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FAMILY LAW: OUGHT A PROFESSIONAL DEGREE BE DIVISIBLE AS PROPERTY UPON DIVORCE?

In recent years the law governing marriage and divorce has changed dramatically. In both common law and community property jurisdictions courts are beginning to view marriage not as a union of the participants but as a partnership of equals.¹ The prevalence of no-fault divorce statutes allows courts to focus their attention on the financial incidents of marital dissolution rather than on the disputes over fault grounds for divorce that previously occupied much of the courts' time, even though many states have mixed fault and no-fault statutes. The wife has lost alimony bargaining power that she traditionally possessed in fault litigation; legislatures, and subsequently the courts, have used alimony awards and property division to provide for the actual needs of the parties rather than to punish the offending spouse.² Courts have become innovators seeking to use their dissolution authority to divide a wider range of property than many heretofore thought the courts had authority to divide.³ Courts frequently make property divisions based on a notion that treats the marital relationship as a de facto economic partnership in which the partners share the benefits, burdens, and responsibilities of marriage.⁴

One problem that has received special attention in recent years

1. See Krauskopf, *A Theory for "Just" Division of Marital Property in Missouri*, 41 Mo. L. REV. 165 (1976); Krauskopf & Thomas, *Partnership Marriage: The Solution to An Ineffective and Inequitable Law of Support*, 35 OHIO ST. L.J. 558 (1974); Murphy, *The Implied Partnership: Equitable Alternative to Contemporary Methods of Postmarital Property Distribution*, 26 U. FLA. L. REV. 221 (1974).

2. See notes 195-199 & accompanying text *infra*. But see *In re Marriage of Vanet*, 544 S.W.2d 236, 241 (Mo. Ct. App. 1976) (wife who supported family while husband was in graduate school awarded alimony based on husband's future earning ability notwithstanding difficulty of valuing wife's contribution). See also Erickson, *Spousal Support Toward the Realization of Educational Goals: How the Law Can Ensure Reciprocity*, 1978 WIS. L. REV. 947, 959-960; Comment, *Horstmann v. Horstmann: Present Right to Practice a Profession as Marital Property*, 56 DEN. L.J. 677, 681-84 (1979).

3. For example, some courts routinely divide assets such as goodwill, the value of an ongoing professional practice, and both vested and nonvested pension and retirement benefits. See notes 155-182 & accompanying text *infra*.

4. See Krauskopf, *supra* note 1; Krauskopf & Thomas, *supra* note 1; Murphy, *supra* note 1.

is whether an advanced professional degree constitutes a divisible property interest upon marital dissolution.⁵ This Note analyzes whether an advanced degree constitutes a divisible property interest by focusing on two issues: first, whether a degree or license is property;⁶ second, if a degree or license is property, whether that property is divisible.⁷

The problem arises when one spouse, traditionally the wife,⁸ supports the other spouse during a professional graduate program; shortly after the nonworking spouse earns a degree or completes required postgraduate training, the marriage dissolves. Dissolution under these circumstances creates problems for the court that attempts to adjudicate the economic rights of the parties; without fault-based alimony criteria, the court effectively may deny the supporting spouse a remedy. If the working spouse supported the couple throughout the marriage, she is therefore capable of self-support. The working spouse, consequently, cannot receive alimony in many jurisdictions.⁹ Furthermore, often the only valuable asset which the married couple acquires during the marriage is the nonworking spouse's educational degree. The couple dissipates the marital earnings and savings to support the family and to meet the student spouse's educational expenses. Often during the early years of marriage, the couple seeks through a partnership effort to acquire a professional education for one spouse, thereby delaying

5. *E.g.*, *Todd v. Todd*, 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (1969); *In re Marriage of Graham*, 194 Colo. 429, 574 P.2d 75 (1978); *In re Marriage of Horstmann*, 263 N.W.2d 885 (Iowa 1978); *Inman v. Inman*, 578 S.W.2d 266 (Ky. Ct. App. 1979); *Moss v. Moss*, 80 Mich. App. 693, 264 N.W.2d 97 (1978); *Hubbard v. Hubbard*, 603 P.2d 747 (Okla. 1979); *DeWitt v. DeWitt*, 98 Wis. 2d 44, 296 N.W.2d 761 (Ct. App. 1980).

This Note addresses solely the consideration of the attainment of a graduate professional degree as opposed to an undergraduate degree. An undergraduate education usually addresses the comprehension of liberal arts and sciences rather than the attainment of a profession. Furthermore, one is more likely to seek a graduate education during the time in life when marriage is more common and the spouses are more likely to view education in terms of future earning ability. See Comment, *The Interest of the Community in a Professional Education*, 10 CAL. W.L. REV. 590, 591 n.5 (1974).

6. See notes 138-147 & accompanying text *infra*.

7. See notes 148-154 & accompanying text *infra*.

8. Although some husbands support their wives during school, the writer's research has yet to reveal a single case in which the husband sues the wife for division of her degree as marital property. Consequently, the word "he" is used to denote the student spouse, and "she" is used to denote the working spouse.

9. See notes 195-199 & accompanying text *infra*.

other major investments. Thus, the economic benefits of occupational preparation have not accrued at the time the parties divorce.

Under certain circumstances, fairness compels inclusion as a divisible marital property asset of that portion of one spouse's earning power acquired through the partnership endeavor. Several courts have treated a professional degree as a marital asset; this Note seeks to examine the solutions and nonsolutions proposed by the courts in the context of existing remedies and statutes.

This Note contends that to allow a court to classify an advanced educational degree or license as marital property subject to division upon divorce is both reasonable and necessary. Furthermore, the classification of a professional degree as a property asset, distributable upon dissolution of marriage, is the only feasible, widely available remedy when the parties, for whatever reasons, end the marriage without other divisible marital assets. If through the working spouse's effort the degreed spouse becomes unjustly enriched, the courts as a matter of equity must value and distribute the professional degree as a marital asset.¹⁰

KINDS OF PROPERTY DISTRIBUTION STATUTES

Each state has a unique scheme of postdissolution marital property distribution. In the United States, distribution statutes fall into three distinct classes: strict common law, equitable distribution, and community property. Understanding the classification of an asset as divisible property requires an examination of each category of distribution statute.

10. For purposes of deciding what to classify as the "thing" to be divided, the courts have not clarified the distinction between a professional license and increased earning capacity. The distinction largely is semantic and for the purposes of this Note does not affect the outcome of the cases. *E.g.*, *Todd v. Todd*, 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (1969) (law degree not community property); *In re Marriage of Graham*, 194 Colo. 429, 574 P.2d 75 (1978) (educational degree is not marital property); *In re Marriage of Horstmann*, 263 N.W.2d 885 (Iowa 1978) (future earning capacity of husband's law degree is marital property); *Inman v. Inman*, 578 S.W.2d 266 (Ky. Ct. App. 1979) (license to practice dentistry is marital property). See also Comment, *Professional Education as a Divisible Asset in Marriage Dissolutions*, 64 IOWA L. REV. 705, 710-12 (1979); 1979 WASH. U.L.Q. 1175, 1177 (1979).

Strict Common Law

Five jurisdictions follow the strict common law rule.¹¹ These jurisdictions give the court no power to distribute the separate property of the spouses; instead, distribution is a function of title alone.¹² Some strict common law jurisdictions give the courts limited authority to distribute property according to special equities.¹³

Because of the commingling of property occurring during the marital partnership, courts following the common law approach must decide the true ownership of each property asset. The court's jurisdiction over the matter, however, ends when the court determines to which spouse the property belongs.¹⁴ The argument that an educational degree is marital property subject to division by the court upon divorce is inapplicable in the five jurisdictions that follow the strict common law rule because those states do not allow equitable distribution of property under any circumstances. Such an award is possible, reasonable, and necessary under equitable distribution and community property distribution statutes.¹⁵

Equitable Distribution

The most common modern form of property distribution juris-

11. These states are Florida, Mississippi, South Carolina, Virginia, and West Virginia. See Freed & Foster, *Divorce in the Fifty States: An Overview as of August 1, 1980*, 6 FAM. L. REP. 4043 (1980).

Recent court decisions in both South Carolina and Florida, however, cast doubt on the view that these two states are strict common law jurisdictions. See *Canakarís v. Canakarís*, 382 So. 2d 1197 (Fla. 1980); *Blum v. Blum*, 382 So. 2d 52 (Fla. Dist. Ct. App. 1980); *Simmons v. Simmons*, 6 FAM. L. REP. 2671 (S.C. May 6, 1980). Many practitioners consider as a consequence of these decisions that South Carolina and Florida are now equitable distribution jurisdictions. See Freed & Foster, *supra*, at 1051. See generally note 16 & accompanying text *infra*. Pennsylvania and New York, two states that traditionally have followed the strict common law rule have changed recently to an equitable distribution rule. Act of June 19, 1980, ch. 281, § 9, 1980 N.Y. Laws 445, 448 (codified at N.Y. Dom. Rel. Law § 236 (McKinney Cum. Supp. 1980)); Divorce Code, Act No. 1980-26, § 401(d), 1980 Pa. Legis. Serv. 49, 56 (to be codified at Pa. Cons. Stat. § 401(d)).

12. Freed & Foster, *supra* note 11, at 4051.

13. See, e.g., *Johnson v. Johnson*, 367 So. 2d 695 (Fla. Dist. Ct. App. 1979); *Wilson v. Wilson*, 270 S.C. 216, 241 S.E.2d 566 (1978).

14. See *Erickson, Spousal Support Towards the Realization of Educational Goals: How the Law Can Ensure Reciprocity*, 1978 WIS. L. REV. 947, 961.

15. See notes 133-137 & accompanying text *infra*.

diction in the United States is the equitable distribution system.¹⁶ Thirty-eight jurisdictions grant judicial authority to distribute some or all of the property owned by the parties at the time of divorce according to standards set forth in the applicable statute.¹⁷ The distribution statutes in these jurisdictions do not specify the exact proportion of marital property a court must award to each spouse. The courts thus possess wide discretion to distribute property in accordance with broad notions of fairness and the facts of each case.¹⁸ Statutes in some jurisdictions provide only that courts award property in a "just" and "equitable" manner, whereas others specify certain criteria that the court should consider when distributing property between divorcing partners.¹⁹

16. Thirty-eight jurisdictions distribute according to an equitable distribution system: Alabama, Alaska, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Wisconsin, and Wyoming. Freed & Foster, *supra* note 11, at 4032-33. See also note 11 *supra*.

17. The court's power of distribution generally relates only to those assets acquired by the parties during marriage. See H. CLARK, *LAW OF DOMESTIC RELATIONS*, 450-51 (1968).

18. See, e.g., N.J. STAT. ANN. § 2A:34-23 (West Supp. 1980).

19. See, e.g., WIS. STAT. ANN. § 767.255 (West Supp. 1980). Among the more common criteria used by the court are: contributions of a spouse to the marriage; marital assets and the relative financial condition of the spouses; duration of marriage; age, health and circumstances of the parties; amount and source of income; and standard of living. Freed & Foster, *supra* note 11, at 4033.

Section 401(d) of the 1980 PA. DIVORCE CODE provides:

In a proceeding for divorce or annulment, the court shall upon request of either party, equitably divide, distribute or assign the marital property between the parties without regard to marital misconduct in such proportions as the court deems just after considering all relevant factors including:

- (1) The length of the marriage.
- (2) Any prior marriage of either party.
- (3) The age, health, station, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties.
- (4) The contribution by one party to the education, training or increased earning power of the other party.
- (5) The opportunity of each party for future acquisitions of capital assets and income.
- (6) The sources of income of both parties, including but not limited to medical, retirement, insurance and other benefits.
- (7) The contribution or dissipation of each party in the acquisition, preservation, depreciation or appreciation of the marital property, including the contribution of a party as homemaker.

Moreover, several states have adopted provisions identical or similar to section 307 of the Uniform Marriage and Divorce Act (UMDA), which contains two alternative versions.²⁰ Alternative A

(8) The value of the property set apart to each party.

(9) The standard of living of the parties established during the marriage.

(10) The economic circumstances of each party at the time the division of property is to become effective.

Divorce Code, Act No. 1980-26, § 401(d), 1980 Pa. Legis. Serv. 49, 56 (to be codified at 23 PA. CONS. STAT. § 401(d)).

20. Section 307 of the UMDA provides:

§307 Alternative A:

(a) in a proceeding for dissolution of a marriage, legal separation, or disposition of property following a decree of dissolution of marriage or legal separation by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court, without regard to marital misconduct, shall, and in a proceeding for legal separation may, finally equitably apportion between the parties the property and assets belonging to either or both however and whenever acquired, and whether the title thereto is in the name of the husband or wife or both. In making apportionment the court shall consider the duration of the marriage, and prior marriage of either party, antenuptial agreement of the parties, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties, custodial provisions, whether the apportionment is in lieu of or in addition to maintenance, and the opportunity of each for future acquisition of capital assets and income. *The court shall also consider the contribution or dissipation of each party in the acquisition, preservation, depreciation, or appreciation in value of the respective estates, and the contribution of a spouse as a homemaker or to the family unit.*

(b) In a proceeding, the court may protect and promote the best interests of the children by setting aside a portion of the jointly and separately held estates of the parties in a separate fund or trust for the support, maintenance, education, and general welfare of any minor, dependent, or incompetent children of the parties.

