

motive;⁴² thus, a tenant has no property interest in the renewal of his tenancy. The court, therefore, in precluding *Windward Partners* from terminating for retaliatory reasons the month-to-month tenancies of the eight tenants in this case, seems to have recognized an expectancy—*i.e.*, “a property interest”—in the renewal of periodic tenancies.

For this reason the court’s decision may signal a significant change in the judicial attitude toward the doctrine of retaliatory eviction.⁴³ Courts originally fashioned the retaliatory eviction doctrine in response to the public policy need for private citizens’ reports of housing code violations.⁴⁴ The *Windward Partners* court may have shifted the doctrine’s foundation to the need to protect tenants from retaliating landlords.⁴⁵

DOMESTIC LAW—DIVORCE—KENTUCKY INCLUDES LICENSE TO PRACTICE DENTISTRY IN MARITAL PROPERTY DIVISION. *Inman v. Inman*, 578 S.W.2d 266 (Ky. Ct. App. 1979). Early in the Inmans’ seventeen-year marriage, Mrs. Inman worked as a teacher to enable her husband to attend dental school. Although Dr. Inman worked steadily as a dentist after obtaining his license and the Inmans acquired several

42. See note 5 *supra* and accompanying text.

43. California may have followed Hawaii’s lead in extending a common-law retaliatory eviction defense to tenants beyond its statutory defense. In *Vargas v. Municipal Court*, 22 Cal. 3d 902, 587 P.2d 714, 150 Cal. Rptr. 918 (1978), the court allowed an agricultural tenant to assert a common-law retaliatory eviction defense in addition to its statutory defense. The landlord conceded that the common-law defense existed, but claimed that the lower court lacked jurisdiction. This concession is surprising in light of four law review articles that had debated the question of whether a common-law retaliatory eviction defense still existed in California after enactment of the California statute. See Moskowitz, *supra* note 40; Note, *supra* note 33; Comment, *California’s Common Law Defense Against Landlord Retaliatory Conduct*, 22 U.C.L.A. L. REV. 1161 (1975); 22 HASTINGS L.J. 1365 (1971). The California Supreme Court noted this debate and expressly left open the question in *S.P. Growers Ass’n v. Rodriguez*, 17 Cal. 3d 719, 729 n.4, 552 P.2d 721, 727 n.4, 131 Cal. Rptr. 761, 767 n.4 (1976). *But see* *Laster v. Bowman*, 52 Ohio App. 2d 379, 370 N.E.2d 767 (1977) (statute is exclusive remedy available to evicted tenants).

44. See notes 6-10 *supra* and accompanying text.

45. If the interest granted to the tenants in *Windward* extends one step further, a situation may develop in which a landlord cannot evict a tenant without good cause. See D.C. CODE ENCYCL. § 45-1653 (West Supp. 1978-1979); N.J. STAT. ANN. § 2A:18-61.1 (West Supp. 1979-1980); note 8 *supra*. Tenants in these states seem to have an even greater “property interest” in their tenancies than the *Windward* tenants.

valuable items of property, bad investments and inept management of the dental practice left the couple on the brink of bankruptcy at the time of their divorce. A Kentucky circuit court, however, classified Dr. Inman's dental license as marital property. On this basis, it distributed most of the marital assets to Mrs. Inman, allocated virtually all the concomitant financial burdens to Dr. Inman, and awarded Mrs. Inman maintenance of \$100 per month. The Kentucky Court of Appeals cautiously affirmed in principle the circuit court's decision regarding the license and *held*: To reach an equitable result in a dissolution of marriage proceeding, a circuit court may find a marital property interest in a spouse's professional license if the couple acquired little or no marital property through the increased earning capacity of the license obtained with the other spouse's support.¹

In a divorce action the power of a state court to transfer property between spouses, either in addition to or in lieu of alimony, depends upon the state's enabling statute.² Kentucky's statute provides for division and distribution of marital property in a manner that is economically just.³ The statute on its face seems to allow for the inclusion of a

1. *Inman v. Inman*, 578 S.W.2d 266 (Ky. Ct. App. 1979). The court expressed "strong reservations about placing a professional license in the category of marital property," but concluded that in "certain instances . . . treating a professional license as marital property is the only way in which a court can achieve an equitable result." *Id.* at 268.

