WORKING SPOUSE ENTITLED TO COMPENSATION ON DIVORCE FOR FINANCIAL SUPPORT OF SPOUSE PURSUING PROFESSIONAL DEGREE

In Re Marriage of Lundberg, 107 Wis. 2d 1, 318 N.W.2d 918 (1982)

In *In re Marriage of Lundberg*,[1] a divorce action, the Wisconsin Supreme Court recognized a statutory[2] right to compensation of a spouse who financially supports the other spouse pursuing a professional graduate degree.[3]

Petitioner Judy Lundberg requested compensation for financial support she provided her husband while he attended medical school.[4] The trial court awarded her a lump-sum maintenance award.[5] The appellate court reversed, holding that no Wisconsin authority supported a gross alimony award, and alternatively, that the amount of compensation awarded was improper because it exceeded the value of the marital assets.[6] The Wisconsin Supreme Court reversed and *held*: Wisconsin divorce statutes governing property division and maintenance payments[7] authorize compensation to a spouse who has supported the family during the other spouse's enrollment in professional school.[8]

Working spouses have only recently begun to seek compensation in divorce proceedings for amounts contributed to their spouse's education.[9] A majority of jurisdictions, however, deny the working spouse

1. 107 Wis. 2d 1, 318 N.W.2d 918 (1982).

2. Divorce Reform Act, WIS. STAT. ANN. § 247.255, 247.26 (West 1975). *See infra* note 25.

3. 107 Wis. 2d at 10, 318 N.W.2d at 922.

4. The Lundbergs married in late 1970 during the husband's last year of college. Mrs. Lundberg received her Master's Degree in English in 1972, at which time she began teaching. The same year, her husband entered medical school. Mrs. Lundberg supported both of them and performed most of the household chores. *Id.* at 3-5, 318 N.W.2d at 919-20.

Mr. Lundberg graduated from medical school in 1976. In August, 1978, Mrs. Lundberg filed a petition for divorce. Because the divorce occurred shortly after Mr. Lundberg completed medical school, the couple had acquired few marital assets. *Id.* at 3-5, 318 N.W.2d at 919-20.

5. *Id.* at 6, 318 N.W.2d at 920.

6. *Id.* at 6, 318 N.W.2d at 920-21.

7. WIS. STAT. ANN. §§ 247.255, 247.26 (West 1975).

8. 107 Wis. 2d at 10, 318 N.W.2d at 922.

9. The case of a working spouse supporting a student spouse is hardly a new phenomenon. As one writer has noted " '[p]utting hubby through' college, law school, medical school or other educational program ('getting a Ph.T.' as it is sometimes called), appears to be a firmly entrenched American Institution, despite the women's liberation movement." Erickson, *Spousal Support Towards the Realization of Educational Goals: How the Law Can Ensure Reciprocity,* 1978 WIS. L. REV. 947, 948 n.4.

compensation. These courts hold that neither the professional degree or license attained by the student spouse, nor the resulting increased earning capacity constitutes marital property[10] subject to division on dissolution of the marriage.[11] Courts refusing to recognize the degree as a marital asset generally employ one of five rationales.[12] First, courts have held that a professional degree lacks the traditional attributes of property, such as transferability and objective market value.[13]

10. *See, e.g., In re* Marriage of Aufmuth, 89 Cal. App. 3d 446, 152 Cal. Rptr. 668 (1979) (law degree); Todd v. Todd, 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (1969) (same); *In re* Marriage of Graham, 174 Colo. 429, 574 P.2d 75 (1978) (en banc) (business degree); *In re* Marriage of Goldstein, 97 Ill. App. 3d 1023, 423 N.E.2d 1201 (1981) (medical license); *In re* Marriage of McManama, 399 N.E.2d 371 (Ind. 1980) (law degree); Wilcox v. Wilcox, 173 Ind. App. 661, 365 N.E.2d 792 (1977) (Ph.D. degree); Stern v. Stern, 66 N.J. 340, 331 A.2d 257 (1975) (law degree); Muckleroy v. Muckleroy, 84 N.M. 14, 498 P.2d 1357 (1972) (medical license); Lira v. Lira, 68 Ohio App. 164, 428 N.E.2d 445 (1980) (same); Frausto v. Frausto, 611 S.W.2d 656 (Tex. Civ. App. 1981) (same).

