from your browser, phone, desktop, email or wherever you happen to be." *About*, TUMBLR, <http://www.tumblr.com/about> (last visited Jan. 25, 2014).

¹¹³ *Getting Started with Twitter*, TWITTER, <https://support.twitter.com/groups/31-twitter-basics/topics/104-welcome-to-twitter-support/articles/215585-twitter-101-how-should-i-get-started-using-twitter> (last visited Jan. 28, 2014) ("Twitter is an information network made up of 140-character messages called Tweets.").

The celebrity/fan relationship has shifted from a one-way delivery channel to more of a conversation. These days, fans' tweets and comments on celebrity posts are actually getting responses. The name of the game is now engaging with a fan base.

....

Social media can be a powerful platform, as it can effectively shape public opinion of an individual or group of people. This can lead to the downfall of some celebrities, but for others . . . it means extended career and influence.¹¹⁴

Because consumers have acquired a need, or at least desire, to engage with celebrities, a celebrity's social media presence coupled with consumers' immediate accessibility to celebrities' work makes celebrity entertainers more susceptible to a volatile celebrity status.¹¹⁵

Overall, present-day technological advancements have become and will continue to be inextricably linked to the status of celebrities in the arts and entertainment industry. Therefore, the nature of celebrity status, today and in the future, is more volatile for reasons not reviewed by the court yet.

B. "Bieber Fever"¹¹⁶

Technology can increase, or even create a celebrity.¹¹⁷ Decades ago, entertainers became famous through traditional means of content distribution (e.g., televised content).¹¹⁸ Because of technological

¹¹⁴ Clayton, *supra* note 100.

¹¹⁵ See *supra* note 100 for the distinction between arts and entertainment celebrities and other celebrities (e.g., athletes, politicians). This Note will not discuss the extent to which other celebrities are prone to volatility due to technological changes. Specifically, this Note will not explore whether other celebrities should be entitled to modifiable assessments of the value of their celebrity status because of technological advancements.

¹¹⁶ "Bieber Fever" is a reference to pop singer Justin Bieber, who rose to fame through YouTube videos. *Celebrity Central: Justin Bieber*, PEOPLE, http://www.people.com/people/justin_bieber/biography/ (last visited Jan. 26, 2014).

¹¹⁷ See Clayton, *supra* note 100.

¹¹⁸ See, e.g., Tim Molloy, *Comedy Central Steals Louis C.K.'s Business Model — But Admits It*, BUS. INSIDER (July 16, 2013), <http://www.businessinsider.com/comedy-central-steals-louis-cks-business-model-2013-7> (explaining the shift from DVD releases to streaming digital formats of comedy specials). See also Paula Wilson, *How Justin Bieber Went from Regular Canadian Teen to Super Star Overnight... And How He Might Lose It All*, CELEBRITY NETWORTH (Jan. 27, 2014), <http://www.celebritynetworth.com/articles/entertainment-articles/justin-bieber-went-regular-canadian-teen-super-star-overnight-might-lose/> ("After winning a local talent competition when [Justin Bieber] was twelve, his mother uploaded a video of his performance to YouTube. . . . She began uploading more videos, and his online fanbase began to increase. In 2008, Scooter Braun, a marketing executive and music manager, stumbled across Justin Bieber's videos and tracked him down Justin was introduced to R&B superstar, Usher. It quickly became apparent that the teen had the potential to be a major star Justin signed with Raymond Braun Media Group."); *Inside Austin Mahone's Rising Fame!*, OK! MAG. (May 3, 2013), <http://okmagazine.com/videos/inside-austin-mahones-rising-fame/> ("Austin [Mahone]'s rising fame through YouTube is being compared to Justin Bieber's worldwide success."); Mike

advancements and reliance on social media and mobile apps, today anyone or anything can become a celebrity (e.g., Sweet Brown¹¹⁹ or CeeLo Green's cat¹²⁰) or a celebrity can suddenly fall from grace (e.g., Paula Deen).¹²¹

One of the most prominent examples of an overnight fame story through the use of present-day technology is Justin Bieber.¹²² Notably, Bieber connects with his fans through the following social media: Twitter, Instagram,¹²³ and Facebook.¹²⁴ Most memorably, Bieber and Disney teen icon turned solo pop artist, Selena Gomez, were dating for some time—at a time when both celebrities had attained fame and fortune.¹²⁵

Imagine, though, if Justin Bieber were married to a non-celebrity¹²⁶ during his transformation from a regular YouTube user to an internationally renowned superstar. Also, imagine that Bieber's wife,

Masnick, *Macklemore Explains Why Not Being On A Label Helped Him Succeed*, TECHDIRT (Apr. 4, 2013, 1:10 PM), <http://www.techdirt.com/blog/casestudies/articles/20130401/03115322523/macklemore-explains-why-not-being-label-helped-him-succeed.shtml> (“With the power of the internet and with the real personal relationship that you can have via social media with your fans . . . YouTube has obviously completely replaced [MTV].”).

¹¹⁹ Megan Rose Dickey, *'Ain't Nobody Got Time For That' Viral-Video Star Does Have Time To Sue Apple*, BUS. INSIDER (Mar. 12, 2013, 2:22 PM), <http://www.businessinsider.com/sweet-brown-apple-lawsuit-2013-3> (discussing Kimberly Wilkins who became famous from an interview posted on YouTube that became viral).

¹²⁰ John Vinson, *Cee Lo Green's Cat Purrfect, Latest TV Star, 34,000 Twitter Followers: Twitter Fame and Meow Mix...*, WEBPRONews (Mar. 12, 2012), <http://www.webpronews.com/cee-lo-greens-cat-purrfect-latest-tv-star-34000-twitter-followers-2012-03>. See also *Purrfect The Cat*, TWITTER <https://twitter.com/PurrfectTheCat> (last visited Feb. 11, 2015).

¹²¹ Rene Lynch, *Paula Deen Goes Viral Amid 'N-word' Controversy*, L.A. TIMES (June 19, 2013), <http://www.latimes.com/features/food/dailydish/la-dd-paula-deen-racism-controversy-20130619,0,180352.story#axzz2rdxrK6YG> (“Paula Deen went viral Wednesday, first for her alleged use of the N-word and then as she was lampooned in a social media blitz tartly spoofing her popular show . . .”).

¹²² Wilson, *supra* note 118 (“After posting videos of his R&B covers to YouTube while still a pre-teen, the singer experienced a meteoric rise to superstardom that was dizzying to behold He has managed to ride the wave of hysterical popularity quite successfully for years, and currently has a net worth of \$160 million.”). Bieber's fame has somewhat dwindled due to recent controversies. See Jen Heger, *Numbers Don't Lie: Miley Cyrus, Justin Bieber's Popularity Plummets Amid Booze, Drug & Twerking Scandals*, RADAR ONLINE (Mar. 4, 2014), <http://radaronline.com/exclusives/2014/03/miley-cyrus-justin-bieber-plunging-popularity/>. But see *Justin Bieber, Taylor Swift, Eminem & Rihanna: The Top 10 Most Popular Ice Bucket Challenges*, BILLBOARD (Sept. 9, 2014), <http://www.billboard.com/articles/list/6244072/justin-bieber-taylor-swift-eminem-rihanna-music-top-10-most-popular-ice-bucket-challenges>.