Alternative B:

In a proceeding for dissolution of the marriage, legal separation, or disposition of property following a decree of dissolution of the marriage or legal separation by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall assign each spouse's separate property to that spouse. It also shall divide community property, without regard to marital misconduct, in just proportions after considering all relevant factors including:

(1) contribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker;

(2) value of the property set apart to each spouse;

(3) duration of the marriage; and

(4) economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for a reasonable period to the spouse having custody of

conforms to practice in equitable distribution jurisdictions; alternative B conforms to practice in community property jurisdictions. The UMDA, section 307 in particular, has as its primary goal the elimination of any consideration of fault or wrongdoing by one of the married partners in the various determinations made by the court.²¹ Evident throughout the UMDA is an attempt to reduce the adversary nature of marital litigation.²² The Act endeavors to make the distribution of assets upon the dissolution of marriage similar to the distribution of assets at the dissolution of a business partnership.²³

Community Property

Under a community property system,²⁴ ownership of all property acquired during the marriage, with certain exceptions, vests immediately in the marital community.²⁵ Each spouse is capable of owning separate property as well as community property. For example, property owned separately by each spouse before marriage continues to be owned separately after marriage. If, however, the industry, labor, or property of the marital community has contributed substantially to an increase in the value of the separate property, a court will consider as community property the increase in value of the separate property.²⁶

any children.

UNIFORM MARRIAGE AND DIVORCE ACT § 307 (emphasis supplied).

Connecticut, Delaware, and Montana have provisions similar or identical to Alternative A. See CONN. GEN. STAT. ANN. §§ 466-481 (West Supp. 1979); DEL. CODE ANN. tit. 13, § 15 (1980); MONT. REV. CODES ANN. § 40-4-202 (1980). Colorado, Kentucky, Missouri, and Washington have provisions similar or identical to Alternative B. See COLO. REV. STAT. § 14-10-113 (Supp. 1979); KY. REV. STAT. § 403.190 (Supp. 1980); MO. ANN. STAT. § 452.330 (Vernon 1977); WASH. REV. CODE ANN. § 26.09.080 (Supp. 1979).

21. See Note, *Property, Maintenance, and Child Support Decrees Under the Uniform Marriage and Divorce Act*, 18 S.D.L. REV. 559 (1973).

22. UNIFORM MARRIAGE AND DIVORCE ACT, Commissioner's Prefatory Note.

23. *Id.* See Note, *supra* note 21, at 560-61.

24. The nine community property jurisdictions are: Puerto Rico, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. Freed & Foster, *supra* note 11, at 4032.

25. Although during marriage one spouse may have no realistic control over the property, upon divorce, he or she is assured of a one-half interest in the property, subject to equitable considerations in most jurisdictions. See generally W. DE FUNIAK & M. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* § 60 (2d ed. 1971).

26. *Id.*

Community property states differ in their approach to property division. California, Louisiana, and New Mexico, for example, normally divide marital property by distributing half of the property to each spouse.²⁷ The other five community property jurisdictions permit distribution of property equitably between the parties in much the same way as do equitable distribution jurisdictions.²⁸

CASE LAW

Few courts have considered whether a professional education, or the potential for increased earning ability, should be recognized as an asset with a quantifiable value for the purpose of division as property between the parties upon divorce.²⁹ Most of the early cases that discuss the issue, decided before *In re Marriage of Graham*³⁰ in 1978, hold that neither the degree nor the increased earning potential generated by the degree are property.³¹ Several cases, particularly those decided after *Graham*, hold that either the education or the future earning power that it represents constitute an asset subject to division as property upon dissolution.³² Each case demonstrates one court's unique way of dealing with the problems engendered in the consideration of whether a professional degree or license can be considered marital property. With the exception of *Graham*, the outcome of each case from a factual standpoint reflects a measure of justice given to both parties. From a legal standpoint, however, many of the cases establish unjust, untenable

27. CAL. CIV. CODE § 4800 (West 1979); LA. CIV. CODE ANN. art. 2406 (West 1971); N. M. STAT. ANN. § 40-4-7 (1978).

28. ARIZ. REV. STAT. ANN. § 25.318 (1976); IDAHO CODE § 32-712 (1980); NEV. REV. STAT. § 125.150; TEX. FAM. CODE ANN. tit. 1, § 3.63 (Vernon 1975); WASH. REV. CODE ANN. § 26.09.080 (1979). See also notes 19-26 & accompanying text *supra*.

29. *E.g.*, *Todd v. Todd*, 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (1969); *In re Marriage of Graham*, 194 Colo. 429, 574 P.2d 75 (1978); *In re Marriage of Horstmann*, 263 N.W.2d 885 (Iowa 1978); *Inman v. Inman*, 578 S.W.2d 266 (Ky. Ct. App. 1979); *Stern v. Stern*, 66 N.J. 340, 331 A.2d 257 (1975); *Hubbard v. Hubbard*, 603 P.2d 747 (Okla. 1979); *Daniels v. Daniels*, 20 Ohio Op. 2d 458, 185 N.E.2d 773 (1961). See also *Franklin v. Franklin*, 67 Cal. App. 2d 717, 155 P.2d 637 (1945).

30. 194 Colo. 429, 574 P.2d 75 (1978).

31. *Todd v. Todd*, 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (1969); *Stern v. Stern*, 66 N.J. 340, 331 A.2d 257 (1975). *But see Daniels v. Daniels*, 20 Ohio Op. 2d 458, 185 N.E.2d 773 (1961).

32. *In re Marriage of Horstmann*, 263 N.W.2d 885 (Iowa 1978); *Inman v. Inman*, 578 S.W.2d 266 (Ky. Ct. App. 1979); *Hubbard v. Hubbard*, 603 P.2d 747 (Okla. 1979).

precedents. Courts dealing with unique fact settings often promulgate an across-the-board rule of law that does justice between the litigants in the instant case, but creates a potential for injustice in many situations not foreseen by the court.

Todd v Todd

The California Court of Appeals first expressed the view that a professional education fails to constitute a divisible asset upon marital dissolution in *Todd v. Todd*.³³ The Todds married in 1947 and separated in 1964. Mrs. Todd, the plaintiff, worked to support the family while her husband obtained undergraduate and law degrees.³⁴ She contended that because her husband's education was financed in large part with community funds, her husband's education constituted a community asset with substantial value that the court ought to divide between the parties upon divorce.³⁵ The California Court of Appeals rejected Mrs. Todd's argument, holding: "If a spouse's education preparing him for the practice of law can be said to be 'community property,' a proposition which is extremely doubtful even though the education is acquired with community monies, it manifestly is of such a character that a monetary value cannot be placed upon it."³⁶ The court in *Todd*, therefore, considered the husband's degree as at best an intangible property right incapable of monetary valuation.³⁷

In the same action, however, the court awarded Mrs. Todd \$111,500 in community assets, while awarding only \$89,116.35 in community assets to the husband.³⁸ Subsequent opinions citing the *Todd* case for doctrinal support in denying a property interest in the spouse's degree often neglect to mention the larger award to the wife.³⁹ The court in *Todd* acknowledged that the plaintiff realized value from her investment in her husband's education through the large property division award made to her. Her property award

33. 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (1969).

34. *Id.* at _____, 78 Cal. Rptr. at 134.

35. *Id.* at _____, 78 Cal. Rptr. at 134.

36. *Id.* at _____, 78 Cal. Rptr. at 134.

37. *Id.* at _____, 78 Cal. Rptr. at 135.

38. *Id.* at _____, 78 Cal. Rptr. at 135.

39. See *In re Marriage of Graham*, 194 Colo. 429, _____, 574 P.2d 75, 77 (1978); *Stern v. Stern*, 66 N.J. 340, _____, 331 A.2d 257, 260 n.3 (1978).

was obtained as a result of the increased earning capacity that resulted from Mr. Todd's educational degrees, made possible partly with Mrs. Todd's assistance.⁴⁰ The court in *Todd*, therefore, did not address the typical situation in which the working spouse has realized nothing on her investment; rather the court considered a situation in which the spouse has realized on her investment because she supported her husband during schooling many years before the divorce. The spouse received a substantial property award⁴¹ because the divorce occurred long enough after her contribution for the degree of the husband to have contributed substantially to community assets, and hence, to a larger quantity of property to distribute. Thus, the precedential value of the *Todd* case is doubtful.

Stern v Stern

The Supreme Court of New Jersey, which decided *Stern v. Stern*⁴² in 1975, reached an outcome similar to that of *Todd*. Rather than supporting her husband during professional school, as is the usual situation in these cases, Mrs. Stern contributed to her husband's earning capacity by providing him with "connections" that substantially enhanced his future earning capacity Mrs. Stern

40. 272 Cal. App. 2d at ____, 78 Cal. Rptr. at 135.

41. *Id.* at ____, 78 Cal. Rptr. at 135.

42. 66 N.J. 340, 331 A.2d 257 (1975). A recent decision of the New Jersey Superior Court reveals that the *Stern* analysis may have limited application. In *Mahoney v. Mahoney*, 175 N.J. Super. 443, 419 A.2d 1149 (Ch. Div. 1980), the Superior Court of Middlesex County held that the education and degree obtained by the professional spouse constitutes a property right subject to equitable offset upon the dissolution of a marriage. The court awarded Mrs. Mahoney a \$5,000 credit, payable in monthly installments of \$100, in recognition of her contributions to the maintenance of the household and the support of her husband while he attended graduate school.

Judge Rubin relied upon the Iowa Supreme Court holding in *In re Marriage of Horstmann*, 263 N.W.2d 885 (Iowa 1978), to find that when no substantial assets are available for judicial distribution, a court may recognize and reward the contributions of the working spouse to avoid unjust enrichment of the educated spouse. Moreover, the court held that fairness demanded such a result because "[a] working spouse who contributes to the education of another [sic] spouse does so certainly with the expectation that there will be in the future some benefit derived from such a sacrifice." 175 N.J. Super. at ____, 419 A.2d at 1150.

See also *Washington Post*, Dec. 6, 1980, at A-12, col. 3 (report of similar New Jersey holding that working spouse of doctor to get 20% of degree valued at \$305,000; working spouse had become deaf).

was the daughter of a successful attorney who, upon his daughter's marriage to defendant Milton Stern, had hired the defendant as an associate in his law office.⁴³ As a result of his entry into his father-in-law's law firm, Mr. Stern had become a managing partner with the firm.

The New Jersey Supreme Court rejected the lower court's⁴⁴ treatment of the defendant's earning capacity as a separate item of property under the New Jersey property division statute.⁴⁵ Like the court in *Todd*, the court in *Stern* held that potential earning capacity should be only one factor considered by a court in distributing property and awarding alimony.⁴⁶ The court held that the degree itself, however, should not be a separate item of property.⁴⁷

Stern, like *Todd*, involved a situation in which the degreed spouse had been out of school for a period of years, had established a substantial professional practice, and had accumulated numerous possessions.⁴⁸ Furthermore, Mrs. Stern's "contributions" to her husband's career had not been of the same magnitude as those made by spouses in other cases examining whether an advanced educational degree constitutes property subject to division upon divorce.⁴⁹

Although affording the litigating parties justice, *Stern* potentially disserves future litigants by holding that future earning ca-

43. 66 N.J. at ____, 331 A.2d at 259-60.

44. S C v. A C, 123 N.J. Super. 566, ____, 304 A.2d 202, 204-05 (Ch. Div. 1973) (initials were used in the lower court case name to protect the anonymity of the parties).

45. 66 N.J. at ____, 331 A.2d at 260.

46. *Id.* at ____, 331 A.2d at 260.

47. *Id.* at ____, 331 A.2d at 260.

48. 123 N.J. Super. at ____, 304 A.2d at 204. The parties agreed that the plaintiff was to receive the marital house and furnishings in return for payment to the defendant by the plaintiff of one-half of the appraised value of the house and furnishings. The court evenly divided joint bank accounts between the parties.

The lower court, however, deemed the defendant's earnings a divisible property asset because the defendant owned a 16.9% interest in a lucrative partnership. The court thus awarded the plaintiff \$100,000 in 10 annual installments.

49. In *Stern*, the wife's contribution to her husband's career was more tenuous than in most of the cases that raise the issue. The status and position of one spouse's father and the accompanying relative advantage to the other spouse is not a contribution of the same character as that of the spouse who sacrifices opportunity and material advantage to aid the other spouse to attain a degree enhancing his earning power. In one instance, the spouse contributes by her labor; in the other, she merely brings to the marriage unearned enrichments.

capacity cannot be considered property subject to division upon divorce. If the parties to subsequent litigation, unlike the parties in *Stern*, have no other assets to divide, such a rule creates injustice by allowing one spouse to enrich himself by a degree earned at the expense of both spouses.