11. The classification of a state's property distribution statute often influences whether a court can classify a degree as a marital asset. In strict common law jurisdictions (Florida, Mississippi, South Carolina, Virginia and West Virginia), the court may distribute property only according to title of ownership. Thus a degree cannot constitute marital property in common law states. Those courts ignore equitable considerations, such as one spouse's contribution toward the other spouse's degree.

In community property jurisdictions (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas and Washington), all property acquired during the marriage is property of the marital community and is divided equally upon divorce. A wife's contribution to her husband's professional education will not affect the property distribution, unless the court classifies the degree as an asset vested in the community.

Courts in the thirty-eight "equitable distribution" jurisdictions (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) consider all relevant factors, both financial and non-financial, in determining the property division. *See* Erickson, *supra* note 9, at 961-64 (describing the three different marital property regimes); Foster & Freed, *Divorce in the Fifty States: An Overview as of August 1, 1980,* 6 Fam. L. Rep. (BNA) 4043, 4050-52 (1980) (classifying each type of property distribution statute). *See also* Note, *Family Law: Ought a Professional Degree Be Divisible as Property Upon Divorce?,* 22 WM. & MARY L. REV. 517, 519-24 (1981) (discussing the various types of property distribution statutes).

12. *See* Moore, *Should a Professional Degree Be Considered a Marital Asset Upon Divorce?,* 15 AKRON L. REV. 543, 545-53 (1982). *See also infra* notes 13-17 and accompanying text.

13. *See, e.g., In re* Marriage of Graham, 194 Colo. 429, 574 P.2d 75 (1978) (en banc).

The Colorado Supreme Court in *Graham* held that although a wife contributed up to seventy percent of the family expenses while her husband earned his master's degree in business administration, the degree did not constitute marital property. *Id.* at 431-32, 574 P.2d at 76-77. Reasoning that a degree was not a "traditional" form of property, the court ruled that the Colorado divorce statute gave it no authority to distribute proceeds from the degree as a marital asset. *Id.* at 432, 574 P.2d at 77. *See generally* Comment, *Graduate Degree Rejected as Marital Property Subject*

Second, courts have argued that the intangible nature of the degree renders any property valuation highly speculative.[14] Third, some jurisdictions reason that the financial implications of classifying a degree as marital property may discourage the degree holder from entering less lucrative fields within a chosen profession.[15] Fourth, courts often perceive alimony as a better means of compensating the spouse for assistance provided toward the degree holder's professional education.[16] Fifth, some courts determine that valuing the degree is tantamount to dividing post-dissolution earnings.[17]

Recently, an increasing number of jurisdictions have awarded compensation to the working spouse,[18] generally relying on four legal theo-

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to Division Upon Divorce: In re Marriage of Graham, 11 CONN. L. REV. 62 (1978); Comment, In re Marriage of Graham: *Education Acquired During Marriage—for Richer or Poorer?,* 12 J. MAR. J. PRAC. & PROC. 709 (1979).

14. *See, e.g,* Todd v. Todd, 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (1969). In *Todd*, a California appellate court held that the intangible nature of a degree renders it incapable of valuation. *Id.* at 791, 78 Cal. Rptr. at 135. The court refused to recognize one spouse's degree as community property, even though community funds had partially paid for the degree. California's community property law formed the basis for the *Todd* court's decision. The court stated:

> [T]he word 'property,' as used in the code sections relating to community property, does not encompass every property right acquired by either husband or wife during marriage . . . . The right to practice medicine and similar professions, for instance, is a property right but it is not one which could be classed as community property.

272 Cal. App. 2d 786, 791, 78 Cal. Rptr. 131, 135 (1969) (quoting Franklin v. Franklin, 67 Cal. App. 2d 717, 725, 155 P.2d 637, 641 (1945)).

The court also noted that Mrs. Todd had already received the benefits of her husband's education. The court awarded Mrs. Todd 55% of the community assets, which primarily arose from Mr. Todd's income as an attorney. 272 Cal. App. 2d 786, 789, 795, 78 Cal. Rptr. 131, 134, 137 (1969).

15. *See, e.g.,* DeWitt v. DeWitt, 98 Wis. 2d 44, 296 N.W.2d 761 (1980). *See infra* note 24.

> Whether a professional education is and will be a future value to its recipient is a matter resting on factors which are at best difficult to anticipate and measure. A person qualified by education for a given profession may choose not to practice it, may fail at it, or may practice in a specialty, location or manner which generates less than the average income enjoyed by fellow professionals. The potential worth of the education may never be realized for these or many other reasons. An award based on the prediction of the degree holder's access at the chosen field may bear no relationship to the reality he or she faces after the divorce.