The court of appeals found, however, that the circuit court had not made sufficient findings of fact to support its particular division of the marital property. The court of appeals thus remanded the case for a determination of "a) the approximate dollar value of Sue Inman's contribution to Dr. Inman's acquisition of a license to practice dentistry, b) the approximate dollar value of Dr. Inman's increased earning capacity, [and] c) the approximate dollar value, if any, of Mrs. Inman's contribution to the worth of Dr. Inman's practice." *Id.* at 270.

The court of appeals also held that the circuit court's award of periodic maintenance was improper under Kentucky statute in view of the award of child support, the disposition of property to Mrs. Inman, and the demonstrated ability of Mrs. Inman to support herself. *Id.* The court of appeals further directed the lower court, in its redivision of the marital assets and debts, to consider the extent to which Mrs. Inman was a willing participant in the acquisition of the marital debts and the effect on the relative burdens and benefits of the parties caused by foreclosure on the marital domicile since the circuit court's decision. *Id.* at 270-71.

2. See generally 24 AM. JUR. *Divorce and Separation* § 926 (1966); H. CLARK, *LAW OF DOMESTIC RELATIONS* § 14.8 (1968).

3. "[T]he court . . . shall divide marital property without regard to marital misconduct in just proportions considering all relevant factors . . ." KY. REV. STAT. ANN. § 403.190 (1) (Baldwin 1979). Approximately 30 states have equitable distribution provisions similar to Kentucky's. See, e.g., COLO. REV. STAT. § 14-10-113 (1973); OHIO REV. CODE ANN. § 3105.18 (Page Supp. 1978); OKLA. STAT. tit. 12, § 1278 (Supp. 1977).

In community property states and states with equitable distribution provisions, the *Inman* analysis is clearly relevant; if a license is marital property, each spouse presumably is entitled to a one-

professional license as marital property,⁴ but no Kentucky court had specifically ruled upon the issue until *Inman*. Kentucky cases, in characterizing the distribution of marital property upon divorce, consistently followed the rule that courts must divide property acquired by a "team effort."⁵

The California Court of Appeals in *Todd v. Todd*⁶ was the first court to confront squarely the issue of whether a professional license or degree⁷ is marital property.⁸ Mrs. Todd, who worked while her husband attended undergraduate and law school, contended that her husband's education, partially financed with community property funds, was a

half share in its value, however measured. In those states which retain the common-law principles of distribution the analysis is probably irrelevant.

4. The statute provides in pertinent part:

For the purpose of this chapter, "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 before 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; (d) Property excluded by valid agreement of the parties; and (e) The increase in value of property acquired before the marriage to the extent that such increase did not result from the efforts of the parties during marriage.

KY. REV. STAT. ANN. § 403.190(2) (Baldwin 1979) (emphasis added).

5. See *Beggs v. Beggs*, 479 S.W.2d 598 (Ky. Ct. App. 1972) (wife's management of household, attention to needs of children, and financial support of husband while he obtained professional education should have been considered in adjusting property rights). See generally *Williams v. Williams*, 500 S.W.2d 79 (Ky. Ct. App. 1973) ("team effort" division of property unjust because award to wife of use of marital residence for life unless she remarried constituted award of alimony); *Peterson v. Peterson*, 479 S.W.2d 892 (Ky. Ct. App. 1972) (chancellor should consider actual investment in and services rendered by wife to husband's business enterprise).

6. 272 Cal. App. 2d 786, 789, 78 Cal. Rptr. 131, 134 (1969).

7. The distinction, if any, between a professional education or degree, a professional license, and an increase in earning capacity, for purposes of this issue, has been neither clarified nor agreed upon by the courts. *E.g.*, *Todd v. Todd*, 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (1969) (law degree is not community property); *In re Marriage of Graham*, — Colo. —, 574 P.2d 75, 77 (1978) (educational degree is not marital property); *In re Marriage of Horstman*, 263 N.W.2d 885 (Iowa 1978) (future earning capacity of husband who received law degree is a marital asset).