In Re Marriage of Graham

*In re Marriage of Graham*⁵⁰ was the first appellate court case to consider whether a professional degree constituted marital property capable of division when the parties were divorced shortly after the nonworking spouse obtained his degree.⁵¹ In *Graham* the parties had accumulated no other substantial marital assets besides the degree.⁵² After six years of marriage the Grahams filed a joint petition seeking marital dissolution.⁵³ While Mrs. Graham had been employed throughout the marriage as an airline stewardess, her income had provided approximately seventy percent of the couple's marital income.⁵⁴ During the marriage, Mr. Graham worked part-time and obtained both undergraduate and M.B.A. degrees.⁵⁵ The only substantial asset the parties acquired during their marriage was Mr. Graham's graduate degree and the increased future earning potential that the degree represented.⁵⁶ Characterizing her husband's graduate education as a property asset under the Colorado divorce and dissolution statute, Mrs. Graham sought an equitable division of the value of the degree as marital property.⁵⁷ Mrs. Graham failed to make a claim for support

50. 194 Colo. 429, 574 P.2d 75 (1978). See generally 11 CONN. L. REV. 62 (1978); 13 TULSA L. J. 646 (1978).

51. 194 Colo. at ____, 574 P.2d at 77.

52. *Id.* at ____, 574 P.2d at 76.

53. *Id.* at ____, 574 P.2d at 77.

54. *Id.* at ____, 574 P.2d at 77.

55. *Id.* at ____, 574 P.2d at 77.

56. *Id.* at ____, 574 P.2d at 76.

57. An expert witness testified for Mrs. Graham that the discounted present value of Mr. Graham's M.B.A. degree was \$82,836. *Id.* See also Brief for Appellee at 5, *In re Marriage of Graham*, 555 P.2d 527 (Colo. Ct. App. 1976), *aff'd*, 194 Colo. 429, 574 P.2d 75 (1978). The witness reached this valuation by use of statistical/actuarial data calculating Mr. Graham's projected lifetime earnings both with and without the degree. The lower court concluded that the degree earned by Mr. Graham was marital property in which Mrs. Graham had an interest. The court accordingly found that Mrs. Graham had a 40% interest in the degree and awarded her \$33,134 payable in monthly installments of \$100. This percentage was de-

probably because she could not qualify for an award under the Colorado support statute,⁵⁸ which directs the court to award maintenance only when the party seeking it cannot "provide for his reasonable needs" and cannot "support himself through appropriate employment."⁵⁹ Mrs. Graham was capable of supporting both herself and her husband. Under Colorado law, therefore, Mrs. Graham's only potential hope for receipt of a return on her investment was through a property division.⁶⁰

rived through consideration of the following time-oriented factors: (1) Mr. Graham's educational pursuits were considered full-time employment of 40 hours per week; (2) his part-time job took about 20 hours per week; and (3) Mrs. Graham's full-time job required 40 hours per week. Thus, Mr. Graham invested 60% of the time in the pursuit of his degree while Mrs. Graham invested 40%. *Id.*

58. 194 Colo. at _____, 574 P.2d at 78-79.

59. COLO. REV. STAT. § 14-10-114 (1973).

60. The Uniform Dissolution of Marriage Act, COLO. REV. STAT. § 14-10-113 (Cum. Supp. 1979), states:

(1) In a proceeding for dissolution of marriage the court shall set apart to each spouse his property without regard to marital misconduct, in such proportions as the court deems just after considering all relevant factors including:

(a) The contribution of each spouse to the acquisition of the marital property, including the contribution of the spouse as homemaker;

(b) The value of the property set apart to each spouse;

(c) The economic circumstances of each spouse at the time the division of property is to become effective, and

(d) Any increases or decreases in the value of the separate property of the spouse during the marriage or the depletion of the separate property for marital purposes.

(2) For purposes of this article only, "marital property" means all property acquired by either spouse subsequent to the marriage except:

(a) Property acquired by gift, bequest, devise, or descent;

(b) Property acquired in exchange for property acquired prior to the marriage or in exchange for property acquired by gift, bequest, devise, or descent;

(c) Property acquired by a spouse after a decree of legal separation; and

(d) Property excluded by valid agreement of the parties.

(3) All property acquired by either spouse subsequent to the marriage and prior to a decree of legal separation is presumed to be marital property, regardless of whether title is held individually or by the spouses in some form of coownership. The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection (2) of this section.

(4) An asset of a spouse acquired prior to the marriage or in accordance with subsection (2)(a) or (2)(b) of this section shall be considered as marital prop-

The Colorado Supreme Court rejected Mrs. Graham's characterization of her husband's degree as marital property. In a four to three decision, the court held that the educational degree failed to come within the legislature's definition of property⁶¹ because the degree lacked many of the characteristics associated with the traditional notion of property. The court stated:

[The degree] does not have an exchange value or any objective transferable value on the open market. It is personal to the holder, it terminates on the death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed, or pledged. An advanced degree is a cumulative product of many years of previous education combined with diligence and hard work. It may not be acquired by the mere expenditure of money. 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.⁶²

Ignoring the realities of Mrs. Graham's situation, the court rea-

erty, for purposes of this article only, to the extent that its present value exceeds its value at the time of the marriage or at the time of acquisition if acquired after the marriage.

(5) For purposes of this section only, property shall be valued as of the date of the decree or as of the date of the hearing on disposition of property if such hearing precedes the date of the decree.

61. The Colorado statute may be broader than interpreted by the *Graham* majority. The court noted that previous Colorado case precedent embraced a broad view of property, but nonetheless took a narrow view of what constitutes property. A broader interpretation is supported by the legislature's use of the phrase "all property." American Jurisprudence interprets the use of the term to mean:

The words "all property," as used in a statute, contract, or like instrument, are usually given a very comprehensive construction except where accompanied by a specific enumeration, in which instance the latter controls and limits such words; but it has been said that "property" and "all property" are not interchangeable terms, and a court is not warranted in substituting one for the other.

63 AM. JUR. 2D *Property* § 2, at 289 (1972); see 11 CONN. L. REV. 62, 67 & n.21 (1978).

Moreover, in a recent Colorado decision, *Nichols v. Nichols*, No. 78-716 (Colo. Ct. App. March 3, 1980), the Colorado Court of Appeals held that professional goodwill is a marital property asset capable of division upon dissolution of marriage. This holding may indicate a willingness on the part of Colorado courts to view the legislative definition of property more broadly. Of course business goodwill may be a transferable asset. On the other hand, defining property by transferability only, rather than by its substance, either as a mere res or as value, reflects a narrow view of the concept of property.

62. 194 Colo. at ____, 574 P.2d at 77.

soned that other remedies were available to compensate the working spouse for any loss that she might have suffered.⁶³ The majority held that a court may consider only the working spouse's contribution to the degreed spouse's education when dividing marital property or awarding maintenance.⁶⁴ Consequently, contrary to the view expressed in the court's opinion, Mrs. Graham effectively was denied a remedy. Under the court's restrictive definition of property, the parties had no marital property to divide. Moreover, because Mrs. Graham was capable of self-support, she was ineligible to receive a maintenance award under the Colorado statute.⁶⁵

Justice Carrigan, writing for three justices in dissent, focused upon the economic realities of the *Graham* situation. Realizing that the wife's earnings provided her husband's support and thus constituted an "investment" in his education,⁶⁶ Justice Carrigan argued that as a matter of equity the court must provide "extraordinary remedies to prevent extraordinary injustice."⁶⁷ Instead of focusing on whether the husband's degree constituted marital property subject to division, the dissenting opinion considered the asset at issue to be the increase in the degreed spouse's earning potential made possible by attainment of the advanced degree.⁶⁸ The minority found that in the limited circumstances when no other award is available under the divorce and dissolution statute to a spouse who contributed to a marital partner's degree, the spouse may share in the degreed spouse's future bounty. Sharing in the degreed spouse's future bounty, according to the minority, is analogous to awards in personal injury and wrongful death actions of anticipated future earnings, discounted to present value, against a tortfeasor who impairs or destroys another's future earning capacity.⁶⁹

The *Graham* decision is at odds with equitable practice⁷⁰ because the majority allows the plaintiff no return on her investment.

63. *Id.* at _____, 574 P.2d at 78.

64. *Id.* at _____, 574 P.2d at 78.

65. See note 58 & accompanying text *supra*.

66. 194 Colo. at _____, 574 P.2d at 78 (Carrigan, J., dissenting).

67. *Id.* at _____, 574 P.2d at 78 (Carrigan, J., dissenting).

68. *Id.* at _____, 574 P.2d at 79 (Carrigan, J., dissenting).

69. *Id.* at _____, 574 P.2d at 79 (Carrigan, J., dissenting).

70. *Id.* at 78-79.

By narrowly defining property and then determining that an advanced educational degree fails to fit within that definition, the majority allows the defendant the windfall of the plaintiff's contribution to his professional education unencumbered by liability to the contributing spouse.

In Re Marriage of Horstmann

In re Marriage of Horstmann,⁷¹ an Iowa Supreme Court case, involved facts similar to *Graham*. The Horstmans married during their junior year in college.⁷² Mrs. Horstmann, who never finished her college education, worked as a bank clerk while her husband attended law school.⁷³ Both Mr. and Mrs. Horstmann's parents also provided financial assistance during their marriage.⁷⁴

Affirming the district court decision, the Iowa Supreme Court held that the potential for increased earning capacity made possible by a law degree and certificate of admission to the bar constituted an asset for distribution by the court.⁷⁵ Thus, *Horstmann* appears to be the first state supreme court decision to recognize the working spouse's right to a portion of the nonworking spouse's increased future earning capacity as valuable property⁷⁶ upon dissolution of marriage.

The court found that the Horstmans earned and spent the majority of their assets to allow Mr. Horstmann to complete his legal education.⁷⁷ Moreover, the court noted the couple's significantly low standard of living because of Mr. Horstmann's status as a full-time student rather than a full-time employee during the couple's

71. 263 N.W.2d 885 (Iowa 1978).

72. *Id.* at 886.

73. *Id.*

74. *Id.*

75. *Id.* at 890.

76. Other courts had recognized the right previously in dicta, but had not made a property division on that basis. *See, e.g., Daniels v. Daniels*, 20 Ohio Op. 2d 458, 459, 185 N.E.2d 773, 775 (1961). Still other courts have held that the spouse's contribution to a professional degree is only a factor to be considered. *See, e.g., In re Marriage of Graham*, 194 Colo. 429, 574 P.2d 75 (1978); *Schantz v. Schantz*, 163 N.W.2d 398 (Iowa 1968); *Stern v. Stern*, 66 N.J. 340, 331 A.2d 257 (1975). *But see In re Marriage of Vanet*, 554 S.W.2d 236, 242 (Mo. Ct. App. 1976).

77. 263 N.W.2d 885, 887-88 (Iowa 1978).

entire marriage.⁷⁸ According to the court, Mrs. Horstmann sacrificed her education to have the couple's child, supported the family while her husband was attending school, and received no companionship or services because her husband had to study long hours while he attended law school.⁷⁹ Finally, the court found that the couple had accumulated no savings.⁸⁰

Justice Mason, writing the opinion for a unanimous court, agreed in principle with *Graham and Todd* that an educational degree does not constitute a suitable asset for distribution by the courts upon dissolution of marriage. The court, however, considered, not the degree itself, but the potential future earning capacity engendered by the degree to constitute the asset subject to division.⁸¹ The Iowa court thus held that the parties had an asset to divide, affirming the lower court's award of \$18,000 property distribution to Mrs. Horstmann because of her contributions and sacrifices toward her husband's attainment of a law degree.⁸²

The court in *Horstmann* cited with approval an Ohio decision, *Daniels v. Daniels*.⁸³ In that case, the Ohio Court of Appeals likened the right to practice medicine to a franchise and thus held that the license constituted property that a trial court could consider when awarding alimony.⁸⁴ Presumably the court in *Daniels*, if unable to award the working spouse alimony, would have awarded Mrs. Daniels a property interest in her husband's degree because of the franchise nature of a professional education and practice.⁸⁵

78. *Id.* at 890.

79. *Id.*

80. *Id.*

81. *Id.* at 891.

82. The court arrived at the \$18,000 figure roughly by adding that portion of the working spouse's income expended for family needs during the last three years of the marriage, \$15,760, to the sums contributed to the family by the working spouse's parents, \$10,939, and subtracting the student spouse's earnings, \$9,196. *Id.* at 886-87. See Comment, *Professional Education as a Divisible Asset in Marriage Dissolutions*, 64 IOWA L. REV. 705, 706 n.18 (1979).

83. 20 OHIO OP. 2d 458, 185 N.E.2d 773 (1961).

84. *Id.* at —, 185 N.E.2d at 775.