Id. at 58, 296 N.W.2d at 768.

16. *See, e.g.,* Moss v. Moss, 80 Mich. App. 693, 264 N.W.2d 97 (1978).

17. *See, e.g., In re* Marriage of McManama, 399 N.E.2d 371 (Ind. 1980).

18. *See In re* Marriage of Horstmann, 263 N.W.2d 885 (Iowa 1978) (future earning capacity resulting from law degree constitutes marital property); Inman v. Inman, 578 S.W.2d 266 (Ky. Ct. App. 1979), 9 FAM. L. REP. (BNA) 2131 (Ky. Nov. 23, 1982) (digest of opinion) (dental license constitutes marital property), *modified,* 8 FAM. L. REP. (BNA) 2329 (Ky. Ct. App. March 12, 1982) (digest of opinion), *rev'd on other grounds,*; Reen v. Reen, 8 Fam. L. Rep. (BNA) 1053 (Mass. P. & Fam. Ct. 1981) (case summary) (license to practice orthodontia is a marital asset); Vaclav v. Vaclav, 96 Mich. App. 584, 293 N.W.2d 613 (1980) (medical degree constitutes marital asset);

ries to justify the award.[19] Some courts, disagreeing with the reasoning employed by the majority of jurisdictions, treat the professional degree or license as marital property subject to division upon divorce.[20] The

Moss v. Moss, 80 Mich. App. 693, 264 N.W.2d 97 (1978) (same); DeLa Rosa v. DeLa Rosa, 309 N.W.2d 755 (Minn. 1981) (wife entitled to restitution for contributions made toward the attainment of her husband's degree); *In re* Cropp, 5 Fam. L. Rep. (BNA) 2957 (Minn. Dist. Ct. 1979) (digest of opinion) (wife granted lump-sum settlement as restitution for putting husband through professional school); Lynn v. Lynn, 7 FAM. L. REP. (BNA) 3001 (N.J. Super. Ct. Ch. Div. Dec. 5, 1980), *rev'd,* 91 N.J. 510, 453 A.2d 539 (1982) (professional degree unequivocally constitutes a marital asset); Mahoney v. Mahoney, 182 N.J. Super. 598, 442 A.2d 1062 (App. Div.) (wife not entitled to reimbursement for supporting her husband during professional school—rehabilitative alimony the appropriate remedy), *rev'd in part,* 91 N.J. 488, 453 A.2d 527 (1982); Hill v. Hill, 182 N.J. Super. 616, 442 A.2d 1072 (App. Div.) (1982) (wife awarded rehabilitative alimony as compensation for putting husband through dental school), *modified,* 91 N.J. 506, 453 A.2d 537; Hubbard v. Hubbard, 603 P.2d 747 (Okla. 1979) (wife entitled to reimbursement for contributions made to attainment of husband's degree).

Since the Wisconsin Supreme Court's decision in *Lundberg*, several of these cases have been either modified or overruled by the state's highest court. *See* Inman v. Inman, 9 FAM. L. REP. (BNA) 2131 (Ky. Nov. 23, 1982) (digest of opinion) (before the state supreme court on the "law of the case" rule); Lynn v. Lynn, 91 N.J. 510, 453 A.2d 539 (1982) (reversing the lower court); Mahoney v. Mahoney, 91 N.J. 488, 543 A.2d 527 (1982) (modifying the decision of the lower court). The *Lundberg* case will be analyzed in light of the law existing at the time of the decision. Thus, the *Inman*, *Mahoney* and *Lynn* holdings are discussed as they existed pre-*Lundberg*. For a discussion of those cases' subsequent history, see *infra* notes 20 & 22.

19. *Cf.* Moore, *supra* note 12, at 544. Dr. Moore divides the potential legal theories into four categories: (1) the degree as marital asset; (2) restitution; (3) alimony; and (4) the equitable division of tangible assets.