¹²³ *FAQ*, INSTAGRAM, <http://instagram.com/about/faq/> (last visited Feb. 11, 2015) (“Instagram is a fun and quirky way to share your life with friends through a series of pictures.”).

¹²⁴ *Justin Bieber*, FACEBOOK, <https://www.facebook.com/JustinBieber> (last visited Feb. 11, 2015); *justinbieber*, INSTAGRAM, <http://instagram.com/justinbieber> (last visited Feb. 11, 2015); *Justin Bieber*, TWITTER <https://twitter.com/justinbieber> (last visited Feb. 11, 2015).

¹²⁵ See *Celebrity Central: Selena Gomez*, PEOPLE.COM, http://www.people.com/people/selena_gomez (last visited Feb. 11, 2015).

¹²⁶ This Note will only explore the issue of property division between a celebrity and non-celebrity couple. The Note will not address the additional complexity of how courts may consider another celebrity's contribution to their celebrity spouse's celebrity status in a dyadic celebrity couple.

similar to the husband in *Elkus*, contributed to his career by recording the YouTube videos, setting up his YouTube channel, advising him about song choice to attract more viewers to that channel, and cutting his signature haircut.¹²⁷ Consider that Bieber files for divorce a few months after contracting with assiduous manager, Scooter Braun,¹²⁸ but prior to Bieber hitting it big with recording contracts, concert deals,¹²⁹ a movie contract,¹³⁰ and sponsorship deals, including a fragrance.¹³¹ Unlike the facts in *Elkus*, where the opera singer argued that her career had blossomed prior to the marriage,¹³² Bieber's hypothetical wife argues that Bieber is most certainly going to become famous because of her contributions. The wife in the Bieber hypothetical would argue that she contributed to her husband's celebrity status by distributing his content and helping to promote his Internet presence on Facebook and Twitter, which attracted Scooter Braun to him. As a result of her contributions, Justin Bieber is in a prime position for a blossoming career in the music industry; and therefore, she is entitled to a portion of his celebrity status.

Notably, most common law states, such as Michigan would not even classify Bieber's celebrity status as property or marital property.¹³³ Moreover, if a Michigan court, for example, were to classify his celebrity status as marital property, then the wife would only receive the value of her contribution to Bieber's celebrity status.¹³⁴ In New York or New Jersey, a court would assess the growth of Bieber's celebrity status from the beginning of the marriage to the time Bieber filed for

¹²⁷ Cavan Sieczkowski, *Justin Bieber's New Haircut: Singer Gets Bangs, Rewinds To 2009*, HUFFPOST CELEBRITY (Apr. 10, 2013, 9:29 AM), http://www.huffingtonpost.com/2013/04/10/justin-bieber-new-haircut-photo_n_3051087.html ("Justin Bieber debuted a new haircut . . . featuring the bangs that made him famous four years ago . . . [T]his is the style that made him an international teenybopper idol when he hit the scene in 2009 . . .").

¹²⁸ Zack O'Malley Greenburg, *Bieber's Business Brain: Scooter Braun*, FORBES (May 16, 2012), <http://www.forbes.com/sites/zackomalleygreenburg/2012/05/16/biebers-business-brain-scooter-braun/> ("This is the kind of mix that [Scooter] Braun assiduously cultivates. As his cash cow, Justin Bieber, records a few miles away, Braun is tending to his other investments—namely tech deals and The Wanted, whom he also manages, along with rapper Asher Roth, singer-songwriter Mike Posner, Australian poster Cody Simpson and Canadian songstress Carly Rae Jepsen . . .").

¹²⁹ Alex Hudson, *Beyoncé, Bon Jovi, Justin Timberlake Top List of 2013's Top-Earning Tours*, EXCLAIM.CA (Dec. 31, 2013), http://exclaim.ca/News/beyonce_bon_jovi_justin_timberlake_top_list_of_2013s_top-earning_tours ("The top-earning Canadian on the list is Justin Bieber, who ranked fourth with \$169 million.").

¹³⁰ Casey Lewis, *Big Deal News! Justin Bieber's 'Believe' Movie Premiere Is Next Week, and We're Gonna Be There*, TEEN VOGUE, <http://www.teenvogue.com/entertainment/movies/2013-12/justin-bieber-believe-premiere-red-carpet> (last visited Feb. 11, 2015).

¹³¹ See Tim Worstall, *Justin Bieber's Perfume Gets Sold to Elizabeth Arden*, FORBES (June 13, 2012), <http://www.forbes.com/sites/timworstall/2012/06/13/justin-biebers-perfume-gets-sold-to-elizabeth-arden/>.

¹³² *Elkus v. Elkus*, 572 N.Y.S.2d 901, 904 (1991).

¹³³ See *supra* Introduction.

¹³⁴ See *Postema v. Postema*, 471 N.W.2d 912 (Mich. Ct. App. 1991).

divorce.¹³⁵

Contrarily, Justin Bieber would argue that he has very little to no celebrity status—he only signed with a manager a few months before he filed for divorce. While he may be on the brink of success, nothing is guaranteed compared to that of the Saturday Night Live comedian in *Piscopo*. Unlike Piscopo, who argued that his career was going downhill after evidence of a successful career,¹³⁶ here, there is very little evidence of a successful music career for Justin Bieber. Arguably, it is too early to tell the trajectory of Bieber’s career. Because there is very little to no actual evidence of celebrity, a court sitting in a common law state, and therefore using a theory of equitable distribution, would probably reject the wife’s argument. Specifically, the court cannot rely on Bieber’s past earning capacity to attempt a valuation of his celebrity status.¹³⁷

Because courts currently assess property division in a one-time process to promote finality and the disentanglement of financial assets between a divorcing couple,¹³⁸ Bieber’s hypothetical wife will be denied an equitable portion of his celebrity status, to which she, arguably, greatly contributed. Ultimately, because courts do not leave room for

¹³⁵ See, e.g., *Elkus*, 572 N.Y.S.2d 904. Notably, the following are available valuation dates that courts, across the country, may apply:

1) [S]eparation date or commencement of action at the filing date, 2) the trial or hearing date, 3) date of dissolution when judge signs decree, 4) date nearest to actual partition/distribution of assets, or 5) allowing the court to apply whichever date suits the facts of that particular case (the factor analysis).

Lynn Weddle Judkins, *The Road to Splitsville: How the Timing of Valuation During Marital Dissolution Leads to Costly Detours*, 15 J. AM. ACAD. MATRIMONIAL LAWYERS 465, 466 (1998). The crux of this Note’s argument focuses on accuracy and fairness; therefore, the Note advocates for a valuation date that is closest to the date nearest to actual partition of distribution of property. Specifically, the recommended valuation date (i.e., date of actual property distribution) not only allows for some time to pass for courts to better predict the incremental value of the asset, but also is close enough to the time of the marriage that a trial court can more easily and accurately identify the source of the growth in the asset. Source of the growth is important to determine the distribution of marital property to each spouse. *Golub v. Golub*, 527 N.Y.S.2d 946, 950 (Sup. Ct. 1988). For further discussion about the difficulty of identifying a spouse’s source of contribution to the value of celebrity status as divorce proceedings move further away from the time of the marriage, see Part III. For clarity, in New York, for example, the date of final adjudication in a divorce action is usually years after the date of filing. *Lawyers Explain the Divorce Timeline in New York State*, SAGER GELLERMAN EISNER LLP (last visited Feb. 11, 2015), <http://www.sagergellerman.com/new-york/divorce-timeline/>.

