SEARCHING FOR AN EQUITABLE INTEREST IN A PROFESSIONAL EDUCATION UPON DIVORCE: TIME TO LEGISLATE THE EMERGING VIEW

I. INTRODUCTION

An increasing number of courts are determining whether a professional degree or license[1] earned during marriage constitutes marital property in which a working, non-professional spouse may claim a distributable interest. Twenty-four of the twenty-eight jurisdictions ruling on the matter have held that a professional degree or license is not marital property subject to equitable division and distribution.[2]

1. The terms "degree" or "professional degree" are used as shorthand for a professional license, advanced degree or education, or the enhanced earning potential associated with either of them. No distinction is made between the degree or license and the potential enhanced earning capacity. Supporting spouses have sought an equitable interest in a variety of educational achievements. *See infra* note 2. Making an illusory distinction, the court in *In re* Marriage of Horstman, 263 N.W.2d 885 (Iowa 1978), noted that the law degree and the admission to practice law themselves did not constitute a distributable marital asset. Rather, the potential for future increased earnings that the degree and license made possible did constitute such an asset. *Id.* at 891. *See also* Note, *Family Sacrifice*, *infra* note 4, at 277 n.11 (the distinction between the degree and the enhanced earning capacity it represents is not clear).

2. *See, e.g.*, Jones v. Jones, 454 So. 2d 1006 (Ala. Civ. App. 1984) (law degree); Pyeatte v. Pyeatte, 135 Ariz. 346, 661 P.2d 196 (Ct. App. 1982) (law degree); Sullivan v. Sullivan, 134 Cal. App. 3d 634, 184 Cal. Rptr. 796 (1982), *superseded on other grounds*, 37 Cal. 3d 762, 691 P.2d 1020, 209 Cal. Rptr. 354 (1984) (medical license); *In re* Marriage of Graham, 194 Colo. 429, 574 P.2d 75 (1978) (M.B.A.); Zahler v. Zahler, 8 Fam. L. Rep. (BNA) 2694 (Conn. Super. Ct. 1982) (medical degree); Wright v. Wright, 469 A.2d 803 (Del. Fam. Ct. 1983) (dental degree); Hughes v. Hughes, 438 So. 2d 146 (Fla. Dist. Ct. App. 1983) (bachelor's degree); *In re* Marriage of Weinstein, 128 Ill. App. 3d 234, 470 N.E.2d 551 (1984) (osteopathy degree and license); *In re* Marriage of McManama, 179 Ind. App. 513, 386 N.E.2d 953 (1979), *vacated on other grounds*, 272

Broadly worded divorce statutes that recognize judicial need for flexibility and discretion to reach equitable results in varying fact situations encourage ad-hoc approaches to this unique problem, commonly referred to as the "diploma dilemma."[3] Under these liberal legislative schemes courts are granting a wide variety of awards to resolve a problem most state legislatures clearly never anticipated. These disparate remedies, derived from controversial, value-ridden, judge-made law[4]

Ind. 483, 399 N.E.2d 371 (1980) (law degree); Lovett v. Lovett, 688 S.W.2d 329 (Ky. 1985) (medical license); Archer v. Archer, 303 Md. 347, 493 A.2d 1074 (1985) (medical degree and license); DeLa Rosa v. DeLa Rosa, 309 N.W.2d 755 (Minn. 1981) (medical license); Ruben v. Ruben, 123 N.H. 358, 461 A.2d 733 (1983) (Ph.D.); Mahoney v. Mahoney, 91 N.J. 488, 450 A.2d 527 (1982) (M.B.A.); Muckelroy v. Muckelroy, 84 N.M. 14, 498 P.2d 1357 (1972) (medical licensee); Stevens v. Stevens, 23 Ohio St. 3d 115, 492 N.E.2d 131 (1986) (veterinary degree); Hubbard v. Hubbard, 603 P.2d 747 (Okla. 1979) (medical license); Lehmicke v. Lehmicke, 489 A.2d 782 (Pa. Super. Ct. 1985) (medical degree); Helm v. Helm, 345 S.E.2d 720 (S.C. 1986) (medical degree); Wehrkamp v. Wehrkamp, 357 N.W.2d 264 (S.D. 1984) (dental degree); Beeler v. Beeler, 715 S.W.2d 625 (Tenn. Ct. App. 1986) (dental license); Frausto v. Frausto, 611 S.W.2d 656 (Tex. Civ. App. 1980) (medical license); Washburn v. Washburn, 101 Wash. 2d 168, 677 P.2d 152 (1984) (veterinary degree); Haugan v. Haugan, 117 Wis. 2d 200, 343 N.W.2d 796 (1984) (medical license).

Four jurisdictions have concluded that a professional degree is marital property subject to equitable division. *See In re* Marriage of Horstmann, 263 N.W.2d 885 (Iowa 1978) (potential earning capacity that law degree represents constitutes distributable asset); Reen v. Reen, 8 Fam. L. Rep. (BNA) 2193 (N.J. Super. Ct. 1981) (medical degree and license); Woodworth v. Woodworth, 126 Mich. App. 258, 337 N.W.2d 332 (1983) (law degree); O'Brien v. O'Brien, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985) (medical license), *remanded*, 120 A.D.2d 656, 302 N.Y.S.2d 250 (1986).

3. *See, e.g.*, Haugan v. Haugan, 117 Wis. 2d 200, 212-13, 343 N.W.2d 796, 802-03 (1984) (statutes provide flexible means by which a court can award just compensation to the supporting spouse using either maintenance or property division or both); Grosskopf v. Grosskopf, 677 P.2d 814, 823 (Wyo. 1984) (broad discretion of trial court to grant equitable relief shall not be disturbed unless evident abuse); Martin v. Martin, 358 N.W.2d 793, 797 (S.D. 1984) (no mathematical formula binds trial court's full power to make equitable division of marital property). For a review of jurisdictions applying the principle that property division is not subject to rules, formulas, or presumptions, see Annotation, *Divorce—Equitable Distribution*, 41 A.L.R.4TH 481, 504-05 (1984).

This Note does not provide a survey of every state statute that addresses this matter. Even when state legislatures have specifically considered one spouse's contributions to the other's education, the typically broad language of the statutes reflects a long-standing reluctance to provide divorce courts with more than general guidelines. *See, e.g.*, N.Y. DOM. REL. LAW § 236 (McKinney Supp. 1983-84); 21-23 PA. CONS. STAT. ANN. § 23-401(d) (Purdon Supp. 1983-84); WIS. STAT. § 767.255 (1981-82).

The array of controversial judicial theories as to what is "equitable," "just," or "fair" has elicited much recent commentary.

4. *See, e.g., Equitable Distribution of Degrees and Licenses: Two Theories Toward Compensating Spousal Contributions*, 49 BROOKLYN L. REV. 301 (1983); Fitzpatrick & Doucette, *Can the Economimc Value of an Education Really Be Measured? A Guide for*

make categorical legal synthesis of the material difficult.

This Note initially summarizes the judicial disagreement[5] concerning if and when the label of "property" should attach to a professional degree. Next, this Note examines the principal theories and corresponding remedies this debate spawns. The fundamentally improper and unfair treatment of a degree as marital property is then discussed. The Note then identifies and advocates the emerging view of both spouses' respective rights in a professional degree upon divorce. This view maintains that whether or not a professional degree fits a legal definition of property is irrelevant.[6] A court's sole responsibility,

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Marital Property Dissolution, 21 J. FAM. L. 511 (1983); Herring, *Divisibility of Advanced Degrees in Equitable Distribution States*, 19 J. MARSHALL L. REV. 1 (1985); Mullenix, *Valuation of an Educational Degree at Divorce*, 16 LOY. L.A. L. REV. 227 (1983); Note, *Property Distribution In Domestic Relations Law: A Proposal For Excluding Educational Degrees And Professional Licenses From the Marital Estate*, 11 HOFSTRA L. REV. 1327 (1983) [hereinafter Note, *Excluding Educational Degrees*]; Note, *Family Law: Professional Degrees in 1986—Family Sacrifice Equals Family Asset*, 25 WASHBURN L.J. 276 (1986) [hereinafter Note, *Family Sacrifice*]; Note, *Equitable Interest In Enhanced Earning Capacity: The Treatment of a Professional Degree at Dissolution—In re Marriage of Washburn*, 60 WASH. L. REV. 431 (1985) [hereinafter Note, *Treatment of a Professional Degree*]; Comment, *The Equity—Property Dilemma: Analyzing the Working Spouse's Contributions to the Other's Educational Degree at Divorce*, 23 HOUS. L. REV. 991 (1986) [hereinafter Comment, *The Equity—Property Dilemma*]; Comment, *The Professional Education Earned During Marriage: The Case for Spousal Support*, 16 PAC. L.J. 981 (1986) [hereinafter *Spousal Support*]; Comment, *For Richer or Poorer—Equities in the Career-Threshold, No Asset Divorce*, 58 TUL. L. REV. 791 (1974); Comment, *'Till Degree Do Us Part: The Community Property Interest in a Professional Degree*, 18 U.S.F. L. REV. 275 (1984) [hereinafter Comment, *Community Property Interest*]; *see also* 24 AM. JUR. 2D *Divorce and Separation* § 898 (1983); Annotation, *Spouse's Professional Degree or License as Marital Property for Purposes of Alimony, Support, or Property Settlement*, A.L.R.4TH 1294 (Supp. 1986) (spouse's professional degree or license as marital property for purposes of alimony, support, or property settlement).

Media reports and comments on recent cases are also common. *See, e.g.*, Adler & Stadman, *Justice: Dividing Degrees*, NEWSWEEK, Jan. 6, 1986, at 61; *Court Calls Medical License Marital Property*, Kansas City Star, Dec. 27, 1985, at 3, cols. 1-4; *Doctor's License Ruled Property of Marriage*, St. Louis Post-Dispatch, at 4, cols. 1-2; Allen, *Court Recognizes Marital 'Interest' in Medical License*, L.A. Daily J., Jan. 13, 1982, at 1; Arnold, *Divorce Entitles to Share Doctor's Future Earnings*, L.A. Times, Jan. 12, 1982, at 1, col. 6, 7; Granelli, *Whose Law Degree Is It Anyway?*, National L.J., Feb. 1, 1982, at 6, col. 2; Sullivan, *Divorce, American Style, Is Killing Me By Degrees*, L.A. Times, Jan. 19, 1982, at Part II, 5, cols. 1-2.

This Note does not attempt to provide a compendium of the extensive commentary that has been generated on this issue. The focus, rather, is on courts' past and current treatment of key issues and development of remedies under existing statutory schemes.

5. Lesman v. Lesman, 88 A.D.2d 153, 158, 452 N.Y.S.2d 935, 939 (1982).

6. *See infra* notes 166-69 and accompanying text.

rather, should be to dissolve a marriage in a manner that is fair to both parties. This Note suggests that the fairest and least subjective remedy, consistent with the special relationship of marriage, is to return the supporting spouse's direct financial contributions to educational costs, while treating the degree holder's future earnings as his personal and separate property. Results in professional degree cases will remain unpredictable, however, until legislatures provide clear remedies that afford less discretion. Accordingly, this Note concludes by proposing model statutory provisions that incorporate the equitable remedy under the emerging view.

II. CHARACTERIZING THE PROFESSIONAL DEGREE AS PROPERTY—COMMON THEMES BUT "DOCTRINAL CHAOS"

The student spouse-working spouse marriage is increasingly common.[7] Typically, the wife[8] agrees to be the principal breadwinner while the husband pursues a professional degree.[9] Graduate education generally depletes the couple's assets because of significant educational

7. In Washburn v. Washburn, 101 Wash. 2d 168, 173, 677 P.2d 152, 155 (Wash. 1984) the court recognized the commonality of the student spouse-working spouse situation. The situation has, in fact, become enough of a common occurrence that courts have coined colloquialisms for it. *See e.g.*, O'Brien v. O'Brien, 106 A.D.2d 223, 231, 485 N.Y.S.2d 548, 554 (1985) ("student-spouse, working-spouse syndrome"); Lovett v. Lovett, 688 S.W.2d 329, 330 (Ky. 1985) ("diploma dilemma"); Haugan v. Haugan, 117 Wis. 2d 200, 206, 343 N.W.2d 796, 799-800 (1984) ("university degree-divorce degree"). One commentator refers to this phenomenon as "getting a Ph.T.," or, "putting hubby through." Erickson, *Spousal Support Toward the Realization of Educational Goals: How the Law Can Ensure Reciprocity*, 1978 WIS. L. REV. 947, 948 n.4 (1978).

8. To avoid gender difficulties, this Note assumes that the wife is the supporting spouse, while the husband is the student spouse. Though opposite roles may be taken, nearly all of the reported cases involve the wife who sought an award for supporting her husband through professional school. Of the approximately 75 reported cases that have ruled on how one spouse's contributions to the other's education should be treated, only two exist in which a husband claimed a distributive interest in his wife's professional education. The husband was denied relief in each case because he had not made personal sacrifices during his wife's education that limited his own career plans or advancement. *See* Saint-Pierre v. Saint-Pierre, 357 N.W.2d 250, 262 (S.D. 1984); Griffin v. Griffin, 10 Fam. L. Rep. (BNA) 1091 (Mich. Cir. Ct. Nov. 22, 1983). *See also In re* Marriage of Hall, 103 Wash. 2d 236, 248, 692 P.2d 175, 182 (1984) (husband with professional practice may not offset his goodwill with future earning potential of salaried wife).

9. *See* Haugan v. Haugan, 117 Wis. 2d 200, 343 N.W.2d 796 (1984). In *Haugan* the wife worked as an elementary school teacher and performed most of the household duties during the seven year period in which her husband completed his medical degree and residency. The couple separated two months before the husband completed his

expenses and the student spouse's inability to contribute to the couple's support. The working spouse often foregoes the benefit of a second income and her own education or career advancement, expecting that the student spouse's degree will afford them a higher standard of living in the future. The working spouse never realizes this higher standard of living when the marriage dissolves just after the student spouse graduates. The supporting spouse's proven ability to support herself often undermines her claim for alimony.[10] Even if an alimony claim is successful, the working spouse may not fare well because alimony payments are, in part, based on the couple's standard of living established during the marriage, often low in this situation.[11] Compounding this injustice is the fact that after the couple divides the little marital property they did accumulate, the student spouse parts with a professional degree and a higher earning potential, while the working spouse is often left with only a divorce decree and unfulfilled expectations.[12]

The majority of divorce statutes provide for equitable distribution of property acquired during the marriage.[13] To qualify for a partial dis-

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residence, at which time the couple had acquired substantial liabilities and few assets. 117 Wis. 2d at 202, 343 N.W.2d at 798.

10. *See, e.g.*, DeLa Rosa v. DeLa Rosa, 309 N.W.2d 755, 758 (Minn. 1981) (working spouse not entitled to maintenance when having a demonstrated ability of self-support, under MINN. STAT. § 518.552 (1980)); Moss v. Moss, 639 S.W.2d 370, 373 (Ky. Ct. App. 1982) (compensation under maintenance provision, KY. REV. STAT. ANN. § 403.200 (2), intended to allow spouse to become self-sufficient).

11. Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 KAN. L. REV. 379, 399 (1980). Many states expressly provide that the couple's established standard of living is a relevant factor courts must consider in determining the necessity, amount, duration, and manner of payment of alimony. *See, e.g.*, PA. CONS. STAT. ANN. § 23-501(b)(8) (Purdon Supp. 1982-83). Most statutes are not clear, however, as to what effect a high or low standard of living should have on claims for alimony. Some courts believe that a demonstrated high standard of living during the marriage is evidence that the non-professional spouse has already realized the benefits of the education. Martin v. Martin, 358 N.W.2d 793 (S.D. 1984). Alimony is reduced to the extent of that realization. *See supra* notes 144-49 and accompanying text (discusses effect of accumulated assets on alimony and distributive awards). Other courts hold that the working spouse's claim for alimony is strengthened if her contributions to the student spouse's education aided the couple's attainment of a better standard of living during the marriage. Stevens v. Stevens, 23 Ohio St. 3d 115, 121-23, 492 N.E.2d 141, 136-37 (1986). Under the statute proposed in this Note, the extent to which the working spouse realizes such benefits from contributing to the professional spouse's education is irrelevant in determining her right to compensation. *See infra* note 206 and accompanying text.

12. *See* O'Brien v. O'Brien, 106 A.D.2d 223, 231, 485 N.Y.S.2d 548, 554 (1985).

13. Although no generally accepted definition of "equitable distribution" exists, the doctrine refers to wide judicial authority to make an equitable distribution of property

tribution of the student spouse's expected lifetime earnings, the working spouse seeks a liberal construction of "property."[14] If a court concludes that the professional degree is marital property, the divorce statutes provide that the working spouse will gain a divisible share of the student spouse's future earnings.[15] A minority of courts follow this "property" view but their approaches to the problem vary. When, for example, traditional marital assets are available for distribution, some courts believe that equity can be achieved without characterizing the degree as distributable marital property.[16] Other courts conclude that

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acquired during the marriage, regardless of legal title. *See* Annotation, *Divorce: Equitable Distribution Doctrine*, 41 A.L.R.4TH 481, 487 (1984). A key difference between equitable distribution statutes and common law is the recognition of a spouse's nonfinancial contributions to the marital estate. Most courts recognize that property division, under equitable distribution theory, is directly related to other economic awards of alimony and child support. *Id.* at 487, 516-18. If the marital estate is large enough, an equitable distribution is preferable to periodic support payments. *Id.* See *infra* notes 105-109 and accompanying text. *See also* Note, *Excluding Educational Degrees*, *supra* note 4, at 1327 n.2.

14. Archer v. Archer, 303 Md. 347, 352, 493 A.2d 1074, 1077 (1985). Plaintiffs often insist that a liberal construction of "property" that encompasses non-traditional forms of property is necessary to "effect the broad remedial purposes" of divorce statutes. *Id.* The court in *In re* Marriage of Weinstein, 128 Ill. App. 3d 234, 470 N.E.2d 551 (1984) acknowledged Illinois' acceptance of a broad definition of "property," which connoted "any tangible or intangible *res* which might be made the subject of ownership." *Id.* at 244, 470 N.E.2d at 559 (citing *In re* Marriage of Goldstein, 97 Ill. App. 3d 1023, 1026, 423 N.E.2d 1201, 1203 (1981)). In spite of this sweeping definition, the court noted that to qualify as property, "the *res* must be in the nature of a present property interest, rather than a mere expectancy interest." *Id.*

Divorce statutes and their legislative histories typically provide courts with little or no guidance as to the meaning of the word "property." Mahoney v. Mahoney, 91 N.J. 488, 495, 453 A.2d 527, 531 (1982).