85. See also *Greer v. Greer*, 32 Colo. App. 196, 510 P.2d 905 (1973) (wife who supported husband through medical school awarded \$7,200 alimony "for the like period of years that she contributed to family upkeep"); *Moss v. Moss*, 80 Mich. App. 693, 264 N.W.2d 97 (1978) (husband ordered to pay \$15,000 gross alimony to wife for her aid in putting husband through medical school).

Inman v Inman

The next case to consider whether a spouse's degree constitutes marital property was *Inman v. Inman*,⁸⁶ decided by the Kentucky Court of Appeals in early 1979. At the time of their divorce, the Inmans had been married seventeen years.⁸⁷ Throughout most of their marriage, Mrs. Inman had worked as a teacher, enabling her husband to attend dental school and to build a practice.⁸⁸ Although Dr. Inman worked steadily as a practicing dentist, the Inmans were on the "brink of bankruptcy" as a result of Dr. Inman's poor financial management practices and a series of unwise investments.⁸⁹ Encumbrances rendered worthless most of their property.⁹⁰ To achieve an equitable result in a division upon dissolution, the Kentucky court found a divisible marital property interest in Dr. Inman's professional license to practice dentistry.⁹¹ Only a minimal amount of property was acquired through the increased earning capacity represented by the dental degree. The court reasoned that excluding the license from the marital estate would allow the degreed spouse a "windfall of contribution to his or her increased earning capacity."⁹² The court, however, qualified⁹³ the apportionability of a professional license as property: "The best measure of a spouse's interest in such a degree should be measured by his or her monetary investment in the degree, but not equivalent to recovery in quasi-contract to prevent unjust enrichment."⁹⁴

86. 578 S.W.2d 266 (Ky. Ct. App. 1979).

87. *Id.* at 267.

88. *Id.*

89. *Id.*

90. *Id.* The court learned during the time between the circuit court decision and the court of appeals argument that Dr. Inman had defaulted on mortgage payments and that the couple's home had been lost through foreclosure proceedings. *Id.*

91. *Id.* at 268.

92. *Id.*

93. *Id.*

94. *Id.* at 269. The court stated:

This court has strong reservations about placing a professional license in the category of marital property. In spite of these reservations, however, we feel that there are certain instances in which treating a professional license as marital property is the only way in which a court can achieve an equitable result.

Id. at 268.

Inman is the only state appellate court decision to hold that the license to practice a profession is marital property subject to division upon dissolution of marriage.⁹⁵ Other decisions that grant the working spouse a property division remedy generally consider future earning potential to be the divisible asset.⁹⁶

Hubbard v Hubbard

In *Hubbard v. Hubbard*,⁹⁷ the Supreme Court of Oklahoma affirmed in part and reversed in part the district court holding that Mrs. Hubbard, who had supported her husband for twelve years through college, medical school, internship and residency, had a property interest in her husband's medical degree.⁹⁸ The Hubbards divorced shortly after Dr. Hubbard completed his hospital residency. The lower court found that Mrs. Hubbard had a "vested interest in the defendant's medical profession, which is deemed to be a valuable property right," and awarded her \$100,000 gross alimony in lieu of property division.⁹⁹

In a per curiam opinion, the Oklahoma Supreme Court took the position of the majority in *Graham* that a professional degree is a form of intangible, indivisible property in which no other person can have a vested interest.¹⁰⁰ The court held, rather, that Mrs. Hubbard had an equitable claim to repayment in lieu of property division for the investment she had made in Dr. Hubbard's education and training.¹⁰¹ Thus, instead of a right to a proportional

95. *Id.* at 269. The court fixed the measure of damages as "the amount spent for direct support and school expenses during the period of education, plus reasonable interest and adjustments for inflation, apportioned to the spouse who provided support when there is little or no increased earning capacity provided by the supported spouse's degree or training." *Id.* at 269-70.

96. See, e.g., *In re Marriage of Horstmann*, 263 N.W.2d 77 (Iowa 1978); *Diment v. Diment*, 531 P.2d 1071, 1073 (Okla. Ct. App. 1974).

97. 603 P.2d 747 (Okla. 1979).

98. *Id.* at 749.

99. *Id.* at 749-50 (quoting trial court opinion of Judge Harris).

100. *Id.* at 750.

101. *Id.* The court stated:

He would leave the marriage with an earning capacity increased by \$250,000.00 which was obtained in substantial measure through the efforts and sacrifices of his wife. She, on the other hand, would leave the marriage without either a return on her investment or an earning capacity similarly increased through joint efforts.

share of the defendant's anticipated net income over the next twelve years,¹⁰² Mrs. Hubbard had a right to maintain a claim against her husband for reimbursement.¹⁰³

Relying on the reasoning of the *Graham* dissent¹⁰⁴ and the opinion of the Kentucky Court of Appeals in *Inman*,¹⁰⁵ the *Hubbard* majority contended that granting Mrs. Hubbard a right to compensation was necessary to prevent her husband's unjust enrichment.¹⁰⁶ Limiting Mrs. Hubbard's claim to alimony for support and maintenance, according to the court, would require her unreasonably to forego remarriage in order to realize a return on her investment.¹⁰⁷

Three members of the court would have sustained the trial court's decision on the remedy available¹⁰⁸ and would have sustained the award of \$100,000 to Mrs. Hubbard.¹⁰⁹ Justice Lavender, writing for the dissent, would have found the increased future earning potential an asset for distribution as alimony in lieu of property division rather than as a claim for reimbursement.¹¹⁰

Id. at 750-51. The court stated further:

It is precisely because of this total joint commitment to Dr. Hubbard's education and training that there were few conventional assets such as an expensive home, furnishings, savings or investments, to divide at the time of divorce. All the resources of the marriage had been dissipated on Dr. Hubbard's education.

Id. at 751.

102. *Id.* at 750 (citing trial court opinion). The trial court accepted expert testimony on the fact and established that Dr. Hubbard's minimum net income over the next twelve years—the length of time plaintiff had supported husband through school and training—was \$250,000. The trial court also determined that Mrs. Hubbard was entitled to 40% of that amount, or \$100,000. *Id.*

103. *Id.* at 750-52.

104. 194 Colo. 429, ____, 574 P.2d 75, 78-79 (1978) (Carrigan, J., dissenting).

105. 578 S.W.2d 266, 268 (Ky. Ct. App. 1979).

106. 603 P.2d at 751.

107. *Id.* at 751-52. *See also* *Diment v. Diment*, 531 P.2d 107 (Okla. Ct. App. 1974). The court in *Hubbard* partially overruled an earlier decision of the Oklahoma Supreme Court, *Colvert v. Colvert*, 568 P.2d 623 (1977), insofar as one could interpret *Colvert* to "mean that a court can consider the future earnings of a spouse in setting the amount of alimony, [and] then designate the alimony payments based on future income as property division alimony." *Id.* at 752. Thus, in a limited holding, the Oklahoma Supreme Court allowed the plaintiff to maintain an action for a return on her investment.

108. 603 P.2d at 753 (Lavender, C.J., dissenting).

109. *Id.* at 753-54 (Lavender, C.J., dissenting).

110. *Id.* at 753 (Lavender, C.J., dissenting).

DeWitt v DeWitt

The Wisconsin Court of Appeals recently considered whether an advanced educational degree constitutes marital property. In *DeWitt v. DeWitt*,¹¹¹ the court held that neither a professional degree, nor a license, nor education constitutes marital property.¹¹²

The DeWitts married in 1968 and separated permanently in 1977.¹¹³ Mr. DeWitt, a full-time student, was employed part-time from 1968 until he completed a law degree in 1975.¹¹⁴ Mrs. DeWitt worked full-time as a legal secretary during most of the marriage.¹¹⁵ In addition she performed most of the household and child care tasks, handled the family finances, and worked part-time assisting her husband in several business ventures.¹¹⁶ Mr. DeWitt was employed by his father's law firm upon completion of his law school education.¹¹⁷ Subsequently, Mrs. DeWitt quit her job to attend school full-time and completed an associate degree in accounting prior to the institution of divorce proceedings.¹¹⁸

The court of appeals held that the trial court abused its discretion by making a property division award that divided the plaintiff husband's law degree between the parties upon divorce.¹¹⁹ The Wisconsin court chose instead to follow the opinion of the Colorado Court of Appeals in *Graham*,¹²⁰ and specifically rejected the reasoning of *Horstmann*¹²¹ and *Inman*,¹²² saying:

[E]quity compels some form of remuneration for a spouse whose

111. 98 Wis. 2d 44, 296 N.W.2d 761 (Ct. App. 1980).

112. *Id.* at ____, 296 N.W.2d at 770.

113. *Id.* at ____, 296 N.W.2d at 762-63.

114. *Id.* at ____, 296 N.W.2d at 762-63. Plaintiff-husband also spent substantial time, money, and effort on home improvements to three structures owned by the parties during marriage. *Id.* at ____, 296 N.W.2d at 762-63.

115. *Id.* at ____, 296 N.W.2d at 762-63.

116. *Id.* at ____, 296 N.W.2d at 762-63.

117. *Id.* at ____, 296 N.W.2d at 762-63.

118. *Id.* at ____, 296 N.W.2d at 763. Mrs. DeWitt alleged that at the time of marriage the parties had "agreed that it would be financially preferable for the plaintiff to attend school and complete his law degree first, and that she would then complete her college education." Plaintiff denied these allegations. *Id.* at ____, 296 N.W.2d at 763.

119. *Id.* at ____, 296 N.W.2d at 765. See *Dean v. Dean*, 87 Wis. 2d 854, 275 N.W.2d 902 (1979); *Leighton v. Leighton*, 81 Wis. 2d 620, 261 N.W.2d 457 (1978).

120. 194 Colo. 429, 574 P.2d 75 (1978). See notes 50-69 & accompanying text *supra*.

121. 263 N.W.2d 885 (Iowa 1978). See notes 71-82 & accompanying text *supra*.

122. 578 S.W.2d 266 (Ky. Ct. App. 1979). See notes 86-96 & accompanying text *supra*.

contributions to the marriage have significantly exceeded those of the mate. We cannot agree, however, that equity is served by attempting to place a dollar value on something so intangible as a professional education, degree, or license. The difficulties inherent in that attempt are illustrated by this case.

The "cost approach" fails to consider the scholastic efforts and acumen of the degree holder, which may well have a bearing on the income-yielding potential of the education. It treats the parties as though they were strictly business partners, one of whom has made a calculated investment in the commodity of the other's professional training, expecting a dollar for dollar return. We do not think that most marital planning is so coldly undertaken.¹²³

The court of appeals remanded the case to the trial court for reconsideration of its denial of alimony,¹²⁴ and indicated that the parties' disparate financial contributions to the marriage and disparate attainments during the marriage were proper factors for the lower court's consideration in awarding maintenance and making property division.¹²⁵

Justice Dykman filed a concurring opinion in which he disagreed with the majority's refusal to consider the degree a marital asset under Wisconsin law.¹²⁶ Although concurring in the result, Dykman felt that the court's opinion in *DeWitt* unwarrantedly, unnecessarily, and unreasonably limited the trial court's options in providing an equitable settlement between the parties upon divorce.¹²⁷ Citing *Leighton v. Leighton*,¹²⁸ Justice Dykman stated that the majority opinion was inconsistent with Wisconsin precedent that allowed valuation and division of future contingent inter-

123. 98 Wis. 2d at ____, 296 N.W.2d at 767.

124. *Id.* at ____, 296 N.W.2d at 767. The court stated:

[W]e agree with the plaintiff's contention that a division based upon such a valuation necessarily involves a "division" of post-divorce earnings. [The statute does not authorize the] court which has determined that alimony is not warranted to surcharge one party by awarding the other party property in excess of the net value of the marital estate, thereby creating what amounts to a "lien" on future earnings.

Id. at ____, 296 N.W.2d at 768.

125. *Id.* at ____, 296 N.W.2d at 770.

126. *Id.* at ____, 296 N.W.2d at 770-71 (Dykman, J., concurring).

127. *Id.* at ____, 296 N.W.2d at 770-71 (Dykman, J., concurring).

128. 81 Wis. 2d 620, 261 N.W.2d 457 (1978).

ests in property for purposes of property settlement.¹²⁹

Even more compelling, in Dykman's view, was the potential for injustice created by the *DeWitt* opinion in the situation in which the married parties had acquired no substantial assets during marriage and the working spouse was not qualified to receive an award of alimony.¹³⁰ Although the majority indicated that a showing of need is not required for a spouse to qualify for a maintenance award, Wisconsin case law indicated the contrary.¹³¹ Thus, in Justice Dykman's view, the inability to consider one spouse's professional degree as an asset results in the unjust situation in which the income of one spouse benefits the other spouse while the contributing spouse has no available method of compensation for her contribution.¹³²

Summary

The preceding cases demonstrate a willingness on the part of the courts to look to the particular facts of each case in reaching a solution that treats both litigants fairly. Courts that deny the claim of the spouse who petitions for a division of a professional degree as a marital asset usually either find other substantial assets to divide between the parties or award alimony to the petitioning spouse.¹³³ On the other hand, cases that present the court with a situation in which the working marital partner is capable of self-support and the parties have accumulated no substantial, conventional assets during marriage generally find some sort of valuable asset in the nonworking spouse's professional degree capable of division between the parties.¹³⁴ The sole exception to this factual

129. 98 Wis. 2d at ____, 296 N.W.2d at 770-71 (Dykman, J., concurring).