20. *See, e.g.,* Inman v. Inman, 578 S.W.2d 266 (Ky. Ct. App. 1979), *modified,* 8 FAM. L. REP. (BNA) 2329 (Ky. Ct. App. Mar. 12, 1982) (digest of opinion), *rev'd on other grounds,* 9 FAM. L. REP. (BNA) 2131 (Ky. Nov. 23, 1982) (digest of opinion). In *Inman* a Kentucky appellate court first held that a professional degree constitutes marital property subject to distribution upon divorce when the marriage partners have not accumulated other tangible assets. The court reasoned that when a couple has accumulated no marital assets, the degree-earning spouse may well receive a "windfall of contribution." *Id.* at 268. The court valued the degree as the amount the working spouse actually expended in support, plus interest. Subsequently, in *Leveck v. Leveck,* 614 S.W.2d 710 (Ky. Ct. App. 1981), the Kentucky appellate court refused to broaden its *Inman* ruling, and held that a degree did not constitute marital property when the couple had accumulated substantial marital assets. *Id.* at 712.

After the *Lundberg* decision, Kentucky Supreme Court reversed *Inman* on other grounds (the "law of the case" rule). Inman v. Inman, 9 FAM. L. REP. (BNA) 2131 (Ky. Nov. 23, 1982) (digest of opinion). Therefore, the lower court's holding that a degree constitutes a marital asset remained theoretically intact. However, the Kentucky Supreme Court stated that if it were confronted with the issue, it would rule that a degree does not constitute marital property. *Id.* at 2133. Instead, it would authorize compensation based on the wife's contribution toward the degree, as well as the potential for increased earning capacity. *Id.*

See also Lynn v. Lynn, 7 FAM. L. REP. (BNA) 3001 (N.J. Super. Ct. Ch. Div. Dec. 5, 1980), *rev'd,* 91 N.J. 510, 453 A.2d 539 (1982). In *Lynn*, a New Jersey superior court held that the term property is sufficiently broad to include an educational degree acquired with the use of marital funds. *Id.* at 3006. The court valued the asset as the difference between the earning capacity of a

spouse is awarded a portion of the degree's determined worth as part of the property settlement. Other courts award compensation on the basis of the potential earning capacity of the degree-holding spouse.[21] Employing a restitutionary theory, some courts treat the professional degree as a marital asset. These courts use a "quasi-loan" analysis to award the supporting spouse the amount contributed toward the acquisition of the degree.[22] A few courts employ a rehabilitative alimony theory to award the working spouse maintenance to obtain the education and skills necessary to increase earning capacity.[23]

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male with a four year college degree and that of a specialist in internal medicine. *Id.* at 3007. Another New Jersey court, however, refused to characterize a degree as a marital asset and advocated the use of rehabilitative alimony as an appropriate method for compensating the working spouse. Mahoney v. Mahoney, 91 N.J. 488, 453 A.2d 257 (1982).

The New Jersey Supreme Court resolved this conflict when it reviewed *Mahoney* and *Lynn* and held that the term "property," as used in New Jersey's equitable distribution statute, does not encompass an educational degree. Mahoney v. Mahoney, 91 N.J. at 492, 453 A.2d at 529. *Lynn* as a companion case to *Mahoney*, was therefore overruled.

The New Jersey Supreme Court did not overrule that part of *Mahoney* dealing with the issue of rehabilitative alimony. The court stated, however, that insofar as rehabilitative alimony is not always appropriate (i.e., where the wife is unable to return to the job market), "reimbursement" alimony is the preferred means of compensation. *Id.* at 501, 453 A.2d at 534. For a discussion of rehabilitative alimony see *infra* note 23 and accompanying text.

21. *In re* Marriage of Horstmann, 263 N.W.2d 885 (Iowa 1978), established the Iowa rule that the increase in earning capacity, rather than the professional degree per se, constitutes the marital asset. The court determined that the value of this asset equaled the actual cost of obtaining the degree, and awarded that amount as part of the property settlement. *Id.* at 891. *See generally* Comment, Horstmann v. Horstmann: *Present Right to Practice a Profession as Marital Property,* 56 DEN. L.J. 677 (1979).

22. *See, e.g.,* DeLa Rosa v. DeLa Rosa, 309 N.W.2d 755 (Minn. 1981); Hubbard v. Hubbard, 603 P.2d 747 (Okla. 1979). In *Hubbard*, the Oklahoma Supreme Court ruled that the wife had an equitable claim for repayment of the investment she had made in her husband's education. 603 P.2d at 751-52. The court argued that to hold otherwise would result in the unjust enrichment of the husband. Thus, the court awarded Mrs. Hubbard a lump sum settlement in lieu of a property division.

The court stressed that the award represented compensation for her "past investment rather than a 'vested interest' in his future earnings." *Id.* at 752. *See generally* Note, *Domestic Relations: Recognition of a Wife's Interest in Professional Degree Earned by Husband During Marriage,* 7 U. DAYTON L. REV. 183 (1981) (containing an analysis of *Hubbard*).