¹³⁶ *Piscopo v. Piscopo*, 555 A.2d 1190, 1192 (N.J. Super. Ct. Ch. Div. 1988). See also Steve Marsh, *The Vulture Transcript: Joe Piscopo Dissects His Career, From SNL to the Buff Era and Beyond*, VULTURE (Aug. 3, 2011), http://www.vulture.com/2011/08/joe_piscopo_interview_eddie_mu.html.

¹³⁷ See *Piscopo*, 555 A.2d at 580 – 81 1190, 1192 (N.J. Super. Ct. Ch. Div. 1988), *aff’d*, 557 A.2d 1040 (N.J. Super. Ct. App. Div. 1989) (rejecting the celebrity spouse’s argument that celebrity status valuation is too speculative because the court will use his past earning capacity as a gauge for the probability of his actual earning potential). Conversely, a court may find that because there is no evidence of a spouse’s past earning capacity, a court cannot fairly value a non-existing earning capacity.

¹³⁸ See *Laing v. Laing*, 741 P.2d 649, 657–58 (Alaska 1987).

modification of property division, and unique problems relating to celebrity status have arisen due to new technological advancements, non-celebrity spouses may not receive their fair portion of celebrity status in a divorce proceeding.

C. “*Here Today Gone Tomorrow*” Problem¹³⁹

Changes in the arts and entertainment industry, particularly, celebrities having their own Twitter accounts and Facebook fan pages, provide an opportunity for celebrities to have greater control over their “status”—they have faster public relations control compared to that of celebrities in the past.¹⁴⁰ However, there are many recent examples of that same technology damaging a celebrity’s reputation.¹⁴¹ Another version of a “here today gone tomorrow” celebrity is the “overnight celebrity.”¹⁴² The longevity of a celebrity’s career is more of a concern

¹³⁹ Rosen, *supra* note 6, at 511 n.169 (citing Cynthia M. Germano, *Do You Promise to Love, Honor and Equitably Divide your Celebrity Status upon Divorce—A Look at the Development and Application of New York’s Equitable Distribution Statute*, 9 LOY. L.A. ENT. L. REV. 153, 170 (1989)). Germano distinguished celebrity status from other human capital, such as medical licenses or law degrees:

Exposure in one film today may lead to many roles in the future. Future fame however, is uncertain and cannot be guaranteed. Thus, any division awarding future earnings of a celebrity to her spouse is also uncertain As the court in *O’Brien* noted, a professional license is a property right that can only be revoked with due process of law. A celebrity’s status, however, is not a lifelong attainment and can be taken away with one critic’s pen.

Germano, *supra*. However, this Note disagrees with Germano’s analysis. Like the New York and New Jersey courts, this Note rejects the notion that celebrity status is unstable solely because fame relies on external influences, like consumers or critics—the same can be said for any human capital or other property. For example, a lawyer or a doctor may lose clients or patients, respectively, because of a pattern of alleged malpractice. Also, a natural disaster can devalue real property. This Note argues that recent technological advancements are innate to celebrity status only—not other human capital or property—and those advancements uniquely contribute to the volatility of celebrity fame. Such volatility should be recognized by courts when considering valuation of celebrity status. Moreover, Germano proposes that courts should reimburse the non-celebrity spouse’s contribution to address the unpredictability of celebrity status. Germano, *supra* note 139. Contrarily, this Note follows the *O’Brien* court of valuation (i.e., give the non-human capital holder an equitable portion of the value of the human capital because a refund does not reflect “any incremental value in the asset”). *O’Brien v. O’Brien*, 489 N.E.2d 712, 718 (N.Y. 1985). Yet, this Note proposes that the valuation of celebrity status should be modifiable for fair and accurate distribution of celebrity status to the non-celebrity spouse.

¹⁴⁰ See ABS Staff, *In Age of Celebrities And Twitter, is PR Obsolete?*, ATLANTA BLACK STAR (Jan. 23, 2013), <http://atlantablackstar.com/2013/01/23/in-the-age-of-celebrities-and-twitter-is-pr-obsolete/>.

¹⁴¹ See Jonathan Balthaser, *Top 11 Most Cringeworthy Celebrity Tweets of 2011*, ABC NEWS (Dec. 13, 2011), <http://abcnews.go.com/Technology/11-cringe-worthy-celebrity-tweets-2011/story?id=15139065>; Christina Warren, *10 People Who Lost Jobs Over Social Media Mistakes*, MASHABLE (June 16, 2011), <http://mashable.com/2011/06/16/weinergate-social-media-job-loss/>.

¹⁴² See e.g., *Psy Lands American Music Award*, THE TIMES OF INDIA (Nov. 14, 2012), http://articles.timesofindia.indiatimes.com/2012-11-14/news-and-interviews/35111662_1_psy-american-music-award-destorm; Jennifer Schembri, *10 Celebrities Who Became Famous Overnight*, THE RICHEST (June 23, 2014), <http://www.therichest.com/expensive-lifestyle/entertainment/10-celebrities-who-became-famous-overnight/>; Tay Zonday, *Trivia*, INTERNET

today because of the accessibility and speed of content distribution to consumers through present-day technology. Not only does the technology actually send information to the consumer more quickly than before (even almost immediately), but the trend in the industry increases the fervor around celebrities for content consumers to learn more about celebrities' lives and their day-to-day or even minute-to-minute activities.¹⁴³

Because the courts currently do not reserve jurisdiction over marital property division,¹⁴⁴ divorcing celebrity spouses who are victims of the “here today gone tomorrow” problem will have to pay inequitable amounts to the non-celebrity spouse. Imagine a 2015 version of Joe Piscopo—in other words, the celebrity has a steady or even blossoming career. For the sake of clarity, this Note will refer to this hypothetical celebrity as JP. Consider further that JP and his spouse are divorcing. Here, his spouse will rely on New York or New Jersey law to support a claim to the celebrity status.

Assume that a court rules in favor of JP's spouse.¹⁴⁵ Imagine that unlike the real Joe Piscopo, whose career eventually crumbled because of its own natural declination, JP accidentally tweets or posts on Instagram something very damaging (maybe it is an inappropriate photograph or maybe the content is racist, sexist, homophobic, etc.).¹⁴⁶ Consequently, instead of having a thriving career, JP now loses most of his fan base, which translates to him losing the opportunity to be cast in other entertainment opportunities—no director or producer wants to work with him. Here, JP will continue to pay out to his spouse the court-decided portion of his celebrity status based on what the court calculated to be his enhanced earning capacity. Yet, the amount calculated by the court, prior to the damaging tweets or Instagram posts, is no longer an accurate representation of JP's enhanced earning capacity. Because the court does not have jurisdiction to modify the property division order and decision, the result is unfair to the celebrity spouse.

Moreover, JP is significantly different from the original Joe Piscopo because a celebrity of the present-day arts and entertainment industry is more susceptible to unpredictable earning capacities.