130. *Id.* at ____, 296 N.W.2d at 770 (Dykman, J., concurring); see *Leighton v. Leighton*, 81 Wis. 2d 630, 261 N.W.2d 457 (1978) (unvested interest in pension fund could be included in a property division; the existence of contingencies is not a basis for excluding an asset from property division). See also *Bloomer v. Bloomer*, 84 Wis. 2d 124, 267 N.W.2d 235 (1978); *Parsons v. Parsons*, 68 Wis. 2d 744, 229 N.W.2d 629 (1975).

131. 98 Wis. 2d at ____, 296 N.W.2d at 770 & n.2.

132. *Id.* at ____, 296 N.W.2d at 770-71. See, e.g., *Anderson v. Anderson*, 72 Wis. 2d 631, 642-43, 242 N.W.2d 165, 171 (1976).

133. See, e.g., *Todd v. Todd*, 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (1969); *Stern v. Stern*, 66 N.J. 340, 331 A.2d 257 (1975); *DeWitt v. DeWitt*, 98 Wis. 2d 44, 296 N.W.2d 761 (Ct. App. 1980).

134. See, e.g., *In re Marriage of Horstmann*, 263 N.W.2d 885 (Iowa 1978); *Inman v. In-*

pattern is the Colorado Supreme Court decision in *In re Marriage of Graham*.¹³⁵ The court in *Graham* left the working spouse without a remedy. Mr. Graham took his degree and left the marriage with a greatly enhanced earning capacity.¹³⁶ Mrs. Graham left the marriage with nothing.

The compelling injustice of *Graham* illustrates the need for the specific adoption of a property distribution remedy for the situation in which a marriage breaks apart shortly after one spouse has completed an education with the aid of the other spouse. The premises of acknowledging the working spouse's interest in the educated partner's professional degree are that the court should recognize and compensate the working spouse for contributions toward the student spouse's attainment of a professional degree and that the educated spouse who receives the support of his working mate should not benefit from unjust enrichment. The supporting spouse expended time, money, and effort in expectation of an increased future income and an enhanced social position.

A limited rule recognizing the contributions of the working spouse to the attainment of the degree also considers the sacrifices made by one spouse to support the other during professional school. Although these sacrifices differ with the circumstances of each case, some of the more common sacrifices include: foregoing the standard of living made possible by two incomes; the additional strains placed on the family budget by educational costs; and foregoing advanced education for the working spouse because of economic and personal factors.¹³⁷

man, 578 S.W.2d 266 (Ky. Ct. App. 1979); *Hubbard v. Hubbard*, 603 P.2d 747 (Okla. 1979).

135. 194 Colo. 429, 574 P.2d 75 (1978).

136. *Id.* at ____, 574 P.2d at 78-79 (Carrigan, J., dissenting).

137. *E.g.*, *DeWitt v. DeWitt*, 98 Wis. 2d 44 296 N.W.2d 761 (Ct. App. 1980). See Erickson, *Spousal Support Toward the Realization of Education Goals: How the Law Can Ensure Reciprocity*, 1978 WIS. L. REV. 947, 961.

A growing number of jurisdictions are comparing the contribution of one spouse as homemaker and parent and the educational and career achievements of the other spouse when determining property division and/or maintenance: Arkansas, California, Colorado, Delaware, the District of Columbia, Florida, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Virginia, and Wisconsin. See Freed & Foster, *supra* note 11. While such a consideration is a step in the right direction, it is irrelevant if no marital property exists to divide between the divorcing partners. In the future, courts may extrapolate from the recognition of contributions of

Upon dissolution the working spouse has realized none of her expectations. Courts should strive to provide at least a partial remedy to the nonstudent spouse for sacrifices made. A court ought to divide as property the quantifiable benefits of the graduate education of one spouse between the parties to reflect their respective efforts toward its attainment.

PROPERTY RIGHTS

What is Property?

Several courts that deny the working spouse relief hold that a professional degree or license, or the future earning capacity it generates, is not property.¹³⁸ These courts deny the plaintiff's claim to an entitlement because the degree, or the increased earning power it represents, lacks many of the attributes traditionally associated with the concept of property, particularly alienability and tangibility.

Thus whether a court will consider an advanced educational degree as property depends upon the court's understanding of the term "property."¹³⁹ In his text on property, Dean Cribbet states that "[a]s a layman you are accustomed to speak of the thing itself as property; as a lawyer you must realize that property is a concept, separate and apart from the thing. Property consists, in fact, of the legal relations among people in regard to a thing."¹⁴⁰ Later

both spouses to the marriage to award relief when a spouse puts the other through professional school. The better rule, however, allows the court to grant the supporting spouse an interest in the educated spouse's degree or future earning capacity.

138. *In re Marriage of Graham*, 194 Colo. 429, 574 P.2d 75 (1978); *Hiscox v. Hiscox*, 385 N.E.2d 1166 (Ind. Ct. App. 1979); *Stern v. Stern*, 66 N.J. 340, 331 A.2d 257 (1975).

139. The court in *Graham* stated the issue in the following manner:

An educational degree, such as an M.B.A., is simply not encompassed, even by the broad views of the concept of property. It does not have an exchange value or any objective transferable value on an open market. It is personal to the holder. It terminates on the death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed, or pledged. An advanced degree is a cumulative product of many years of previous education, combined with diligence and hard work. It may not be acquired by the mere expenditure of money. 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. at _____, 574 P.2d at 77.

140. J. CRIBBET, *PRINCIPLES OF THE LAW OF PROPERTY* 2 (2d ed. 1975).

in the same text, Cribbet refers to the situation in which a court refuses to grant relief when it finds no property interest because the court may act only to protect property rights, and declares: "[I]s not this reasoning in reverse? If the court grants the protection, it has created a species of property If it refuses the remedy then no property can be said to exist because 'take away laws and property ceases.'"¹⁴¹

Thus, property is that bundle of rights that the courts recognize as property.¹⁴² In order to make the determination that a thing is property, the court should ask whether, as a matter of policy, the definition of property should include a particular concept. For a court to state a general definition of property and then to ask whether a professional degree or license conforms to the definitional requirements is insufficient. Such a deductive approach ignores the special characteristics of both a divorce proceeding and a professional education.

The purpose of most modern dissolution statutes lies in mitigating the potential harm to spouses and their children caused by di-

141. *Id.* at 5. At an earlier date, Jeremy Bentham expressed a similar view of the concept of property:

The idea of property consists in an established expectation; in the persuasion of being able to draw such or such an advantage from the thing possessed

Now this expectation, this persuasion, can only be the work of law. I cannot count upon the enjoyment of that which I regard as mine, except through the promise of the law which guarantees it to me It is only through the protection of the law that I am able to inclose a field, and give myself up to its cultivation with the sure though distant hope of harvest

Property and law are born together, and die together. Before laws were made there was no property; Take away laws and property ceases.

J. BENTHAM, *THE THEORY OF LEGISLATION* 68-69 (1975).

142. See generally *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970). In *Roth* the United States Supreme Court described a property interest in this way:

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.

408 U.S. at 577.

The working spouse who supports the student spouse during school clearly relies on the supposition, as does the student spouse, that the investment will reap a return. See also Note, *Due Process Limitations on Occupational Licensing*, 59 VA. L. REV. 1097 (1973).

vorce.¹⁴³ If divorce courts sincerely attempted to vindicate the legitimate expectations of both parties with regard to interests in a professional license, they could serve well the goal of mitigation of harm.¹⁴⁴

One spouse, for example, may have interrupted, discontinued, or sacrificed an education altogether to provide a livelihood for the couple while the other spouse attends school. The spouse who supports his or her mate through a graduate program sacrifices a higher standard of living and delays or foregoes otherwise desirable expenditures and investments with the legitimate expectation of reaping a future reward, an increased social and economic position and a future standard of living that accompanies professional status.¹⁴⁵

The achievement of an advanced degree greatly enhances the student's earning ability, and hence the student's personal position. Upon dissolution the student spouse will leave the marriage with a valuable degree. The working partner who has supported

143. For example, modern statutes generally have eliminated fault both as a sole ground for divorce and as a consideration in awarding alimony. See, e.g., UNIFORM MARRIAGE AND DIVORCE ACT.

144. Courts and commentators alike recognize that the situation in which a marriage breaks up shortly after the student spouse receives a degree is not unusual. See, e.g., *In re Marriage of Graham*, 194 Colo. 429, —, 574 P.2d 75, 78 (1978) (Carrigan, J., dissenting) ("The case presents the not unfamiliar pattern of the wife, willing to sacrifice for a more secure family financial future, works [sic] to educate her husband only to be awarded a divorce decree shortly after he is awarded the degree."). Erickson, *Spousal Support Toward the Realization of Educational Goals: How the Law Can Ensure Reciprocity*, 1978 Wis. L. REV. 947, 948 n.4. " 'Putting hubby through' college, law school, medical school or other educational program (getting a Ph.D. as it is sometimes called), appears to be a firmly entrenched American tradition, despite the women's liberation movement."

145. Numerous studies have demonstrated that income levels relate directly to educational levels. One commentator states: "So close is the association between educational attainment and income that, whether annual mean income figures or lifetime earnings are considered, one fact emerges: percentage increases in income vary directly with educational attainment." Comment, *The Interest of the Community in a Professional Education*, 10 CAL. W.L. REV. 590, 605 (1974). Moreover, increases in annual income correlate with as little as a one year increase in schooling. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, ANNUAL MEAN INCOME, LIFETIME INCOME, AND EDUCATIONAL ATTAINMENT OF MEN IN THE UNITED STATES, FOR SELECTED YEARS, 1956 TO 1966 (1968); Brunner & Wayland, *Education and Income*, 32 J. EDUC. & SOC. 21 (1958); Glick & Miller, *Educational Level and Potential Income*, 21 AM. SOC. REV. 307 (1956); Howthakker, *Education and Income*, 41 REV. ECON. & STATISTICS 24 (1959); Miller, *Annual and Lifetime Income In Relation to Education: 1933-59*, 50 AM. ECON. REV. 962 (1960); Miller, *Capital Value of Man In Law*, 6 CAL. TRIAL LAW. J. 33 (1969); Schultz, *Capital Formation by Education*, 68 J. POLITICAL ECON. 571 (1960).

the student spouse with expectations of benefitting from the enhanced earning power of the degreed spouse instead receives nothing. The working spouse's expenditures are an immediate investment in the nonworking spouse's degree and a future investment in a better way of life for both. To deprive the working spouse of any yield on the investment does that spouse a grave injustice.

The same courts that refuse to grant the supporting spouse a property interest in the other's professional degree generally consider the degree and the increased earning capacity it represents as factors the court must consider in the division of property and the award of maintenance.¹⁴⁶ If, however, the working spouse is self-supporting and the couple has acquired no substantial assets during their marriage, consideration of the increased future earning capacity of one spouse becomes irrelevant because the court often has no basis upon which to award support.¹⁴⁷ Additionally, under the court's definition of property, no property exists to divide between the marital partners upon dissolution.

Even if an Advanced Professional Degree Is Property, Is it Divisible Property?

Courts that are willing to recognize in theory the existence of a property interest in an advanced educational degree nevertheless often hold that, because the degree has only intangible or intellectual value, its monetary worth upon division is negligible.¹⁴⁸ Under this view of a degree as property with only speculative value, the working spouse reaps nothing by way of property division.¹⁴⁹

146. *Todd v. Todd*, 272 Cal. App. 2d 786, ____, 78 Cal. Rptr. 131, 135 (1969); *In re Marriage of Graham*, 194 Colo. 429, ____, 574 P.2d 75, 78 (1978); *Stern v. Stern*, 66 N.J. 340, ____, 331 A.2d 257, 260 (1975). See also *Daniels v. Daniels*, 20 Ohio Op. 2d 458, 185 N.E.2d 773 (1961).

147. See *In re Marriage of Graham*, 194 Colo. 429, ____, 574 P.2d 75, 78-79 (1978) (Carrigan, J., dissenting). Judge Carrigan in his frequently cited dissenting opinion in *Graham* points out that under the Colorado maintenance statute, COLO. REV. STAT. § 14-10-114(2) (1973), Mrs. Graham was ineligible to receive an award of maintenance because she was clearly self-supporting. Thus, Judge Carrigan correctly finds that the majority opinion in *Graham* leaves Mrs. Graham without a remedy. 194 Colo. at ____, 574 P.2d at 79 (Carrigan, J., dissenting).

148. See *Todd v. Todd*, 272 Cal. App. 2d 786, ____, 78 Cal. Rptr. 131, 134 (1969); *Franklin v. Franklin*, 67 Cal. App. 2d 717, ____, 155 P.2d 637, 641 (1945). See also *In re Marriage of Aufmuth*, 89 Cal. App. 3d 446, 152 Cal. Rptr. 668 (1979).