After the Wisconsin Supreme Court's decision in *Lundberg*, the New Jersey Supreme Court in Mahoney v. Mahoney, 91 N.J. 488, 453 A.2d 527 (1982), articulated another basis similar to restitution for compensating a wife who supported her husband while he obtained a graduate degree—"reimbursement" alimony. *Id.* at 501, 453 A.2d at 534. Under this theory, a wife is entitled to reimbursement of that amount which she contributed toward her husband's degree.

23. The Uniform Marriage and Divorce Act [U.M.D.A.] incorporates the concept of rehabilitative alimony. Section 308 of the U.M.D.A. provides in pertinent part:

The Wisconsin Supreme Court, in *In re Marriage of Lundberg*,[24] considered some of these theories before basing its award of compensation to the working spouse for financial support of the degree-earning spouse on the Wisconsin Divorce Reform Act.[25] Examining the factors

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(b) The maintenance order shall be in amounts and for periods of time the court deems just, without regard to marital misconduct, and after considering all relevant factors including:

(1) the financial resources of the party seeking maintenance, including marital property apportioned to him, his ability to meet his needs independently, and the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;

(2) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;

(3) the standard of living established during the marriage;

(4) the duration of the marriage;

(5) the age and the physical and emotional condition of the spouse seeking maintenance; and

(6) the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

UNIF. MARRIAGE AND DIVORCE ACT § 308(b), 9 U.L.A. 160 (1973). Eight states have adopted § 308(b)(2) of the U.M.D.A. *See* ARIZ. REV. STAT. ANN. § 25-319 (1976); COLO. REV. STAT. § 14-10-114 (1973 & Supp. 1982); DEL. CODE ANN. tit. 13, § 1512 (1981); KY. REV. STAT. ANN. § 403.200 (Baldwin 1983); MO. REV. STAT. § 452.335 (1978); MONT. CODE ANN. § 40-4-203 (1981); WASH. REV. CODE ANN. § 26.09.090 (Supp. 1983-1984); WIS. STAT. ANN. § 767.26 (West 1981). *See also* Erickson, *supra* note 9, at 952 n.21.

A New Jersey superior court in *Mahoney v. Mahoney*, 182 N.J. Super. 598, 442 A.2d 1062 (App. Div.), *rev'd in part*, 91 N.J. 488, 453 A.2d 527 (1982), advocated the use of "rehabilitative alimony" as the proper remedy for the working spouse. *Id.* at 611-12, 442 A.2d at 1070. Though the court refused to characterize a degree as a marital asset, it recognized that many women defer their own training or education to support a degree-earning spouse. Thus, upon divorce, these women have lower earning capacities than their husbands. *Id.* at 615, 442 A.2d at 1071-72.

The wife in *Mahoney* did not request rehabilitative alimony. *Id.* at 603, 442 A.2d at 1065. Rather, the court independently suggested that it was the appropriate remedy. *Id.* at 615, 442 A.2d at 1071-72. *See also* Hill v. Hill, 182 N.J. Super. 616, 442 A.2d 1072 (1982). In *Hill*, decided the same day as *Mahoney*, the wife requested rehabilitative alimony so that she could attend dental school. The court granted her request, stating, "[a]s we noted in *Mahoney*, this is a singularly appropriate technique in a situation such as this where the wife, after the failure of the marriage, seeks to enhance her own income capacity by pursuing education or professional objectives." *Id.* at 620, 442 A.2d at 1074. For a discussion of subsequent history of *Mahoney*, see *supra* note 20.

24. 107 Wis. 2d 1, 318 N.W.2d 918 (1982). In DeWitt v. DeWitt, 98 Wis. 2d 44, 296 N.W.2d 761 (Ct. App. 1980), the Wisconsin appellate court decided a wife's claim to compensation for the financial support of her husband while he pursued a law degree. The trial court classified the degree as a marital asset. The appellate court reversed and held that a degree is not "property" within the meaning of the existing property distribution statute. While the court stated that the wife's financial contribution to her husband's degree is a relevant factor in determining property division and maintenance the court asserted that under no circumstances could any award exceed 100% of the marital estate. *Id.* at 59-63, 269 N.W.2d 768-771. Since *DeWitt*, the Wisconsin legislature has repealed the statute relied upon by the appellate court. *See infra* note 25.