MOVIE DATABASE, http://m.imdb.com/name/nm2747938/trivia?ref_=m_nm_dyk_trv (last visited Feb. 11, 2015).

¹⁴³ See KELLI S. BURNS, *CELEB 2.0: HOW SOCIAL MEDIA FOSTER OUR FASCINATION WITH POPULAR CULTURE* ix-x (2009).

¹⁴⁴ See discussion *infra* Part III.

¹⁴⁵ For purposes of this hypothetical, actual numbers to represent the value of the celebrity status or the distribution portions per spouse are unnecessary.

¹⁴⁶ This Note acknowledges that accidental tweets, Facebook posts, or Instagram pictures, at times, can boost a celebrity's career. See ABS Staff, *supra* note 140. For purposes of this section of this Note, assume that the unintentional and sudden post by JP damages his celebrity's status and reputation.

Celebrity volatility that the original Piscopo argued is distinguishable from the volatility faced by present-day celebrities because technological advancements are inextricably linked to celebrity status.¹⁴⁷

In the JP hypothetical, the non-celebrity spouse would seek valuation and distribution of the celebrity status immediately, whereas the celebrity would want to defer assessment and payments of the marital property. Contrarily, in the Bieber hypothetical, mentioned in Part II.B, the celebrity spouse will want a court to classify, value and distribute the celebrity status immediately because he has no celebrity status at the time of the divorce proceeding. It seems unfair that because courts do not have the power to wait to assess division of property between divorcing spouses, in some cases a celebrity can avoid paying out the accurate value of his/her enhanced earning capacity (e.g., the Bieber hypothetical), but in other situations, a non-celebrity can end up with a windfall that is not reflective of the celebrity spouse's earning capacity (e.g., the JP hypothetical). The problem in either case is that courts have not recognized the innate volatility of celebrity careers in the arts and entertainment industry.

D. *Celebrity Vitality After Death*

Another unique problem that has only arisen in the present-day arts and entertainment industry is the continued or even increased earning capacity of a celebrity after his or her death. Arguably, celebrity popularity after a celebrity dies is not a new phenomenon.¹⁴⁸ Yet, in the past, an increase in a celebrity's value after death resulted from the ephemeral quality of a dead celebrity.¹⁴⁹ In other words, the actual event of the death causes a spike in sales of the deceased celebrity's products. Traditionally:

¹⁴⁷ See *supra* Part II.A.

¹⁴⁸ Lisa DiCarlo, *Reaping Millions After Death*, FORBES (Oct. 26, 2004), http://www.forbes.com/2004/10/25/cx_id_1025deadcelebsintro.html. Notably, this article predates the launch to the general public of the major social media sites: YouTube (2005), Facebook (2006), Twitter (2007), and Instagram (2010). *About*, FACEBOOK, <https://www.facebook.com/facebook/info> (last visited Feb. 11, 2015); *About Twitter, Inc.*, TWITTER, <https://about.twitter.com/company> (last visited Jan. 28, 2014); *About YouTube*, YOUTUBE, <http://www.youtube.com/yt/about/> (last visited Jan. 28, 2014); *Press*, INSTAGRAM, <http://instagram.com/press/> (last visited Feb. 11, 2015).

¹⁴⁹ Ira Kalb, *How Whitney Houston's Death Brought Her Brand To Life*, BUSINESS INSIDER (Feb. 21, 2012), <http://www.businessinsider.com/whitney-houstons-death-has-brought-her-brand-to-life-2012-2> ("Collectors anticipate that original works and possessions of celebrities will go up in value after they die The limited supply of celebrity-branded items cause them to become more valuable as more people bid for fewer articles What further enhances the brand value of dead celebrities is that the public realizes that they will not be adding more material to their body of work. This makes each of their songs, videos, movies, writings, and possessions that more unique and valuable. Since there is no more present or future, all that is left is the past, and the past becomes historic and more desirable.").

For musicians like John Lennon John Lennon [sic], the bulk of it comes from worldwide publishing royalties. . . . Elvis Presley[‘]s estate earns tens of millions of dollars annually, not from music sales . . . but from merchandising and admissions to Graceland. Because actors don’t own rights to the films in which they appear, revenue comes almost entirely from licensing and merchandising. The image of Marilyn Monroe Marilyn Monroe [sic], for example, is used to sell literally hundreds of different products worldwide.¹⁵⁰

Moreover, “[celebrities’] movies, songs, videos, writings, homes, museums, and stars on the Hollywood Walk of Fame will keep them alive—frozen in time at a time when most were young, vibrant, and successful.”¹⁵¹ Instead, today’s technology captures the eternal quality and dynamic vibrancy of a dead celebrity.¹⁵²

The income collected from sales of a celebrity’s work after death would be included in the celebrity’s estate.¹⁵³ Like with any estate, as the money comes in, the money would be divided up per the deceased celebrity’s request in his or her will, or state elective share statutes (e.g., a spouse is legally entitled to X amount of dollars or a certain portion of the estate).¹⁵⁴ Yet, what happens in a situation where a celebrity and non-celebrity are married, and then the couple divorces prior to the celebrity spouse’s death, but then the celebrity spouse continues to profit from its celebrity status after death. The issue of death is especially problematic for valuation of celebrity status because courts currently use life tables to determine the duration of one’s earnings.¹⁵⁵ Therefore, courts do not account for the accrued value of human capital after death, which is only unique to celebrity status.

The best example of this phenomenon is Michael Jackson.¹⁵⁶ Currently, Michael Jackson is “on tour” with Cirque du Soleil performing what appears to be new choreography to new cuts of his

¹⁵⁰ DiCarlo, *supra* note 148.

¹⁵¹ Kalb, *supra* note 149.

¹⁵² *The Top 10 Dead Celebs On Social Media*, FORBES, <http://www.forbes.com/pictures/mfl45mffd/social-networking-lives-of-the-dead-celebrities/> (last visited Feb. 11, 2015) (“[Elvis Presley] has 6.9 million fans on Facebook. His estate uses the page to, unsurprisingly, promote merchandise and, surprisingly, announce new music.”). See also Greenburg, *supra* note 27.

¹⁵³ See Dorothy Pomerantz, *The Top-Earning Dead Celebrities*, FORBES (Oct. 25, 2011), <http://www.forbes.com/sites/dorothypomerantz/2011/10/25/the-top-earning-dead-celebrities/>.

¹⁵⁴ Ronald R. Volkmer, *Judicial Change of Elective Share Rules*, (Jan. 2004), available at Westlaw (referencing the Uniform Probate Code).

¹⁵⁵ RICHARD E. KAYE & DAVID A. SLAVIN, AMERICAN JURISPRUDENCE TRIALS §14 (1996), available at Westlaw.