Courts also differ over whether education, increased earning capacity, or both should be considered the divisible asset, but the cases "represent a trend toward . . . awarding the working spouse something, either as reimbursement for the efforts put forth or as a share in the future benefits to be received as a result of the education." Comment, *Professional Education as a Divisible Asset in Marriage Dissolutions*, 64 IOWA L. REV. 705, 710-12 (1979).

8. Two earlier cases discussed in dictum the notion of a professional degree or license as marital property and reached opposite conclusions. *Franklin v. Franklin*, 67 Cal. App. 2d 717, 725, 155 P.2d 637, 641 (1945) (right to practice a profession is not community property); *Daniels v. Daniels*, 20 Ohio Op. 2d 458, 459, 185 N.E.2d 773, 775 (Ct. App. 1961) (court, by analogy to a franchise, recognized right to practice medicine as property, but no issue was present on whether it was divisible).

community property asset. The court rejected this argument,⁹ but noted that Mrs. Todd would realize part of the value of her husband's education through a substantial property award.¹⁰

Few other jurisdictions have addressed the issue. Some courts flatly refuse to treat a license or degree as marital property.¹¹ Other courts evade the issue semantically by incorporating an amount into alimony or maintenance that purports to reflect the wife's contributions to the husband's attainment of increased earning capacity.¹² These cases, weighing the lack of alternative measures to recompense the wife equitably, indicate that designation of an award as alimony or as property distribution may not control the amount or nature of the award,¹³ rather, an award of maintenance or alimony depends in part on the

9. Relying upon dictum in an earlier case, *Franklin v. Franklin*, 67 Cal. App. 2d 717, 155 P.2d 637 (1945), the California Court of Appeals concluded: "At best, education is an intangible property right, the value of which because of its character, cannot have a monetary value placed upon it for division between spouses." 272 Cal. App. 2d at 791, 78 Cal. Rptr. at 135.

10. 272 Cal. App. 2d at 791, 78 Cal. Rptr. at 135. Mrs. Todd received over \$100,000 in the property settlement. This award included her share of the value of her husband's law practice at the time of dissolution, which the court held to be community property.

11. See *Todd v. Todd*, 272 Cal. App. 2d 786, 789, 78 Cal. Rptr. 131, 134 (1969) (education cannot be monetarily valued for division upon divorce); *Franklin v. Franklin*, 67 Cal. App. 2d 717, 725, 155 P.2d 637, 641 (1945) (right to practice a profession is not community property); *Hubbard v. Hubbard*, 603 P.2d 747, 750 (Okla. 1979) (neither an individual's professional education nor license can be properly viewed as "property" subject to division); cf. *In re Marriage of Horstman*, 263 N.W.2d 885 (Iowa 1978) (court characterized issue as whether a party's future earning potential based on the party's education or skill acquired during the marriage is an asset for distribution).

12. See *Moss v. Moss*, 80 Mich. App. 693, 694, 264 N.W.2d 97, 98 (1978) (\$15,000 gross alimony allowed because husband's medical degree could not be divided); *Magruder v. Magruder*, 190 Neb. 573, 578, 209 N.W.2d 585, 591 (1973) (\$100,000 alimony payable over ten-year period allowed to wife who put husband through medical school); *Diment v. Diment*, 531 P.2d 1071, 1073 (Okla. App. 1974) (award of permanent alimony not terminable upon death or remarriage allowed in lieu of property award to wife who supported husband from eleventh grade through medical school).

In *Moss*, even though the wife's income would exceed the husband's until he finished his residency, the court approved the alimony award because the medical degree was the only substantial asset acquired during the marriage. 80 Mich. App. at 694, 264 N.W.2d at 98. The *Magruder* court noted that the husband sought a divorce just as the parties had "reached the point where they could begin to reap some of the economic rewards of their efforts." 190 Neb. at 577, 209 N.W.2d at 588. Finally, the court in *Diment* actually admitted that "permanent alimony" was "in substance a property award for the contributions which [the wife] made to [the husband's] increase in earning capacity." 531 P.2d at 1073.