149. See note 148 *supra*.

Placing a value on an individual's earning potential undoubtedly engages the court in speculation. Emphasis on the speculative nature of the value of a degree ignores the fact that the educated spouse does not have a vested right to any level of income or property, but has only a potential for higher income made possible by the achievement of the advanced degree. The crucial factor, therefore, is not the eventual earnings of the degreed spouse but rather the effect of the present right to practice a profession on the spouse's earning capacity.¹⁵⁰

Other instances in which courts generally find a divisible property interest in an equally intangible concept with an equally speculative value can guide courts troubled by the speculative value of a professional degree.¹⁵¹ Commentators often cite three analogies regarding valuation and divisibility: professional goodwill,¹⁵² pension and retirement benefits,¹⁵³ and personal injury or wrongful death awards for lost future earning capacity.¹⁵⁴

Goodwill

The accounting concept of goodwill,¹⁵⁵ like an advanced professional degree, is by nature an asset with an elusive value. Unlike an advanced educational degree, however, professional goodwill is an asset capable of valuation and division between parties upon di-

150. See note 145 *supra*.

151. See, e.g., *In re Marriage of Brown*, 15 Cal. 3d 838, 126 Cal. Rptr. 633, 544 P.2d 561 (1976) (nonvested pension rights are a distributable property asset); *Nixon v. Nixon*, 525 S.W.2d 835 (Mo. Ct. App. 1975) (proceeds from personal injury claim held distributable upon divorce); *Stern v. Stern*, 66 N.J. 340, 331 A.2d 257 (1975) (professional goodwill is property subject to division upon marital dissolution); *McGrew v. McGrew*, 151 N.J. Super. 515, 377 A.2d 697 (App. Div. 1977) (pension benefits held distributable between parties upon divorce).

152. See notes 155-160 & accompanying text *infra*.

153. See notes 162-171 & accompanying text *infra*.

154. See notes 172-182 & accompanying text *infra*.

155. Justice Story defined goodwill as

[t]he advantage or benefit, which is acquired by an establishment, beyond the mere value of capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement, which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices.

J. STORY, COMMENTARIES ON THE LAW OF PARTNERSHIPS § 99 (1968).

voice in both common law¹⁵⁶ and community property jurisdictions.¹⁵⁷ Courts hold that the nonprofessional spouse, having contributed to the building of the professional practice through the provision of services, financial, domestic, or otherwise, has a valuable interest in the goodwill of the professional spouse's practice.¹⁵⁸ Furthermore, although recognizing that goodwill is an amorphous asset, some courts maintain that the problems encountered in valuing goodwill are an improper basis for a court's refusal to acknowledge and to consider the existence of the goodwill value when dividing the value of a professional practice between spouses in a marital dissolution proceeding.¹⁵⁹

Methods of placing a value on professional goodwill vary according to the circumstances of each case. Factors considered by the courts when valuing the goodwill of a professional practice include the length of time that the professional spouse has practiced, the comparative success of the spouse's professional practice, the professional spouse's age and health, the past profits of the practice, the fixed resources of the practice, and the physical assets of the practice.¹⁶⁰

Pension and Retirement Benefits

The general willingness of courts to divide pension and retire-

156. See, e.g., *In re Marriage of Nichols*, No. 78-716 (Colo. Ct. App. March 3, 1980); *Stern v. Stern*, 66 N.J. 340, 331 A.2d 257 (1975).

157. See, e.g., *In re Marriage of Lopez*, 38 Cal. App. 3d 93, 113 Cal. Rptr. 58 (1974); *In re Marriage of Lukens*, 16 Wash. App. 481, 558 P.2d 279 (1976). But see *Nail v. Nail*, 486 S.W.2d 761 (Tex. 1972). See generally Lurvey, *Professional Goodwill on Marital Dissolution: Is it Property or Another Name for Alimony?*, 52 CAL. S.B.J. 27 (1977).

158. See *In re Marriage of Lopez*, 38 Cal. App. 3d 93, —, 113 Cal. Rptr. 58, 67 (1974); *In re Marriage of Fleege*, 91 Wash. 2d 324, —, 588 P.2d 1136, 1139 (1979) (citing *Golden v. Golden*, 270 Cal. App. 2d 401, 405, 75 Cal. Rptr. 735, 735 (1969)). One court also has stated flatly that goodwill is an asset; if acquired during the marriage, it is a community asset; hence, the asset of goodwill is divisible upon divorce. *In re Marriage of Goger*, 27 Or. App. 729, —, 557 P.2d 46, 47 (1976).

159. E.g., *In re Marriage of Lopez*, 38 Cal. App. 3d 93, 108, 113 Cal. Rptr. 58, 67 (1974); *In re Marriage of Lukens*, 16 Wash. App. 481, 486, 558 P.2d 279, 282 (1976). The court in *Lopez* states: "The fact that 'professional goodwill' may be elusive, intangible, difficult to evaluate and will ordinarily require special disposition, is not reason to ignore its existence in a proper case." 38 Cal. App. 3d at —, 113 Cal. Rptr. at 67.

160. See *In re Marriage of Lukens*, 16 Wash. App. 481, 484, 558 P.2d 279, 282 (1976). The only breakdown in the analogy between a professional education and professional goodwill is the inability to transfer a professional education.

ment benefits of the employed spouse upon divorce provides a second analogy to support the proposition that courts ought to consider a professional degree as property for purposes of division upon divorce.¹⁶¹ Even though pension and retirement benefits normally are not mature, but are future interests, contingent future interests, or even expectancies, the benefits may have a value to both spouses that is capable of division as property. A majority of courts that have considered the question of divisibility of pension benefits hold that the benefits are divisible property.¹⁶²

In community property jurisdictions, pension and retirement benefits constitute divisible community assets whether the interests are mature,¹⁶³ vested,¹⁶⁴ or unvested but accrued.¹⁶⁵ Equitable distribution jurisdictions, though less willing to regard benefits as property than are community property jurisdictions, nevertheless frequently hold pension and retirement benefits divisible.¹⁶⁶

161. Pension and retirement benefits fall into three general categories: mature, vested, and accrued. A mature benefit is a benefit that a beneficiary is presently and immediately entitled to receive. A vested benefit is a benefit certain to be paid, but the employee does not receive the payment until he retires or otherwise terminates his employment relationship with the payor. An accrued or earned benefit is a benefit that accrues as a result of employment, but the employee presently has no guarantee of eventual payment. Bonavich, *Allocation of Private Pension Benefits in Illinois Divorce Proceedings*, 29 DE PAUL L. REV. 1, 12-13 (1979). See Bass, *Division at Divorce of ERISA Pensions*, 4 FAM. L. REP. See generally J. MAMORSKY, *PENSION AND PROFIT SHARING PLANS: A BASIC GUIDE*, 1-37 (1977).

162. See, e.g., *Neal v. Neal*, 116 Ariz. 590, 570 P.2d 758 (1977); *In re Marriage of Brown*, 15 Cal. 3d 838, 126 Cal. Rptr. 633, 544 P.2d 561 (1976); *In re Marriage of Pope*, 37 Colo. App. 237, 544 P.2d 639 (1975); *Shill v. Shill*, 5 FAM. L. REP. 1185 (Idaho 1979); *Moon v. Moon*, 345 So. 2d 168 (La. Ct. App.), cert. denied, 347 So. 2d 250 (La. 1977); *Chisnell v. Chisnell*, 82 Mich. App. 699, 267 N.W.2d 155, cert. denied, 442 U.S. 940 (1978); *Kruger v. Kruger*, 73 N.J. 463, 375 A.2d 659 (1977); *Whittenburg v. Whittenburg*, 523 S.W.2d 797 (Tex. Civ. App. 1975). But see *In re Marriage of Ellis*, 36 Colo. App. 234, 538 P.2d 1347 (1975); *Savage v. Savage*, ___ Ind. App. ___, 374 N.E.2d 536 (1978).

163. See, e.g., *Everson v. Everson*, 24 Ariz. App. 239, 537 P.2d 624 (1975); *Ramsey v. Ramsey*, 96 Idaho 672, 535 P.2d 53 (1975). But see *Daigre v. Daigre*, 228 La. 682, 83 So. 2d 900 (1955).

164. See, e.g., *In re Marriage of Fithian*, 10 Cal. 3d 952, 111 Cal. Rptr. 369, 517 P.2d 449, cert. denied, 419 U.S. 825 (1974); *Collida v. Collida*, 546 S.W.2d 708 (Tex. Civ. App. 1977).

165. *Van Loan v. Van Loan*, 116 Ariz. 272, 569 P.2d 214 (1977); *In re Marriage of Brown*, 15 Cal. 3d 838, 126 Cal. Rptr. 633, 544 P.2d 561 (1976); *Wilder v. Wilder*, 85 Wash. 2d 364, 534 P.2d 1355 (1975). See also *Foster & Freed, Spousal Rights in Retirement and Pension Benefits*, 16 J. FAM. L. 187 (1977-78).

166. See note 162 *supra*. Courts also have found divisible property interests in similar kinds of assets. E.g., *Flowers v. Flowers*, 118 Ariz. 577, 578 P.2d 1006 (1978) (divisible property interest in husband's disability benefits); *Guy v. Guy*, 98 Idaho 205, 560 P.2d 876 (1977)

Generally, the spouse may claim a divisible interest in mature benefits received by his or her marriage partner.¹⁶⁷ The majority of equitable division jurisdictions, though taking a varied view of how the right to a spouse's mature benefits originates, hold that vested but presently unpayable benefits constitute marital property subject to division.¹⁶⁸ Some courts, however, treat the existence of unmatured benefits or assets only as a factor in determining an award of alimony or the distribution of other property, not as divisible property per se.¹⁶⁹

Courts frequently hold that pension and retirement benefits that have yet to vest in the recipient are neither a divisible property interest nor a factor in an equitable distribution between spouses.¹⁷⁰ Even in equitable distribution states, however, a growing minority of jurisdictions allow a court to consider nonvested property rights on dissolution. The contingency of the property interest affects the value of the right, not the existence of the right itself.¹⁷¹

(divisible property benefits in military disability payments); *Elliott v. Elliott*, ___ Minn. ___, 274 N.W.2d 75 (1978) (social security benefits are divisible property); *Anspach v. Anspach*, 557 S.W.2d 3 (Mo. Ct. App. 1977) (social security benefits are divisible property); *In re Marriage of Columbus*, 31 Or. App. 811, 571 P.2d 565 (1977) (savings plan with employer held to be divisible asset).

167. See, e.g., *In re Marriage of Mitchell*, 195 Colo. 399, 579 P.2d 613 (1978); *Tavares v. Tavares*, 58 Haw. 541, 574 P.2d 125 (1978); *Pellegrino v. Pellegrino*, 134 N.J. Super. 512, 342 A.2d 226 (App. Div. 1975); *Schafer v. Schafer*, 9 Wis. 2d 502, 101 N.W.2d 780 (1960).

168. See, e.g., *Stigall v. Stigall*, 151 Ind. App. 26, 277 N.E.2d 802 (1972); *In re Marriage of Ralston*, 242 N.W.2d 269 (Iowa 1976); *McGrew v. McGrew*, 151 N.J. Super. 515, 377 A.2d 697 (App. Div. 1977). But see *Howard v. Howard*, 196 Neb. 351, 242 N.W.2d 884 (1976); *Baker v. Baker*, 546 P.2d 1325 (Okla. 1975).

169. See, e.g., *Griffin v. Griffin*, 338 So. 2d 416 (Ala. Ct. App. 1976); *In re Marriage of Ralston*, 252 N.W.2d 269 (Iowa 1976); *Hutchins v. Hutchins*, 71 Mich. App. 361, 248 N.W.2d 272 (1976); *Martinett v. Martinett*, 8 Utah 2d 202, 331 P.2d 821 (1958); *Leighton v. Leighton*, 81 Wis. 2d 620, 261 N.W.2d 457 (1978).

170. *Cose v. Cose*, 592 P.2d 1230 (Alas. 1979); *Fenney v. Fenney*, 259 Ark. 858, 537 S.W.2d 367 (1976); *Yelkin v. Yelkin*, 193 Neb. 789, 229 N.W.2d 59 (1975); *Savage v. Savage*, ___ Ind. App. ___, 374 N.E.2d 536 (1978); *Miller v. Miller*, 83 Mich. App. 672, 269 N.W.2d 264 (1978); *Ray v. Ray*, 336 S.W.2d 731 (Mo. Ct. App. 1960).

171. *In re Marriage of Hunt*, 78 Ill. App. 3d 653, 397 N.E.2d 511 (1979); *Elliott v. Elliott*, ___ Minn. ___, 274 N.W.2d 75 (1978); *Chisnell v. Chisnell*, 82 Mich. App. 699, 267 N.W.2d 155 (1978).