¹⁵⁶ See Greenburg, *supra* note 27. Michael Jackson passed away on June 25, 2009. Brooks Barnes, *A Star Idolized and Haunted, Michael Jackson Dies at 50*, N.Y. TIMES (June 25, 2009), http://www.nytimes.com/2009/06/26/arts/music/26jackson.html?pagewanted=all&_r=0.

music with the help of holograms.¹⁵⁷ Additionally, because of social media and holograms, Michael Jackson's celebrity has been captured to only reflect his artistic talent and honor—for example, his image appears to be less tarnished by the child sex allegations.¹⁵⁸ Finally, the Cirque du Soleil co-production "Michael Jackson: The Immortal World Tour" supports the idea that Jackson's estate profits directly from his enhanced earning capacity—rather than an illusion of ephemerality—because his celebrity status is forever captured at the peak of his career in a brand new context.¹⁵⁹

Consider a hypothetical involving Michael Jackson, but pretend that he was never married to Lisa Marie-Presley.¹⁶⁰ Instead, imagine that Jackson was married to a non-celebrity.¹⁶¹ Assume the strongest argument for the spouse. For example, assume that the spouse suggested that Jackson wear one-glove,¹⁶² or that his spouse stayed up all night to motivate him to perfect the moon-walk,¹⁶³ and critique to his song lyrics or ideas about his music videos, including his idea to design gravity-defying shoes for "Smooth Criminal,"¹⁶⁴ etc. Finally, assume that prior

¹⁵⁷ See Zack O'Malley Greenburg, *Michael Jackson One: The Latest Piece Of A Postmortem Empire*, FORBES (Oct. 23, 2013), <http://www.forbes.com/sites/zackomalleygreenburg/2013/10/23/michael-jackson-one-the-latest-piece-of-a-postmortem-empire/> [hereinafter Greenburg II]. See also *Cirque du Soleil and The Estate of Michael Jackson announce Michael Jackson ONE*, CIRQUE DU SOLEIL (Feb. 21, 2013), <http://www.cirquedusoleil.com/en/press/news/2013/michael-jackson-one-press-conference.aspx>. Notably, Michael Jackson performed "live" at the Billboard Music Awards on May 18, 2014. See Phil Gallo, *Michael Jackson Hologram Rocks Billboard Music Awards: Watch & Go Behind the Scenes*, BILLBOARD (May 18, 2014), <http://www.billboard.com/articles/events/bbma-2014/6092040/michael-jackson-hologram-billboard-music-awards>; see also Rich McCormick, *Watch Michael Jackson return as a moonwalking hologram*, THE VERGE (May 18, 2014), <http://www.theverge.com/2014/5/18/5729866/michael-jackson-hologram-at-billboard-music-awards>.

¹⁵⁸ See *Michael Jackson's Lucrative Legacy*, CBS NEWS (Sept. 8, 2013), <http://www.cbsnews.com/news/michael-jacksons-lucrative-legacy-08-09-2013/4/>.

¹⁵⁹ See Greenburg II, *supra* note 157 (describing Michael Jackson's accomplishment of a feat that he could not have done when he was alive—touring in two places at the same time). See also *Michael Jackson's Lucrative Legacy*, *supra* note 158 (explaining that people seem to either ignore or forget the controversies surrounding Michael Jackson's career, including child sex allegations, because people only see what the technology presents to them).

¹⁶⁰ *Lisa Marie Presley Opens Up About Michael Jackson*, OPRAH (Oct. 21, 2010), <http://www.oprah.com/oprahshow/Lisa-Marie-Presley-Opens-Up-About-Michael-Jackson/1> (last visited Feb. 11, 2015).

¹⁶¹ For purposes of this hypothetical, assume that Michael Jackson got married before he broke from the Jackson 5 to launch his solo career.

¹⁶² Sadie Whitelocks, *Michael Jackson's Crystal Glove Set to Make More Than £250,000 at Auction*, DAILY MAIL (May 14, 2012, 11:51 AM), <http://www.dailymail.co.uk/femail/article-2144276/Michael-Jacksons-crystal-glove-set-make-250-00-auction.html>.

¹⁶³ Ben Popper, *Moonwalker: A History of Michael Jackson's Signature Move*, LEGACY.COM (Aug. 29, 2011), <http://www.legacy.com/news/legends-and-legacies/moonwalker-a-history-of-michael-jacksons-signature-move/842/>.

¹⁶⁴ *Method and Means for Creating Anti-Gravity Illusion*, U.S. Patent No. 5,255,452 A (filed Jun. 29, 1992), available at <http://www.google.com/patents/US5255452> (last visited Feb. 11, 2015). See also Dan Vergano, *Jackson's 'Smooth' Leaning Move Really Was Patented*, USA TODAY (July 2, 2009), http://usatoday30.usatoday.com/life/people/2009-06-30-jackson-patent_N.htm.

to Michael Jackson's death, the couple divorces in a common law state that recognizes celebrity status.¹⁶⁵

Consider that Jackson's estate continues to profit from his enhanced earning capacity, which continues to "survive"¹⁶⁶ because of present-day technology. Similar to the problems raised in the Bieber and Piscopo hypotheticals, here, Jackson's spouse would not receive a fair portion of the value of Jackson's celebrity status. The new problem of technological advancements in the arts and entertainment industry is that valuation of a celebrity's status may be inaccurately determined because courts have never before considered the unique issue of post-mortem celebrity fame.

III. PROPOSAL

A. *Reserved Jurisdiction Approach*

The speculative nature of the value of celebrity status is not foreign to courts, although the unique concerns that were raised in Part II have yet to be presented in court. Some courts do not recognize any human capital (e.g., law degree, medical license, or celebrity status) as property because of the speculative nature of valuing such capital.¹⁶⁷ Even courts that recognize professional licenses, for example, may be hesitant to recognize celebrity status as property because there is no

¹⁶⁵ For the sake of minimizing variables, assume that Michael Jackson did not pass away suddenly and at an unexpected age, but rather he died at an age at which actuarial life tables would accurately predict his death for someone with his health conditions, etc.

¹⁶⁶ A peculiar complexity to the issue of post-mortem celebrity fame is the idea that existence of celebrity status, like other human capital (e.g., law degree or medical license), terminates upon death of the celebrity or license holder—human capital does not survive, in the legal context. *See e.g.*, *Postema v. Postema*, 471 N.W.2d 912, 917 (Mich. Ct. App. 1991) (citing *In re Marriage of Graham*, 574 P.2d 75, 77 (Colo. 1978)). Although this Note describes the continuation of celebrity status after death, this Note does not suggest that courts should treat post-mortem celebrity status in the same manner as property during a celebrity's life. In other words, a non-celebrity spouse cannot claim a portion of the status after the celebrity dies. Instead, courts should factor post-mortem fame into the longevity of celebrity status, which will affect the value of the status. *See infra* Part III for further explanation.

¹⁶⁷ Allen M. Parkman, *Human Capital as Property in Celebrity Divorces*, 29 FAM. L. Q. 141, 142–43, 169 (1995), available at <http://www.unm.edu/~parkman/FLQ95.PDF>. Human capital:

[D]oes not have an exchange value . . . on an open market. It is personal to the holder. It terminates on death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed or pledged . . . It is simply an intellectual achievement that may potentially assist in the future acquisition of property. In our view, it has none of the attributes of property in the usual sense of that term.