13. See Comment, *supra* note 7, at 712-13. The author categorizes these cases into "recognitional" and "non-recognitional" decisions. Although those cases which recognize a degree as marital property through larger alimony awards tend to be those in which few assets had been acquired, the author concludes that, "[b]y awarding a large share of the assets to the working

earning capacity of the husband.¹⁴

Only two recent cases have addressed the *Inman* issue directly. In *In re Marriage of Graham*¹⁵ the Colorado Supreme Court held that although "property," as used in the Colorado distribution-of-property statute, must be construed broadly,¹⁶ an educational degree does not fall within even the broadest traditional interpretations of the term.¹⁷ The Oklahoma Supreme Court in *Hubbard v. Hubbard*¹⁸ reached the same result, citing *Graham* with approval.¹⁹ Well-reasoned dissenting opinions in both cases, however, cited authority demonstrating that it is neither logical nor equitable to exclude from distributable property the value of a professional degree, especially when the wife has contributed to its attainment and virtually no other assets remain to be divided.²⁰

spouse. . . . the nonrecognitional courts are implicitly recognizing the value of the education to both spouses." *Id.* at 713.

14. See *In re Marriage of Horstman*, 263 N.W.2d 885 (Iowa 1978); *Moss v. Moss*, 80 Mich. App. 693, 264 N.W.2d 97 (1978); *In re Marriage of Vanet*, 544 S.W.2d 236 (Mo. Ct. App. 1976); *Magruder v. Magruder*, 190 Neb. 573, 209 N.W.2d 585 (1973); *Hubbard v. Hubbard*, 603 P.2d 747 (Okla. 1979).

15. —Colo.—, 574 P.2d 75 (1978).

16. *Id.* at —, 574 P.2d at 76. The relevant portion of the Colorado statute is identical to the definition set forth in the Kentucky statute. See note 4 *supra*.

17. "[A degree] does not have an exchange value or any objective value on an open market. It is personal to the holder. . . . It cannot be assigned, sold, transferred, conveyed, or pledged." —Colo. at —, 574 P.2d at 77. Cf. *Stern v. Stern*, 66 N.J. 340, 345, 331 A.2d 257, 260 (1975) (a person's earning capacity, even when developed with the spouse's aid, cannot be recognized as a "separate, particular item of property" for distribution upon divorce).

18. 603 P.2d 747 (Okla. 1979).

19. In *Hubbard* income from wife's employment over a twelve-year period helped pay for husband's medical education and family expenses. The court reversed an award of \$100,000 alimony in lieu of property division, holding that property-division alimony cannot be based upon non-property rights, *i.e.*, medical training and medical license.

20. — Colo. at —, 574 P.2d at 78 (Carrigan, J., dissenting); 603 P.2d at 753 (Lavender, J., dissenting). Judge Carrigan pointed out that a husband's future earning potential or goodwill may be considered in deciding property division or alimony awards as may the wife's enhancement of the husband's financial status. He characterized the "property" to be divided as "the increase in the husband's earning power concomitant to that degree which is the asset conferred on him by his wife's efforts." — Colo. at —, 574 P.2d at 78-79. Judge Lavender also argued that because awards of permanent alimony are based on future earnings, such considerations should extend to property divisions. 603 P.2d at 753.

A recharacterization of the issue appeared in *In re Marriage of Horstman*, 263 N.W.2d 885 (Iowa 1978), in which the Iowa Supreme Court stated:

[A] trial court in a dissolution case where proper evidence is presented may consider the future earning capacity of both parties and in determining those capacities it may consider the education, skill or talent of both parties. This statement of principle . . . applies to the court's determination of an equitable distribution of assets and property and to a determination of . . . alimony.