Tort Awards

In a wrongful death¹⁷² or a personal injury action,¹⁷³ courts consistently have recognized the need to determine the value of a professional education in order to compensate fully a plaintiff for loss of future income. A court easily can extend the tort concept of valuation of future earning capacity to a situation in which the supporting spouse will lose the economic benefits of the degreed spouse's education upon dissolution of the marriage. The nonstudent spouse will lose the same expectancy as the plaintiff will in the personal injury or wrongful death action.¹⁷⁴

Damages in a personal injury or wrongful death action are unliquidated; no one fixed mathematical formula is used to decide each case. Rather, each case involves different facts, considerations, and probabilities to which courts cannot attempt to apply a formula. Instead, courts must assume that each situation is unique and recognize that a determination of damages involves speculation, uncertainty, and arbitrariness. Courts, however, rarely deny a remedy for lost future earning capacity in a personal injury or wrongful death action merely because assessing future earning capacity in-

172. See, e.g., *Snodgrass v. Nelson*, 369 F Supp. 1206 (D.S.D. 1974), *aff'd*, 503 F.2d 94 (8th Cir. 1974) (plaintiff wife of decedent college student who planned to become a high school teacher and coach allowed to recover under South Dakota law \$150,000 discounted to present value based on her decedent husband's possible future earnings as a teacher and coach); *Morrison v. State*, 516 P.2d 402 (Alas. 1973) (parents of decedent, a 13 year old girl, allowed to recover for lost future earning capacity); *Borak v. Bridge*, 524 S.W.2d 773 (Tex. Civ. App. 1975) (parents of decedent college student who planned to become a banker allowed to recover for loss of their son's future earning capacity and his "benefits" to them). See generally *Peck & Hopkins, Economics and Impaired Earning Capacity in Personal Injury Cases*, 44 WASH. L. REV. 351 (1969).

173. See, e.g., *Hoffman v. Sterling Drug Inc.*, 374 F Supp. 850 (M.D. Pa. 1974) (plaintiff allowed to recover for lost earning capacity as an architect as a result of blindness caused by use of defendant's product; the proper measure for determining future earning capacity is neither age, preinjury occupation, nor the nature of the proposed profession but rather skill, likelihood of becoming a member of the profession, and availability of work in that area; instructions to the jury protected against wholly speculative testimony); *Frankel v. United States*, 321 F Supp. 1331 (E.D. Pa. 1970) (plaintiff, an art student, injured in an accident with a government employee, resulting in complete disability; her progress in school, family background, and painting had indicated excellent progress and the court awarded \$62,000 for loss of future earning capacity even though the plaintiff was still in school and had not yet begun a career) (applying Pennsylvania law).

174. See Comment, *The Interest of the Community in a Professional Education*, 10 CAL. W.L. REV. 590 (1974); 11 CONN. L. REV. 62 (1978).

volves the court in speculation.¹⁷⁵ Courts should be equally hesitant to deny relief to a nonstudent spouse who has lost the economic potential of the partial value of the education that she helped to provide.¹⁷⁶

Several courts, moreover, have found that a cause of action, settlement, or personal injury award is marital property for purposes of property division upon marital dissolution. In *Nixon v. Nixon*,¹⁷⁷ for example, the injured spouse claimed that a personal injury settlement was separate personal property not subject to division upon divorce.¹⁷⁸ The Missouri Court of Appeals disagreed, holding that the Missouri property division statute provides for the division of all marital property and that marital property includes the property acquired as a result of the settlement of a personal injury action.¹⁷⁹ California, in particular, has been willing to include personal injury actions in community property¹⁸⁰ upon dissolution of marriage even though the court has recognized that such an action is both nonsurvivable¹⁸¹ and nontransferable.¹⁸²

Valuation

Of the appellate court decisions that have awarded the working spouse an interest in the degreed spouse's future earning capacity or professional degree, most have made the award on a restitution

175. See, e.g., *Harpen Truck Lines, Inc. v. Mills*, 378 F.2d 705, 709-10 (5th Cir. 1967); *Kroger Co. v. Rawlings*, 251 F.2d 943, 945 (6th Cir. 1958).

176. For example, courts have considered earning capacity even when the injured party had no previous consistent earning history. E.g., *Morrison v. State*, 516 P.2d 402 (Alas. 1973); *Hildyard v. Western Fastners, Inc.*, 33 Colo. App. 396, —, 522 P.2d 596, 601 (1974) (recovery allowed for loss of earning capacity even though plaintiff was unemployed); *Florida Greyhound Lines, Inc. v. Jones*, 60 So. 2d 396, 398 (Fla. 1952) (recovery allowed for lost earning capacity of unemployed housewife because she might have to work at some future time).

177. 525 S.W.2d 835 (Mo. Ct. App. 1975).

178. *Id.* at 839; accord, *Hall v. Hall*, 349 So. 2d 1349 (La. Ct. App. 1977).

179. 525 S.W.2d at 839.

180. *Flores v. Brown*, 39 Cal. 2d 622, 248 P.2d 922 (1952); see Comment, 56 DEN. L.J. 677, 688 (1979).

181. *De La Torre v. Johnson*, 200 Cal. 754, 254 P. 1105 (1927). The California state legislature recently has made a cause of action for personal injury survivable. CAL. PROB. CODE § 573 (West Supp. 1980).

182. *Wikstrom v. Yolo Fliers Club*, 206 Cal. 461, 274 P. 959 (1929).

or implied-loan-value theory¹⁸³ The assumption that a professional education is solely a monetary purchase underlies the restitution or implied-loan-value theory; the court measures the working spouse's recovery by the amount of that spouse's financial contribution to the other spouse's attainment of the professional degree.¹⁸⁴ Thus, the student spouse must "repay" the implied loan. Some courts award the working spouse interest on the implied loan, whereas others restrict recovery to the amount of the working spouse's financial contribution.

In one sense, the restitution measure undercompensates the working spouse because a professional education has more value than is reflected in its monetary cost. The degree has a value in the future as an asset that becomes more valuable with time, experience, and expenditure. Moreover, acquiring an education represents more than a mere monetary purchase. Both partners expend time and effort in its acquisition. The working spouse's right to share in the benefits necessarily ought to hinge on more than the financial contribution made toward the attainment of the degree; rather, the working spouse's overall contribution to the marital partnership and the degree earned ought to provide the basis of the right to share. The monetary cost of the spouse's professional education relates only tangentially to the real value of the education as the means to an end of practicing a profession. Therefore, to the extent that the value of an education exceeds its cost, the educated spouse at least partially becomes unjustly enriched.

The restitution measure, however, does have certain advantages.¹⁸⁵ No speculation regarding the future earning capacity of the degreed spouse is necessary because the court can calculate easily the amount due the working spouse by reference to known variables.¹⁸⁶ Moreover, the restitution measure is consistent with

183. See *In re Marriage of Horstmann*, 263 N.W.2d 885 (Iowa 1978); *Inman v. Inman*, 578 S.W.2d 266 (Ky. Ct. App. 1979); *Hubbard v. Hubbard*, 603 P.2d 747 (Okla. 1979). See also *Greer v. Greer*, 32 Colo. App. 196, 510 P.2d 905 (1973); *Moss v. Moss*, 80 Mich. App. 693, 264 N.W.2d 97 (1978); *Daniels v. Daniels*, 20 Ohio App. 2d 458, 185 N.E.2d 773 (1961).

184. See, e.g., 11 CONN. L. REV. 62, 73-74 (1978); Comment, *Horstmann v. Horstmann: Present Right to Practice a Profession as Marital Property*, 56 DEN. L.J. 677, 688-89 (1979).

185. See note 184 *supra*.

186. Known variables include, but are not limited to, cost of tuition, fees, and books, financial contribution of each spouse to the family, living expense, and scholarships and fellowships received by the student spouse. Comment, *The Interest of the Community in a*

the practice of shaping a decree by equating the commitment and investment of the parties in the marriage with the duration of marriage.¹⁸⁷ The reimbursement measure, although inadequate, better serves equity than does no remedy at all.

Several lower court decisions have awarded the working spouse a measure of recovery different from a reimbursement measure for contributions made by one spouse to the other spouse's future earning capacity.¹⁸⁸ Generally, these courts determine through expert actuarial testimony the difference between what the decreed spouse would have earned had the spouse not achieved the degree and the spouse's projected future earning capacity with the degree. The court then determines the percentage of time, money, and effort that each spouse expended toward obtaining the degree, dividing the difference accordingly.¹⁸⁹ A sizable award to the working spouse and a reversal by an appellate court usually result.¹⁹⁰

Appellate courts consider excessive an award based on the difference between predegree and postdegree earning capacity. A large property division award to a spouse married for only a few years appears punitive. In avoiding inequity to the decreed spouse, however, the courts heap inequity on the other and set potentially harsh precedent that denies the working spouse any remedy.

One commentator¹⁹¹ suggests a compromise formula that represents an accurate assessment of the property division value of the present right to practice a profession without "punishing" the decreed spouse.¹⁹² The formula allocates to the working spouse as reimbursement approximately one-half of the "opportunity cost" of the degree. Opportunity cost, as defined by the author, is the

Professional Education, 10 CAL. W.L. REV. 590, 604 (1974).

187. See, e.g., *Schantz v. Schantz*, 163 N.W.2d 398, 405 (Iowa 1968).

188. See *In re Marriage of Graham*, 194 Colo. 429, 574 P.2d 75 (1978); notes 57, 102 *supra*.

189. Cf. *In re Marriage of Graham*, 38 Colo. App. 130, —, 555 P.2d 527, 528 (1976) (descriptions of findings of trial court), *aff'd*, 194 Colo. 429, —, 574 P.2d 75, 76 (1978); *Hubbard v. Hubbard*, 603 P.2d 747, 749-50 (Okla. 1979) (description of findings of trial court).

190. See, e.g., *In re Marriage of Graham*, 194 Colo. 429, 574 P.2d 75 (1978); *In re Marriage of Horstmann*, 263 N.W.2d 885 (Iowa 1978); *Stern v. Stern*, 66 N.J. 340, 331 A.2d 257 (1975).

191. Comment, *The Interest of the Community in a Professional Education*, 10 CAL. W.L. REV. 590 (1974).

192. *Id.* at 603.

direct cost of the education plus the indirect cost of the education.¹⁹³ Under the cost opportunity formula, the court has the power to adjust the percentage of the opportunity cost to be awarded according to the relative contributions by each party to the attainment of the degree.¹⁹⁴ If the direct cost of the education derives from sources outside the marriage, the working spouse receives her equitable share of the opportunity cost alone.

THE INADEQUATE ALTERNATIVES

Alimony

Under the common law, alimony derived from the husband's duty of support to his wife.¹⁹⁵ Generally, alimony was a permanent award set at an amount sufficient to provide the wife with her basic life needs: food, clothing, shelter, and miscellaneous necessities.¹⁹⁶ With the increasing frequency of divorce, the advent of no-fault dissolution, and the growing trend toward sexual equality, the focus of alimony, now usually called by a sex neutral term such as support or maintenance, has changed. Need or inability to provide

193. *Id.* at 604. Direct cost refers to the direct purchase price of the degree based on amounts paid for tuition, laboratory fees, and other incidental expenses. Indirect cost refers to the expenditure of effort and skill by the student spouse. The two components together yield the cost value of the student spouse's education.

194. Recognizing the shortcoming of the cost valuation method as reflecting only the acquisition cost of the degree, the commentator suggests an alternative valuation formula that could determine the amount of the working spouse's interest in the student spouse's degree. The alternative formula assumes that the value of experience and skill increases with time while the value of education diminishes with time. Calculations are made for each year of the degree holder's remaining work life based on actuarial data. The commentator illustrates the formula mathematically: (income with professional education - income without professional education) X (number of years of professional education + number of years since professional education).

Although the formula may reflect accurately the interest of the working spouse in the educated spouse's degree, such a formula is highly speculative. Hence a court reluctant to divide the value of the degree between the parties on marital dissolution is unlikely to utilize the formula.

195. See H. CLARK, *THE LAW OF DOMESTIC RELATIONS* § 14.1 (1968); Krauskopf & Thomas, *Partnership Marriage: The Solution to an Ineffective and Inequitable Law of Support*, 35 OHIO ST. L.J. 558, 563 (1974); Note, *The Economics of Divorce: Alimony and Property Awards*, 43 U. CIN. L. REV. 133, 135 (1974).

196. See H. CLARK, *THE LAW OF DOMESTIC RELATIONS* § 14.5 (1968); Note, *Rehabilitative Spousal Support: In Need of a More Comprehensive Approach to Mitigating Dissolution Trauma*, 12 U. S.F. L. REV. 493 (1978).

for oneself generally is the focal point of an award in alimony,¹⁹⁷ the amount of which usually varies with the duration of the marriage and the economic condition of the parties.¹⁹⁸ In some jurisdictions only the inability to support oneself is relevant to determining whether to award a petitioning spouse alimony.¹⁹⁹ The Uniform Marriage and Divorce Act, for example, makes financial need the sole factor in awarding maintenance upon dissolution.²⁰⁰ As a practical matter, therefore, maintenance may be unavailable to the supporting spouse in some jurisdictions.