15. *See, e.g.*, WIS. STAT. § 767.255 (1981-82). The statute provides in pertinent part:

> Property Division: Upon every judgment of annulment, divorce or legal separation . . . the court shall divide the property of the parties . . . Any property shown to have been acquired by either party prior to or during the course of the marriage as a gift, bequest, devise or inheritance or to have been paid for by either party with funds so acquired shall remain the property of such party and may not be subjected to property division . . . The court shall presume that all other property is to be divided equally between the parties, but may alter this distribution without regard to marital misconduct after considering:
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> . . .
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> (5) The contribution by one party to the education, training or increased earning power of the other.

Id.

16. The presence of marital assets, whether accumulated through use of the degree or otherwise, satisfies most courts that an equitable distribution can be made without

although a degree is not property in a literal sense, it is an "asset of the marriage."[17] Still other courts maintain that the increase in the student spouse's earning power, rather than the degree itself, constitutes a distributable marital asset.[18] Because each of these approaches produce similar results, identifying meaningful differences in the underlying rationales is difficult. The remedies produced are not factually based or objectively reasoned, but reveal a judicial abhorrence of inadequate rewards for a supporting spouse's efforts.[19]

Most courts hold that neither the professional degree nor its holder's increased earning capacity are property subject to equitable allocation upon divorce. Like the minority, however, an individual sense of fairness rather than predictable legal standards typically guides these decisions. Five of the more common rationale are: (1) the degree lacks the traditional attributes of "property;"[20] (2) the value of a degree is too speculative;[21] (3) the characterization of marriage as a commercial en-

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considering division of a professional degree. *See, e.g.*, Meinholz v. Meinholz, 283 Ark. 509, 678 S.W.2d 348, 350 (1984). For courts that recognize a professional degree as divisible property, such accumulated assets represent a realization of the supporting spouse's expectancy. *O'Brien*, 489 N.E.2d at 718, 498 N.Y.S.2d at 749. Oddly enough, this does not alter either side's view of the degree's property or non-property classification. *See supra* note 2 and accompanying text.

17. *See, e.g.*, Lovett v. Lovett, 688 S.W.2d 329, 332 (Ky. 1985) ("[a]lthough a professional degree, a license to practice, or an acquired specialty may not be property in the liberal sense, they are *assets of the marriage*"). Despite this characterization that the degree is an asset subject to division, the court concluded that the degree represents a relevant factor in the duration and size of alimony. *Id.* at 333. *See infra* notes 98-101 and accompanying text.

18. *See, e.g., In re* Marriage of Horstmann, 263 N.W.2d 885, 891 (Iowa 1978); *In re* Marriage of Graham, 194 Colo. 429, 433, 574 P.2d 75, 79 (1978) (Carrigan, J., dissenting). The courts' non-uniform labelling of the disputed interest in the degree has added much confusion to the issue. In spite of the various labels used, the enhanced earning potential from the degree is the only proper element of the degree's value to which courts can rationally refer. The professional spouse's potential income stream is the only valuable aspect of the student's achievement in which a former supporting spouse could seek an interest.

19. Justice Thompson, in O'Brien v. O'Brien, 106 A.D.2d 223, 485 N.Y.S.2d 548 (1985), explained his preference for a marital property award over a restitutionary award, noting that such award "does not relegate [the working spouse] to the role of an alternative to a student loan." *Id.* at 239, 485 N.Y.S.2d at 559.

20. Archer v. Archer, 303 Md. 347, 352, 493 A.2d 1074, 1077 (1985). *See also* Note, *Family Sacrifice*, *supra* note 4, at 277.

21. *See, e.g.*, Todd v. Todd, 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (1969); *In re* Marriage of Goldstein, 97 Ill. App. 3d 1023, 423 N.E.2d 1201 (1981); Lynn v. Lynn, 91 N.J. 510, 453 A.2d 539 (1982); Pacht v. Jadd, 13 Ohio App. 3d 363, 469 N.E.2d 918 (1983); Saint-Pierre v. Saint-Pierre, 357 N.W.2d 250 (S.D. 1984); O'Brien v. O'Brien,

terprise demeans the concept of marriage;[22] (4) the future earning capacity of the student spouse is a personal, unpredictable, post-marital effort;[23] and (5) the supporting spouse's contributions towards the other spouse's education are most important when awarding alimony or distributing property.[24] This wide variety of decision rationales clearly demonstrates the lack of a solution to the diploma dilemma. The controversy cries for a strictly defined solution from the state

106 A.D.2d 223, 485 N.Y.S.2d 548 (1985). *See infra* notes 30-35 and accompanying text.

22. For example, in its rejection of the "marriage as commercial enterprise" theory, the court in Pyeatte v. Pyeatte, 135 Ariz. 346, 661 P.2d 196 (Ct. App. 1982) commented that it would not "strike a balance" among the spouses' respective contributions to the marriage to determine a monetary award, because "[t]o do so would diminish the individual personalities of the husband and wife to economic entities and reduce the institution of marriage to that of a closely held corporation." *Id.* at 207. *See infra* notes 61-79 and accompanying text.

23. *See infra* notes 67-79 and accompanying text.

24. Most courts recognize that to completely ignore the working spouse's contributions would be unfair. *See infra* notes 107-21 and accompanying text. The courts dramatize the unfairness of the situation in a number of ways. In Mahoney v. Mahoney the court stated that it was "patently unfair that the supporting spouse be denied the mutually anticipated benefit while the supported spouse keeps not only the degree, but also all of the financial and material rewards flowing from it." 91 N.J. 488, 500, 453 A.2d 527, 533-34 (1982).

Some courts also recognize the supporting spouse's non-financial contributions and personal sacrifices. These "opportunity costs" include the couple's reduced standard of living and income stemming from the student spouse's foregone employment and the opportunities for career advancement or education that the working spouse may have passed up in order to support the couple. Haugan v. Haugan, 117 Wis. 2d 200, 213, 343 N.W.2d 796 (1984). In *Haugan* the court expressed its approval of awarding to the supporting spouse her share in such opportunity costs for purposes of quantifying the value of her contributions to the marriage and the student spouse's education. *Id.* at 803.

Because out-of-pocket expenses often pale against the opportunity costs of obtaining a professional education, some commentators feel that opportunity costs represent the true cost of the education. *Spousal Support, supra* note 4, at 998, 1001-06.

Viewing the unfairness another way, some judges look at the degree as the end product of a concerted family effort in which the supporting spouse shared the burden, self-deprivation, and stress of the experience. The court in Woodworth v. Woodworth stated:

> [F]airness dictates that the spouse who did not earn an advanced degree be compensated whenever the advanced degree is the product of such concerted family investment. The degree holder has expended great effort to obtain the degree not only for him—or herself, but also to benefit the family as a whole. The other spouse has shared in this effort and contributed in other ways as well, not merely as a gift to the student spouse nor merely to share individually in the benefits but to help the marital unit as a whole.

126 Mich. App. 258, 261, 337 N.W.2d 332, 334 (1983).

legislatures.[25]

III. THE PROPERTY DEBATE

A. *The Fundamental Incorrectness of Classifying a Professional Degree as Divisible Marital Property*

In spite of their disagreement over the characterization of a professional degree as marital property, courts on both sides of the debate agree that the real value of a degree is the potential earning capacity it represents.[26] Ironically, both sides use this observation to justify opposite conclusions as to whom that value belongs. *In re Marriage of Graham*[27] pioneered rejection of a degree as distributable marital property. In *Graham* the husband attended school and acquired both an engineering and an M.B.A. degree during three and one half years of the couple's six year marriage.[28] The Colorado Supreme Court held that an education is not property subject to division under Colorado's Uniform Dissolution Act.[29]

The *Graham* court popularized two points that distinguish a degree from the traditional concept of property. First, the degree has no objectively determinable market value.[30] Second, the degree is personal

25. In Stevens v. Stevens, 23 Ohio St. 3d 115, 492 N.E.3d 131 (1986), the court recognized the ambiguity in Ohio's "hybrid statute." *Id.* at 137. The court, though recognizing persuasive arguments for treating a professional degree or its earning capacity as a distributable marital asset, refused to make such a finding without an explicit decision from the legislature. *Id. See supra* notes 3-5, 13-19 and accompanying text.

26. *See* Mahoney v. Mahoney, 91 N.J. 488, 493, 453 A.2d 527, 5231-32 (1982); Archer v. Archer, 303 Md. 347, 354, 493 A.2d 1074, 1080 (1985).

27. 194 Colo. 429, 574 P.2d 75 (1978).

28. *Id.* at 76. The trial court determined that during the marriage the wife contributed 70% of the financial support, which included her husband's education. 194 Colo. 429 (1977). The trial court estimated the future earnings value of the M.B.A. at $82,836 and awarded 40% ($33,134) to his wife. *Id.* The appellate court reversed this ruling, holding that an education is not properly subject to division under Colorado's Uniform Dissolution Act. 555 P.2d 527 (Colo. Ct. App. 1977). The Colorado Supreme Court affirmed this reversal. 194 Colo. 429, 574 P.2d 75 (1978).

29. The court acknowledged the Colorado legislature's intent to give the term "property" a broad inclusive meaning. *Id.* at 76. The term's traditional and commonly understood meaning, however, limits what may be considered property, thereby precluding a degree from falling within that category. *Id.* at 76-77.

30. In concluding that an educational degree has none of the usual attributes of property, the court in *Graham* stated:

> An educational degree . . . is simply not encompassed even by the broad views of . . . "property." It does not have an exchange value or any objective transferrable value on an open market. It is personal to the holder. It terminates on the death of

to the holder.[31] Valuation of a degree is difficult because various personal variables such as intelligence, integrity, ability, diligence, resourcefulness, and fate determine whether the potential for increased earnings will be realized.[32] Even if the degree's value can be estimated, unforeseen events may exist that could impair the holder's earning potential.[33]

Graham further distinguished a degree from conventional marital property by recognizing that an award of a percentage of the degree-holding spouse's future earnings to the supporting spouse is tantamount to vesting the supporting spouse with a proprietary right to the

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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.

Id. at 75. The Supreme Courts of several states have agreed with *Graham*. *See, e.g.*, Lovett v. Lovett, 688 S.W.2d 329 (Ky. 1985); Archer v. Archer, 303 Md. 347, 493 A.2d 1074 (1985); Ruben v. Ruben, 123 N.H. 358, 461 A.2d 733 (1983); Mahoney v. Mahoney, 91 N.J. 488, 453 A.2d 527 (1982); Stevens v. Stevens, 23 Ohio St. 3d 115, 492 N.E.2d 131 (1986); Hubbard v. Hubbard, 603 P.2d 747 (Okla. 1979); Lehmicke v. Lehmicke, 489 A.2d 782 (Pa. Super. Ct. 1985); Saint-Pierre v. Saint-Pierre, 357 N.W.2d 250 (S.D. 1984); Grosskopf v. Grosskopf, 677 P.2d 814 (Wyo. 1984). *But see In re* Marriage of Horstmann, 263 N.W.2d 885 (1978) (though court had no quarrel with *Graham* language, it was the student spouse's enhanced earning capacity, not the degree, that constituted the marital asset).

31. *See supra* note 30 and accompanying text.

32. Lehmicke v. Lehmicke, 489 A.2d 782, 788 (Pa. Super. Ct. 1985). *Accord* O'Brien v. O'Brien, 106 A.D.2d 223, 225, 485 N.Y.S.2d 548, 550, *modified*, 489 N.E.2d 712, 714, 498 N.Y.S.2d 743, 746 (1985). Apart from such labor, the degree has no pecuniary value susceptible of measurement. 106 A.D.2d at 226, 485 N.Y.S.2d at 551.

33. DeWitt v. DeWitt, 98 Wis. 2d 44, 296 N.W.2d 761, 768 (Ct. App. 1980). Specifically, one who is newly qualified for a given profession may later abandon it, fail it, or experience an income level far below that of his colleagues because he practices in a lower yielding specialty, location, or manner. *Id.*

Based on the concern that equitable distribution might be misused to permit courts to make a career decision for a licensed spouse still in training, at least one judge has suggested that the courts be allowed to revise any distributive award to conform to reality. O'Brien v. O'Brien, 489 N.E.2d 712, 720, 498 N.Y.S.2d 743, 752 (1985). Valuation of the degree before the holder's career began would involve a "gamut of calculations." Mahoney v. Mahoney, 91 N.J. 488, 493, 453 A.2d 527, 532 (1982). Unfortunately, divorce in diploma dilemma cases typically occurs before the professional spouse's career gets underway. In these career-threshold, no-asset situations a court predisposed towards protecting the working spouse's expectancy interest is likely to find a property interest in the degree. Comment, *Is a Professional Degree Marital Property Under Virginia's Marriage Dissolution Statutes?*, 7 GEO. MASON U.L. REV. 47, 53, 76 n.169 (1984).

student spouse's very person.[34] Whether a business degree or a licensee to practice medicine, a degree is nothing more than a privilege conferred upon the student spouse that only the state may regulate or alienate.[35] Thus, if the degree constitutes an asset at all, it is one that the student spouse holds as the property of his own person to the exclusion of others.[36]

The *Graham* rationale elicits a variety of criticisms and counter-arguments, at the heart of which is a belief that courts should go beyond the strict traditional definition of property.[37] In the absence of precise

34. *O'Brien*, 485 N.Y.S.2d at 550. *See* Hubbard v. Hubbard, 603 P.2d 747, 752 (Okla. 1979) (working spouse entitled to cash award but limited fair compensation to spouse's past investments, rather than a "vested interest" in licensed spouse's future earnings).

35. *O'Brien*, 485 N.Y.S.2d at 550-51. The non-transferable privilege that a diploma or certificate memorializes is conferred only upon the student's fulfillment of the granting authority's requirements. *Id.* at 551.

36. *Id.* The minority view's expansion of divisible marital property to include a professional degree indicates a concession that legislators have not clearly provided for its division and distribution. Legislative inaction, in states whose supreme courts have held that a professional degree is not divisible marital property, may also indicate the legislatures' approval of that position. This Note argues, however, that the issue is not appropriate for the judiciary to decide.

37. O'Brien v. O'Brien, 106 A.D.2d 223 485 N.Y.S.2d 548, 560 (1985) (Thompson, J., concurring in part and dissenting in part) (arguing that complete reliance upon traditional concepts of property is unrealistic and inappropriate in seeking equity). As one judge put it, we "now look to 'resources' as opposed to a particular asset or tangible piece of property. . ." Lynn v. Lynn, 7 Fam. L. Rep. (BNA) 3001, 3002 (N.J. Super. Ct. 1980). For commentary advocating a dynamic "new property" with respect to professional degrees, see Mullenix, *supra* note 4, at 254-56; Note, *Family Sacrifice*, *supra* note 4, at 301-02; Note, *Treatment of a Professional Degree*, *supra* note 4, at 441-45. Commentators favoring a degree's classification as marital property maintain that to recognize the right to practice one's profession as a valuable property *right* is inconsistent with the conclusion that a professional degree is not a property *asset*. *See, e.g.*, Mullenix, *supra* note 4, at 256 (emphasis added). There is nothing anomalous, however, with these two conclusions. As one judge asked, "[w]hat kind of property are we all talking about?" *O'Brien*, 485 N.Y.S.2d at 551.

The right to ply one's trade is a constitutionally protected right that has intrinsic not monetary value to its holder, and may only be removed under due process of law. Crook v. Baker, 584 F. Supp. 1531 (E.D. Mich. 1984) (advanced degree represents property interest which state may not rescind without first affording due process of law). Thus, the degree cannot be properly classed as tangible distributable marital property. Interpreting New Mexico's community property statutes, the court in Muckelroy v. Muckelroy, 84 N.M. 14, 498 P.2d 1357 (1972) pointed out that while "the right to engage in a licensed profession is a protected property right . . . not all property rights are property within the meaning of the . . . statutes. *Id.* at 15-16, 498 P.2d at 1358. *Accord* Franklin v. Franklin, 67 Cal. App. 2d 717, 725, 155 P.2d 637, 641 (1945) (right to practice medicine is property right, but not one that can be classed as community

statutory provisions, the judiciary's attempts to expand the concept of marital property to embrace a degree rely less on how closely a degree resembles conventional property than on notions of fairness.[38] Because a degree represents a marriage's most valuable, if not sole asset, proponents of protecting a wife's expectancy interest believe that the only way to achieve an equitable result is to treat the degree as marital property.[39] These courts believe that only by devising extraordinary remedies can they meet their responsibility to prevent injustice.[40]

B. *Using Theories Outside Divorce Law To Support the Degree-as-Property Theory*

Faced with broad statutory guidelines, scant legislative history, and little precedent, courts attempt to draw analogies from unrelated common law theories to support their view of professional degrees as distributable marital property. These borrowed concepts were developed,

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property). *But see O'Brien*, 485 N.Y.S.2d at 560 (Thompson, J., concurring in part and dissenting in part) (privilege to practice medicine that student spouse had converted from education was in the nature of a franchise subject to equitable distribution as marital property).

38. *See* Krauskopf, *supra* note 11, at 388-89. Some commentators insist that courts do not need to restrict "property" to its traditional meaning when assessing marital assets. In *In re* Marriage of Graham, 194 Colo. 429, 574 P.2d 75 (1978), the dissent stated that the majority's restrictive view of property unjustly limited remedies. "While the majority . . . focuses on whether the husband's . . . degree is marital 'property' . . . , it is not the degree itself which constitutes the asset in question. Rather it is the increase in [his] earning power concomitant to that degree which is the asset conferred on him by his wife's efforts." *Id.* at 435, 574 P.2d at 79 (Carrigan, J., dissenting). *But see* Mahoney v. Mahoney, 91 N.J. 488, 453 A.2d 527 (1982), in which the court noted that New Jersey courts subject a broad range of assets and interests to equitable division, yet distinguished an educational degree from those forms of divisible property. *Id.* at 492, 453 A.2d at 531.

39. *See* Haugan v. Haugan, 117 Wis. 2d 200, 205, 343 N.W.2d 796, 800 (1984) (because degree is most significant asset of marriage, working spouse must be allowed to participate in financial rewards attributable to the student spouse's enhanced earning capacity).

40. *In re* Marriage of Graham, 194 Colo. 429, 434, 574 F.2d 75, 78 (1978) (Carrigan, J., dissenting) (student spouse's enhanced earning capacity must be considered marital asset to prevent extraordinary injustice). *Cf.* Hubbard v. Hubbard, 603 P.2d 747, 752 (Okla. 1979) (working spouse has right to compensation for contributions to marriage's only valuable asset to extent of actual investment).