25. Divorce Reform Act, WIS. STAT. §§ 247.255, 247.26 (West 1977). Section 247.26, the

maintenance provision which was in effect at the time of the *Lundberg* decision provides in pertinent part:

> (1) Upon every judgment of annulment, divorce or legal separation, or in rendering a judgment in an action under § 247.02(1)(g) or (j), the court may grant an order requiring maintenance payments to either party for a limited or indefinite length of time after considering:
>
> (a) The length of the marriage.
>
> (b) The age and physical and emotional health of the parties.
>
> (c) The distribution of property made under § 247.555.
>
> (d) The educational level of each party at the time of marriage and at the time the action is commenced.
>
> (e) The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.
>
> (f) The feasibility that the party seeking maintenance can become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and, if so, the length of time necessary to achieve this goal.
>
> (g) The tax consequences to each party.
>
> (h) Any mutual agreement made by the parties before or during the marriage, according to the terms of which one party has made financial or service contributions to the other with the expectation of reciprocation or other compensation in the future, where such repayment has not been made, or any mutual agreement made by the parties before or during the marriage concerning any arrangement for the financial support of the parties.
>
> (i) Such other factors as the court may in each individual case determine to be relevant.

Id.

The Divorce Reform Act added § 247.255, which established provisions for property division. Section 247.255 provided in pertinent part:

> The court shall presume that all other property except inherited property is to be divided equally between the parties, but may alter this distribution without regard to marital misconduct after considering:
>
> (1) The length of the marriage.
>
> (2) The property brought to the marriage by each party.
>
> (3) The contribution of each party to the marriage, giving appropriate economic value to each party's contribution in homemaking and child care services.
>
> (4) The age and physical and emotional health of the parties.
>
> (5) The contribution by one party to the education, training or increased earning power of the other.
>
> (6) The earning capacity of each party, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage.
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> (7) The desirability of awarding the family home or the right to live therein for a reasonable period to the party having custody of any children.
>
> (8) The amount and duration of an order under § 257.26 granting maintenance

enumerated in the property division statute,[26] Chief Justice Beilfuss, writing for the court, determined that the factor concerning "[t]he contribution by one party to the education, training, or increased earning capacity of the other"[27] controlled.[28] Thus, the court concluded that if substantial marital assets exist, a court may award a larger share of the estate to the working spouse.[29]

The court recognized, however, that the Lundbergs owned few marital assets. Therefore, the maintenance statute provided the only potential vehicle for compensation.[30] The court admitted that the Wisconsin maintenance statute,[31] unlike the property division statute,[32] contained

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payments to either party, any order for periodic family support payments under § 247.261 and whether the property division is in lieu of such payments.

(9) Other economic circumstances of each party, including pension benefits, vested or unvested, and future interests.

(10) The tax consequences to each party.

(11) Any written agreement made by the parties before or during the marriage concerning any arrangement for property distribution; such agreements shall be binding upon the court except that no such agreement shall be binding where the terms of the agreement are inequitable as to either party. The court shall presume any such agreement to be equitable as to both parties.

(12) Such other factors as the court may in each individual case determine to be relevant.

Id. (effective Jan. 15, 1978).

Sections 247.26 and 247.255 have since been renumbered as, respectively, WIS. STAT. §§ 767.26, 767.255 (1981). *See* 1979 Wis. Laws 50 (effective July 20, 1979). Section 767.26, the maintenance statute, was subsequently amended to include subsection 9, which takes into account the contributions for one spouse to the education of the other.

Section 767.26 now provides in pertinent part:

Upon every judgment or annulment, divorce or legal separation, or in rendering a judgment in an action under § 767.02(1)(g) or (j), the court may grant an order requiring maintenance payments to either party for a limited or indefinite length of time after considering:

. . . .

(9) The contribution by one party to the education, training or increased earning power of the other.

(10) Such other factors as the court may in each individual case determine to be relevant.

WIS. STAT. ANN. § 767.26(9)-(10) (West 1981) (effective Aug. 1, 1980). The amended statute did not apply to the *Lundberg* proceeding, which was initiated on August 10, 1978.

26. WIS. STAT. § 247.255 (1977). *See supra* note 25 for text.

27. WIS. STAT. § 247.255(5) (1977).

28. 107 Wis. 2d at 11, 318 N.W.2d at 923.

29. *Id.* at 10-12, 318 N.W.2d at 923-24.