Id. See e.g., *Postema*, 471 N.W.2d at 917 (citing *In re Marriage of Graham*, 574 P.2d 75, 77 (Colo. 1978)). This Note, like the *Postema* court, rejects the Colorado characterization of human capital because "mutual sacrifice, effort, and contribution of both parties as part of a larger, long-range plan intended to benefit the family as a whole" should give rise to an equitable claim to human capital. *Postema*, 471 N.W.2d at 915. Also, "whether or not an advanced degree can physically or metaphysically be defined as 'property' is beside the point" because courts should focus on fairness. *Id.* (citing *Woodworth v. Woodworth*, 337 N.W.2d 332, 335 (Mich. Ct. App. 1983)).

physical evidence to indicate the value of the property.¹⁶⁸

This Note proposes a reserved jurisdiction approach (discussed below), which will minimize the problem of speculative valuation of celebrity status. The approach is especially helpful to remedy the unique problem of increased volatility of celebrity status due to technological advancements. Currently, only two states (i.e., New York and New Jersey) recognize celebrity status as marital property, but the reserved jurisdiction approach should alleviate the concerns of the other common law courts that do not recognize celebrity status as property. Consequently, with the adoption of the reserved jurisdiction approach, all common law states that recognize traditional human capital (e.g., law degree or medical license) should recognize celebrity status. Specifically, those courts that do not recognize celebrity status may reevaluate the procedure and decide that the inequity of denying a non-celebrity spouse a fair share to the value of the celebrity spouse's status, to which the non-celebrity contributed, outweighs the minimal speculative assessment of the disputed property. Additionally, New York and New Jersey courts can administer property division in divorce proceedings more accurately and fairly.

The reserved jurisdiction approach is described in *Laing v. Laing*.¹⁶⁹ In *Laing*, the Supreme Court of Alaska addressed the speculative nature of non-vested pensions, which the court recognized as marital property.¹⁷⁰ The problem with non-vested pensions is that:

A present lump sum award to the non-employee spouse calculated on a pension which has not vested does not necessarily promote th[e] purpose [of providing financial security to pension participants]. The fact is that nonvested [sic] pensions are sometimes forfeited, often for reasons which properly should be within the power of the employee to decide, and sometimes for reasons which are entirely beyond the control of the employee.¹⁷¹

Moreover, the court reasoned that “[t]here is no reliable way to factor the contingency of forfeiture [of a non-vested pension] into a present value calcul[ation]. Thus, we are willing to accept a degree of continued financial entanglement insofar as that may be necessary to

¹⁶⁸ See Parkman, *supra* note 167. “The characterization of celebrity in divorce is still an unresolved issue. To assume that other courts will follow *Golub*, *Elkus*, or *Piscopo* would be premature. *O’Brien* was itself a landmark decision followed by no other courts outside New York [and New Jersey].” Raj Rajan, *The Characterization of the Celebrity’s Career in Divorce*, 11 J. CONTEMP. LEGAL ISSUES 251, 255 (2000).

¹⁶⁹ *Laing v. Laing*, 741 P.2d 649, 656–58 (Alaska 1987).

¹⁷⁰ *Id.* at 649.

¹⁷¹ *Id.* at 657–58.

effect a just division of nonvested [sic] pension rights.”¹⁷² With the reserved jurisdiction approach, although the parties would continue to be financially entangled, which is a counterintuitive goal of divorcing parties, the court acknowledges that fair valuation outweighs that burden.¹⁷³

Reserved jurisdiction means “the trial court retains jurisdiction and orders the [moneyed] spouse to pay to the former spouse a fraction of each pension payment actually received.”¹⁷⁴ Therefore, the court will wait until the pension vests so that the court can more fairly allocate the risk of forfeiture of the pension.¹⁷⁵

Analogously, because today’s arts or entertainment celebrities are more susceptible to unpredictable longevity of their careers, courts can take on a similar reserved jurisdiction approach. Specifically, to remedy the problem of the speculative nature of celebrity status, courts can retain jurisdiction and order the celebrity spouse to pay the former spouse a certain portion of the celebrity spouse’s enhanced earning capacity based on the celebrity spouse’s actual income received after the divorce.

This Note proposes that courts, in the initial property division assessment, should continue to defer to accountants to assess the value of a celebrity status based on actuarial life tables and application of the industry discount.¹⁷⁶ Additionally, accountants should work with experts in the arts and entertainment industry to incorporate the likelihood of future success and longevity of a celebrity’s career into the accountant’s valuation of the celebrity status. Collaboration with experts will address the new issues that have arisen because of the different nature of the arts and entertainment industry. Specifically, in the hypothetical Justin Bieber case in Part II.B, an accountant could work with an industry expert to more accurately estimate the likelihood and longevity of Bieber’s success and nature of his success of being a young teen heartthrob. Similarly, accountants can work with industry experts to factor in post-mortem fame into valuation of a more established celebrity’s status, like in the hypothetical divorce situation with Michael Jackson, in Part II.D. Finally, divorcing parties should have the opportunity to modify the trial court’s initial property division assessment to offset any under or overestimations, like in the 2015 Joe Piscopo hypothetical in Part II.C, for fairness.

Arguably, a one-time assessment with the risk of under or over

¹⁷² *Id.* at 658.

¹⁷³ *See id.* at 657–58 (“[The reserved jurisdiction approach] more evenly allocates the risk of forfeiture between the parties, although it also runs counter to our expressed preference for finalizing a couple’s financial affairs as soon as possible.”).

¹⁷⁴ *Id.* at 657.

¹⁷⁵ *Id.*

¹⁷⁶ *Piscopo v. Piscopo*, 557 A.2d 1040, 1041 (N.J. Super. Ct. App. Div. 1989).

paying is less costly—in terms of time and money—than the reserved jurisdiction approach, which will lead to more accurate payments. The reality is that the option to modify leads to more court expenses, including the hiring of more accountants and experts. Yet, accuracy and fairness should prevail. Although the court would have the power to reserve jurisdiction over divorce cases involving property division of celebrity status, the parties have the choice to seek modification or settle out of court, if they feel burdened by the procedure.

Another counterargument to the reserved jurisdiction approach is that a non-vested pension is not the same as celebrity status because a non-vested pension eventually vests at a certain time, if not forfeited.¹⁷⁷ Change in celebrity status does not have a set date, unlike the transition from non-vested to vested pensions. Because there is no certain date of change in status, a divorce case where the issues are the valuation and distribution of celebrity status can remain on a court's docket forever. Also, if courts adopt the reserved jurisdiction approach, it leaves open other questions of uncertainty—how long should a case remain in a court's jurisdiction and what is sufficient evidence that a party must present to a judge in order to support their claim of a change in celebrity status that affects the value or the respective parties' entitlement to the marital property of celebrity? Overall, these questions stem from the broad concerns about the use of judicial resources and judicial efficiency. Additionally, because of the possibility of a divorce case involving the potential for the equitable distribution of celebrity status to drag out indefinitely, a divorcing spouse with money may take advantage of that potential and strategically drag out the process even further to force the opposing spouse to settle out of court.

Such concerns have some merit, but because the purpose of equitable distribution is for divorcing parties to receive fair shares of marital property upon divorce, courts can enforce guidelines that should curb divorcing parties' abuse of the uncertainty of change in celebrity status. For example, after the initial divorce proceeding and decision by a judge about property division, the court may require a two-year waiting period from the last date of adjudication to issue the first claim and all other subsequent claims to modify valuation and distribution of celebrity status by either party.¹⁷⁸ The time requirement would prevent

¹⁷⁷ *Non-Vested Pensions and Divorce*, PENSION APPRAISERS, INC., <http://www.pensionappraisers.com/pension/Non-Vested-Pensions-and-Divorce-29.shtml> (last visited Feb. 11, 2015) (“A non-vested pension plan is one in which the employee has not completed the required years of creditable service in order to earn the right to receive benefits under the terms of the plan. Most pension plans require members to achieve a set number of years of creditable employment before being entitled to pension benefits under the terms of the plan (i.e. 3 years, 5 years, 10 years, etc.). Vesting occurs when the employee completes the number of years of service required to receive benefits under the plan at some point in the future.”)