Characterizations of the degree as the marriage's only asset, however, did not persuade the court in DeWitt v. DeWitt, 98 Wis. 2d 44, 296 N.W.2d 761 (Ct. App. 1980), which refused to recognize how "attempting to place a dollar value on something so intangible as a professional education, degree, or license" could serve any conceivable form of equity. 98 Wis. 2d at 57, 296 N.W.2d at 767.

however, with different policy goals in mind. As a result, they are not properly adaptable to fairly resolving the issue of whether an equitable interest lies in a professional degree.

Courts often express concern about characterizing the degree and its potential earning capacity as a divisible asset because of the speculative and restrictive nature of such an award.[41] Judges adopting the "property" view, however, consistently find support for these awards in areas where other intangible and speculative property rights are estimated and distributed. These areas include the accounting concept of goodwill,[42] wrongful death and personal injury actions,[43] and pension and retirement benefits.[44]

1. Goodwill

The majority view is that a degree does not fit the traditional concept of property because it is intangible and cannot be valued with certainty. Opponents respond by arguing that valuation of a degree is no more

41. *O'Brien*, 485 N.Y.S.2d at 558. The appellate court's dissent in *O'Brien* conceded that concern over such speculation was legitimate. Yet the dissent argued that it was an "inadequate basis" for denying the supporting spouse a share in her ex-husband's estimated future earnings. *Id.* (Thompson, J., concurring in part and dissenting in Part).

42. For cases in which the primary issue was whether goodwill existed, see *In re* Marriage of Hall, 101 Wash. 2d 236, 692 P.2d 175 (1984) (physician in private practice has goodwill but salaried professor does not); *In re* Marriage of Lukens, 16 Wash. App. 481, 558 P.2d 279 (1976) (physician in private practice); *In re* Marriage of Freedman, 35 Wash. App. 49, 665 P.2d 902 (attorney in private practice). *See also In re* Marriage of Kaplan, 23 Wash. App. 503, 597 P.2d 439 (1979) (existence of goodwill is a question of fact).

For professional degree cases attempting to draw support from goodwill cases, *see In re* Marriage of Graham, 194 Colo. 429, 574 P.2d 75, 78 (1978) (Carrigan, J., dissenting) (husband's future earning potential indicated by goodwill value of professional practice); Washburn v. Washburn, 101 Wash. 2d 168, 180, 677 P.2d 152, 162 (1984) (veterinary license, like goodwill, is an intangible property interest). For additional commentary regarding the goodwill valuation analogy, see Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 U.C.L.A. L. REV. 1181, 1214-15 (1981); Lurvey, *Professional Goodwill on Marital Dissolution: Is It Property or Another Name For Alimony?*, 52 CAL. ST. BAR J. 1, 27 (Jan.-Feb. 1977).

43. *See, e.g.*, Washburn v. Washburn, 101 Wash. 2d 168, 180, 677 P.2d 152, 162 (1984); *In re* Marriage of Graham, 194 Colo. 429, 574 P.2d 75, 79 (1978) (Carrigan, J., dissenting); Hubbard v. Hubbard, 603 P.2d 747, 751 (Okla. 1979). A discussion of analogies to tort recovery can be found in Krauskopf, *supra* note 38, at 388-89.

44. *See, e.g.*, Wilder v. Wilder, 85 Wash. 2d 364, 534 P.2d 1355 (1975); DeRevere v. DeRevere, 5 Wash. App. 741, 746, 491 P.2d 249, 252 (1971). *See also* Foster & Freed, *Spousal Rights in Retirement and Pension Benefits*, 16 J. FAM. L. 187 (1977-78).

elusive than the established process of distributing and valuing goodwill in a professional practice.[45] Goodwill is personal to the holder and cannot be transferred, conveyed, or pledged. Judicially accepted methods of valuing professional goodwill, therefore, should easily adapt to the valuation of a degree.[46] Although advocates of this view recognize that valuation can be difficult, they believe that this difficulty is an improper basis for refusing to acknowledge the degree's potential value. The important point is not the means by which goodwill is valued, but that a property interest is found in an intangible, thus permitting its equitable distribution upon dissolution.[47]

Proponents of the property view maintain that to treat the supporting spouse of a salaried professional differently from the supporting spouse of a professional who is associated with a practice is illogical and unfair. Both types of professionals earned their degrees while married, yet goodwill exists, if at all, only in the case of the practicing professional.[48] Property theory proponents question the justice in awarding "marital property" when the spouse has been practicing a profession two weeks before the divorce proceedings started, but not when the licensed spouse will not launch his or her practice until two weeks after the divorce proceedings commence.[49] This anomaly demonstrates both the awkwardness and inequity of trying to fit a round

45. O'Brien v. O'Brien, 489 N.E.2d 712, 718, 498 N.Y.S.2d 743, 750 (1985), *remanded*, 120 A.D.2d 656, 302 N.Y.S.2d 250 (1986). Courts typically define professional goodwill as the "expectation of continued public patronage." *In re* Marriage of Lukens, 16 Wash. App. 481, 483, 558 P.2d 279, 280 (1976). More specifically, it has been defined as:

> [A] benefit or advantage which is acquired by an establishment beyond the mere value of the 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.

Id. at 483-84, 558 P.2d at 281. *See also In re* Marriage of Hall, 103 Wash. 2d 236, 239, 692 P.2d 175, 178 (1984) (goodwill is a property or asset that supplements the earning capacity of another asset, business, or profession).

46. *In re* Marriage of Hall, 103 Wash. 2d 236, 692 P.2d 175 (1984). *See* Mullenix, *supra* note 4, at 257-59 (both goodwill and educational degrees should be recognized as intangible property assets, capable of valuation upon divorce). *But see* Nail v. Nail, 486 S.W.2d 761 (Tex. 1972) (professional goodwill is not a separate asset capable of valuation and division upon dissolution of marriage).

47. Washburn v. Washburn, 101 Wash. 2d 168, 178, 677 P.2d 152, 162 (1984) (Rosellini, J., dissenting).

48. *Id.*

49. O'Brien v. O'Brien, 489 N.E.2d 712, 716-17, 498 N.Y.S.2d 743, 748 (1985).

peg—a professional degree—into a square hole—the traditional concept of property.

The deficiencies in the goodwill-professional degree analogy become apparent when one compares the degree's intrinsic value, the enhanced earning capacity of its holder, to goodwill. In *Hall v. Hall*[50] the Washington Supreme Court held that a professional in private practice has goodwill, but a comparably educated professional working as a salaried employee does not.[51] The court noted that goodwill is an asset that supplements the earning capacity of another asset, such as a profession, but is neither the earning capacity itself nor merely a factor contributing to the practice's earning capacity.[52] Rather, goodwill is a "distinct asset of a professional practice."[53] Unlike goodwill, which merely diminishes when the professional leaves the business, a professional's earning capacity disappears when he dies or retires.[54] The fundamental difference is that although the practicing and salaried professionals both have earning capacities, only the practicing professional has a practice to which his goodwill can attach.[55]

Explaining its view of the relationship between the practice and the professional's earning capacity, the court stated:

> An established practice merely represents the exercise of the privileges conferred upon the professional spouse by the license and the income flowing from that practice represents the receipt of the enhanced earning capacity that licensure allows. That being so, it would be unfair not to consider the license a marital asset.

Id.

50. 103 Wash. 2d 236, 692 P.2d 175 (1984).

51. *Id.* at 241, 692 P.2d at 178. The court would not allow the practicing professional spouse to apply his salaried professional wife's equivalent earning capacity to offset the distributable portion of his established professional goodwill for property distribution. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* The components of goodwill distinguish a practicing professional from a salaried professional. The *Hall* court explained:

> The practicing professional brings an earning capacity to the practice comprised of skill and education. The goodwill, comprised of such things as location, referrals, associations, reputation, trade name and office organization, can directly supplement this earning capacity. When the practicing professional dies, retires or moves he takes his skill and education with him, but the goodwill factors must be transferred or otherwise left behind. The goodwill may exist even though it is not marketable . . . .
>
> The salaried professional also brings an earning capacity comprised of skill and education to the position. However, when the salaried professional leaves . . . he takes everything with him to the new position. There is nothing that increased his

An additional distinction between goodwill and a professional degree is that the goodwill of a professional practice is valued at its present market value before distribution.[56] A professional degree, however, has no market value capable of estimation or valuation.[57] Typically, when a marriage breaks up just as the recently graduated spouse begins the professional career, the degree holder has not yet capitalized on the degree's benefits. Thus, no meaningful evidence of the degree's value exists.[58] At that point, the degree is worth only what was spent to acquire it.[59]

2. Tort Law

Perhaps the most common argument against the distribution of an interest in a professional degree as marital property is that its worth is not subject to precise valuation.[60] Courts favoring distribution respond that ascertaining a degree's value is no more speculative than determining the economic value of a victim's earning capacity in personal injury cases or wrongful death actions.[61] This analogy to tort law is misplaced and inappropriate for several important policy reasons. Tort victims receive as loss compensation awards based on future earnings. In contrast, the distribution of marital property is intended to equitably divide property accumulated during marriage.[62] Compensation is not

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earning capacity in the old salaried position that cannot be taken to the new position.

Id.

56. Comment, *Community Property Interest*, *supra* note 4, at 288-89. The market value approach sets a value on professional goodwill by determining the fair price at which the practice could be sold in the open market.

57. Lehmicke v. Lehmicke, 489 A.2d 782, 785 (Pa. Super. Ct. 1985).

58. *See supra* notes 32-33 and accompanying text.

59. *See, e.g.*, Inman v. Inman, 578 S.W.2d 266, 269 (Ky. Ct. App. 1979) (best measure of spouse's interest in a degree is the amount spent for direct support and school expenses during the period of the education, plus reasonable interest and adjustments for inflation); DeLa Rosa v. DeLa Rosa, 309 N.W.2d 755, 759 (Minn. 1981) (wife entitled to reimbursement of her husband's living expenses and direct educational costs). *But see* DeWitt v. DeWitt, 98 Wis. 2d 44, 56-57, 296 N.W.2d 761, 767 (Ct. App. 1980) (*Inman's* "cost approach" rejected because it fails to consider scholastic efforts and acumen of degree holder and merely treats parties as business partners).

60. Stevens v. Stevens, 23 Ohio St. 3d 115, 117, 492 N.E.2d 131, 133 (1986).

61. *See supra* note 46 and accompanying text.

62. *See* Note, *Excluding Educational Degrees*, *supra* note 4, at 1349. Determining the future value of the professional spouse's earnings for compensatory purposes is inappropriate in the context of dissolution. *Id.* Yet, the marital estate consists of identifiable assets subject to accurate division.

an appropriate policy goal in marital property distribution.[63]

Tort and divorce law are further distinguishable because tort awards are based on a theory of fault. Most states have abandoned fault as a basis of dissolution awards.[64] The tort analogy is plainly unsuitable in the dissolution context.

3. Pension Rights

The weakest of the three analogies equates professional degrees with employee pension rights, which are often recognized as divisible marital property.[65] One court recognized that pension benefits represent a

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63. Wisner v. Wisner, 129 Ariz. 333, 341, 631 P.2d 115, 123 (Ct. App. 1981) (rejecting the wife's claim for restitution for the value of her homemaking services and for the couple's reduced income during the husband's lengthy training period). The court reasoned:

> In each marriage, for example, the couple decides on a certain division of labor, and while there is value to what each spouse is doing, whether it be labor for monetary compensation or homemaking, that value is consumed by the community in the on-going relationship and forms no basis for a claim of unjust enrichment upon dissolution.

Id. The same court in Pyeatte v. Pyeatte, 135 Ariz. 346, 661 P.2d 196 (Ct. App. 1982), although reaffirming the position with respect to the "usual and incidental activities of the marital relationship," noted an exception. *Id.* at 203. Where "the facts demonstrate an agreement between the spouses and an extraordinary or unilateral effort by one spouse which inures solely to the benefit of the other by the time of dissolution," the court concluded that restitution is appropriate to prevent the unjust enrichment of one spouse at the expense of the other. *Id.* at 203-04. *See infra* note 119 and accompanying text. *Cf.* Woodworth v. Woodworth, 126 Mich. App. 258, 261, 337 N.W.2d 332, 335-36 (1983) (although court did not believe spouses expect compensation for their efforts in marriage, finding that law degree was marital property was necessary to protect working spouse's share of the fruits of the degree).

See Note, *Excluding Educational Degrees*, *supra* note 4, at 1349. The commentator concludes that a division of the marital estate that recognizes these policy differences will avoid undue prejudice to the student spouse who may earn less than anticipated. *Id.*

64. *See* Freed & Foster, *Divorce In The Fifty States: An Overview*, 14 FAM. L.Q. 229, 276-83 (1981). According to Freed & Foster, only Illinois and South Dakota provide for fault as grounds for divorce; all other jurisdictions now operate under "no-fault" divorce schemes. *Id. See also* Mullenix, *supra* note 4, at 270.

Although most statutes do not expressly authorize courts to consider fault for purposes of equitable distribution and support awards, they often allow courts to consider other relevant factors in dissolution proceedings. *See, e.g.*, IOWA CODE ANN. § 598.21(1)(m) (West 1981); PA. STAT. ANN. tit. 23, § 501(b)(14) (Purdon Supp. 1986). Such provisions may serve as judicial authority for accepting evidence of fault.

65. *See, e.g., In re* Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976) (en banc); Deering v. Deering, 292 Md. 115, 437 A.2d 883 (1981); Weir v. Weir, 173 N.J. Super. 130, 413 A.2d 638 (1980).

form of deferred compensation for services rendered to the employer and, as such, are a contractual right derived from the terms of the employment contract.[66] Supporters of this theory thus conclude that the pension represents a current asset and is a form of property.[67] The right to pension payments, however, is in sharp contrast to a mere expectancy of future income that a professional degree may produce.[68]

C. *Marriage Characterized as a Economic Partnership or Business Venture*

Courts that apply property concepts to professional degrees generally treat marriage as a commercial enterprise or business partnership. Equitable distribution theorists[69] view the supporting spouse's contribution to the marriage as one "partner's" contribution to the accumulation of all family assets, which entitles her to a proportionate share in the property of the enterprise.[70] The supporting spouse's contributions to the student spouse's education are thus similar to an "investment" in the family.[71] Dissolution prevents the supporting spouse from realiz-

66. Archer v. Archer, 303 Md. 347, 357, 493 A.2d 1074, 1079 (1985).

67. *Id.* at 363, 493 A.2d at 1079-80.

68. *Id.*

69. *See supra* notes 13-15, *infra* notes 105-09 and accompanying text.

70. In *O'Brien* the New York Court of Appeals found that New York's equitable distribution statute considered marriage an economic partnership. Thus, upon dissolution of the marriage, "there should be a winding up of the parties' economic affairs and a severance of their economic ties by an equitable distribution of the marital assets: 489 N.E.2d 712, 715, 498 N.Y.S.2d 743, 747 (1985). As a general rule, the court concluded, "marital fault is inconsistent with the underlying assumption that marriage is an economic partnership" in which each party is entitled to his fair share upon its dissolution. *Id.* at 719, 498 N.Y.S.2d at 750.

In a typical economic partnership, no guarantee exists that the venture will realize a profit, therefore, each partner accepts the risk that the enterprise may experience losses or even total failure. Further, the extent of each partner's right to share in any profits in a measure of his or her direct financial contribution to the entity's capital. *See generally* Krauskopf, *supra* note 38, at 386-88 (economic analysis of the family as a business firm).

The Wisconsin Court of Appeals in *DeWitt* rejected this partnership view of marriage, stating that it "treats the parties as though that marriage is not 'so coldly undertaken.' " 98 Wis. 2d 44, 50, 296 N.W.2d 761 (Ct. App. 1980). In *Wisner* the Arizona Court of Appeals similarly rejected the "business partnership" theory. 129 Ariz. 333, 631 P.2d 115 (Ct. App. 1981). The court reasoned that the spouses determine what each will contribute to the marriage and that the decision to support the student spouse's pursuit of a professional degree is "mutual, consensual and made with full understanding of the sacrifices that necessarily [accompany] the decision." *Id.* at 341, 631 P.2d at 123.

71. *See, e.g., Woodworth*, 337 N.W.2d at 334 (mutual sacrifice and effort constitutes

ing an expected return on that investment.[72] Under a contract theory, many of the same courts believe that the student spouse's retention of benefits from the working spouse's support during the educational period constitutes unjust enrichment.[73]

Reflecting on a couple's pursuit of a professional degree as a business venture, the court in *Lehmicke v. Lehmicke*[74] recognized the anomaly

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family investment in marital unit as a whole); *accord Washburn*, 101 Wash. 2d at 190, 677 P.2d at 164 (Rosellini, J., dissenting). *Compare Hubbard*, 603 P.2d at 750-52 (supporting spouse's contributions characterized as an "investment," but recovery limited to past investment, rather than including a "vested interest" in degree holder's future earnings).

72. The debate over what constitutes the supporting spouse's "expectancy" often depends on the judges' personal opinions because of the statutes' broad wording.

73. *See, e.g.*, Pyeatte v. Pyeatte, 135 Ariz. 346, 661 P.2d 196 (Ct. App. 1982); Woodworth v. Woodworth, 126 Mich. App. 258, 268, 337 N.W.2d 332, 337 (1983). Most courts find the concept of unjust enrichment both appropriate and useful in professional degree cases. A variety of opinions exist, however, concerning the amount and form of compensation needed to prevent unjust enrichment. Opposing views range from restitution to an award based on the supporting spouse's expectancy in the student spouse's enhanced earning power. *See, e.g., In re* Marriage of Horstmann, 263 N.W.2d 885 (Iowa 1978) (restitution); Inman v. Inman, 578 S.W.2d 266 (Ky. Ct. App. 1979) (restitution); DeLa Rosa v. DeLa Rosa, 309 N.W.2d 755 (Minn. 1981); *Woodworth*, 126 Mich. App. at 268, 337 N.W.2d at 337 (expectancy). *See also* Pinnell, *Divorce After Professional School: Education and Future Earning Capacity May Be Marital Property*, 44 MO. L. REV. 329, 335 (1979) (expectancy). *But see* Wisner v. Wisner, 129 Ariz. 333, 341, 631 P.2d 115, 123 (Ct. App. 1981) (unjust enrichment, as a legal concept, is inappropriate for marital application); Washburn v. Washburn, 101 Wash. 2d 168, 175, 677 P.2d 152, 156 (1984) (unjust enrichment theory that places value on supporting spouse's contributions is inappropriate in context of marriage); Church v. Church, 96 N.M. 388, 395, 630 P.2d 1243, 1250 (1981) (wife's homemaking services not a basis for an equitable award based on unjust enrichment, applying Virginia law). For an illustration of a thorough application of traditional contract principles applied to a professional degree case, see Pyeatte v. Pyeatte, 135 Ariz. 346, 661 P.2d 196 (Ct. App. 1982).