When one spouse supports the other during school and marital dissolution follows shortly upon the nonworking spouse's attainment of a professional degree or license, of necessity the working spouse will have demonstrated the ability to support herself. In addition, the brevity of the marriage tends to reduce any possible award to the petitioning spouse.²⁰¹ That the married couple's standard of living is necessarily modest further influences the court's award to the noneducated spouse because the measure of support partially depends upon the marital standard of living.²⁰² Thus the speculative aspect of valuing future earning capacity, the brevity of the marriage, the demonstrated ability of self-support, and the modesty of the couple's standard of living combine to limit any award to the working spouse.

The conceptual differences between alimony and property division make alimony an unattractive alternative to property division

197. See, e.g., *Grinold v. Grinold*, 32 Conn. Supp. 225, 348 A.2d 32 (1975). See also Note, *Property, Maintenance and Child Support Decrees Under the Uniform Marriage and Divorce Act*, 18 S.D. L. REV. 559, 567 (1973).

198. See generally, Johnston, *Sex and Property: The Common Law Tradition, the Law School Curriculum and Developments Toward Equality*, 47 N.Y.U. L. REV. 1033 (1972); Comment, *Horstmann v. Horstmann: Present Right to Practice a Profession as Marital Property*, 56 DEN. L.J. 677 (1979).

199. See, e.g., *Knipfer v. Knipfer*, 259 Iowa 347, —, 144 N.W.2d 140, 143 (1966); *Magruder v. Magruder*, 190 Neb. 573, —, 209 N.W.2d 585, 588 (1973); *Doyle v. Doyle*, 5 Misc.2d 4, 158 N.Y.S.2d 909 (Sup. Ct. 1957); Clark, *Divorce Policy and Divorce Reform*, 42 U. COLO. L. REV. 403, 409 (1971).

200. UNIFORM MARRIAGE AND DIVORCE ACT § 308.

201. See Comment, *The Interest of the Community in a Professional Education*, 10 CAL. W.L. REV. 590, 595 (1974).

202. See, e.g., *Flanders v. Flanders*, 240 Iowa 159, 40 N.W.2d 468 (1950); *Prosser v. Prosser*, 156 Neb. 629, 57 N.W.2d 468 (1953); *McDonald v. McDonald*, 120 Utah 573, 236 P.2d 1066 (1951). See also H. CLARK, LAW OF DOMESTIC RELATIONS § 14.5 (1968).

for the working spouse. Each spouse's right to a portion of divisible property is independent of need. An award of alimony, which is not a right,²⁰³ is within the sole discretion of the court. In a property division, on the other hand, a spouse has a right to receive that portion of the combined marital property to which that spouse has a legal or equitable claim.²⁰⁴ Although the amount of the property to which each spouse has a valid claim varies, the spouse admittedly has some interest in the property and therefore may claim a return on the investment in recognition of any significant contribution made to the parties' marital assets. Although the court does not have to divide the property equally, the equitable notion that each spouse is entitled to a just share of the property accumulated as a result of that spouse's partnership effort influences the division of property.²⁰⁵ In addition, a property division

203. See, e.g., *Morgan v. Morgan*, 59 Wash. 2d 639, —, 369 P.2d 516, 518 (1962); Note, *The Economics of Divorce: Alimony and Property Awards*, 43 U. CIN. L. REV. 133 (1974).

204. See H. CLARK, *LAW OF DOMESTIC RELATIONS* § 14.8 (1968); Daggett, *Division of Property upon Dissolution of Marriage*, 6 LAW & CONTEMP. PROB. 225 (1939).

205. See, e.g., *Painter v. Painter*, 65 N.J. 196, 320 A.2d 484 (1974); *Parsons v. Parsons*, 68 Wis. 2d 744, 229 N.W.2d 629 (1975).

Professor Joan Krauskopf discusses from an economic point of view the problem of recompensing the supporting spouse upon marital dissolution. Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 KAN. L. REV. 379 (1980). Krauskopf treats the family unit as an economic "firm" in which all members of the unit seek together to maximize the total welfare of the firm. *Id.* at 386. Thus, the working spouse who contributes to the firm's economic well-being by supporting both partners while the non-working spouse pursues an advanced education becomes a marital investor. The working spouse provides as an investment the source of funds that provide the incentive for the non-working spouse to acquire the education. The author labels the investment "marriage specific capital"; the gain realized as a result of one spouse's attainment of a professional degree is valuable to both partners only if the marriage remains intact. *Id.* at 387.

When a divorce occurs, the working spouse, in her capacity as a marital investor, seeks a return on her investment. By adequately compensating the working spouse for her contribution to the non-working spouse's attainment of an advanced educational degree, the courts shape the law to serve two important social goals: the economic productivity of society and the welfare of the family unit. *Id.* at 395.

Rather than rehabilitative maintenance, periodic maintenance, or property division, Professor Krauskopf prefers "in gross" maintenance as a solution to the problems engendered by the attempt to reach a fair economic partition of the benefits of a professional education when the parties to the marriage have no marital assets but the professional degree. *Id.* at 401. Maintenance or alimony in gross is a fixed, lump sum, non-modifiable award. Krauskopf prefers the solution of maintenance in gross because "[t]he court may award this lump sum regardless of whether other property is in existence without classifying the education or the increased earning capacity as an asset. [Maintenance in gross] allows compensation tar-

decree is advantageous to the degreed spouse over an award of alimony because a property division decree constitutes a fixed and finally settled award; the student spouse does not suffer the burden of unending alimony payments and the risk of upward modification of alimony payments. Rather, both parties, the payees and payor, know exactly their rights and liabilities with respect to the severed marriage relationship and may continue with life. Moreover, an award of alimony constitutes income to the working spouse for income tax purposes, whereas a property distribution is not income to the working spouse because it merely adjusts the rights of the parties.²⁰⁶

Nonmatrimonial Equitable Remedies

When one spouse supports his or her mate through a graduate school program, the supporting spouse rarely will extract from the student spouse an express promise of repayment. Without a promise of repayment, a successful suit in equity for reimbursement is

lored to protect expectation interests rather than providing only 'damages' in the form of periodic alimony for the lost opportunities of the relying spouse." *Id.* (footnote omitted).

Only a limited number of jurisdictions recognize maintenance in gross, however. *Moss v. Moss*, 80 Mich. App. 693, 264 N.W.2d 97 (1978); *In re Cropp*, 5 FAM. L. REP. (BNA) 2957 (Minn. Dist. Ct., Sept. 6, 1979); *Magruder v. Magruder*, 190 Neb. 573, 209 N.W.2d 585 (1973). See also *Wheeler v. Wheeler*, 193 Neb. 615, 228 N.W.2d 594 (1975). The state maintenance statute may not admit of an interpretation that permits maintenance in gross in the circumstance of a professional degree, or the court may not wish to so interpret the maintenance statute, even if theoretically permissible. See *In re Marriage of Graham*, 194 Colo. 429, ___, 574 P.2d 75, 79 (Carrigan, J., dissenting); *Inman v. Inman*, 578 S.W.2d 266, 270 (Ky. Ct. App. 1979). See also *Krauskopf, supra*, at 401. Moreover, maintenance as a concept, whether periodic or in gross, implies a duty of one spouse, traditionally the husband, to support the other. See, e.g., *Gibson v. Stiles*, 240 S.W.2d 609, 611 (Ky. Ct. App. 1951); *Eaton v. Davis*, 176 Va. 330, 338, 10 S.E.2d 893, 897 (1940); *Boudwin v. Boudwin*, 162 Wash. 142, ___, 298 P.2d 337, 338 (1931). Thus, maintenance as a concept stresses one spouse's need for support and the other spouse's obligation to support. If maintenance concerns support, the investment analogy becomes extraneous to the consideration of an award of maintenance. On the other hand, the property division remedy readily adapts to the investment analogy. If the professional degree constitutes property, the court can value it with the aid of expert witnesses; then the court can divide the degree's value by considering the relative contributions of the parties to the attainment of the degree.

Therefore, the law ought to adopt the property division remedy, because the court must focus on the asset acquired and the relative contributions to its acquisition, rather than on the relative financial condition of each spouse and the duty of support.

206. I.R.C. § 71(a)(1). See, e.g., Note, *Selected Tax Aspects of Divorce and Property Settlements*, 41 IND. L. REV. 732 (1966).

unlikely.²⁰⁷ In addition, a constructive trust theory is unavailable in most jurisdictions because the plaintiff must prove both that the defendant was unjustly enriched and that the defendant had fraudulent intent.²⁰⁸ Moreover, the constructive trust theory suffers the defect that no specific res exists to which the trust can attach.²⁰⁹

Within the matrimonial setting a quantum meruit remedy also is unlikely to succeed. A recovery for services rendered by a supporting spouse potentially would reduce the unjust enrichment of the student spouse. In many jurisdictions, however, the presumption that marital services are gratuitous, and thus performed without the expectation of payment, precludes the working spouse from making an equitable claim for time, money, and effort expended to aid the student spouse in the attainment of a professional degree.²¹⁰

Even if a quantum meruit remedy is available to the working spouse, it fails to compensate adequately the nonstudent spouse for contributions made toward the attainment of a professional de-

207. Erickson, *Spousal Support Toward the Realization of Educational Goals: How the Law Can Ensure Reciprocity*, 1978 Wis. L. Rev. 947, 948-49.

208. *E.g.*, Dove v. White, 211 Md. 228, 126 A.2d 835 (1956); Kachanian v. Kachanian, 100 N.H. 135, 121 A.2d 566 (1956); Marston v. Myers, 217 Or. 498, 342 P.2d 1111 (1959); Rosen v. Rosen, 384 Pa. 547, 121 A.2d 89 (1956).

209. See notes 139-149 & accompanying text *supra*. One prominent text describes the constructive trust as follows.

A constructive trust is imposed where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it. The duty to convey the property may arise because it was acquired through fraud, duress, undue influence or mistake, or through a breach of a fiduciary duty, or through the wrongful disposition of another's property. The basis of the constructive trust is the unjust enrichment which would result if the person having the property were permitted to retain it.

5 A. SCOTT, LAW OF TRUSTS 3215 (3d ed. 1967).

210. *E.g.*, Bean v. Wilson, 120 Cal. 2d 58, 260 P.2d 134 (1953). Note, however, that in community property jurisdictions a putative spouse may recover for services rendered. *E.g.*, Keene v. Keene, 57 Cal. 2d 657, 21 Cal. Rptr. 593, 371 P.2d 329 (1962). The putative marriage concept is a doctrine of de facto marriage, which is available in California, Louisiana, and Texas. A putative marriage is marriage solemnized when one or both parties were ignorant of an impediment to the marriage that rendered it void or voidable. H. CLARK, LAW OF DOMESTIC RELATIONS § 4.2 (1968). See, *e.g.*, *In re Foy's Estate*, 109 Cal. App. 2d 329, 240 P.2d 685 (1952); Funderburk v. Funderburk, 214 La. 717, 38 So. 2d 502 (1949).

gree.²¹¹ The measure of the working spouse's recovery reflects not the working spouse's interest in the asset obtained as a partial result of her efforts but rather the wholly independent basis of services rendered to the student spouse.

A working spouse who seeks repayment under an equitable remedy for putting his or her student spouse through school has a limited chance of success in most jurisdictions. Some equitable remedies are not equally available in all jurisdictions; others are not enforceable within the setting of marital litigation. In addition, even if an equitable claim is successful, the plaintiff will collect inadequate recompense for his or her contributions.²¹²

CONCLUSION

An advanced professional degree is a valuable asset. When two parties contribute to the attainment of an asset, both ought to have at least an equitable interest in that asset. Division of the intangible asset represented by an educational degree or professional license, however, is difficult because of the personal character of the property. Courts deciding whether a professional degree constitutes an asset, and valuing that asset, must resolve conflicting social and economic policies. On the one hand, the working spouse has made an irrevocable investment of time, money, and effort in the student spouse's advanced educational degree with the reasonable expectation that a substantial benefit would accrue to the couple in future years. When divorce intervenes between the investment and the accrual of a benefit, to deny the working spouse a remedy is unjust. The injustice is compounded when the basis of the denial is failure of the degree to satisfy the judicial requirements of property. Courts, however, also must be sensitive to the interests of the degreed spouse and avoid unduly burdensome postdissolution demands on the student spouse in favor of the working spouse.

Current decisions lack the explicit analysis and decisional guidelines necessary to aid the divorcing partners and domestic practitioners to formulate a claim for an adequate remedy when the divorcing partners have accumulated no conventional marital assets.

211. See notes 185-190 & accompanying text *supra*.

212. See note 207 & accompanying text *supra*.

A limited, well defined rule that allows the trial court to consider the greatly increased earning capacity of the student spouse as a property asset capable of division upon divorce when division of other, more conventional property assets will not benefit adequately the working spouse is needed.

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