¹⁷⁸ This Note presumes that the decision by the trial court about property division will be the final

parties from taking each other to court anytime they feel like it, which also protects the court's and the parties' resources (e.g., time and money). Further, two years seems like a fair amount of time to balance the fast-paced culture of the arts and entertainment industry with the lengthiness of gathering evidence and building a viable case for modification so that parties are not merely using the court for therapeutic relief or a means to seek revenge against the other party. Finally, two years is only a minimum, so the time requirement would not force any party to bring a claim for modification unnecessarily, unlike the effects of other alternatives to timeliness of a claim (e.g., statute of limitations). The waiting period will encourage parties to evaluate their situation about whether to invest time and money into another court proceeding. As a result, thoughtful parties who decide to seek modification will probably have sufficient evidence for a court to assess, whereas parties who do not have sufficient evidence will be deterred from wasting the court's time.

A proposal to address the potential indefiniteness of reserved jurisdiction is to arrange a scheme, in which the maximum time for a party to seek modification would directly correlate to the length of the marriage. For example, assume that a celebrity and non-celebrity couple married in 2010, and then either spouse files for divorce in 2014. Assume the decision about property division is sometime in 2016 (e.g., approximately two years after filing). To prevent the indefiniteness of modification, a court here would give the parties up to 2020 to seek modification. Moreover, because of the proposed two-year waiting period, the parties will only have the opportunity to seek modification in court for only two years.¹⁷⁹

Additionally, the maximum time limit would deny parties, who were married for two years or less, the option to modify the trial court decision.¹⁸⁰ For example, if a couple were married for exactly two years, a party cannot seek modification because the proposed waiting period equals the duration of their marriage. Furthermore, this Note assumes that the longer the marriage, the greater the opportunity for spousal

assessment, unless either party seeks to modify. This Note does not endorse the view that the initial decision by the trial court merely be a tentative assessment because that will cause further financial entanglement between the parties. For example, this Note does not suggest that the celebrity spouse may be entitled to a refund of excess funds for an overestimation of a tentative assessment.

¹⁷⁹ To clarify, using the Note's proposal, either party of this hypothetical couple would have a right to seek modification two years after the date of last adjudication, which is sometime in 2016. Therefore, the parties would have between only 2018 and 2020 to seek modification.

¹⁸⁰ For purposes of identifying the maximum time limit on modification, this Note defines "year" to mean at least six months. For example, if a couple were married for two years and seven months, that couple would have three years from the property division adjudication to seek modification. Similarly, a couple that was only married for two years and four months, will have a maximum time limit of two years.

contribution, and therefore, a stronger argument that a non-celebrity spouse is entitled to a portion of the value of the celebrity status. Conversely, the shorter the marriage, the lesser the opportunity for spousal contribution, and therefore, a weaker argument that a non-celebrity spouse is entitled to a portion of the value of the celebrity status (i.e., a lesser need for ongoing proceedings to determine accuracy of valuation and distribution of the celebrity status). Consequently, the proposed maximum time limit would promote judicial efficiency by preventing frivolous claims of modification.

Assume a celebrity and non-celebrity couple has been married for twenty years. Arguably, granting a court jurisdiction over a divorce involving celebrity status as marital property for eighteen years¹⁸¹ may seem like a long time to keep the parties financially entangled, but fairness and accuracy should prevail.¹⁸² Also, the parties are not obligated to seek modification or they may feel incentivized to settle.

B. Modifiability of Property

Modifiability of property division presents a peculiar problem that is not present in the modification of child support or alimony. Specifically, child support and alimony are forward-looking. Child support is concerned with the future welfare of minor children, and alimony is concerned with the ability of spouses to live independently. Property division is backward-looking, particularly in human capital cases because courts must examine past contribution to determine how to apportion the value of the property. Unlike with child support and alimony, which require examination of present-day salaries and circumstances to determine future need in a modification action, modifiability of the value of a spouse's celebrity status would have to look at past conduct to determine present-day distribution of future value.

The backward-looking aspect of property division becomes an issue when the court has to identify the source of contribution to the property's value. Three scenarios in particular highlight this source identification problem: 1) long marriages, 2) remarriage, and 3) sex symbols.

Again, imagine a divorced couple, who was married for twenty-years, and the trial court distributed the value of the celebrity spouse's status at 50% to each spouse. The twelfth year after the property division adjudication, the non-celebrity spouse seeks modification of the value of the property because his former spouse is even more famous now than when they were married. The celebrity could persuasively

¹⁸¹ Length of marriage (twenty years) – Waiting period (two years) = Opportunity to modify (eighteen years).

¹⁸² Laing v. Laing, 741 P.2d 649, 658 (Alaska 1987).

argue that twelve years have passed, and that although the non-celebrity may have contributed to the foundation of her celebrity status, too much time has now passed to identify the husband as a source of that fame. Contrarily, the non-celebrity would argue that the trial court already ruled that he contributed to half of the property, and he is entitled to the accrued incremental growth of the property from the twelve years.

Similarly, in the case of remarriage, imagine that Prince was married and his wife suggested the name “The Artist Formerly Known As Prince.” Yet, Prince did not change his name per that suggestion until he divorced his first wife and remarried, at which time he is making more money. His former spouse may feel entitled to the incremental value of the celebrity’s status because of her contribution to his identity—his name—but his second wife was the one who actually persuaded Prince to change his name. Again, remarriage presents a problem with identifying the source of contribution and how integral a certain contribution is to the celebrity status.

A court may address this problem by applying another discount—on top of the original discount applied to offset the unique quality of celebrity¹⁸³—to the value of the celebrity status as time moves further away from the actual marriage or when another spouse enters the equation. The additional discount will make the total value of the celebrity status proportionally smaller, but the non-celebrity’s entitled percentage to the asset remains the same.¹⁸⁴ Modification should not be an opportunity for further fact-finding on the issue of contribution, but only on the issues of valuation and distribution. Moreover, the discount would fairly balance the non-celebrity’s entitlement to incremental value of the celebrity status with the reality that the non-celebrity has been attenuated from the asset for some time. The discount would be determined on a case-by-case basis by accountants and experts in the arts and entertainment industry.

Another solution to the problem of attenuation because of length of separation is Michigan’s reimbursement approach,¹⁸⁵ but this approach does not resolve the problem of loss of incremental value to the non-celebrity spouse.

Another unique scenario is the effect of marriage on sex symbols. For example, soon after R&B heartthrob Usher married Tameka Foster in 2007, his celebrity status began to fade.¹⁸⁶ The couple eventually

¹⁸³ *Piscopo v. Piscopo*, 557 A.2d 1040, 1041 (N.J. Super. Ct. App. Div. 1989).