30. *Id.* at 12, 318 N.W.2d at 923. The court added that because the parties had not acquired a great deal of property, the trial court had allowed each party to keep what was in his or her possession, and "[a]ccording to the trial court's valuation, the property awarded to David was actually about $3,000 more valuable than that given to Judy." *Id.* This outcome further supports the court's contention that maintenance payments are the better vehicle for compensation.

31. WIS. STAT. § 247.26 (1977).

no educational support provision. The factors enumerated in the maintenance statute, however, convinced the court that the legislature no longer intended that maintenance payments be based solely on need.[33] Because the statute authorized the trial court to consider all relevant factors in determining its award, the supreme court concluded that the lump-sum maintenance award clearly fell within the parameters of the statute.[34] Labeling the award maintenance may greatly affect the desirability of the award, however, because it may be subject to subsequent modification.[35]

Justice Callow concurred with the majority in the compensation issue.[36] He argued, however, that the actual value of the wife's investment plus the value of her lost opportunities should serve as a ceiling

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32. WIS. STAT. § 247.255 (1977).

33. 107 Wis. 2d at 12-13, 318 Wis. 2d at 923. *See also* WIS. STAT. § 247.26 (1977). These factors include: the distribution of property under the property division statute; the education level of the parties; and the feasibility that the maintenance-seeking spouse will become self-supporting at an income level comparable to that enjoyed during the marriage. *See supra* note 25 for text of statute.

34. 107 Wis. 2d at 14, 318 N.W.2d at 924.

35. WIS. STAT. ANN. § 767.32 (West 1981) authorizes modification of maintenance awards. It provides in pertinent part:

> (1) After a judgment providing for child support under § 767.25, maintenance payments under § 767.26 or family support payments under § 767.261, or for the appointment of trustees under § 767.31 the court may, from time to time, on the petition of either of the parties, or upon the petition of the department of health and social services, a county welfare agency or a child support agency if an assignment has been made under § 49.19(4)(h) or if either party or their minor children receives aid under ch. 49, and upon notice to the family court commissioner *revise and alter such judgment respecting the amount of such maintenance* or child support and the payment thereof, and also respecting the appropriation and payment of the principal and income of the property so held in trust, *and may make any judgment respecting any of the matters which such court might have made in the original action, except that a judgment which waives maintenance payments for either party shall not thereafter be revised or altered in that respect nor shall the provisions of a judgment with respect to final division of property be subject to revision or modification*. . . .
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> . . . .
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> (3) *After a final judgment requiring maintenance payment has been rendered and the payee has remarried, the court shall, on application of the payer with notice to the payee and upon proof of remarriage, vacate the order requiring such payments.*
>
> (4) In any case in which the state is a real party in interest under § 767.075, the department of health and social services shall review the support obligation periodically and whenever circumstances so warrant, petition the court for revision of the judgment with respect to the support obligation.

Id. (emphasis added).

36. "[A] spouse is entitled to receive compensation for being the breadwinner and for those lost opportunities which result from sacrifices made while supporting the spouse who obtained an advanced education." *Id.* at 15, 318 N.W.2d at 925 (Callow, J., concurring).

for any award.[37] Specifically rejecting any computation based on future earnings,[38] he categorized the degree as marital property.[39] The concurring justice considered this alternative more desirable because an event such as the death of either spouse or remarriage of the dependent spouse may terminate the maintenance payments prior to receipt of the full value of the degree.[40]

The *Lundberg* court avoided the difficult question of valuation of the working spouse's contribution. At trial, Mrs. Lundberg presented, but did not use, an economist's valuation.[41] Instead, she requested an amount which she subjectively believed equalled the value of her support.[42] The supreme court considered the lower court's award "fair and equitable" under the circumstances[43] and, therefore, did not have to consider any method for valuing compensation or an upper limit to such compensation.[44]

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37. *Id.* at 15, 318 N.W.2d at 925 (Callow, J., concurring).

38. *Id.* at 16, 318 N.W.2d at 925 (Callow, J., concurring). Justice Callow rejected the future earnings method of valuation, stating that it "is too speculative to be judicially recognizable." He pointed out that there is no certainty that the degree holder will actually practice in the chosen field, or even earn the amounts the economist predicted. *Id.* at 16, 318 N.W.2d at 925 (Callow, J., concurring). *See supra* note 15 and accompanying text.

39. 107 Wis. 2d at 16, 318 N.W.2d at 925 (Callow, J., concurring). *See also supra* notes 18-23.