The most common criticism of restitutionary awards is that they do not recognize the working spouse's contributions toward yet unrealized marital assets, particularly when the marriage did not endure long enough to convert the student spouse's enhanced earning potential into accumulated marital assets. *Woodworth*, 126 Mich. App. at 268, 337 N.W.2d at 337.

In Mahoney v. Mahoney, 91 N.J. 488, 453 A.2d 527 (1982), the New Jersey Supreme Court, recognizing the potential for unjust enrichment of the student spouse, introduced the concept of "reimbursement alimony." Reimbursement alimony provides for the return of all financial contributions that the supporting spouse made towards the former spouse's education, including household and travel expenses. *Id.* at 501, 453 A.2d at 534. *See also* Stevens v. Stevens, 23 Ohio St. 3d 115, 123, 492 N.E.2d 131, 138 (1986) (Wright, J., concurring) (supporting spouse entitled to repayment or recovery of "investment" to prevent unjust enrichment, but recoupment limited to actual expenditures).

74. 489 A.2d 782, 789-90 (Pa. Super. Ct. 1985) (Wieand, J., concurring and dissent-

of providing the supporting spouse with a guaranteed return in degree situations but not in the simpler case of a failed marriage. The court recognized that when a marriage dissolves, the non-working spouse is not required to reimburse the working spouse for economic support provided during the marriage.[75] The non-working spouse's reasons for not working are immaterial.[76]

The "economic partnership" and "family investment" approaches to the marriage institution provide tempting theories to justify equitable relief in diploma dilemma cases.[77] Serious theoretical and practical problems associated with the application of these rationale illustrate, however, that these approaches are more concerned with mending the working spouse's unfulfilled expectations than with the theories' soundness. As with the goodwill, tort, and pension analogies, treating marriage as a strictly financial undertaking is a haphazard process of backward rationalization in which the court first determines the equitable result and then searches for supporting rationale.

Critics of the economic view argue that it demeans the concept of marriage, comparing the institution to closely held corporations.[78] Courts applying the economic view measure each spouse's contribu-

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ing). In *Lehmicke* the parties were married 13 years before their divorce, although they had separated nearly seven years earlier. *Id.* at 783-84. Their separation occurred approximately one year after the husband's graduation from medical school. *Id.* at 784. The wife used her income to support the family and to pay certain educational expenses for her husband. *Id.* The husband contributed to his educational expenses through a loan, a scholarship, and income from research projects. *Id.* The marital estate at divorce typified the career threshold, no asset situation where few assets had accumulated during the marriage. At the time of divorce, the wife was a part-time registered nurse while the husband was a board certified pediatrician in private practice. *Id.* The trial court denied the wife alimony but found the husband's medical degree to be marital property, awarding the wife $64,790. *Id.* at 783.

75. *Id.* at 789-90 (Wieand, J., concurring and dissenting).

76. *Id.* The issue of recovery for one spouse's contributions to another's education generally occurs only in cases involving a professional degree with high earning potential, because large sums of money or property are normally at stake. Situations may exist, however, in which the professional education is incomplete or the student spouse earned a degree or certificate with minimal earning potential. In fairness to the supporting spouse in such cases, statutes should ensure reimbursement to the supporting spouse, independent of alimony, for her financial contributions to the educational endeavor. The proposed statute in the appendix provides this feature.

77. *See infra* notes 147-51 and accompanying text.

78. Pyeatte v. Pyeatte, 135 Ariz. 346, 357, 661 P.2d 196, 207 (Ct. App. 1982). The court in *Pyeatte* recognized the economics inherent in the institution of marriage, but rejected it as grounds for treating the relationship strictly as a financial undertaking.

The larger issue in professional degree cases actually is what constitutes good *social*

tions, financial and otherwise, to each other and to the marriage and then compensate each spouse respectively.[79] The court in *Wisner v. Wisner*[80] disapproved of this theory, stating that courts must not "treat marriage as an arm's length transaction," permitting a spouse to plead unjust enrichment when the marriage fails.[81] A rebuttable presumption exists, the court noted, that the couple's decision to pursue a degree was mutual and informed regarding expected sacrifices both would make.[82]

Perhaps the strongest criticism of the economic partnership theory is the time-honored belief that marriage is for better or for worse.[83] The legal duties arising from marriage are unlike those of any business partnership agreement. Marriage, one judge aptly observed, "is not entered into with a conscious intent that at some future time there will be an accounting of and reimbursement for moneys contributed to the support of the family."[84] The law imposes a duty of spousal support on both spouses.[85]

Implicit in compensatory award theories is a judicial recognition

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policy. Because the problem raises social questions, the proper sources for its resolution are the legislatures.

79. 135 Ariz. at 357, 661 P.2d at 207. In particular, the court refused to attempt to "strike a balance" between each parties' contribution to the marriage when they had been married for a number of years. *Id. Compare* Stevens v. Stevens, 23 Ohio St. 3d 115, 492 N.E.2d 131 (1986) a case in which the court used a different balancing process in determining whether a degree was marital property. Without evaluating the propriety of the economic partnership theory, the court saw the challenge as striking a balance "somewhere between subjecting the husband to a life of professional servitude and leaving the wife in near penury, without sufficient financial resources with which to improve her station in life," and held that a professional degree was not marital property. *Id.* at 117, 492 N.E.2d at 133.

80. 192 Ariz. 333, 631 P.2d 115 (Ct. App. 1981).

81. *Id.* at 341, 631 P.2d at 123.

82. *Id.*

83. Lehmicke v. Lehmicke, 489 A.2d at 790 (Pa. Super. Ct. 1985) (Wieand, J., concurring and dissenting). The United States Supreme Court has espoused a similar view, stating, "Marriage is a coming together for better or for worse . . . [The] association promotes a way of life, not causes; . . . a bilateral loyalty, not commercial or social projects." Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

84. 489 A.2d at 790. *See also* Mahoney v. Mahoney, 91 N.J. 488, 500, 453 A.2d 527, 533 (1982) ("Marriage is not a business arrangement in which the parties keep track of debits and credits, their accounts to be settled upon divorce.").

85. 489 A.2d at 790. The *Lehmicke* concurrence recognized this duty, indicating that one spouse's compliance with his or her duty does not result in unjust enrichment to the other, if, for whatever reason, the "enriched" spouse was unable to contribute familial support. *Id.*

that but for the couple's decision to pursue a degree, those measurable dollars would have been available for other purposes. Absent fraud, courts may assume that the couple made a mutual decision to have one spouse work while the other earns a professional degree,[86] which presumably considered the sacrifices and deprivation each spouse expected to experience.[87] Thus, any award designed to recoup the working spouse's share of the marriage's opportunity costs in terms of the student spouse's lost income and the working spouse's foregone opportunities for enhanced earning capacity is difficult, if not impossible, to justify.[88]

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86. *See* Wisner v. Wisner, 129 Ariz. 333, 341, 631 P.2d 115, 123 (Ct. App. 1981). *See also* Washburn v. Washburn, 101 Wash. 2d 168, 173, 677 P.2d 152, 155 (1984) (husband and wife mutually decide that one will support the other while the latter obtains a professional degree).

87. *Wisner*, 129 Ariz. at 341, 631 P.2d at 123. Certainly the family makes a concerted effort during the marriage to obtain the degree, with the mutual intent of enhancing the family's potential earning power. Woodworth v. Woodworth, 126 Mich. App. 258, 260-61, 337 N.W.2d 332, 334 (1983). A married couple's decision to spend family resources to enhance potential family wealth, however, does not provide a basis of recovery for unfulfilled expectations. Moss v. Moss, 639 S.W.2d 370, 374 (Ky. Ct. App. 1982) (right of recovery to marital property is based upon theory of contribution, but it is impossible for either spouse to contribute to a potential which is not yet and may never be realized). Upon divorce, all concerted efforts cease and neither spouse can logically continue to hold the expectations that rested on those past efforts and contributions. *Moss*, 639 S.W.2d at 370. The degree-holder's earning capacity is personal to him and leaves with him upon dissolution. *See supra* notes 31-32, 35-36 and accompanying texts. *Contra* Note, *Treatment of a Professional Degree*, *supra* note 4, at 453-54.

The argument that because the degree is the "end product of a concerted family effort," the supporting spouse should receive compensation equal to her expectation interest is unpersuasive and contributes nothing towards understanding what is fair in these cases. This reasoning erroneously presumes that the parties' intentions and expectations during the marriage remain intact and suddenly become actionable upon dissolution. Most courts recognize that the supporting spouse's contributions to the education do not vest her with an in interest in the student spouse's future earnings. *See, e.g., In re* Marriage of McManama, 386 N.E.2d 953, 955 (Ind. Ct. App. 1979); Ruben v. Ruben, 461 A.2d 733, 735 (N.H. 1983) (supporting spouse has no quantifiable interest by virtue of contributions toward professional advancement). The significance of the couple's voluntary assumption of both the costs and the risks inherent in their decision to allocate family resources is that neither spouse should have a guarantee in divorce to the unrealized wealth of the other that is better than the mere hope of such wealth that existed during the marriage. *See* DeWitt v. DeWitt, 90 Wis. 2d 44, 58, 296 S.W.2d 761, 768 (Ct. App. 1980).

88. *See* DaLa Rosa v. DeLa Rosa, 309 N.W.2d 755, 758-59 (Minn. 1981) (no recovery for foregone income of student spouse). *But see* Washburn v. Washburn, 101 Wash. 2d 168, 179-80, 677 P.2d 152, 159 (1984) (student spouse's foregone earnings and supporting spouse's foregone educational or career opportunities are factors to consider when determining the proper amount of compensation for the supporting spouse). *See*

Neither the voluntary nature of the degree decision nor the imposed duty of spousal support, however, should alone be sufficient to deny the supporting spouse recoupment of her direct financial contributions towards the student spouse's degree.[89] Restitution for these contributions recognizes two important features of this unique problem. First, the court is dissolving a marriage, not a formal business partnership in which records are kept and profits are sought. Second, acquiring an education requires not only the expenditure of money, but requires also a certain amount of aptitude and skill that a person arguably possesses before marriage.[90] The degree holder is penalized if an interest in the degree is divided without considering his non-financial contributions towards earning it.[91]

This proper view of the common law duty of spousal support demonstrates that a complete assessment and quantitative valuation of each spouse's individual contributions during the marriage and their expectancies is unworkable and socially unacceptable. Mechanically applying principles of restitution, implied loan, unjust enrichment and quasi-contract to a marriage is not only inappropriate but also contrary to public policy because these theories are based on measurements of fault.[92] Placing blame on a spouse or determining whether a spouse

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also Spousal Support, supra note 4, at 1002-05 (author advocates focus on disparate earning capacities between the two spouses resulting from disproportionate allocation of opportunity costs in order to more equitably reapportion this burden). *Accord* Note, *Family Sacrifice, supra* note 4, at 296-97 (author insists that supporting spouse be allowed to recoup foregone educational opportunities and other non-financial contributions).

89. The court in *Lehmicke* recognized the sacrifices of the working spouse and the reduced standard of living both parties likely experienced during the educational period, but permitted reimbursement only for amounts advanced in excess of the legal duty of spousal support. 489 A.2d at 787. The court agreed with the *Mahoney* "reimbursement alimony" approach and noted that, although its award was not in the form of alimony, it was based on the same equitable principles. *Id.* The proposed statute adopts this concept.

Under the theory of a legal duty of spousal support, the *Lehmicke* court implicitly applied a "but for" approach in determining the extent of reimbursement to the supporting spouse. The student spouse must return to the supporting spouse those funds that, "but for" the decision to attend school, would have been saved or spent otherwise.

90. *See* Stern v. Stern, 66 N.J. 340, 345, 33 A.2d 257, 260 (1975).

91. *See* Comment, *Community Property Interest, supra* note 4, at 291.

92. *See supra* note 64 and accompanying text. *Compare* Pyeatte v. Pyeatte, 135 Ariz. 346, 661 P.2d 196 (Ct. App. 1982). In *Pyeatte* the court noted that restitution traditionally has been available upon either an "implied-in-fact" contract or on a quasi-contractual basis. *Id.* at 353, 661 P.2d at 203. To obtain restitution on the basis of an implied-in-fact contract, the supporting spouse must prove the elements of a binding

imprudently exhausted assets is not the law's purpose in a divorce action.[93]

D. *The Unworkable Consequences of Distributing a Property Interest in a Professional Degree*

1. Impact on Affected Parties' Rights and Obligations

Judges and commentators who favor distributing a portion of the student spouse's lifetime earnings to the supporting spouse as marital property give little consideration to other legal ramifications of such an award. Generally, this action places too much weight on immediate equity concerns. A property distribution or cash award in lieu of distribution places the supporting spouse and every judgment creditor of a debtor spouse in a position to attach and execute against the degree as property.[94] In addition, questions arise regarding both the inheritance rights of the supporting spouse's heirs and the obligation of the student spouse's estate to honor the divorce decree.[95] Another concern is the innovative judicial order that the student spouse to maintain a life insurance policy for the supporting spouse's benefit to meet any unpaid award.[96] This measure guarantees the supporting spouse an income stream that she may not have had but for the divorce, an income stream that the degree holder may never earn.[97]

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contract. *Id.* Restitution, however, is available in quasi-contract without a showing of mutual assent. *Id.* The court observed that restitution on the basis of unjust enrichment was inappropriate for purposes of seeking restitution for the value of "usual and incidental activities of the marital relationship," such as homemaking services. *Id.* The court concluded, however, that restitution was appropriate when "the facts demonstrate an agreement between the spouses and an extraordinary or unilateral effort by one spouse which inures solely to the benefit of the other by the time of dissolution." *Id.* Because the case presented the typical no asset, career-threshold situation, the court held that equity required restitution to the supporting spouse for her contributions to the student spouse's living and educational expenses. *Id.* at 357, 661 P.2d at 207.

93. Wisner v. Wisner, 129 Ariz. 333, 341, 631 P.2d 115, 123 (Ct. App. 1981).

94. O'Brien v. O'Brien, 106 A.D.2d 223, 227, 485 N.Y.S.2d 548, 551 (1985).

95. Generally, maintenance awards terminate upon the payor's death. *See, e.g.,* TENN. CODE ANN. § 36-5-101(d) (Supp. 1986). Alternatively, a judgment to pay a property debt such as a supporting spouse's "interest" in the professional degree would represent a claim against the student spouse's estate, depriving his subsequently formed family of an inheritance they might otherwise expect. *See* Note, *Treatment of a Professional Degree, supra* note 4, at 440.

96. The trial court in O'Brien v. O'Brien directed the husband to maintain a life insurance policy on his life in his ex-wife's benefit for the unpaid balance of the award. 114 Misc. 2d 233, 242 (1985).

97. *See* DeWitt v. DeWitt, 98 Wis. 2d 44, 58, 296 N.W.2d 761, 768 (Ct. App. 1980)

Awards of a property interest in the student spouse's enhanced earning capacity consistently exceed mere restitution of the supporting spouse's contribution because restitution does not satisfy "expectancy." Yet expectancy is not truly realistic and equitable unless it is subject to future exigencies that the degree holder might experience, regardless of whether he remains married. Unexpected events, such as malpractice claims, diminish the value of the degree.

2. Spousal Contributions That Enhance Unlicensed Careers

If the working spouse's contributions towards the student spouse's education entitles her to a property interest in his enhanced earning

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(superseded by statute as stated in *In re* Marriage of Lundberg, 107 Wis. 2d 1, 318 N.W.2d 918, 922 (1982)) (to award a share of an education's estimated future value as property is tantamount to awarding a share of something that never existed in any real sense); *but cf.* Mahoney v. Mahoney, 91 N.J. 488, 503, 453 A.2d 527, 535 (1982) ("marriage should not be a free ticket to professional education . . . without subsequent obligation").

Because property awards are not modifiable, a property interest in the student spouse's future earnings is a "perpetual lien" on the student spouse's future income. Moss v. Moss, 639 S.W.2d 370, 374 (Ky. Ct. App. 1982). *But see* Washburn v. Washburn, 101 Wash. 2d 168, 179, 677 P.2d 152, 158 n.3 (1984) (maintenance award not a "perpetual lien" because it is modifiable to account for circumstantial changes); Lovett v. Lovett, 688 S.W.2d 329, 333 (Ky. 1985) (adjustable maintenance award preferred over award of future earnings as marital property).

The few property-based judgments in a professional degree cases have awarded the difference between the student spouse's earning potential before and after his receipt of the degree. *See supra* notes 13-15, 160-61 and accompanying text. No court ordering such an award has provided for subsequent modification should the student spouse's career plans change by design or fate. Because a property judgment fails to recognize the payor spouse's true future ability to pay, it commends him, in effect, to practice a certain profession and, as one commentator queried, "Is the supporting spouse entitled to a property settlement that forces the new lawyer to work on Wall Street and give up his or her public defender's job in order to meet the earnings of the statistically average lawyers." Mullenix, *supra* note 4, at 168.

Initially, the idea of the student spouse leaving the marriage with the degree and all its promise without rewarding the working spouse's efforts appears to constitute a windfall for the student spouse. Wisner v. Wisner, 129 Ariz. 333, 341, 631 P.2d 115, 122 (Ct. App. 1981). From the student spouse's perspective, however, a court ordered award of his future earnings as marital property is tantamount to granting the supporting spouse a guaranteed annuity. The supporting spouse obtains this income entitlement without having to fulfill any future obligations, which she presumably was fully prepared to continue making in the form of spousal support. Further, such an award assures the supporting spouse to an interest in the professional's future earnings without having to share in the financial costs of maintaining the license. For example, in the case of a medical license, such costs include malpractice premiums, state and federal license renewal fees, and the expense of obtaining the necessary continuing medical education credits.

capacity, then similar contributions to another spouse's enhanced, although unlicensed, business career should receive a comparable award. In *Meinholz v. Meinholz*[98] a housewife made such a claim. The wife gave up her ambition to be a counselor and became a homemaker after she and her husband agreed to work together as a partnership toward the common goal of establishing his career.[99] The court rejected her attempt to rely on professional license cases because divorce in those cases typically occurs just when the increased earnings begin.[100] In the court's view, the wife's case was unlike the professional license cases because of the couple's accumulation of marital property and the wife's eligibility for maintenance.[101] The presence of accumulated assets led the court to conclude that the supporting spouse had already benefited from her husband's increased earning capacity.[102]

Although *Meinholz* represents the majority of non-licensed, "enhanced business career" cases,[103] the rationale presupposes that material rewards accumulate commensurately with the couple's joint efforts. This reasoning is not adaptable to situations in which the benefits from the wife's contributions towards the career are not realized until after the divorce.