¹⁸⁴ A discount will not deprive the non-celebrity spouse of a fair share because the longer the marriage, the greater likelihood that the non-celebrity has already enjoyed some benefits of the celebrity status. See *Postema v. Postema*, 471 N.W.2d 912, 920 (Mich. Ct. App. 1991).

¹⁸⁵ *Id.* at 919 – 920 (explaining that in a divorce case, the issue of property division of a professional license should be reimbursed to the non-license holder to compensate for that spouse’s efforts).

¹⁸⁶ See Sharde Miller, *Usher Tells Oprah That Ex-Wife Tameka Foster Made Them Enemies*,

divorced.¹⁸⁷ Assume that a trial court awards Tameka a portion of the value of Usher's celebrity status. Assume that soon after Usher and Tameka divorce, his career blossoms again, and Tameka seeks modification of the value of the property two years after the divorce. Usher argues that Tameka did not contribute to his increased fame, but in fact she was holding him back from success and therefore is not entitled to any increase in value of his celebrity status. Here, a court should not award Tameka an increased judgment because the growth did not stem from marital efforts, which is the touchstone of property division.¹⁸⁸ Although the primary purpose for modification is to determine the accurate value of celebrity status, a court may also modify the distribution to account for attenuation of contribution, when appropriate.

Finally, like child support and alimony, the ability to modify a property division judgment automatically terminates upon death of either party because the property no longer exists in the legal context.¹⁸⁹

C. More on Modification of Celebrity Status

Courts, or more appropriately, state legislatures should permit the parties to waive their ability to modify divorce settlements. From the parties' perspective, if the concern is continued entanglement of finances, and the divorcing couple decides that they do not want anything to do with one another ever again, both parties, together, should have the right to waive their ability to modify, at any time. Specifically, in cases where celebrity status is at issue, if both parties agree to either a one-time assessment or no future assessments of the celebrity status, then the divorcing couple can waive the right to modify. Consequently, the parties have some control over the length of the divorce action. Also, both parties would have to agree to the waiver. Therefore, if one party wants to waive the right to modify, but the other party does not, the party interested in the waiver does not lose the right

ABC NEWS (Sept. 17, 2012), <http://abcnews.go.com/Entertainment/usher-tells-oprah-wife-tameka-foster-made-enemies/story?id=17251100> (referring to Usher and Tameka Foster's wedding in 2007). See also The Launch Writer, *Three Questions Oprah Never Asked Usher*, THE LAUNCH MAG. (Sept. 27, 2012), <http://thelaunchmagazine.com/?p=3217> ("Usher's record sales have plummeted . . . it's still quite astonishing that Usher is no longer a platinum-selling artist.") Notably, The Launch Writer does not identify Usher's marriage as the reason for his diminishing brand as a sex symbol. The Launch Writer, *supra*. The author recognizes that when Usher was notoriously dating another woman (i.e., Chili from TLC), prior to his marriage to Foster, his record sales increased. The Launch Writer, *supra*. However, this Note suggests that the heightened commitment of marriage coupled with the missing allure of a dyadic celebrity couple—Tameka Foster is not a celebrity—distinguishes Usher's relationships. For purposes of this section, assume the validity of the notion that Tameka Foster diminished Usher's "sex symbol" status.

¹⁸⁷ Miller, *supra* note 186.

¹⁸⁸ See *supra* Part I.

¹⁸⁹ See *supra* note 166.

to modify in the future. Moreover, that party's initial desire to waive modification should not be used as evidence to support a contention that the party did not believe he or she was entitled to more shares of the celebrity status or that he or she should pay out less on the property (i.e., the desire to waive modification should only reflect the party's interest in finality of divorce).

Of course it is easier for courts to continue with the one-time procedure of all marital property, but "difficulty of determination is no deterrent to valuation where equity demands monetary compensation."¹⁹⁰ Additionally, if parties do not want their finances entangled, the parties are free to resolve the issue of marital property division through alternative dispute resolutions, like mediation. Also, current and future spouses, including a celebrity spouse, may be more attracted to prenuptial or postnuptial agreements to prevent ongoing litigation.

Additionally, a remaining concern about the reserved jurisdiction approach would be that technological advancements do not only affect the unpredictability of celebrity status, but such advancements contribute to the value of other property, including business or real property. Would courts have to defer valuation and distribution of other types of marital property? No because no other property is so dependent on and intertwined with technology.¹⁹¹ This Note suggests that the element of forfeiture of a non-vested pension is analogous to the impact of technology on arts and entertainment celebrities (i.e., technology is now an element of a celebrity). The technology is what makes celebrity status so volatile and deserving of special consideration in property division, unlike other human capital or real property cases.¹⁹²

Another general counterargument is that the advancements in technology that affect the longevity of a celebrity's career are not actual problems for most celebrities. Arguably, only exceptional celebrities, like Michael Jackson, Elvis Presley, and Elizabeth Taylor who had (and have, even though they are deceased) international renowned celebrity status, risk the possibility of falling from grace, or make exceeding amounts of money upon death. Although this Note refers to celebrities who have hit international fame and fortune, technological advancements do not affect only those celebrities. Because of technology, more and more people are attaining celebrity status that may not have achieved it previously.¹⁹³ Therefore, the increased unpredictability of celebrity status is not isolated to world-renowned

¹⁹⁰ *Piscopo v. Piscopo*, 555 A.2d at 580 – 81 1190, 1191 (N.J. Super. Ct. Ch. Div. 1988), *aff'd*, 557 A.2d 1040 (N.J. Super. Ct. App. Div. 1989).

¹⁹¹ See *supra* Part II.A.

¹⁹² See Germano, *supra* note 139.

¹⁹³ See *supra* discussion note 142.

celebrities alone.

CONCLUSION

In New York and New Jersey, a divorcing couple that includes a celebrity spouse must deal with the issue of valuation and distribution of celebrity status as marital property. One reason that other states have not followed New York and New Jersey is the speculative nature of assessing human capital, especially celebrity status. Moreover, the technological advancements in the present-day arts and entertainment industry are innate to the unique volatility of celebrity careers in this industry; either celebrities are born overnight or face sudden increases in their celebrity status, or the opposite where celebrities fall from grace more easily than before.

Due to common law courts' traditional policy of disentangling divorcing spouses' finances, courts do not allow modification for property division. Yet, in the case of celebrity status, courts should have the opportunity to reserve jurisdiction over the matter because the unpredictability of the effects of how consumers use certain technology to consume their content and interact with their favorite celebrities is inextricably linked to a celebrity's earning capacity. To reiterate the *Laing* court's analysis, courts should be "willing to accept a degree of continued financial entanglement insofar as that may be necessary to effect a just" distribution.¹⁹⁴

To remedy the problem of inequitable monetary awards of property division in celebrity status cases, courts should reserve jurisdiction over the issue. Over time, the courts can control the proceedings to ensure that divorcing spouses are receiving a fair share of the celebrity status or the celebrity's enhanced earning capacity. State legislatures could step in to delineate certain procedures, such as a waiting period or maximum time limits to seek modification.

Finally, the reserved jurisdiction method may encourage courts in other common law states that have avoided classifying celebrity status as marital property—because of the speculative nature and risk of inaccuracy related to valuation of celebrity status—to recognize celebrity status as marital property.

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¹⁹⁴ *Laing v. Laing*, 741 P.2d 649, 658 (Alaska 1987).

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