40. 107 Wis. 2d at 16, 318 N.W.2d at 925. *See* WIS. STAT. ANN. 767.32 (West 1981) *supra* note 35.

Justice Callow failed to recognize, however, that property settlements are dischargeable in bankruptcy. The Bankruptcy Reform Act of 1978 lists certain debts which are nondischargeable. 11 U.S.C. § 523 (Supp. IV 1980). The statute lists alimony and child support as nondischargeable debts, *id.* § 523(a)(5). Because it does not list marital property divisions, these debts may be discharged. Erickson, *supra* note 9, at 965 n.80. *See generally* Swann, *Dischargeability of Domestic Obligations in Bankruptcy,* 43 TENN. L. REV. 231 (1976).

Another potential disadvantage of a property settlement arises from the extent to which courts are bound by the type of property distribution statute in effect in their jurisdiction. The *Lundberg* court did not face this obstacle because Wisconsin is an equitable distribution jurisdiction. *See supra* note 11.

41. The economist employed two methods of valuing Mrs. Lundberg's investment. The first method compared the average earnings of physicians with that of white males with other types of graduate degrees. The difference was estimated to be approximately $624,400 over a 25-year period. 107 Wis. 2d at 5, 318 N.W.2d at 920.

The second method calculated the amount the wife expended with interest, to support her husband while he attended school, which, in the Lundberg's case, amounted to $33,077. *Id.* Since Mrs. Lundberg did not rely on these figures, it is impossible to ascertain which, if either, the court would have adopted.

42. Mrs. Lundberg requested $25,000. *Id.* at 6, 318 N.W.2d at 920.

43. 107 Wis. 2d at 16, 318 N.W.2d at 925.

44. Inherent in classifying a degree as marital property is the necessity of valuing that asset. Because the wife's award depends upon the degree's determined value, assigning no value to that

The *Lundberg* court correctly interpreted the Divorce Reform Act as authorizing compensation for a working spouse. First, as the court noted, the legislature clearly expressed its intent to compensate the working spouse.[45] Second, a subsection of the property division statute explicitly lists the contribution of one spouse to the education of the other as a factor for judicial consideration.[46] Third, the flexibility of the maintenance statute in effect at the time of the *Lundberg* decision indicates the broad scope of circumstances the legislature intended to cover.[47]

Often, the working spouse seeking compensation upon divorce is left without a legal remedy. Because courts traditionally base maintenance upon need, they deny compensation to the self-supporting spouse.[48] Property division statutes are equally ineffective because the working spouse funnelled the major portion of income toward the other spouse's education, in lieu of acquiring traditional marital assets.[49] The degree-earning spouse, on the other hand, can look forward to a bright financial future because of the increased earning capacity which results from the degree. By its broad interpretation of the maintenance statute, the *Lundberg* court awarded compensation without labeling the degree property.

In authorizing compensation to Mrs. Lundberg, the Wisconsin Supreme Court took an important step in recognizing the supporting spouse's need to be compensated for the contributions made to the marital relationship. Although the decision makes a limited contribu-

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asset leaves the court with nothing to divide. Relying on statutory grounds, however, a court need only consider the factors enumerated in the applicable statute to render an equitable award.

45. *See supra* note 25.

46. WIS. STAT. § 247.255(5) (1977), set out *supra* note 25. The fact that the Legislature had already amended the maintenance statute to include such a provision lends support to the court's interpretation.

47. *See, e.g.*, WIS. STAT. § 247.26(c), (d), (f), (i) (1977); *see supra* note 25. *See generally* Comment, *The 1977 Amendments to the Wisconsin Family Code,* 1978 WIS. L. REV. 882, 890 (author speculates that the Wisconsin legislature intended courts to look to the maintenance as well as the property division statute in compensating a supporting spouse).

48. Erickson, *supra* note 9, at 959. *See supra* note 33.

49. *See, e.g.*, Todd v. Todd, 272 Cal. App. 2d 786, 78 Cal. Rptr. 1131 (1969); *In re* Marriage of Graham, 194 Colo. 429, 574 P.2d 75 (1978) (en banc); Inman v. Inman, 578 S.W.2d 266 (Ky. Ct. App. 1979), Hubbard v. Hubbard, 603 P.2d 747 (Okla. 1979). *See supra* notes 4 & 20.

tion to this new area, it represents a growing commitment to the fair and equitable treatment of spouses upon divorce.

J.R.H.