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98. 283 Ark. 509, 678 S.W.2d 348 (1984).

99. *Id.* at 511, 678 S.W.2d at 349. For a brief digest treatment of cases addressing the value of homemaking services and performance of social obligations for purposes of maintenance and property division, see Annotation, *Divorce—Equitable Distribution*, 41 A.L.R.4TH 481, 510-15 (1984 & Supp. 1986).

100. 283 Ark. at 512, 678 S.W.2d at 350.

101. *Id.*

102. *Id.*

103. Courts consistently refuse to find a property interest in the student spouse's education, degree, license, or earning capacity and refuse to order restitution in favor of the wife when the couple has accumulated substantial assets. Pyeatte v. Pyeatte, 135 Ariz. 346, 354, 661 P.2d 196, 204 (Ct. App. 1982). Because those marital assets represent the product of the education, a distribution of that property to the supporting spouse allows her to realize her "investment" in the student spouse's education. *Id. See, e.g.*, Martin v. Martin, 358 N.W.2d 793, 799 (S.D. 1984) (reimbursement alimony not appropriate where supporting spouse has benefited from student spouse's increased earning capacity); Grosskopf v. Grosskopf, 677 P.2d 814, 822 (Wyo. 1984) (an equitable division of accumulated property permits each party to realize the benefits of the education). See *infra* notes 144-49 and accompanying text for further discussion of the significance of accumulated traditional marital property in professional degree cases.

IV. CRITERIA AND COMPONENTS OF DISSOLUTION AWARDS

A. *Relationship Between Property Division and Support Awards*

Courts have broad discretion to reach equitable results in dissolution matters through either property distribution, periodic support payments, or both.[104] Courts utilize both in efforts to provide financial assistance for each spouse.[105] Under equitable divorce statutes the preferred method of achieving this goal is through property division, rather than an award of maintenance or alimony.[106] This approach is also intended to separate the parties' financial affairs and eliminate the need for further dealings.[107] Because each party in a professional degree case is usually self-sufficient and few marital assets are available for division, courts' application of these principles in determining whether a distributable interest exists in a professional degree involves questions of fairness rather than need.[108]

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104. Haugan v. Haugan, 117 Wis. 2d 200, 211, 343 N.W.2d 796, 802 (1984). *See also* Washburn v. Washburn, 101 Wash. 2d 168, 178, 677 P.2d 152, 158 (1984) (trial court exercises broad discretionary powers in making equitable property division or awarding maintenance).

105. Archer v. Archer, 303 Md. 347, 355, 493 A.2d 1074, 1078 (1985). *See also* O'Brien v. O'Brien, 489 N.E.2d 712, 716, 498 N.Y.S.2d 743, 747 (1985) (concept of maintenance allows recipient to achieve economic independence). *Cf.* DeWitt v. DeWitt, 98 Wis. 2d 44, 60, 296 N.W.2d 761, 769 (1980) (same factors relevant to property division apply to determination of alimony). *See generally* Annotation, *Divorce—Equitable Distribution*, 41 A.L.R. 4TH 481, 516 (1984) (goal of equitable distribution is to make the parties self-sufficient).

106. Grosskopf v. Grosskopf, 677 P.2d 814, 821 (Wyo. 1984).

107. *Id.* Courts in many states are emphasizing the additional goal of equitably distributing property in a manner that separates the parties, obviating the need for further dealings. *See* Annotation, *Divorce—Equitable Distribution*, 41 A.L.R.4TH 481, 491 (1984). The same goal applies to maintenance awards, to enable the parties to plan their future with certainty. *Id.* at 492. Distribution of a degree as property frustrates this goal. The court in *O'Brien*, however, believed that its approval of a payment schedule consisting of 11 annual installments to satisfy a property interest distribution of the professional spouse's degree somehow avoided or minimized "the uncertain and unsuitable economic ties of dependence of a maintenance award" 489 N.E.2d at 717, 498 N.Y.S.2d at 748. The court fails to explain how such awards bring any greater finality to the parties' economic ties than other methods.

108. *See, e.g.*, Woodworth v. Woodworth, 126 Mich. App. 258, 267-68, 337 N.W.2d 332, 337 (1983) (non-supporting spouse should not be deprived of marriage benefits even though self-supporting); Mahoney v. Mahoney, 91 N.J. 488, 501, 453 A.2d 527, 534 (1982) (supporting spouse should be reimbursed for financial contributions to other's education regardless of the appropriateness of alimony or absence of marital property); Haugan v. Haugan, 117 Wis. 2d 200, 216, 343 N.W.2d 796, 804 (1984) (supporting spouse can be awarded maintenance for contribution to husband's education even though not in need).

B. *Judicial Goals in Professional Degree Cases*

Most courts generally agree that the overarching goal of dividing marital property is to determine what equitably belongs to each spouse.[109] Given such general instructions under most divorce statutes, judges in search of an equitable division manufacture a variety of ill-supported resolutions in professional degree cases. Thus, equity is primarily a function of intuition or personal philosophy.

Many judges faced with the task of resolving the diploma dilemma[110] conclude that to ignore the supporting spouse's contributions and allow the student spouse to experience a "windfall" at divorce is patently unfair.[111] The degree and the earning capacity it represents are, in their view, the most valuable "asset" acquired during the marriage.[112] Consequently, fairness demands compensating the supporting spouse for her contributions and foregone opportunities while the student spouse was in school.[113] After all, proponents of this view insist, these contributions were part of a concerted effort and not made as a gift.[114] Such compensation can be achieved, they maintain, through property payments, alimony, or both.[115]

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109. *In re* Marriage of Graham, 574 P.2d 75, 76 (Colo. 1978) (purpose of division of marital property is to allocate what equitably belongs to each spouse); Woodworth v. Woodworth, 126 Mich. App. 258, 269, 337 N.W.2d 332, 337 (1983) (fairness is ultimate objective in a property distribution).

110. *See* Lovett v. Lovett, 688 S.W.2d 329, 333 (Ky. 1985).

111. *See* Haugan v. Haugan, 117 Wis. 2d 200, 207, 343 N.W.2d 796, 800 (1984) (unfair to deny supporting spouse a share in the anticipated earnings while the student spouse keeps the degree and all the financial rewards it promises). The concept of "unjust enrichment" is similarly used to characterize this situation. *Woodworth*, 337 N.W.2d at 337. *See supra* notes 80-107 and accompanying text.

112. *See* O'Brien v. O'Brien, 489 N.E.2d 712, 713, 498 N.Y.S.2d 743, 744 (1985) (husband's newly acquired medical licensee was parties' only asset of any consequence).

113. Haugan v. Haugan, 117 Wis. 2d 200, 219, 343 N.W.2d 796, 805-06 (1984). *See generally* Annotation, *Divorce—Equitable Distribution*, 41 A.L.R.4TH 481, 509-10 (1984 & Supp. 1987) (digest review of cases holding that non-financial contributions to the marital estate should be considered when making a "equitable" or "just" property division). *See infra* notes 121, 175, 210-11 and accompanying texts.

114. *See supra* note 111 and accompanying text. *See also* Comment, *supra* note 33, at 74. As several commentators have observed, however, it is difficult to characterize the supporting spouse's contributions as a gift because they are made with the expectation of yielding future income. *Id.* n.163.

115. The court's position in Haugan v. Haugan, 117 Wis. 2d 200, 343 N.W.2d 796 (1984), was that a spouse whose contributions to the marriage and the student spouse's education have socially and financially handicapped her shall be compensated at termination of the marriage. *Id.* at 219, 343 N.W.2d at 805-06. The court took a broad view of the term "compensation," concluding that Wisconsin's statutes afforded courts

Although agreeing on the general goal of fairness, courts that apply property concepts to a professional degree reject compensation as the correct objective in such cases. Reasoning that mere restitution is a deficient measure of economic justice, their solution is to give the degree a property label that permits a distributive award to the supporting spouse of a percentage in the degree holder's projected lifetime earnings.[116] Others, however, find it untenable that a supporting spouse's contribution to the couple's mutual support for a three or four year period should entitle her to a large percentage of the speculative present value of the professional spouse's lifetime earnings.[117]

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enough flexibility to permit it to compensate the supporting spouse not only for her financial contributions to the education, but also for the opportunity costs resulting from the student's unemployment. *Id.* at 213, 343 N.W.2d at 803. For further discussion regarding the awards of opportunity costs, see *supra* notes 118-21 and accompanying text.

The expansiveness of the court's notion of "compensation" is even more evident given its approval of three alternative approaches directed at compensating opportunity costs. The first approach, the cost-value approach, permits compensation not only for the supporting spouse's contributions to the education's direct cost, but also for living expenses and homemaking services rendered during the marriage. 117 Wis. 2d at 212, 343 N.W.2d at 802. This approach reimburses the wife for all spousal support, imputing income from homemaking services to the marriage for which she receives credit in the same manner as direct educational outlays. The second approach "compensates" the supporting spouse utilizing the present value of the student spouse's enhanced earning capacity. *Id.* at 213, 343 N.W.2d at 803. *See infra* notes 160-64 and accompanying text. In the final approach, known as the labor theory of value, the trial court may award the supporting spouse one-half of the student spouse's enhanced yearly earnings for as many years as the supporting spouse worked to support the student. 117 Wis. 2d at 214, 343 N.W.2d at 803. For commentary advocating this theory, see Mullenix, *supra* note 4.

The phenomenal range of remedial choices in *Haugan* allows the court to devise awards that are inconsistent both in terms of their underlying rationale and results. Such "compensation" assumes dimensions beyond traditional restitution. Awards composed of living expenses and opportunity costs return money to the supporting spouse for which she otherwise would not expect reimbursement had those funds and efforts been expended on noneducational endeavors.

116. *See Washburn*, 101 Wash. 2d at 190, 677 P.2d at 164 (Rosellini, J., dissenting). *But cf. In re* Marriage of Weinstein, 128 Ill. App. 3d 234, 244, 470 N.E.2d 551, 559 (1984) (because a degree is at most a mere expectancy of some future earnings, it cannot represent a guarantee receipt of a fixed amount in the future); Grosskopf v. Grosskopf, 677 P.2d 814, 822 (Wyo. 1984) (court is limited in property division to amount of property in its hands; mere expectancy is not subject to division) (quoting Storm v. Storm, 470 P.2d 367, 370 (Wyo. 1970)).

117. *See* Krauskopf, *supra* note 4, at 414. *See supra* note 110 and accompanying text. One weakness of this "equal-sharing-of-benefits: theory concerns its assumption that each spouse devoted equal amounts of time—her working and his studying—to attaining the education. Comment, *supra* note 33, at 86-87. Of the three variables often

B. *Award Components—The Proper Measure of the Supporting Spouse's Contributions*

A degree's debatable qualifications as divisible marital property presents courts with practical problems identifying the extent of the supporting spouse's interest in the degree. Regardless of whether the court adopts a property view, opinions vary as to the proper components of an equitable award.[118] Most courts agree that the supporting spouse should recover at a minimum her share of direct educational costs.[119] Other courts extend the scope of recovery to contributions towards living expenses and services rendered during the marriage[120]

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used to determine the value of the spouses' relative contributions—time, money, or personal sacrifice—only the money expended provides evidence capable of fair measurement. Only direct financial contributions, therefore, should be compensable. Judicial consideration of any entitlement the supporting spouse might have in the student spouse's earning potential is best reserved for determining the duration and amount of alimony. *See* Stevens v. Stevens, 23 Ohio St. 3d 115, 123, 492 N.E.2d 131, 138 (1986) (Douglas, J., dissenting) (supporting spouse's recoupment of actual expenditures involves minimal speculation).

118. For a recent review of the various forms of compensation or recovery currently allowed in or proposed for professional degree cases, see Mullenix, *supra* note 4, at 261-83, and *Spousal Support*, *supra* note 4, at 282-87.

119. Beeler v. Beeler, 715 S.W.2d 625, 627 (Tenn. Ct. App. 1986). *See also* Pyeatte v. Pyeatte, 135 Ariz. 346, 354-55, 661 P.2d 196, 204-05 (Ct. App. 1982) (emerging consensus is that "restitution to working spouse is appropriate to prevent the unjust enrichment of the student spouse"); *In re* Marriage of Horstmann, 263 N.W.2d 885, 891 (Iowa 1978) (cost of education is one method to establish value of degree); Moss v. Moss, 639 S.W.2d 370, 375 (Ky. Ct. App. 1982) (wife's interest in husband's education restricted to "amount spent for direct support and school expenses") (quoting from Inman v. Inman, 578 S.W.2d 266, 269 (Ky. App. 1979); Hubbard v. Hubbard, 603 P.2d 747, 751 (Okla. 1979) (supporting spouse has right to compensation for amount of direct financial investment in student spouse's education).

120. Haugan v. Haugan, 117 Wis. 2d 200, 211, 343 N.W.2d 796, 802 (1984). *Cf.* Mahoney v. Mahoney, 91 N.J. 488, 501, 453 A.2d 527, 534 (1982) ("reimbursement alimony" includes household expenses and "any other contributions used by the supported spouse in obtaining his or her degree or license"); *but cf.* Pyeatte v. Pyeatte, 135 Ariz. 346, 357, 661 P.2d 196, 207 (Ct. App. 1982) (working spouse's compensable interest in student spouse's education excludes homemaking services and is limited to financial contributions to living expenses and direct educational expenses).

In a similar but more calculated approach, the Supreme Court of Minnesota, in DeLa Rosa v. DeLa Rosa, 309 N.W.2d 755 (Minn. 1981), stated that compensation to the working spouse for "marital support" of the student spouse's education should equal the working spouse's financial contributions to joint living expenses and the student spouse's educational costs minus one-half of the difference between the couple's financial contributions and the cost of education. *Id.* at 759. *Accord* Stevens v. Stevens, 23 Ohio St. 3d 115, 125, 492 N.E.2d 131, 139 (1986) (Douglas, J., dissenting). *But see* Washburn v. Washburn, 101 Wash. 2d 168, 179-80, 677 P.2d 152, 159 (1984) (direct

and the cost of foregone career, employment, or educational opportunities.[121]

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educational costs do not include living expenses the student spouse incurred, because such expenses would exist regardless of his pursuit of a professional education).

121. Washburn v. Washburn, 101 Wash. 2d 168, 180, 677 P.2d 152, 159 (1984). Courts favoring this component argue that to permit recovery of educational expenses but not the cost of foregone opportunities is inconsistent. *Id.* Rather than grant a separate award for this "opportunity cost," courts that allow its recovery generally characterize it as part of the supporting spouse's total contribution to the education, which entitles her to a proportionate share in the professional spouse's future earnings. *See, e.g.*, O'Brien v. O'Brien, 489 N.E.2d 712, 718, 498 N.Y.S.2d 743, 749 (1985) (statute directs full consideration of both direct and indirect contributions to acquisition of marital property, including contributions to career potential of other party).

But cf. Beeler v. Beeler, 715 S.W.2d 625 (Tenn. Ct. App. 1986). Tennessee's divorce statute directs the court to consider "the tangible or intangible contribution by one party to the education, training, or increased earning power of the other party" when fashioning an equitable division of marital property and when awarding support and maintenance. TENN. CODE ANN. §§ 36-4-121(c)(3), 36-5-101(d)(9) (Supp. 1986). The *Beeler* court rejected the property theory and concluded that the working spouse's contribution to the education was just "one factor" to be considered in equitably dividing the marital estate and awarding alimony. 715 S.W.2d at 627. Although the court did not address recoupment of opportunity costs, it did affirm an award to the wife of $1,050 for teaching certification courses. *Id.*

Courts have not indicated what other opportunity costs are recoverable. Some commentators advocate recoupment of only forfeited earnings. *See, e.g., Wife Works So Husband Can Go to Law School: Should She Be Taken in as a "Partner" When "Esq." Is Followed by Divorce? or Can You Have a Community Property Interest in a Professional Education?*, 2 COMM. PROP. J. 85, 92 (1975) (author proposes "cost-value" theory that accounts for direct educational expenses and the opportunity cost of earnings foregone by the student spouse while he was in school). Others, however, believe that recoupment of educational costs must also include the working spouse's foregone educational and career opportunities. *See, e.g., Spousal Support*, *supra* note 4, at 998, 1002. Commentators argue that an award that includes reimbursement for both lost earnings and foregone career and educational opportunities relieves the inequity of the disparate share of these costs that the working spouse invariably bears. *Id. See also* Mullenix, *supra* note 4, at 269.

Inclusion of the student spouse's foregone income as a compensable opportunity cost is significant because it may represent as much as 74% of the total investment cost of acquiring a college education. *See* Krauskopf, *supra* note 4, at 384.

Allowing recovery of "opportunity costs" in addition to traditional alimony, like the economic partnership theory, is inappropriate in the context of marriage because marriage is for "better or worse." Estimating the amount of foregone income requires the courts to engage in troublesome speculation similar to that experienced when estimating the value of future income streams, particularly when a wage history prior to the commencement of the professional education does not exist. To the extent that the court overestimates the foregone income, the supporting spouse will be unjustly enriched.

Inclusion in an award of the opportunity costs of lost career or educational opportunities is also problematic because the court must determine the legitimacy of the opportunity, the value of the opportunity, and whether it was passed up because of the

1. Reimbursement Alimony

A popular innovation developed to remedy the diploma dilemma is "reimbursement alimony."[122] The New Jersey Supreme Court first introduced this concept in *Mahoney v. Mahoney*.[123] In *Mahoney* the wife sought one-half of all financial support she gave her husband while he obtained his M.B.A. degree.[124] The court declined to treat a professional degree as divisible marital property.[125] The court also rejected the commercial enterprise concept of marriage and, therefore, did not condone reimbursement between former spouses.[126] The court emphasized fairness, however, and held that individuals who receive financial support from their spouse to pursue professional training can expect to be forced to reimburse the supporting spouse for these contributions.[127]

Supporting spouses who qualify for reimbursement alimony receive *all* financial contributions to the student spouse for educational purposes.[128] Reimbursement alimony is not an absolute right, however, of every spouse who contributes towards her partner's education.[129] Under the *Mahoney* test, the award is limited to "monetary contributions made with the mutual and shared expectation that both parties to the marriage will derive increased income and material benefits. . . ."[130] Reimbursement alimony is inappropriate in two situations. First, if the couple accumulated substantial assets during the marriage, the sup-

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decision for one party to pursue a professional education. Many courts recognize that the working spouse has a desire at the time of divorce to pursue higher education with a view to a professional career of her own and thereby permit an award or additional alimony to finance such rehabilitation. Stevens v. Stevens, 23 Ohio St. 3d 115, 120-21, 492 N.E.3d 131, 135-36 (1986). *See also* Mahoney v. Mahoney, 91 N.J. 488, 502-04, 453 A.2d 527, 534-35 (1982) (rehabilitative alimony appropriate when supporting spouse is not self-sufficient or is unable to return to job market).