In *Inman v. Inman* the Kentucky Court of Appeals determined that division of the value of Dr. Inman's license as marital property was the only equitable way to allow Mrs. Inman a "return on her investment."²¹

The court first determined that a professional degree or license constituted "property" within the meaning of the Kentucky marital distribution statute.²² The court recognized that "a license to practice a profession lacks many attributes of most sorts of property,"²³ but drawing upon the *Graham* dissent,²⁴ emphasized that courts have accepted earning capacity as property in other contexts.²⁵ The court established an equitable standard for determining whether property is marital in a particular case. This standard includes consideration of such factors as whether more traditional marital property is available for division, the extent to which the wife already has benefited financially from her spouse's enhanced earning capacity or is eligible for maintenance, and

Id. at 891. The court purported to have "no quarrel" with the *Graham* decision regarding the educational concept, but seemed more aligned with *Graham's* dissent in concluding that it is "the potential for increase in future earning capacity made possible by the law degree and certificate of admission conferred upon the husband with the aid of his wife's efforts which constitutes the asset for distribution by the court." *Id.*

21. 578 S.W.2d at 268.

22. *Id.*; see note 4 and accompanying text.

23. 578 S.W.2d at 267.

24. The court quoted with approval from the dissenting opinion in *Graham*: "[E]quity demands that the courts seek extraordinary remedies to prevent extraordinary injustice." *Id.* at 269.

25. The court noted that one who tortiously destroys or reduces another's earning capacity must make monetary compensation for that loss. *Id.* The court drew further support from the non-transferable property interests protected by the fourteenth amendment.

The court also pointed to the Supreme Court's recognition of tenured federal employment and government "largesse" as property interests. *Id.* In this context the court could have noted that courts have recognized the right to practice a profession, as evidenced by a license issued by the state, to be a property interest protected by the fourteenth amendment. See Note, *Due Process Limitations on Occupational Licensing*, 59 VA. L. REV. 1097 (1973).

The *Graham* majority, in contrast, looked to a general property definition—"everything that has exchangeable value or which goes to make up wealth or estate." BLACK'S LAW DICTIONARY 1382 (rev. 4th ed. 1961)—and cited *Ellis v. Ellis*, 191 Colo. 317, 552 P.2d 506 (1976) (military retirement pay not property because it has no lump sum value and terminates on death of the owner). Several states, however, have recognized nonvested or vested but unmaturing pension benefits as assets includable in a division of property. See *In re Marriage of Brown*, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976) (nonvested pension rights more than mere expectancies because based upon a contractual right that is a form of property); *Taggart v. Taggart*, 552 S.W.2d 422 (Tex. 1977) (retirement benefits subject to division); *Wilder v. Wilder*, 85 Wash. 2d 364, 534 P.2d 1355 (1975) (trial court should consider all circumstances and evaluate probability that pension will be enjoyed).

the degree to which support during marriage was reciprocal.²⁶

The *Inman* court, however, next proceeded to limit a spouse's interest in the professional degree to the "amount spent during the period of education, plus reasonable interest and adjustments for inflation."²⁷

Finally, the court concluded that, in some cases, no alternative to division of a license or degree as marital property is available. Although historically fault was relevant in determining alimony,²⁸ modern statutes focus more on actual need; in Kentucky a spouse who is not "unable to support himself through appropriate employment"²⁹ will not receive payments. Alimony, moreover, generally is modifiable, but a property division is not.³⁰ Alimony, unlike a property division, normally ends upon the recipient spouse's remarriage or death.³¹ In such circumstances, therefore, no other method may grant the contributing spouse an equitable share of the ultimate benefit to the community.³²

The Kentucky Court of Appeals' extension in *Inman* of the concept of marital property to include a professional license is consistent with the Kentucky legislature's goal of equitable division of family resources

26. 578 S.W.2d at 269.

27. *Id.* at 269-70. The court's remand instructions, however, see note 1 *supra*, seem to require findings more extensive than would be necessary to satisfy the court's stated measure of valuation. This result probably reflects the court's "strong reservations about placing a professional license in the category of marital property." 578 S.W.2d at 268. One might expect, therefore, that the court, despite the standard it formulated for valuing a spouse's interest, would uphold larger or smaller awards as its sense of equity required. See generally Comment, *The Interest of the Community in a Professional Education*, 10 CAL. W.L. REV. 590 (1974).