The proposed statute adopts the concept of "rehabilitative alimony" rather than an award of the "cost" of foregone opportunities, which may not be confirmed. The advantage of such an award is that its legitimacy is objectively determined from the working spouse's expressed desire at the time of dissolution to pursue a definite course of education or training.

122. *Mahoney*, 91 N.J. at 500, 453 A.2d at 533.

123. 91 N.J. 488, 453 A.2d 527 (1982).

124. *Id.* at 493, 453 A.2d at 529-30.

125. *Id.* at 496-97, 453 A.2d at 532.

126. *Id.* at 500, 453 A.2d at 533.

127. *Id.*

128. *Id.* at 501, 453 A.2d at 534.

129. *Id.* at 502, 453 A.2d at 535.

130. *Id.* at 502-03, 453 A.2d at 535.

porting spouse already realized the benefits of the increased earning capacity she helped finance.[131] Second, reimbursement alimony is inappropriate if the supporting spouse is financially self-sufficient or is unable to return to the job market.[132]

One major shortfall of the *Mahoney* theory of reimbursement alimony is that the propriety of reimbursing the supporting spouses is not determined independently of conventional alimony or property division.[133] The court expressed a preference for an equitable distribution

131. *Id.* at 504, 453 A.2d at 535-36.

132. Consistent with *Mahoney*, many judges feel that reimbursement for the supporting spouse's contributions to the student spouse's education and an award of traditional support or alimony are not mutually exclusive. *See, e.g.*, Stevens v. Stevens, 23 Ohio St. 3d 115, 126, 492 N.E.2d 141, 140 (1986) (Douglas, J., dissenting). Under the "relevant factor" scheme of most divorce statutes, the appropriateness of alimony depends partially on the amount awarded to the contributing spouse as reimbursement for her contributions to the other spouse's education. *Id.* Nor is restitution or reimbursement alimony considered mutually exclusive from a rehabilitative award. *See* Saint-Pierre v. Saint-Pierre, 357 N.W.2d 250, 261 (S.D. 1984) ("rehabilitative alimony" may be more appropriate than reimbursement alimony if supporting spouse requires money to become self-sufficient or improve or refresh her job skills).

The reimbursement award provided for in the proposed statute expressly incorporates a feature that the Superior Court of Pennsylvania emphasized in Lehmicke v. Lehmicke when compensating the supporting spouse, stating that the award is not an alimony award. 489 A.2d 782, 786 (Pa. Super. Ct. 1985). Although the proposed statute rejects a characterization of its award as traditional alimony for purposes of maintenance or support, it retains an "alimony" label solely for purposes of being eligible for advantages that such a classification has over a property distribution award. For example, one such advantage is that, unlike a marital property distribution, alimony is non-dischargeable in bankruptcy. 11 U.S.C. § 523(a)(5) (1986). The Bankruptcy Code defines non-dischargeable items, in part, as debts owed "to a . . . former spouse . . . in connection with a separation agreement, divorce decree, or other order of a court of record. . . ." *Id. But see* Note, *Treatment of a Professional Degree*, *supra* note 4, at 437 ("court's description of the award as a right to receive a sum certain and its protection of the award against termination would probably cause a federal tax or bankruptcy court to identify the award as property, despite the state court's choice of label").

133. 91 N.J. at 504, 453 A.2d at 535-36. The supporting spouse's right to compensation should not depend on the court's ability to otherwise distribute existing marital property or award alimony or other forms of support. *See* Comment, *supra* note 33, at 84-85.

The primary function of alimony is to provide for the other spouse's support. Woodworth v. Woodworth, 126 Mich. App. 258, 267, 337 N.W.2d 332, 336 (1983). Whether the supporting spouse needs support or not, she is entitled to compensation for her contributions to the student spouse's education. Haugan v. Haugan, 117 Wis. 2d 200, 216, 343 N.W.2d 796, 804 (1984); Washburn v. Washburn, 101 Wash. 2d 168, 178-79, 677 P.2d 152, 158 (1984) (demonstrated capacity of self-support does not automatically preclude award of maintenance. *See also* Comment, *supra* note 33, at 84.

Nor should the supporting spouse's right to compensation for her financial contributions to the student spouse's education be conditioned on her subsequent marital status.

of assets over reimbursement alimony if the degree holder's enhanced earning capacity has been sufficiently realized in the form of property.[134] The Model Statute rejects this concept, specifically providing for reimbursement of the supporting spouse's direct financial contributions to the student spouse's education exclusive of any other awards of property or alimony.

Another key disadvantage of the *Mahoney* design of reimbursement alimony, also rejected by the Model Statute, is that it is not available if the marriage endured long enough to accumulate sufficient assets, or if the supporting spouse is either unable to return to the job market or is financially self-sufficient.[135] Conditions on reimbursement require additional evidence and further judicial discretion regarding how much accumulated wealth is enough or how self-sufficient the supporting spouse must be before she is no longer entitled to reimbursement.[136] None of the exceptions are logically related to the concept of reimbursement if their true purpose is reimbursement.[137]

Restitution ignores the supporting spouse's non-financial contributions and fails to meet her hard-earned expectancy of participating in the student spouse's enhanced earning capacity.[138] Most courts favoring distribution of a professional degree as property reject such awards.

Stevens, 23 Ohio St. 3d at 125, 492 N.E.2d at 139 (Douglas, J., dissenting). The proposed statute incorporates this principle.

134. The court in *Mahoney* initially appeared to approve of making "reimbursement alimony" available independent of traditional alimony and equitable distribution. The court stated, however, that "[r]eimbursement alimony should not subvert the basic goals of traditional alimony and equitable distribution." 91 N.J. 488, 503, 453 A.2d 527, 534 (1982). *Cf.* Comment, *The Equity—Property Dilemma," supra* note 4, at 1028, 1033 (author advocates ability of working spouse to make an independent claim for reimbursement alimony as an alternative to a claim for a community property interest in the degree).

135. 91 N.J. at 503, 453 A.2d at 535.

136. *See* Note, *Excluding Educational Degrees, supra* note 4, at 1352.

137. *See* BLACK'S LAW DICTIONARY 1157 (5th ed. 1979) ("reimburse" means "[t]o pay back, to make restoration, to repay that expended; to indemnify or make whole").

Many commentators feel that reimbursing the working spouse for her financial expenditures is the fairest solution. *See* Note, *Excluding Educational Degrees, supra* note 4, at 1338-40. The author summarizes five principal arguments commentators have advanced in support of a restitutionary approach. These arguments include: (1) equity demands restitution to prevent unjust enrichment; (2) restitution avoids speculation of a degree's value; (3) restitution avoids division of the student spouse's post-divorce earnings; (4) property-based distribution of a degree denies the degree-holder freedom of choosing a particular career; and (5) restitution is appropriate because the divorce prevented the wife from financially benefiting from her contributions to the education. *Id.*

138. Haugan v. Haugan, 117 Wis. 2d 200, 219, 343 N.W.2d 796, 805 (1984). *See*

Ironically, both views seek to prevent unjust enrichment of the student spouse.[139] Without precise statutory provisions, however, judicial opinions of how much compensation is just, equitable, or fair will continue to vary.[140]

D. *Doctrinal Solutions and Their Criteria*

1. Relevant Factor Doctrine—Discretionary Chaos

Rather than provide a precise restitutionary award or property division, the majority of state legislatures has chosen to treat the supporting spouse's contributions towards an advanced degree as a "relevant factor" in making a just award of alimony or equitable marital property division.[141] This appealing approach is consistent with the traditional preference of vesting divorce courts with broad discretion.[142] Such flexibility, however, is ill-suited for reaching predictable, consistent results in professional degree cases. Given a statutory license to subjectively evaluate the supporting spouse's contributions, courts produce innovative awards ranging from compensation limited to a share of the education's direct financial costs to a percentage of the student spouse's enhanced lifetime earnings.[143] The "relevant factor" doctrine permits a property-minded court to award the supporting spouse her

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also Woodworth v. Woodworth, 126 Mich. App. 258, 268, 337 N.W.2d 332, 337 (1983) (restitution prevents supporting spouse from realizing expected benefit of career).

139. Woodworth v. Woodworth, 126 Mich. App. 258, 268, 337 N.W.2d 332, 337 (1983) (treating degree as a gift unjustly enriches degree-holder to the extent that its value exceeds its cost); Pyeatte v. Pyeatte, 135 Ariz. 346, 354, 661 P.2d 196, 204 (Ct. App. 1982) (essence of restitution is to prevent unjust enrichment of one spouse at expense of another).

140. *See* Stevens v. Stevens, 23 Ohio St. 3d 115, 123, 492 N.E.2d 131, 137 (1986) (Wright, J., concurring) ("the lack of clarity" in Ohio's statute made it difficult to interpret legislative intent with respect to professional degree cases). *See also Spousal Support, supra* note 4, at 1001 (author recognizes the judiciary's inability to define objectives clearly).

141. *See, e.g.,* the statutes construed in Wisner v. Wisner, 129 Ariz. 333, 631 P.2d 115 (Ct. App. 1981); *In re* Marriage of Sullivan, 134 Cal. App. 3d 634, 184 Cal. Rptr. 796 (1982); *In re* Marriage of Goldstein, 97 Ill. App. 3d 1023, 423 N.E.2d 1201 (1981); Lovett v. Lovett, 688 S.W.2d 329 (Ky. 1985); Ruben v. Ruben, 461 A.2d 733 (N.H. 1983); Stevens v. Stevens, 23 Ohio St. 3d 115, 492 N.E.2d 131 (1986); Beeler v. Beeler, 715 S.W.2d 625 (Tenn. Ct. App. 1986). *Contra* Woodworth v. Woodworth, 126 Mich. App. 258, 337 N.W.2d 332 (1983) (equitable distribution between the parties upon dissolution was court's only concern).

142. *See supra* notes 3, 105 and accompanying text.

143. For recent examples of the judiciary's recognition and review of the plethora of approaches and remedies to this problem, see Archer v. Archer, 303 Md. 347, 352-54,

"share" of the other spouse's degree disguised as conventional alimony or through traditional property division.

2. Reaped Benefits Doctrine

Perhaps the dominant factor for courts analyzing the diploma dilemma is the extent to which the supporting spouse has already realized the benefits of her partner's enhanced earning capacity.[144] When the marriage has endured beyond the launch of the professional spouse's career, a substantial marital estate often has been accumulated. In these cases, regardless of their beliefs regarding the property concept of a professional degree, courts prefer to utilize traditional awards of property division and maintenance to ensure that the non-degree holder's expectations are realized.[145] The threshold determination is whether enough marital assets have accumulated at the time of divorce to finance the amount of compensation the court envisions.[146]

493 A.2d 1074, 1077-78 (Ct. App. 1985) and Washburn v. Washburn, 101 Wash. 2d 168, 174-76, 677 P.2d 152, 155-565 (1984).

144. *See, e.g.*, Pyeatte v. Pyeatte, 135 Ariz. 346, 354-57, 661 P.2d 196, 204-07 (Ct. App. 1982); O'Brien v. O'Brien, 66 N.Y.2d 576, 588-89, *modified*, 489 N.E.2d 712, 718, 498 N.Y.S.2d 743, 749 (1985).

One reason for treating a degree as divisible marital property is that such treatment will discourage the degree-holding spouse from seeking divorce early in his professional career. Note, *Excluding Educational Degrees*, *supra* note 4, at 1334. The professional spouse will postpone divorce until the couple accumulates traditional assets sufficient for an "equitable distribution." *Id.* The application of this argument in the context of a hopelessly broken marriage is dubious. A supporting spouse faced with a broken marriage is unlikely to postpone filing for divorce if her jurisdiction permits an equitable distribution of the professional spouse's future earnings as part of the marital property.

145. *See, e.g.*, Meinholz v. Meinholz, 283 Ark. 509, 512, 678 S.W.2d 348, 350 (1984); Mahoney v. Mahoney, 91 N.J. 488, 502-03, 453 A.2d 1062, 1065 (1982); O'Brien v. O'Brien, 66 N.Y.2d at 588, *modified*, 489 N.E.2d 712, 718, 498 N.Y.S.2d 743, 749 (1985) (court has discretion to distribute other marital assets in lieu of actual distribution of the value of professional spouse's license); DeWitt v. DeWitt, 98 Wis. 2d 44, 56-57, 296 N.W.2d 761, 767 (Ct. App. 1980) (compensation otherwise available through cash award in lieu of conventional property distribution not necessary when non-degree holder has already realized benefit from her investment in other's earning capacity); Grosskopf v. Grosskopf, 677 P.2d 814, 822 (Wyo. 1984). Commentators have pointed out that this "accumulated asset" distinction permits judges to avoid the issue of whether the supporting spouse has a property interest in the degree. *See, e.g.*, Mullenix, *supra* note 4, at 242, 246, 250 ("[t]hese decisions are confusing, evasive, unprincipled, and unfair" because "awards to the supporting spouse often contain disguised compensation for contributions to the student spouse, without expressly stating that the award is a distinction of property"). Note, *Family Sacrifice*, *supra* note 4, at 279 n.21, 280 n.31.

146. Lovett v. Lovett, 688 S.W.2d 329, 332 (Ky. 1985). The court in *Lovett* would

Two primary criticisms of this approach exist. First, it limits distribution of the estimated value of the degree to career-threshold, non-asset situations.[147] Working spouses who supported student spouses through school are entitled to a share of the student spouse's lifetime earnings, while equally supportive non-professional spouses will not participate in those earnings depending on the duration of the marriage and the couple's ability to accumulate marital assets. This approach obligates courts to arbitrarily determine when enough marital property is accumulated for the supporting spouse to realize the "fruits" of her efforts. When the marriage's net worth surpasses this arbitrary boundary, no compensation is needed and the professional degree can be excluded from property distribution.[148]

The second criticism is that accumulation of traditional marital assets is irrelevant in determining whether a degree is divisible marital property. When the professional spouse has practiced his profession long enough to accumulate some judicially prescribed minimum amount of assets, courts can avoid the issue of whether the supporting spouse has an equitable interest in a degree.[149] Equitable results are

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resolve the "diploma dilemma" through a case-by-case determination of what effect the professional education experience had on the standard of living established during the marriage. *Id.* at 333. Once the standard of living and the non-professional spouse's ability to support herself are determined, the court can assess the propriety size, and duration of a maintenance award. *Id. See supra* notes 10-12 and accompanying text.

147. Note, *Excluding Educational Degrees, supra* note 4, at 1350. *See, e.g.,* Inman v. Inman, 578 S.W.2d 266, 268 (Ky. Ct. App. 1981) (if little or no accumulated marital property at time of divorce, only way to achieve equitable result is to treat degree as distributable property). *See also* Comment, *supra* note 33, at 76 n.169 (courts more apt to find property interest in career-threshold, no asset marriage).

148. The accumulated assets distinction is one illustration of the backward rationalization process that courts use to reach the "equitable" result they have in mind. One commentator has, in fact, described the process as one in which the courts first look to the facts to determine whether enough marital assets exist; if sufficient marital property is found, characterization of the degree as property is not necessary to achieve the desired result. Mullenix, *supra* note 4, at 242.

The inherent arbitrary nature of this case-by-case approach results in an unacceptable degree of conflict and inconsistency in awards. *Id.* at 250. As one commentator noted, because the "[c]ourts are, in all probability, incapable of drawing an equitable cut-off line . . . it will be nearly impossible to set a standard of how much marital property is enough before the [supporting spouse] is 'fully compensated' and the professional license can therefore be excluded from property distribution." Note, *Excluding Educational Degrees, supra* note 4, at 1350.

149. Note, *Excluding Educational Degrees, supra* note 4, at 1350. The accumulation of conventional distributable marital assets should not be a factor in determining what form of relief is most equitable in professional degree cases. Lynn v. Lynn, 7 Fam. L. Rep. (BNA) 3001, 3005, 3006 (N.J. Super. Ct. 1980).

impossible under this arbitrary rule when the divorce occurs before the professional has a chance to ply his trade.

3. Timing of Asset Acquisition

Another way courts approach the degree dilemma is by distinguishing property or income acquired after the marriage from property acquired during the marriage. Courts in both community property[150] and equitable distribution[151] states are obligated to draw this distinction under statutes that restrict distribution to property acquired during the marriage.[152] Under this distinction, two categories of marital

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150. Eight states utilize a community property system. The husband and wife own in common property acquired during the marriage, each having an undivided one-half interest. Four of the eight states, California, Idaho, Louisiana, and New Mexico, provide for an equal division of property. *See* CAL. CIV. CODE § 5104 (West 1970); IDAHO CODE § 32-906 (Supp. 1982); LA. CIV. CODE ANN. art. 2335 (West 1985); N.M. STAT. ANN. § 40-3-8B (1978). The remaining four states, Arizona, Nevada, Texas and Washington, provide for an "equitable" but not necessarily equal division. *See* ARIZ. REV. STAT. ANN. § 25-211 (1976); NEV. REV. STAT. § 123.220 (1979); TEX. FAM. CODE ANN. § 5.01(b) (Vernon 1975); WASH. REV. CODE ANN. § 26.16.030 (Supp. 1982).

For a thorough survey and comparative analysis of treatment of professional degrees in both community property and equitable distribution states, see Loeb & McCann, *Dilemma vs. Paradox: Valuation of an Advanced Degree Upon Dissolution of a Marriage*, 66 MARQ. L. REV. 495 (1980); *see also* Note, *Excluding Educational Degrees*, *supra* note 4, at 1327.

151. Thirty-nine states are "equitable distribution" states. *See, e.g.*, ALA. CODE § 30-4-19 (Supp. 1982); ALASKA STAT. § 09.555.210(6) (1975 & Supp. 1982); ARK. STAT. ANN. § 34-1214 (Supp. 1981); COLO. REV. STAT. § 14-10-113(1) (1973 & Supp. 1982); CONN. GEN. STAT. § 46b-81(a) (Supp. 1982); DEL. CODE ANN. tit. 13, § 1513(a) (1974); FLA. STAT. § 61-14 (1975 & Supp. 1983); GA. CODE ANN. § 30-105 (1967 & Supp. 1982); KAN. STAT. ANN. § 60-1610(d) (Supp. 1981); MICH. COMP. LAWS ANN. § 552.23 (1) (Supp. 1982-82); MO. ANN. STAT. § 452-330.1 (Vernon Supp. 1982); VA. CODE ANN. § 20-107.3 (Supp. 1982). The basic premise of this system is that contemporary marriage should be regarded, for economic and property purposes, as a partnership of co-equals. *See* Note, *Excluding Educational Degrees*, *supra* note 4, at 1327 n.2. *See also* Comment, *The Equity—Property Dilemma*, *supra* note 4, at 992 n.7 (partnership principles guide both community property and equitable distribution systems). At divorce, marital property acquired during marriage should be distributed equitably between the spouses pursuant to the state's criteria. Other economic incidents of the marital partnership, like alimony, should be determined on the basis of actual need and ability to pay. *Id.*

The remaining three states are strict title, or common law states in which courts award property on the basis of the name on the title. Only jointly owned property, therefore, is distributable upon divorce. *See* MISS. CODE ANN. § 93-5-23 (Supp. 1982); S.C. CODE ANN. § 20-3-130 (Law Co-op 1976); W. VA. CODE § 48-2-16 (1980).

152. *See In re* Marriage of Aufmuth, 89 Cal. App. 3d 446, 461, 152 Cal. Rptr. 668, 678 (1979) (under a community property statute, assets resulting from income for professional services would be property acquired after the marriage); Archer v. Archer, 303

property exist: community and separate. Community property includes all property that either spouse acquired during the marriage.[153] Property acquired before or after the marriage or during the marriage by descent, bequest, devise, or gift is a spouse's separate property.[154]

The common rationale for refusing to classify a professional as marital property in community property jurisdictions appears in *In re Marriage of Aufmuth*.[155] The court recognized that a legal education's value lies in the degree holder's future earning capacity,, which is dependent upon a host of factors.[156] Characterizing a degree as a marital asset would require division of post-dissolution earnings which, by definition, are the separate property of the professional spouse.[157] Community interest exists only in property acquired during the marriage.[158] To assign a community interest in the value of the post-marital earnings of either spouse is inconsistent with this philosophy.[159]

Aufmuth's community versus separate property distinction plainly demonstrates the impropriety of the economic partnership concept of marriage. The distinction recognizes that the true value of a professional degree is derived exclusively from the future efforts of its holder, as well as a host of unforeseeable events. Both the economic theory and reality of professional degree cases indicate that the degree's un-

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Md. 347, 358, 493 A.2d 1074, 1080 (1985) (under equitable distribution statute, income earned after the marriage as a result of the degree does not constitute "marital property," because it is not acquired during the marriage); DeWitt v. DeWitt, 98 Wis. 2d 44, 59, 296 N.W.2d 761, 768 (1980) (division based on valuation of educational degree "necessarily involves a 'division' of post-divorce earnings" for which no statutory authority exists).

153. *See* Vaughan, *The Policy of Community Property and Inter-Spousal Transactions*, 19 BAYLOR L. REV. 20, 43 (1967). Under the community property system, courts often analogize marriage to a business partnership. The author comments that marital property, like partnership property, should further the success and well being of the partnership. *Id.*.

154. CAL. CIV. CODE §§ 5107-5108 (West 1970).

155. 89 Cal. App. 3d 446, 152 Cal. Rptr. 668 (1979).

156. *Id.* at 461, 152 Cal. Rptr. at 678.

157. *Id.*

158. *Id.*

159. *Id. See also* Archer v. Archer, 303 Md. 347, 358, 493 A.2d 1074, 1080 (1985) (professional income earned after marriage dissolution is not marital property because it would not have been acquired during the marriage); DeWitt v. DeWitt, 98 Wis. 2d 44, 59, 296 N.W.2d 761, 768 (1980) (granting such a property interest awards the other party property in excess of the marital estate's net value, creating a "lien" on future earnings); Grosskopf v. Grosskopf, 677 P.2d 814, 821 (Wyo. 1984) ("one spouse should not have a perpetual claim on the earnings of the other").

determinable value, if and when received, more appropriately and more fairly belongs to the degree holder.

V. VALUATION OF THE PROFESSIONAL DEGREE FOR A DISTRIBUTIVE AWARD

A. *The Discount Valuation Method*

Most judges and commentators who advocate distributing a professional degree as marital property favor the discounted present value method for estimating the value of the degree holder's earning capacity.[160] Under this method, the total value of the professional spouse's enhanced lifetime earnings, whether received immediately or in installments, constitutes the degree's "value" subject to division. To determine the present value of the degree holder's "enhanced earning capacity," experts first estimate the excess amount of income that the average professional in the degree holder's field would earn over the average income of what he would have earned without the degree. Utilizing the estimated years remaining in the professional's expected working life, the experts then discount the excess amount at a selected interest rate. This converts the professional's future income stream into its present value.[161] A percentage of this discounted stream of income is awarded to the supporting spouse based on her contributions to the education and the marriage.

This method is based on significant assumptions that make its use in distributive awards ludicrous. First, courts face the problematic process of determining what the statistically average professional and nonprofessional might earn in their lifetimes. Tremendous speculation permeates these average income estimates, which the student spouse may never achieve.[162] Even if reasonably supportable averages were available, the present value method's comparison of professional school graduates with bachelor degrees is fallible. The *Mahoney* court recognized this flaw when it noted that a person of the caliber to complete professional training would probably be equally productive in an alter-

160. For applications of the present value method, see Haugan v. Haugan, 117 Wis. 2d 200, 213-14, 343 N.W.2d 796, 803 (1984); Woodworth v. Woodworth, 126 Mich. App. 258, 269, 337 N.W.2d 332, 337 (1983); Washburn v. Washburn, 101 Wash. 2d 168, 191-93, 677 P.2d 152, 165 (1984) (Rosellini, J., dissenting).

161. *See infra* note 164 and accompanying text.

162. *See, e.g.*, Stevens v. Stevens, 23 Ohio St. 3d 115, 118, 492 N.E.2d 131, 133 (1986).

native career.[163]

The method also utilizes a discount rate representing the fixed rate of return that the supporting spouse expects to earn on her contributions over the remaining work life of her ex-husband. A higher rate means a lower discounted present value, while a lower rate causes the professional spouse to pay more. The rate cannot be renegotiated to reflect future economic realities, because property awards are traditionally not modifiable.[164]

The many variables and calculations required under the discounted present value method make its application in dissolution proceedings particularly inappropriate. The distribution of an item whose value is determined entirely from forecasts and assumptions eludes both fair and realistic results. State legislatures must provide the courts with precise guidelines for judicial analyses. Absent a legislative solution, awards in recognition of a supporting spouse's contributions will continue to be a function of economic forecasts and personal judicial views rather than objective legal rules and principles.

VI. DETERMINING WHAT IS EQUITABLE

A. *The Emerging View—Analytical Progress But No Remedial Consensus*

One point agreed upon by all courts in diploma dilemma cases is that equity, justice, and fairness must be the guiding principles in fashioning relief.[165] Court opinions, however, reveal that no meaningful consensus exists on how those goals are best achieved. An emerging view

163. 91 N.J. 488, 498, 453 A.2d 527, 532 (1982). *See also* O'Brien v. O'Brien, 106 A.D.2d 223, 230, 485 N.Y.S.2d 548, 553 (1985) (the professional spouse may even earn less from his professional practice than he could have earned from non-professional work).

164. *See, e.g.,* Mahoney v. Mahoney, 91 N.J. 488, 498, 505, 453 A.2d 527, 532, 536 (1982). *See also* Washburn v. Washburn, 101 Wash. 2d 168, 179 n.3, 677 P.2d 152, 158 n.3 (1984) (court emphasized that permitting supporting spouse to be compensated through maintenance award avoided subjecting the student spouse to any form of involuntary servitude in which he would be forced to work at the chosen profession against his will).

165. Hubbard v. Hubbard, 603 P.2d 747, 750 (Okla. 1979), illustrates how a court often depicts the situation in a professional degree case: "[T]his case presents broad questions of equity and natural justice which cannot be avoided on such narrow grounds." For similar enunciations of equity, justice and fairness, see *In re* Marriage of Graham, 194 Colo. 429, 432, 574 P.2d 75, 78 (1978) (Carrigan, J., dissenting); DeLa Rosa v. DeLa Rosa, 309 N.W.2d 755, 758 (Minn. 1981); Roberto v. Brown, 107 Wis. 2d 17, 22, 318 N.W.2d 358, 360 (1982). *See also* Mullenix, *supra* note 4, at 233.

recognizes that whether a professional degree has the qualities of common-law property or not is irrelevant.[166] Instead, the courts' sole concern must be how to equitably divide between the parting spouses assets held at dissolution.[167] Even though a growing number of courts on both sides of the "degree-as-property" issue share this emerging view, their choices of remedies remain diverse.[168] This emerging view offers no greater remedial consistency, because courts continue to cast their relief in maintenance or property distribution forms, both of which have very different purposes and consequences.[169]

1. A New Species of Divisible Property?

Although the emerging view eliminates courts' confusing preoccupation with a professional degree's proper label, it gives them even greater freedom to determine what remedy is equitable. For example, some judges who advocate a property-oriented award argue that the concept of marital property is purely a statutory creation that encompasses all acquisitions of the marriage, material or otherwise.[170] The result is a "new species of property previously unknown at common law or under prior statutes."[171] Others reject this fiction and hold that a profes-

166. The Michigan Court of Appeals in Woodworth v. Woodworth aptly noted that whether or not a degree "can physically or metaphysically be defined as 'property' is beside the point." 126 Mich. App. 258, 262, 337 N.W.2d 332, 335 (1983).

167. *Id.*

168. Despite its declaration that the definition of a degree as property or non-property is irrelevant, the *Woodworth* court awarded the supporting spouse a percentage share of the present value of the degree holder's future earnings. *Id.* at 265, 337 N.W.2d at 337. *Cf.* Washburn v. Washburn, 101 Wash. 2d 168, 181, 677 P.2d 158, 160-61 (1984) (concerned with fairness but not the particular label applied to the award, the court approved of an award that compensated the supporting spouse for her contribution to student spouse's educational costs).

169. *Washburn*, 101 Wash. 2d at 182, 677 P.2d at 161.

170. O'Brien v. O'Brien, 106 A.D.2d 223, 236, 485 N.Y.S.2d 548, 558 (1985) (Thompson, J., concurring in part and dissenting in part). Justice Thompson noted that in the search for a fair and just division of the marriage's assets, exclusive reliance upon conventional concepts of property is "unnecessary and unrealistic." *Id.* The New York Court of Appeals elaborated on this point, emphasizing that marital property cannot "fall within the traditional property concepts because there is no common-law property interest remotely resembling marital property." 66 N.Y.2d 576, 583, 489 N.E.2d 712, 715 (1985).

171. 66 N.Y.2d at 586, 489 N.E.2d at 717. Under this "new property" concept, employment and work-related benefits are principal forms of wealth that can be apportioned at divorce according to the court's discretion. Note, *Treatment of a Professional Degree*, *supra* note 4, at 441-45. *See also* Comment, *supra* note 33, at 70-71 (author emphasizes that the new property concept is particularly important in divorce because

sional degree can never be property, either at common law or by statute.[172] The positions that the New York Court of Appeals and one of that state's appellate division courts recently took in *O'Brien v. O'Brien* typify these sharply opposed views.

In *O'Brien v. O'Brien* the husband left his teaching job to attend medical school full time, allowing him to earn his medical license two months prior to his wife's commencement of the divorce action.[173] Throughout the marriage, the wife was employed as a parochial school teacher and performed most of the household work.[174] The wife testified that because of the couple's decision to pursue the medical education, she was unable to earn the additional credits needed to obtain a permanent teaching certificate, with which she could have doubled her teaching salary.[175] The trial court found the medical degree and license to be divisible marital property and concluded that the wife had contributed seventy-six percent of the parties' total income to the mar-

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earning capacities are often worth much more than the tangible assets of the marriage). Recent commentary suggests that the new property theory justifies equitable distribution of "career assets" as marital property. *See* Note, *Treatment of a Professional Degree*, *supra* note 4, at 441-43 (as a "career asset," the value of the professional spouse's career should be included among the new forms of divisible marital property).

The theory, however, adds no consistency or predictability to the analysis or possible results in professional degree cases. The theory still encourages inappropriate comparisons of professional degrees with goodwill or pension benefits. In addition, one commentator supporting the classification of a degree as a new form of property pointed to the United States Supreme Court's recognition of a due process property interest in public education. Note, *Treatment of a Professional Degree*, *supra* note 4, at 442 (citing Goss v. Lopez, 419 U.S. 565 (1975)). *See also* Comment, *The Equity—Property Dilemma*, *supra* note 4, at 1020-21. Any attempt to analogize a constitutionally protected property interest and divisible marital property not only distorts their respective values but ignores their different legal underpinnings and further illustrates the doctrinal chaos in professional degree cases.

172. O'Brien v. O'Brien, 106 A.D.2d 233, 225, 485 N.Y.S.2d 548, 550 (1985). In *O'Brien* both parties were school teachers at the time of their marriage. 489 N.E.2d at 714, 498 N.Y.S.2d at 744-45. The husband left his teaching job to complete one year of pre-medical courses and then attend medical school full time for four and one-half years while his wife worked. *Id.* Both parties and their families contributed to the educational and living expenses incurred during the marriage. *Id.* The husband then completed his one year residency in internal medicine. *Id.* Two months before the wife commenced action for divorce, the husband gained his license to practice medicine. At the time of trial, the husband had completed his first year of residency in general surgery. *Id.*

173. 489 N.E.2d at 714, 498 N.Y.S.2d at 744-45.

174. *Id.*

175. 106 A.D.2d at 234, 485 N.Y.S.2d at 556 (Thompson, J., concurring in part and dissenting in part).

riage, exclusive of a loan her spouse had obtained.[176] After considering the life style that the wife would have enjoyed from the husband's enhanced earning capacity, the court made a distributive award that represented forty percent of the license's determined value.[177] The court also directed the husband to maintain a life insurance policy on his life for any unpaid balance of the award.[178]

The appellate court rejected the trial court's proposition that New York's equitable distribution statute authorized a distributive award of the student's future earnings as marital property.[179] The court noted that the legislature did not suggest that one spouse's contributions to the other's career potential entitle her to a legally cognizable claim in the former spouse's future labors.[180] Rather than vest the supporting spouse with an equitable interest in non-existent property, the court observed, the legislature chose to provide the supporting spouse with an award for sufficient maintenance and rehabilitation.[181] On appeal, the New York Court of Appeals reversed the appellate court's decision, sharply disagreeing with the court's construction of New York's Domestic Relations Law.[182] *O'Brien* provides a controversial illustration of the diploma dilemma and how two courts reached sharply disparate results while applying the same statute to the same facts.

The Court of Appeals believed that New York's legislature deliberately went beyond traditional property concepts and made marital property a statutory creature.[183] The statute's definition of "marital property," concluded the court, recognizes that each spouse has an equitable claim to "things of value" acquired during the marriage.[184]

176. 489 N.E.2d at 714, 498 N.Y.S.2d at 745.

177. *Id.* Although at the time of trial the husband was not eligible to practice as a surgeon, the trial court computed the present value of his license based on the average projected income of a practicing surgeon. 106 A.D.2d at 224 n.1, 485 N.Y.S.2d at 549 n.1.

178. 489 N.E.2d at 714, 498 N.Y.S.2d at 745.

179. 106 A.D.2d at 224-27, 485 N.Y.S.2d at 550-52.

180. *Id.* at 224-26, 485 N.Y.S.2d at 550-51.

181. *Id.* at 231-33, 485 N.Y.S.2d at 554-55.

182. 489 N.E.2d at 716-17, 498 N.Y.S.2d at 747-48.

183. *Id.* at 715, 498 N.Y.S.2d at 746-47. Explaining the phenomena of an intangible item's ability to transform into divisible marital property, the court noted: "[Marital property] is a statutory creature, is of no meaning whatsoever during the normal course of marriage and arises full-grown, like Athena, upon the signing of a separtion agreement or the commencement of a matrimonial action." *Id.*.

184. *Id.*

New York's statute requires consideration of one spouse's contributions to another's profession or career in determining an equitable distribution of property.[185] Unlike the appellate division majority, which saw this requirement as an equivocal after-thought,[186] the State Court of Appeals interpreted it as a clear indication that an interest in a profession or professional career potential is "marital property."[187] The court further noted that the legislature had replaced the common-law title theory of property distribution[188] with an equitable distribution scheme, which recognizes marriage as an economic partnership.[189] The court reasoned, the legislature intended to consider spousal contributions as an investment in a partnership effort that produced the professional license.[190] The court concluded that the professional license

185. Section 236 of New York's Domestic Relations Law provides in part:

In determining an equitable disposition of property . . ., the court shall consider:

(6) any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse . . . and to the career or career potential of the other party. . . .

(9) the impossibility or difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest intact and free from any claim or interference by the other party.

N.Y. DOM. REL. LAW § 236(B)(5)(d)(6), (9) (McKinney Supp. 1983-84).

In its determination of the amount and duration of maintenance, the court is required to consider the same factors. N.Y. DOM. REL. LAW § 236(B)(8)(a) (McKinney Supp. 1983-84). The statute's language also persuaded the court that the legislature had recognized the courts' inability to alienate the professional degree without due process of law and, therefore, provided for an award in lieu of its actual distribution. 489 N.E.2d at 717, 498 N.Y.S.2d at 748.

186. 106 A.D.2d at 225-28, 485 N.Y.S.2d at 551-52.

187. 489 N.E.2d at 716, 498 N.Y.S.2d at 747.

188. Under the common law title approach to marital property distribution, title alone determines distribution. The five states maintaining this system of distribution are Florida, Mississippi, South Carolina, Virginia, and West Virginia. Freed & Foster, *Divorce in the Fifty States: An Overview as of August 1, 1980*, 6 Fam. L. Rep. (BNA) 4043, 4051 (1980). Because this scheme prohibits distribution of a party's separate property at divorce, the court in Severs v. Severs, 426 So. 2d 992 (Fla. Dist. Ct. App. 1983), denied the working spouse any recovery for her contributions to her spouse's law degree. *Id.* at 994. For a concise discussion comparing the three distinct approaches to property distribution, see Comment, *The Equity—Property Dilemma*, *supra* note 4, at 995-98. *See also* Annotation, *Divorce—Equitable Distribution*, 41 A.L.R.4TH 481, 484-87 (1984) (compares scope of courts' powers under equitable distribution and community property theories).