28. 578 S.W.2d at 270. See — Colo. at —, 574 P.2d at 78 (Carrigan, J., dissenting); 603 P.2d at 753 (Lavender, J., dissenting).

29. For a discussion of the distinction between a decree granting alimony and a decree ordering transfer of property, see H. CLARK, *supra* note 2.

30. H. CLARK, *supra* note 2.

31. *Id.*

32. See 578 S.W.2d at 269. Both Judge Carrigan in *Graham* and Judge Lavender in *Hubbard* recognized the possibility that the wife's ability to support herself while her husband was establishing a career may operate to deny her any maintenance. See note 20 *supra*.

Judge Wilhoit, dissenting in *Inman*, argued that the "'standard of living established during the marriage" provision of subsection (2)(c) [of KY. REV. STAT. ANN. § 403.200 (Baldwin 1979)] "is to be considered in determining whether a spouse is able to support himself." 578 S.W.2d at 271 (quoting *Casper v. Casper*, 510 S.W.2d 253 (1974)). This standard, however, offers little help in situations in which a couple's standard of living is generally low, because a spouse is in school or, as in *Inman*, their standard of living is a false one. See White & Stone, *A Study of Alimony and Child Support Rulings With Some Recommendations*, 10 FAM. L.Q. 75 (1976). Some form of alimony was granted in only 24.43% of the cases surveyed. In the cases in which it was granted, 76% called for rehabilitative alimony and 24% for permanent alimony. *Id.* at 80.

upon dissolution of marriage and the Kentucky statute's broad definition of marital property. In refusing to be "hamstrung by narrow definitions of property,"³³ the *Inman* court has taken a major step toward insuring that a person who puts his or her spouse through professional or graduate school will not be economically handicapped upon dissolution of the marriage.

CONSTITUTIONAL LAW—SEX DISCRIMINATION—WORKMEN'S COMPENSATION PRESUMPTION OF WIDOW'S DEPENDENCY DOES NOT VIOLATE EQUAL PROTECTION CLAUSE. *Wengler v. Druggists Mutual Insurance Co.*, 583 S.W.2d 162 (Mo. 1979). Respondent Wengler claimed workmen's compensation benefits¹ for the death of his wife in a work-related accident. Because Wengler was unable to demonstrate the requisite dependency,² the referee denied him compensation. The Labor and Industrial Relations Committee affirmed the referee's decision, but the circuit court reversed, holding the statute unconstitutional.³ On appeal, the Missouri Supreme Court reversed and *held*: The Missouri workmen's compensation statute, which affords a widow

33. 578 S.W.2d at 269.

1. Wengler filed his claim under MO. REV. STAT. § 287.240 (1978). Subsection 2 provides that "[t]he employer shall also pay to the total dependents of the employee a single total death benefit. . . ." Subsection 4 defines

"dependent" . . . to mean a relative by blood or marriage of a deceased employee, who is actually dependent for support, in whole or in part, upon his wages at the time of the injury. The following persons shall be conclusively presumed to be totally dependent for support upon a deceased employee and any death benefit shall be payable to them, to the exclusion of other total dependents:

(a) A wife upon a husband legally liable for her support, and a husband mentally or physically incapacitated from wage earning upon a wife; provided, that on the death or remarriage of a widow, the death benefit shall cease unless there be other total dependents entitled to any unpaid remainder of such death benefit under this chapter.

2. *Id.* § 287.240. Widows, under the conclusive presumption of dependency, are immediately eligible for workmen's compensation benefits. The same presumption is denied widowers. Only a husband who is unable to work because of mental or physical deficiencies is presumed dependent for support; all other widowers must prove dependency on their deceased wives' wages.

3. The circuit court held that the statute denied equal protection to the widower by requiring proof of dependency while affording a widow the conclusive presumption of dependency at the death of her husband. Thus, the circuit court's analysis emphasized the disadvantages felt by the widower, instead of the detriment imposed upon the woman worker whose employment did not produce the same benefits as that of a male worker. *Wengler v. Druggist Mut. Ins. Co.*, 583 S.W.2d 162, 167 (Mo. 1979).