189. 489 N.E.2d at 716, 498 N.Y.S.2d at 747.

190. *Id.*

should be considered marital property[191] even though it had no market value.[192]

The New York Court of Appeals' reasoning is both flawed and confusing in several respects. First, the court recognized that the license's ability to fit traditional property concepts is irrelevant, but then insisted that the statute creates a "new species of property."[193] Second, though the court's definition of this "new property" included "things of value" acquired *during* the marriage,[194] the court granted the working spouse a distributive award in the "present value" of an income stream that would not be earned until after the divorce.[195] Finally, the court found the belief that the parties' economic affairs should be finalized and severed through an equitable distribution of marital property[196] consistent with both the equitable distribution theory and its view of marriage as an economic partnership. Characterizing marriage as an "economic partnership," however, distorts the parties' true relationship and realistic mutual expectations, and a fixed cash award payable in annual installments is inconsistent with the goal of severing the parties' economic ties.[197]

VII. Proposed Guidelines and Model Statute

O'Brien illustrates that state legislatures have not precisely addressed the diploma dilemma, eliminating all but one interpretation that affords predictable relief. Until a remedial statutory scheme provides an

191. *Id.*

192. *Id.* at 717, 489 N.Y.S.2d at 748. In a New York case decided after *O'Brien*, the Supreme Court of Nassau County in Vanasco v. Vanasco, 503 N.Y.S.2d 480 (N.Y. Sup. Ct. 1986), refused to award the plaintiff a share in the defendant's Certified Public Accountant's license in addition to an equitable share of the defendant's interest as partner in his accounting firm. Pursuant to *O'Brien*, the court acknowledged that in the normal case the license would constitute marital property because it was a "thing of value" acquired during the marriage. *Id.* at 481. The court noted, however, that this case was distinguishable because the license's value may "merge into the business conducted through said license so that an evaluation of said business, rather than the license, is a truer measure of value of said property." *Id.* The danger in such cases, the court observed, was that plaintiff is in effect "seeking two bites of the apple." The court concluded that whatever the license's value, it was "subsumed in the 'value' of the practice so that any residual value of the license is *de minimus*." *Id.*

193. 489 N.E.2d at 717, 498 N.Y.S.2d at 748.

194. *Id.* at 715, 498 N.Y.S.2d at 746.

195. *Id.* at 718, 498 N.Y.S.2d at 749.

196. *Id.* 716-17, 498 N.Y.S.2d at 747-48.

197. *Id.* *See supra* notes 107, 196 and accompanying text.

exclusive non-discretionary remedy, courts' contemporary views of marriage and its accompanying expectations will continue to dominate judicial perceptions of a fair result.[198] Further, remedial inconsistencies will continue at the expense and confusion of litigants.[199]

Theories of restitution and unjust enrichment are generally inappropriate for application to the "contract" of marriage and its attendant legal duty of spousal support.[200] Few disagree, however, that one spouse's direct contributions to the other's education represents a extraordinary form of support that deserves compensation.[201] The proposed Model Act permits recovery limited to the amount spent for all direct educational costs.[202] Thus, the award's size or duration is not dependent on how many years the working spouse contributed to the education or on whether the spouse earned a degree or license prior to the divorce.[203] Further, the award is not based on need or on the

198. The court in Stevens v. Stevens, 23 Ohio St. 3d 115, 492 N.E.2d 131 (1986) recognized that Ohio's statute does not specifically provide for consideration of one spouse's contribution to the professional education of the other as a factor in the division of property or award of alimony. *Id.* at 118 n.1, 492 N.E.2d at 133 n.1. Thus, the court refused to find that a professional degree constituted marital property and expressed its preference to defer to a legislative resolution of this controversy. *Id.* at 120 n.5, 492 N.E.2d at 135 n.5. Noting that the formulation of laws "relating to divorce, alimony, and division of property has historically been the exclusive province" of Ohio's legislature, the court concluded that "any changes in Ohio's domestic laws regarding the treatment of a professional degree upon divorce should emanate from the General Assembly rather than the judiciary." *Id.*

199. *See* Mullenix, *supra* note 4, at 274.

200. *See, e.g.*, Pyeatte v. Pyeatte, 135 Ariz. 346, 353, 661 P.2d 196, 203 (Ct. App. 1982) (restitution on the basis of unjust enrichment inappropriate in marital context). *See supra* note 92 and accompanying text.

201. Hubbard v. Hubbard, 603 P.2d 747, 751 (Okla. 1979).

202. *Accord* Washburn v. Washburn, 101 Wash. 2d 168, 177, 677 P.2d 152, 159 (1984) (amount of supporting spouse's compensation limited to contributions to direct educational costs, but did not include contributions to student spouse's living expenses because those funds would have been expended whether or not the student spouse pursued a professional education).

203. An award restricted to restitution implicitly rejects the "labor theory of value" that a few courts and commentators continue to favor. *See, e.g.*, Haugan v. Haugan, 117 Wis. 2d 200, 343 N.W.2d 796 (1984). In its simplest form, the theory provides compensation to the supporting spouse in an amount equal to one-half of the student spouse's enhanced earning capacity for the same period of time that the supporting spouse worked to support the student. For commentary that fully develops this theory and discusses its advantages, see Mullenix, *supra* note 4, at 274-83, and Note, *Family Sacrifice*, *supra* note 4, at 288-90.

The measure of recovery under the labor theory of value, however, is not accurately related to the relative educational costs that each spouse bore during the marriage.

working spouse's self-supportive ability. An award based on reimbursement[204] is also preferable over other means of recompensing the working spouse's contributions because it quickly severs the parties' need for future contact.[205]

Because the supporting spouse's financial contributions to the other's education are not considered an ordinary form of spousal support under the proposed statute, the statute further stipulates that the right to compensation is unconditional. Thus, this debt cannot be discharged over time by virtue of normal spousal support, no matter how long the marriage endures after the degree is earned. The statute, therefore, prevents any accumulation of divisible marital assets from defeating the right to compensation.[206] The primary advantage this

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Proponents of the degree-as-property view are likely to reject such an award because, like restitution, it fails to give the supporting spouse her full expectancy or "return" on her "investment" in the student spouse's education. Advocates of restitution would likewise reject the labor theory of value, because the theory adheres to the property view of a professional degree and "vests" the supporting spouse with a future interest in the post-dissolution earnings of the student spouse.

204. Although this Note rejects the *O'Brien* court's award based on a property theory, it approves of the court's observation that methods designed to compensate the supporting spouse should not depend upon the supporting spouse's financial need for such compensation. 489 N.E.2d at 717, 498 N.Y.S.2d at 748.

In introducing the concept of reimbursement alimony, the court in Mahoney v. Mahoney, 91 N.J. 488, 453 A.2d 527 (1982) also believed the supporting spouse's need should be ignored, explaining that "there will be circumstances where a supporting spouse should be reimbursed for the financial contributions he or she made to the spouse's successful professional training," in spite of the appropriateness of alimony or the existence or distributable marital property. *Id.* at 501, 453 A.2d at 534. *See also* Mullenix, *supra* note 4, at 279 (supporting spouse entitled to award under labor theory of value "without regard to duration of marriage or the accumulation of marital assets").

205. *See supra* notes 107, 196-97 and accompanying text.

206. The proposed statute rejects a right to restitution subject to a rebuttable presumption similar to one the California legislature adopted. California's amended code reads in pertinent part:

> (c) The reimbursement and assignment required . . . [to be made to the community property of the parties by the degreed spouse] shall be reduced or modified to the extent circumstances render such a disposition unjust, including but not limited to any of the following:
>
> (1) The community has substantially benefitted from the education, training, or loan incurred for the education or training of the . . . [degreed spouse]. There is a rebuttable presumption, affecting the burden of proof, that the community has not substantially benefitted from community contributions to the education or training made less than 10 years before the commencement of the proceeding, and that the community has substantially benefitted from community contributions to the educa-

feature offers over most divorce statutes is that it avoids arbitrary and unprincipled compensatory awards which blur various forms of alimony with property division. Legislating the supporting spouse's compensation in this way also furnishes the parties in advance with a definite reference for marital planning purposes or in making settlement decisions.

The proposed statute also makes reimbursement the working spouse's exclusive remedy for his or her expenditures towards the other spouse's education or enhanced earning capacity.[207] Consideration of one spouse's contributions to the other's education, training, or increased earning power is eliminated as a "relevant factor" for purposes of awarding traditional alimony or making equitable divisions of marital property. Thus, a court is prohibited from granting any form of alimony or property distribution that is designed to protect the working spouse's expectancy interest in the professional spouse's enhanced earning capacity.

Additionally, courts should have express authorization to order the supported spouse to help finance an education or training that the working spouse legitimately desires to pursue after the divorce. This "rehabilitative alimony" award recognizes that the supporting spouse may have foregone educational or career opportunities to allow the professional spouse to pursue professional education.[208] This award provides working spouses with education or training to help reduce the disparate income levels that so often accompany professional degree cases.[209] The supported spouse's obligation under this award is limited to the time that the working spouse is in school, promoting a general

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tion or training made more than 10 years before the commencement of the proceeding.

CAL. CIV. CODE § 4800.3(c)(1) (Deering Supp. 1987).

In contrast to California's code, the Model Statute does not require that the supporting spouse's contributions had "substantially enhanced" the earning capacity of the student spouse. Conditioning the supporting spouse's right to reimbursement in such a way forces the courts to engage in further line drawing. The working spouse either did not did not contribute financially to the student spouse's education, and if she did, she should be compensated. Further, this requirement does not serve a meaningful purpose because few degree-holders exist whose educations did not substantially enhance their earning capacity. Finally, the "substantially enhance" requirement may discriminate against working spouses whose contributions prepared their student spouses for careers less lucrative than medicine or law.

207. CAL. CIV. CODE § 4800.3(d). *See Spousal Support, supra* note 4, at 998.

208. *See supra* notes 88, 121 and accompanying text.

209. *Spousal Support, supra* note 4, at 998-99, 1003-05.

policy of putting the parties in self-sufficient positions without the need for further interference.[210] Rehabilitative alimony applies only in a limited number of cases[211] and should not displace any traditional alimony or support a court may deem appropriate. Such support should continue to be based on traditional factors including the parties' relative needs, standards of living, and the professional spouse's ability to pay.

VIII. CONCLUSION

Courts continue to struggle over the unique problem of how to measure the relevance and weight at divorce of one spouse's contributions to the other's professional education or training. Ironically, both the source of, and solution to, the problem rests in legislation. Under vaguely worded divorce statutes, courts fashion awards of varying sizes and duration using a myriad of rationale. The result is a distorted portrayal of the contemporary marital relationship and an unjust lifetime financial burden on the professional spouse. A view slowly emerging in the courts maintains that characterizing a degree as divisible marital property is irrelevant. Because this leaves the fairness question unanswered, however, no greater consensus on the composition of an equitable result exists. The emerging view has actually encouraged the evolution of a fictional "new species" of marital property to which a professional degree arguably belongs.

The fact that marriage is not a commercial enterprise undermines the "new property" concept. The covenants of marriage do not resemble a series of enforceable rights and obligations. The relationship is not one in which the parties keep running balances of each other's financial and non-financial contributions to the community. Given the parties' mutual legal duty of spousal support, recognition of the working spouse's financial contributions to the education should be limited to direct financial contributions to the education. Although technically inconsistent with the common-law duty of spousal support, such contributions represent an extraordinary form of support that deserves compensation. Such compensation strikes a fair balance because it recognizes that the true measure of the degree's unrealized value is wholly attributable to the student spouse's post-divorce ability and labor and

210. *See supra* notes 107, 196-97 and accompanying text.

211. *See Spousal Support, supra* note 4, at 1004 (author points out that working spouses may either have no desire to take advantage of such rehabilitative support or are unable to do so because of child care responsibilities).

not to the mere expenditure of money. In recognition of career and educational opportunities the working spouse may have passed up, the court should also consider the propriety of forms of support independent of the reimbursed educational costs, examining such factors as the parties' needs, relative standards of living, and the professional spouse's newfound ability to pay.

The discretion vested in the courts under existing state statutes makes such statutes unadaptable to the professional degree controversy. Amendments uniquely tailored to this problem are necessary to precisely instruct the courts what relief a working spouse deserves for contributions to the other spouse's professional education. Until legislatures provide clear solutions, the judiciary will continue to make arbitrary decisions.

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APPENDIX

MODEL MARITAL DISSOLUTION STATUTE[212] PROVISIONS FOR AWARDS AT DISSOLUTION

Section I—*Special Definitions Applicable to Dissolutions Involving Professional Degrees*

A. "Student Spouse" shall mean a husband or wife who receives financial contributions from the other spouse during the course of marriage, which contributions are applied to one or more of the direct costs of the recipient spouse's education or training listed in Part D of this Section.

B. "Supporting Spouse" shall mean a husband or wife who makes financial contributions during the course of marriage to any element of the student spouse's direct educational costs listed in Part D of this Section.

C. "Education" or "Training" shall mean any course of study or training undertaken by the student spouse during the course of his or her marriage to the supporting spouse.

D. "Direct Educational Costs" shall mean tuition, books, fees, supplies, transportation, and any other necessary or incidental expenses of the student spouse's education.

E. "Marital Property" shall mean all real and personal property presently owned by either or both spouses and acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held. Property shall be considered Marital Property as defined by this section for the sole purpose of dividing assets upon divorce and for no other purpose. Marital property shall not include the following:

1. Separate Property as hereinafter defined;

2. Any present or future right, title, or interest of a spouse in his education, training, or earning capacity, including any tangible or intangible benefits directly or indirectly resulting from the spouse's education, training, or earning capacity, without regard to when such education, training, or earning capacity was acquired.

F. "Separate Property" shall mean:

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212. Selected provisions in this model statute not specifically addressed to the contributions of one spouse to the other's education or career were excerpted from both the New York and Wisconsin statutes.

1. All real and personal property acquired by a spouse after a decree of legal separation;

2. All real and personal property acquired at any time by bequest, devise, descent, or gift from a party other than the spouse;

3. All real and personal property acquired in exchange for property acquired prior to the marriage or in exchange for property acquired by bequest, devise, descent, or gift from a party other than the spouse;

4. The appreciation of or income from property acquired before the marriage, except to the extent that the other spouse substantially contributed to the preservation and appreciation of such property;

5. Compensation for personal injuries; and

6. All property described as separate property by valid written agreement of the parties.

Section II—*Spousal Education Support, Rehabilitative Support, and General Support Awards*

A. Spousal Contributions Towards Attainment of a Professional Degree

1. Spousal Education Support Award: upon every judgment of annulment, divorce, or legal separation in which the court determines that the supporting spouse has made financial contributions to the direct educational costs of the student spouse's education or training, the court shall award the supporting spouse an amount equal to such contributions.

2. The student spouse's entitlement to the spousal education support award provided for in this section shall be independent of and may be in addition to any distributive or other support award provided for in this Divorce Code which the court may deem proper under the circumstances.

3. Supporting Spouse's Burden of Proof: the court's determination with respect to such contributions shall be established if the fact of such contributions is proven with a reasonable degree of certainty.

B. Rehabilitative Support

In addition to and independent of any distributive or support award the court may deem proper under other provisions of this Divorce Code, the court, in its discretion, may award, upon every judgment of annulment, dissolution, or legal separation, rehabilitative support to the supporting spouse for the purpose of subsidizing the direct educational costs of any post-dissolution education or training undertaken by the supporting spouse. Such an award shall be no

greater than one-half of all direct educational costs incurred by the supporting spouse.

C. General Support

Upon every judgment of annulment, divorce, or legal separation, or in a proceeding for general support following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse, the court may grant an order requiring general support payments to either spouse after considering:

1. The length of the marriage;

2. The ages, and the physical, mental, and emotional conditions of each party;

3. The relative earnings, earning capacities, assets, and other financial resources of the parties, including but not limited to medical, retirement, insurance, or other benefits, and the marital property apportioned to each party;

4. The relative obligations and liabilities of the parties;

5. The standard of living of the parties established during the marriage;

6. The extent to which either party has custodial responsibilities for children and the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;

7. Any award of rehabilitative support under Part B of this section;

8. The relative abilities of each party to meet his reasonable needs independently, including the relative education or training of the parties, and the time necessary for the party seeking support to acquire sufficient education or training to find appropriate employment and become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage;

9. The contributions and services to the marriage of the party seeking support as a spouse, parent, wage earner, and homemaker;

10. The extent to which it would be inappropriate for a party to seek employment outside the home because that party will be custodian of a minor child;

11. The value of the separate property set apart to each party;

12. The tax consequences to each party;

13. The destruction, concealment, fraudulent disposition, or wasteful dissipation of family assets by either spouse;

14. The marital misconduct of the parties during the marriage in

cases where the court, in its discretion, deems it appropriate to do so; however, the marital misconduct of either of the parties during separation subsequent to the filing of a divorce complaint shall not be considered by the court in its determinations relative to general support; and

15. Such other factors as the court may in each individual case determine to be relevant, except for one party's contributions, whether monetary or non-monetary, to the other's education or training.

Section III—*Disposition of Property*

Upon every judgment of annulment, divorce, or legal separation, or in a proceeding for disposition of property following dissolution of the marriage, the court shall set apart to each spouse his separate property and shall divide the marital property in such proportions as the court deems just, without regard to marital misconduct, after considering all relevant factors, including:

1. The length of the marriage;

2. The ages, and the physical, mental, and emotional conditions of each party;

3. The current and probable future financial circumstances of each party, including current and anticipated earning capacities based on education, training, work experience, employment skills, length of absence from the job market, and custodial responsibilities for children;

4. The value of the separate property set apart to each party;

5. The need of a party having custody of any children to own or occupy the family home and to own or use its household effects;

6. Any award of general support under Part C of this section;

7. The contributions, monetary and non-monetary, of each party to the well being of the children and to the acquisition of marital property, giving appropriate economic value to each party's contribution in homemaking and child care services;

8. The liquid or non-liquid character of all marital property;

9. Any valid written agreement made by the parties before or during the marriage concerning property distribution;

10. The tax consequences to each party; and

11. Such other factors as the court may in each individual case determine to be relevant, except for one party's contributions, whether monetary or non-monetary, to the other's education or training.

COMMENTS